

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 94-391 Decided January 15, 1998

Appeal from an interim decision of the Kanab, Utah, Resource Area Manager, Bureau of Land Management, implementing the Moquith Mountain Management Action Guidance and Schedule. UT-040-217.

Set Aside and Remanded.

1. Administrative Procedure: Administrative Review--Federal Land Policy and Management Act of 1976: Land-Use Planning--Federal Land Policy and Management Act of 1976: Wilderness

A BLM decision to designate certain areas within the Moquith Mountain Wilderness Study Area as open to unrestricted or limited off-road vehicle use by the general public will be set aside and remanded where BLM has not shown whether the requested use will violate the nonimpairment standard. Relevant factors for consideration of whether to open parts of the area to off-road vehicle use as determined in the Management Action Guidance and Schedule must include whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not indicate that BLM has considered whether the nonimpairment standard has been met in the development of the Management Action Guidance and Schedule, the interim decision will be set aside.

APPEARANCES: Heidi J. McIntosh, Esq., Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; Verlin L. Smith, Area Manager, Kanab Resource Area, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Southern Utah Wilderness Alliance (SUWA) appeals the February 28, 1994, interim Decision of the Resource Area Manager, Kanab Resource Area, Bureau of Land Management (BLM), to utilize the Escalante/Kanab Resource Management Plan (RMP) regarding off-road vehicle (ORV) use in the Moquith Mountain Wilderness Study Area (WSA) and the Moquith Mountain WSA Management Guidance and Schedule. The SUWA appeals the Area Manager's interim

Decision because it claims the Management Guidance and Schedule "fails to protect the unique natural resources of the Moquith Mountain WSA from damage caused by unregulated ORV use in violation of applicable law, regulation and Executive Orders." (Statement of Reasons (SOR) at 1.) We set aside and remand the February 28, 1994, interim Decision of the Resource Area Manager.

The Moquith Mountain WSA is located west of Kanab, Utah, and is adjacent to the Coral Pink Sand Dunes State Park. The area is made up of five distinct landscape types: the Vermilion Cliffs, Coral Pink Sand Dunes (Ponderosa Pines Dunes), colorful canyons, an escarpment above the dunes, and a pine forest-slickrock plateau. The western half of the WSA is an active dune system and is adjacent to a Utah State Park ORV play area. The principal recreational use within the sand dunes has been ORV oriented.

The sand dunes portion of the WSA is a continuous landform that consists of approximately 1,490 acres of BLM administered land. The southern portion of the dune area, another 1,500 acres, lies within the Coral Pink Sand Dunes State Park, established in 1963. There are no landform features that separate the BLM portion of the dunes from the State Park.

In 1981, the Kanab Resource Area ORV designations were finalized in the Vermilion Planning Unit Management Framework Plan (MFP). Consistent with Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), the MFP designated the Ponderosa Pines Dunes (Coral Pink Sand Dunes) and a portion of Moquith Mountain as "open" to ORV's. The South Fork/Indian Canyon and Water Canyon Areas of Critical Environmental Concern (ACEC's) were assigned a "limited" designation. The "limited" designation allows for vehicle use only along existing trails and roads.

Two years earlier, in 1979, BLM had issued the IMP. This policy document outlined procedures for managing lands through the wilderness review process. In December 1987, the IMP was released in handbook format as H-8550-1. On July 5, 1995, the IMP was reissued, and the new BLM Manual H-8550-1, at paragraph B-11, provided, in pertinent part:

[I]n all other cases, cross country travel is allowed only where it is specifically authorized by BLM and it satisfies the non-impairment criteria. If impacts threaten to impair the area's wilderness suitability, the BLM may limit or close the affected lands to the uses causing the problem.

Mechanical transport, including all motorized devices as well as trail and mountain bikes, may only be allowed on existing ways and within "open" areas that were designated prior to the passage of FLPMA [(Federal Land Policy and Management Act of 1976)] (October 21, 1976). Use of such devices off existing ways and trails are allowed only for the purposes listed in the paragraph above.

