

HAWKWATCH INTERNATIONAL, INC.

IBLA 96-99, 97-390

Decided February 24, 1998

Appeals from Decisions of the Wells Resource Area Manager, Elko District Office, Bureau of Land Management, establishing conditions for ending helicopter flights into a wilderness study area and ordering removal of a building therefrom. BLM/EK/PL-95-020; NV-010-033.

Affirmed.

1. Environmental Quality: Environmental Statements—Federal Land Policy and Management Act of 1976: Land-Use Planning—National Environmental Policy Act of 1969: Environmental Statements

A management plan that found continuation of helicopter supply flights to a bird study project inside a WSA should terminate following construction of an alternative supply route was consistent with standards for wilderness preservation established under provision of 43 U.S.C. § 1782(c) (1994) and conformed to environmental planning requirements imposed by NEPA.

2. Environmental Quality: Environmental Statements—Federal Land Policy and Management Act of 1976: Land-Use Planning

A Decision finding that a building erected in trespass in a WSA should be removed was properly based upon earlier environmental planning for sanitary facilities to be used by a nature study group working in the WSA.

APPEARANCES: Mara A. Brown, Esq., Eric C. Olson, Esq., and Thomas W. Clawson, Esq., Salt Lake City, Utah, for Appellant; John W. Steiger, Esq., Office of the Field Solicitor, and John R. Payne, Esq., Assistant Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

HawkWatch International, Inc. (HawkWatch), has appealed an October 6, 1995, Finding of No Significant Impact and Decision Record (1995 Decision) issued by the Wells Resource Area Manager, Elko District Office, Bureau

of Land Management (BLM), and docketed with this Board as IBLA 96-99. Therein, BLM determined that air transportation of supplies to HawkWatch workers in a wilderness study area (WSA) in the Goshute Mountains of northeastern Nevada would end 1 year after a stock pack trail into the area is put into service. In a related action, HawkWatch has also appealed from an April 18, 1997, BLM Decision Record (1997 Decision) that required removal of a wooden combination toilet and storage building constructed without prior approval in the WSA where it was discovered by BLM on August 31, 1995. The building was replaced by three Romtec composting toilets during the summer of 1997; the docket number of this second appeal is IBLA 96-390. On August 14, 1997, HawkWatch moved to consolidate these appeals, arguing that termination of air support, trail construction, and building removal are "inextricably intertwined." The Motion is granted; the appeals are consolidated.

The 1995 Decision approved management plan guidelines for future management of the Goshute Raptor Project, a study of birds of prey conducted by HawkWatch in the WSA. See Goshute Raptor Project and Environmental Assessment (EA), October 1995, BLM/EK/PL-95/020. The plan allows HawkWatch to continue a wildlife study in the WSA under conditions that will enable BLM to comply with section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA) and the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), published at 44 Fed. Reg. 72014 (Dec. 12, 1979), requiring that WSA lands be managed so as not to impair their suitability for preservation as wilderness. See 43 U.S.C. § 1782(c) (1994); EA at 1. The EA adopted a position characterized as one that "would result in the most intensive administration of the [HawkWatch] project." (EA at 29.) The reason such regulation is required is said to be because:

Emphasis would be placed on the management of the wilderness resource in accordance with wilderness management guidelines over the continuance of the project itself. At the same time this orientation would take into consideration the importance of the raptor project and allow for some improvement to facilities and operation procedures to take place.

Id.

Ground access to the study site, which includes a dry camp, is limited to foot traffic; water for a season's use by HawkWatch volunteers is currently supplied by helicopter in a single day. Under the plan adopted by BLM and objected to by HawkWatch, however:

Helicopter transportation of potable water and other supplies would be phased out and replaced with a pack stock transportation system and a maximum of 500 gallon storage tank. The helicopter usage would be eliminated the year following the completion of the stock trail. Use of stock would require less on-site storage, because of the ability to repeatedly fill the system by

hauling water. * * * The BLM would identify areas for the placement and construction of a "lies easy on the land" pack stock trail separate from the current access trail. BLM would be responsible for survey and design and HawkWatch (BLM may provide support if funding and manpower is available on a short notice) would be responsible for construction and maintenance of the trail according to BLM standards.

(EA at 12, 13.)

Relying on analysis of the bird study project made by the EA, BLM determined "there are some actions that will require further design prior to development, such as the pack stock trail." (1995 Decision at 1.) Analysis of the future pack trail appearing in the EA is, as HawkWatch contends, quite brief. It states: "Development of a stock trail would disturb an additional 1.1 acres (3 miles x 3 feet). The stock trail would require some tree branch trimming or even removal to construct a safe trail to Bureau standards." (EA at 29.)

HawkWatch objects that environmental impacts associated with construction and operation of the stock trail described by the EA have not been addressed therein, but are deferred for later analysis, contrary to provision of 40 C.F.R. § 1508.25(a)(1) (1994), indicating that closely related actions should be discussed in the same impact statement. HawkWatch also argues that construction of the stock trail is an action that is so closely connected ("inextricably intertwined") with the decision to discontinue helicopter support of the study site and remove the building at the study site that it cannot be separately analyzed, and that the 1995 Decision fails to adequately address environmental effects of the proposed stock trail as a consequence. (Statement of Reasons filed in IBLA 96-99 (SOR) at 3, 9-11.) It is argued that if HawkWatch is required to build the trail proposed by BLM, the cost of doing so may jeopardize continuation of the bird study. (SOR at 7, 8.) Moreover, HawkWatch contends, the EA fails to give the stock trail a "hard look" required by cases construing provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1994) and implementing regulations at 40 C.F.R. Part 1508. (SOR at 12, 13.)