As stated, the IMP of both 1979 and 1995 allows for motorized vehicles to travel existing ways and trails and within "open" areas that were

designated prior to the passage of the FLPMA. Under the IMP, if ORV activities threaten to impair the area's suitability, BLM may limit or close the affected lands to the types of ORV's causing the problem.

Appellant objects to the management actions initiated by the Kanab Resource Area Manager. The stated objective of the management actions under challenge "is to protect wilderness resource values, curtail unauthorized use of ORV visitation, and prevent resource damage from occurring from on-going authorized activities." The specifically delineated actions implemented by the Area Manager, as quoted from the Management Action Guidance and Schedule, are as follows:

A. Numerous trails lead into the sand dunes portion of the WSA from the Hancock Road. Only two trails can be documented prior to the passage of FLPMA (1976). One of these two trails leads to a grazing allotment fence line which crosses the sand dunes. Numerous pull-out areas have been formed to accommodate large motorized camping parties.

Action:

1. Signs will be posted along the WSA's northern boundary, at the edge of the utility ROW [right-of-way], closing the pull-outs to motorized camping and ORV access into the dunes.
 2. The pull-outs will be open to non-motorized activities. The areas will be posted as "no campfire" areas.
 3. Motorized access into the WSA from the northern boundary will be restricted to the two pre-FLPMA trails. These trails will be signed as access route. ORVs can utilize the right of way to access these two trails.
- The remaining routes will be closed to motorized access through signing. When necessary, physical barriers (such as a sand fence) will be constructed to restrict motorized access into the dunes.
4. Vehicle camping along the Hancock Road will be authorized on the north side of the road in areas with little ground vegetation.
 5. IMP patrols will be increased as funding and manpower allows.

B. The dry lakebed (northwest portion of WSA) has been used historically as a staging area and access route into the dunes for motorized camping parties and ORVs. This use has been documented prior to the passage of FLPMA.

Action:

1. Leave the southern and western portion of the dry lakebed open for limited staging and motorized camping. Use limits in the dry lakebed area should not exceed the documented average for a holiday weekend of 50 individual parties. The dry lakebed area should not compensate as an overflow camping area for the displaced campers from the Hancock Road pull-outs.

Allow motorized recreational activities to take place within the dry lakebed only when conditions are conducive to this use. During wet conditions restrict motorized vehicles from utilizing the dry lakebed. These conditions are prevalent during early spring, summer thunderstorm periods, and winter.

2. Implement a "Fire Pan Only" restriction for the area to reduce buildup of charcoal debris. If this restriction is not successful, then initiate a "No Campfire" restriction.

3. Define, sign and or barrier open and closed access routes leading from the dry lakebed into the dunes.

4. Sign the WSA's boundary with the State Park across the sand dunes.

C. Historical use of motorized camping and ORV staging area at Sand Spring and authorized access into eastern portion of sand dunes.

Action:

1. Keep Sand Spring open to limited motorized camping and ORV staging area. Closely monitor for impacts to WSA. Initiate a "No Campfire" restriction for the area.

2. Define and sign access routes into the eastern portion of the sand dunes. Close access trails along the Sand Springs road into the northeast portion of the sand dunes by signing or placement of physical barriers. This will help to protect Welsh's milkweed habitat.

3. Close off any new trails developing from the Sand Spring cherrystemmed road through the placement of signs or physical barriers.

4. Do not take measures to improve or repair the road into Sand Spring.

D. Wilderness inventory ways onto Moquith plateau, Lamb Point, Water Canyon overlook, and Hell Dive.

Action:

1. OHV [off-highway vehicle] use continue along historical trails on the plateau to Lamb Point and Water Canyon overlook. Monitor regularly to address any impacts that would impair the area's suitability.

2. Determine if access route to Hell Dive should be closed to recreational use to protect archeological values?

3. Close off new trails developing from these ways with the placement of signs or barriers.

E. Continue to sign boundary of WSA.

F. Continue scheduled monitoring of WSA. Utilize maps and photo documentation.

G. Notify public and the Moquith Interdisciplinary Team (ID) members of the guidance and schedule actions. Incorporate the Coordinated Resource Management Plan efforts into the Escalante/Kanab Resource Management Plan (RMP). Analysis and decisions will occur during the RMP process. Allow for intense public involvement during the planning process with the Moquith Mountain/Parunaweap Canyon Multiple Use Steering Committee and ID Team members.

H. Continue close coordination with Coral Pink Sand Dunes State Park.

IV. IMPLEMENTATION SCHEDULE

November 1993:

Moquith Mountain WSA Management Guidance and Schedule review by BLM and State Park.

Sign pull-out closures along Hancock Road.

Sign unauthorized trails along Sand Spring Cherrystemmed Road.

February 1994:

Contact Steering Committee and ID Team members about the Moquith Mountain Management Guidance and Schedule.

Develop news releases about management actions for the southern Utah, Salt Lake, Las Vegas, and Phoenix papers.

Spring 1994:

Sign authorized access routes into dunes from the WSA's boundaries.

Sign Moquith Plateau and Hell Dive areas.

Identify alternative use areas for displaced users from the Hancock Road pull-outs.

Identify unauthorized access routes where physical barriers are needed. Work with Force Account to install barriers.

V. ENFORCEMENT

If funding permits, initiate a "Memorandum of Understanding" with Coral Pink Sand Dunes State Park for monitoring and enforcement of the existing closures from May through October.

(Management Schedule and Guidance, 4-7.)

While Appellant concedes that the BLM Management Schedule and Guidance "offers some small steps in the right direction," (SOR at 6), it challenges those aspects of the Decision which permit any continued ORV use in the WSA, in the face of what it claims to be ongoing impairment to the wilderness values in the area. Appellant contends: (1) that implementation of the Management Schedule and Guidance violates the "non-impairment" standard within § 603(c) of FLPMA; (2) that BLM has failed to ensure that ORV use in the Moquith Mountain WSA does not violate the unnecessary and undue degradation test under FLPMA; (3) that the Management Guidance and Schedule violates Executive Order (EO) No. 11989 and applicable regulations by failing to close the area to ORV use in light of the resulting considerable adverse consequences; and (4) that BLM violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1994), by failing to prepare an environmental assessment (EA) or environmental impact statement for this action. Appellant requests that the Board remand the Decision to BLM for immediate fact-finding proceedings to determine whether ORV use is impairing the suitability of the Moquith Mountain WSA for wilderness designation and to close the WSA to ORV use if impairment is found.

In response, Respondent BLM has submitted its Moquith Mountain Management Action Guidance and Schedule and supporting documentation.

In arguing that the Management Guidance and Schedule violates FLPMA, 43 U.S.C. § 1701 (1994), Appellant claims that the "nonimpairment" standard applicable to WSA's within section 603(c) of FLPMA has been violated. That section, codified at 43 U.S.C. § 1782(c) (1994), mandates that the Secretary shall continue to manage such lands in a manner so as not to impair the suitability of such areas for preservation of wilderness and to take any action required to prevent unnecessary or undue degradation of the lands and its resources or to afford environmental protection.

In managing WSA's, BLM "must comply with three statutory mandates under FLPMA: (1) preserving wilderness suitability, (2) preventing unnecessary or undue degradation, and (3) affording environmental protection." Lands within a WSA are also subject to EO No. 11989, 42 Fed. Reg. 26959 (May 25, 1977), which governs ORV use in wilderness areas. The order provides:

[T]he respective agency head shall, whenever he determines that the use of off-road vehicles will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, habitat or cultural or historic resources of particular areas or trails of the public lands, immediately close such areas or trails to the type of off-road vehicle causing such effects, until such time as he determines that such adverse effects have been eliminated and that measures have been implemented to prevent future recurrence.

42 Fed. Reg. 26959 (May 25, 1977).

While an area such as Moquith Mountain is under wilderness review, and until such time as Congress acts on the WSA, BLM is required to manage the WSA pursuant to the IMP, as revised July 12, 1983, 44 Fed. Reg. 72014 (Dec. 12, 1979), 48 Fed. Reg. 31854 (July 12, 1983), as further revised by the IMP of July 5, 1995, BLM Manual H-8550-1. Chapter III H of the 1995 IMP establishes guidelines for ORV use, stating:

Most recreational activities (including fishing, hunting and trapping) are allowed on lands under wilderness review. However, some activities may be prohibited or restricted because they require permanent structures or because they depend upon cross country use of motor vehicles (for example: pickup vehicles for balloons or sailplanes).

BLM will analyze the magnitude of all recreational activities to ensure that such use will not cause impacts that impair the area's wilderness suitability. An example might be erosion caused by increased vehicle travel within a WSA. To prevent this

impairment, the BLM will monitor ongoing recreation uses as well as cumulative impacts, and if necessary, adjust the time, location, or quantity of use or prohibit that use in the impacted area.

* * * * *

11. Except for emergency situations as defined in Chapter I.B.12, vehicle designations in WSAs are to be handled through the land-use planning process. Until WSAs are designated as wilderness or released from study status, vehicle use within each WSA is governed by the terms and conditions as identified in Chapter I.B.11 and any land-use planning decisions. Open areas may be designated only:

(1) as sand dune or snow areas for use by the appropriate sand or snow vehicles, or (2) where an area was designated open prior to October 21, 1976. No vehicle designation in a WSA may allow vehicles to travel off existing ways and trails, except in these two circumstances.

The 1995 IMP also sets forth nonimpairment criteria at Chapter I.B.2. The following criteria are listed as the "nonimpairment criteria."

a. The use, facility, or activity must be temporary. This means a temporary use that does not create surface disturbance or involve permanent placement of facilities may be allowed if such use can easily and immediately be terminated upon wilderness designation. "Temporary" means the use or facility may continue until the date of wilderness designation, at which time the use must cease and/or the facility must be removed. "Surface disturbance" is any new disruption of the soil or vegetation, including vegetative trampling, which would necessitate reclamation. The term "surface disturbance" is discussed further in Specific Policy Guidance, Section 3 below. Decisions to allow or deny proposed actions based on the nonimpairment criteria will be included in appropriate decision documents.

b. When the use, activity, or facility is terminated, the wilderness values must not have been degraded so far as to significantly constrain the Congress's prerogative regarding the area's suitability for preservation as wilderness. The wilderness values to be considered are those mentioned in Section 2(c) of the Wilderness Act of 1964 * * *.

The only permitted exceptions to the above rules are:

(1) Emergencies such as suppression activities associated with wildfire or search and rescue operations;

- (2) Reclamation activities designed to minimize impacts to wilderness values created by IMP violations and emergencies;
- (3) Uses and facilities which are considered grandfathered or valid existing rights under the IMP;
- (4) Uses and facilities that clearly protect or enhance the land's wilderness values or that are the minimum necessary for public health and safety in the use and enjoyment of the wilderness values; and
- (5) Reclamation of pre-FLPMA impacts.

Appellant asserts that the Management Guidance of the Kanab Area Manager will create impacts within the Moquith Mountain WSA which are incapable of being reclaimed so as to be "substantially unnoticeable" at the time the Secretary of the Interior makes his recommendations to the President. Because of those impacts, it argues, and because of BLM's failure to adequately evaluate compliance with the "nonimpairment" standard, the Management Guidance and Schedule is in violation of both FLPMA and the IMP. At a minimum, Appellant contends, FLPMA section 603, as detailed in the IMP, requires that an EA or environmental impact statement should evaluate the Management Guidance and Schedule in light of the nonimpairment standard. Appellant contends that the assessment of possible impacts from the Management Guidance falls short of compliance listed in the IMP. Appellant claims that the failure of BLM to adequately document the impacts of the Management Guidance and Schedule on the Moquith Mountain WSA is particularly significant given the substantial manner in which its provisions will result in the impairment of the WSA's wilderness suitability.

An analysis of Respondent BLM's Management Guidance and Schedule lends credence to the Appellant's claims. In fact, the Management Guidance and Schedule that was implemented is deficient in not addressing the impact of ORV's in the context of the nonimpairment standard. Rather than addressing the potential impacts of ORV's, Respondent's March 1, 1994, letter to Appellant forwarding the Management Action Guidance and Schedule simply advises that the future development of the RMP would include a major functional analysis and decisionmaking "concerning Off-Highway Vehicle use and Areas of Critical Concern." However, this promised future analysis by BLM is not consistent with the IMP. Both the 1979 and 1995 IMP authorize ORV activities on Federal land that constitutes a WSA only where those activities do not threaten to impair the area's wilderness suitability. This requires a nonimpairment review prior to authorizing ORV use.

[1] The BLM has the responsibility to administer the public lands and must be accorded the discretion necessary to effectively discharge its duties. Southern Utah Wilderness Alliance, 128 IBLA 382, 389 (1994); William R. Franklin, 121 IBLA 37, 40 (1991). So long as BLM's management

decision is based on consideration of all relevant factors, and is supported by the record, the Board will not disturb it, absent a showing of clear reasons for modification or reversal. See Southern Utah Wilderness Alliance, *supra*, at 389; Land of Sierra, Inc., 125 IBLA 15, 20 (1992); Wilderness Society, 90 IBLA 221, 232 (1986); Oregon Shores Conservation Coalition, 83 IBLA 1, 5 (1984); Curtin Mitchell and STAND, 82 IBLA 275, 277-278 (1984). Where, however, the record supports an appellant's claim that the IMP standard of nonimpairment regarding ORV use has not been adequately addressed in the management decision, the decision must be set aside and remanded to BLM in order that the issues raised concerning ORV use within the WSA can be addressed in terms of nonimpairment. See California Wilderness Coalition, 101 IBLA 18, 30 (1988).

The interim measures implemented here by the Resource Area Manager of the Moquith Mountain WSA do not adequately consider the nonimpairment standard imposed by the 1979 and 1995 IMP. While the plan was being developed, the Area Manager took the reasonable measures outlined in the Management Guidance and Schedule to "control the impacts" of ORV use in the WSA as mandated by the IMP. What was lacking, however, was any determination that ORV impacts were nonimpairing in open areas, on trails, and in the dry lake area.

Appellant serves on a steering committee, composed of conservationists and community and business leaders, which was brought together by the BLM Kanab Resource Area Manager on March 27, 1990, to study mutual concerns and provide recommended actions for the management of the Moquith Mountain WSA. Recommendations were provided by the steering committee to the Resource Area Manager in August 1991. Both Appellant and Respondent submitted identical copies of those recommendations in their filing. We find that the Management Guidance and Schedule does not effectively implement the steering committee recommendations with respect to ORV's. That Steering Committee Report (Report), attached as appendix 10 to Appellant's SOR, specifically found that the use of all terrain vehicles (ATV's)/ORV's in the Moquith Mountain WSA was not consistent with the Interim Management Policy for lands under wilderness review. The steering committee recommended that "BLM should bring their management of the WSA up to the nonimpairment standard within the Interim Management Policy." Id.

A careful review of the BLM-directed actions delineated above indicates that, while the Resource Area Manager did limit ORV access to the WSA, carefully controlling "limited" and "open" areas and precluding travel on unauthorized routes, there was never a determination by the BLM Area Manager that the nonimpairment standard had been met in taking these actions.

Appellant also specifically disagrees in its SOR with the BLM handling of threatened plant and animal species in the Management Action Guidance and Schedule. Appellant alleges that ORV use on Moquith Mountain adversely impacts the Welsh's milkweed, a plant species which exists only on the Coral Pink Sand Dunes of the Moquith Mountain WSA, and the Coral Pink Sand Dunes Tiger Beetle (Tiger Beetle), a species whose numbers, it claims,

have declined in recent years. The steering committee, however, determined that "[l]ittle is known" of the ORV impacts on these two species. In fact, Appellant presents no evidence that these species are adversely impacted by ORV use, other than a blind allegation. Appellant, moreover, ignores the fact that, while visitation of the WSA has increased, ORV use has significantly declined. The State of Utah, which measures visitation both inside the confines of the Coral Pink Sand State Park and within the adjacent WSA, found ORV use in May 1983 to be 6,806 vehicles, in May 1984 to be 4,013 vehicles, and May 1993 to be 3,823 vehicles. Conversely, Appellant's exhibit 2 to its SOR, which studied population trends related to the Tiger Beetle, reflects that the probable population size was significantly larger in the WSA on June 1, 1992 (900-1,400), than on May 29, 1993 (700-900), despite the fact that ORV use was higher in 1992 than in 1993. This reverse correlation between ORV use and Tiger Beetle population does not support the claim of an increased threat from ORV's.

It is clear from the record, however, that the reason BLM did not consider the Welsh's milkweed and the Tiger Beetle in its initial EA is because those species had not been detected within the Moquith Mountain WSA at the time of its preparation. Nevertheless, Appellant has presented extensive information on both species in attachments to its SOR. As already noted, its own data reflects there is no significant evidence that ORV use adversely impacts the Tiger Beetle population. With respect to the Welsh's milkweed (*Asclepias welshii*), the Report found that the "relationship between current ATV/ORV use and the survival of the Welsh's Milkweed as compared to increased ATV use and plant survival" is "not fully known." It is important to note, however, that the interim protective measures announced by the Resource Area Manager on February 28, 1994, call for specific actions to protect the habitat of Welsh's milkweed through signage and the placement of physical barriers.

Appellant also claims the interim action by the Kanab Resource Area Manager violated NEPA in failing to prepare either an EIS or an EA. Contrary to the claims of the Appellant, this action is not a "major federal action" requiring NEPA review. See 42 U.S.C. § 4332 (C). Rather, this is a management implementing action under the IMP, to preserve the WSA and to prevent unnecessary or undue degradation of the lands and their resources during development of the RMP. See section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1994).

The interim measures contained within the Management Guidance and Schedule merely reflect close adherence and enforcement of the 1981 decisions taken under the MFP developed in 1978 after passage of FLPMA. The 1981 decisions, which followed a complete EA of ORV use in the Moquith Mountain WSA, were consistent with the IMP. The 1979 and 1995 IMP's authorize "open" designations for dunes and snow areas within WSA's with appropriate sand and snow vehicles as long as designated prior to FLPMA, and permits "limited" ORV use along existing roads and trails in ACEC's. (1979 IMP, Chapter III A. 3; 1995 IMP, Chapter I B. 11.) The 1981 decisions of the MFP designated the Ponderosa Pines Dunes (Coral Pink Sands Dunes) and a portion of Moquith Mountain as "open" to ORV's. The existing roads and trails within the South Fork/Indian Canyon and Water Canyons

ACEC's were designated as limited to ORV's. In neither case, however, was it clear in the 1981 MFP whether this was a reiteration of a previous designation made prior to FLPMA, or whether this was a determination made at that time. The interim measures challenged here within the February 1994 Decision must determine whether the "open" and "limited" designations existed prior to FLPMA passage in 1976, and whether the nonimpairment standard is met in open areas, trails, and in the dry lake bed, and not simply conclude that the 1981 decisions are being enforced and that ORV use is sensitive to environmental concerns.

Finally, Appellant urges that BLM did not consider EO No. 11644 in issuing the February 28, 1994, Management Guidance and Schedule. Exec. Order No. 11644, 37 Fed. Reg. 2877 (1972). That EO directs BLM and other agencies to develop and issue regulations which limit ORV use in certain areas. Thus, areas of use must be permitted, restricted, or prohibited according to guidelines designed to minimize damage to natural resources such as soil and wildlife. Executive Order No. 11644 was amended by EO No. 11989, 42 Fed. Reg. 26959 (1977) to require agency heads to immediately close areas or trails to ORV use when he or she determines that "the use of off-road vehicles will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources." Id. It is precisely these considerations, in the context of the IMP, that the Resource Area Manager must weigh in determining whether the nonimpairment standard has been met.

For the above reasons, the Board determines that the interim measures announced by the Resource Area Manager on February 28, 1994, must be set aside and remanded for reconsideration by the BLM Resource Area Manager. The BLM must determine whether the designations of "open" and "limited" ORV use preceded passage of FLPMA, with respect to the dunes, trails, and dry lake bed. If so, the BLM Resource Area Manager must specifically determine whether the use sought to be approved meets the nonimpairment standard contained in both the 1979 and 1995 IMP's.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside and remanded for action consistent with this Decision.

James P. Terry
Administrative Judge

I concur.

James L. Burski
Administrative Judge