The 1997 Decision at issue in IBLA 97-390 required removal of a wooden building described by EA BLM/EK/PL-97/006 as a wooden plywood and board-on-post structure 13-1/2 by 17-1/2 feet in extent, standing over 12 feet high, with a metal roof. This structure houses a storage area and has four metal doors in welded frames; there are two toilet stalls, and a rain-collection and 1,500-gallon water-storage system. (EA at 5, 6.) The total area disturbed by the building, a revetment, and associated walkways is a quarter of an acre. *Id.* at 6. After the building was discovered in 1995, a field investigation and preparation of EA BLM/EK/PL-97/006 1790, NV-010-033 were completed on February 21, 1997. It is principally on this planning that the 1997 Decision relies. Although the building has now been removed

in keeping with a schedule established by the 1997 Decision, the question whether it may be properly constructed and maintained inside the WSA remains to be decided because it could be replaced and HawkWatch wishes to do so.

In a supplemental SOR filed in IBLA 97-390 (SSOR), HawkWatch complains that the 1997 Decision threatens continuation of the Goshute raptor study project at current levels of activity, because a stock trail will be inadequate to replace the water storage and supply facilities that were located in the wooden building. (SSOR at 6-8; SSOR Ex. A at 5.) It is contended that the wooden building conformed to requirements of the IMP for activities inside a WSA and served to enhance wilderness values therein, (SSOR at 12), and that by obviating a need to build a pack trail, the structure provided a reasonable alternative to pack trail construction that should have been considered in a single environmental document, but was not. (SSOR at 9-11; SSOR Ex. A at 5; and see SOR Ex. B.)

HawkWatch argues that BLM and HawkWatch are partners in the raptor study and that the primary purpose of the site at issue is to further the HawkWatch study, which is conducted annually at the site during the raptor migration season from August until October. (SSOR Ex. A at 3, 4, and 6.) It is argued that BLM failed to efficiently analyze the effect that loss of the wooden building would have on HawkWatch's water supply, and also failed to analyze the relationship between construction of the pack trail, termination of helicopter supply, and removal of the wooden building, all of which are connected and interrelated actions. (SSOR at 9, 10; SSOR Ex. A at 5, 6.)

[1] The decision to end helicopter flights into the WSA is consistent with an election made in the management plan, as explained in the EA at 12, to "emphasize the sensitive nature of the site in meeting the non-impairment criteria * * * in anticipation of future wilderness designation." The determination to subordinate the bird study to preservation of the wilderness resource was taken to permit HawkWatch to remove its operations from the study site "upon short notice with no physical impact to the resources within the wilderness study area, should the wilderness management plan for the Goshute Peak Wilderness require it." Id. While HawkWatch argues that BLM is required, under regulations implementing NEPA, to consider the pack trail contemplated by the management plan in complete detail, this argument overlooks the fact that BLM has not yet committed any resources to build the trail.

Since helicopter use will be allowed to continue until a trail is built under a plan approved by BLM, and the 1995 Decision does not approve such construction, there is no prospect that HawkWatch will be harmed by a need to build and maintain a trail that has yet to be located and designed. No definite time for ending use of helicopters in the WSA is set, but that such flights will end is a stated finding by BLM. The argument that mention of future construction activity in a management plan requires immediate detailed site-specific analysis of the mentioned actions was rejected

in Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The same argument is similarly unpersuasive here. There is no indication that BLM seeks to evade a responsibility imposed by NEPA to properly plan for construction of a stock trail if and when the time comes to build one. The finding by BLM that helicopter flights into the HawkWatch site will be discontinued, and that they may be replaced by the use of pack animals, is not shown to be incorrect by an argument that the projected stock trail may be longer, larger, and more expensive than estimated by BLM. If HawkWatch is proven correct during planning for a stock trail, then that suggested alternative supply method may be rejected or modified. In the meantime, HawkWatch is on notice that use of aircraft in a wilderness area may not continue indefinitely.

Moreover, termination of helicopter flights does not necessarily require construction of a stock trail. Other actions, such as a requirement that HawkWatch volunteers camp outside the WSA, (discussed in the EA at 3), or that the bird study not continue inside the WSA, see EA at 23, remain possible alternatives. As we found in the Southern Utah Wilderness Alliance decision cited above, a management plan that is based upon a finding of no significant impact and an environmental assessment complies with NEPA requirements if predicated upon a reasonable analysis of environmental problems likely to be raised by a proposed action. After concluding that the HawkWatch site would likely be included within a wilderness area, BLM found that action was needed to supply the study site by other means than aircraft in order to protect the wilderness resource while allowing the bird study to continue in the WSA. In doing so, it was recognized that further NEPA analysis would be needed before the trail alternative could be finally approved. See EA at 29; Decision at 1. We find that HawkWatch has not shown error in the approach to planning taken by BLM in IBLA 96-99; the 1995 Decision is properly affirmed.

[2] Concerning removal of the HawkWatch building, the 1997 Decision determined, after analyzing alternative actions, that the HawkWatch building was in violation of FLPMA section 603(c), the IMP, and an October 1995 Goshute Raptor Management Plan and EA BLM/EK/PL-95/520. It was determined that preservation of wilderness values within a WSA is the paramount consideration when evaluating any proposed action or use, and that removal of the building was required to protect the wilderness resource. (1997 Decision at 2.)

It has not been shown by HawkWatch that removal of the wooden building will cause curtailment of the raptor study, nor does the record support a finding that the public policy expressed in section 603 of FLPMA and the IMP favor the presence of a permanent wooden building and associated construction at a high elevation in the WSA. We find that NEPA planning requirements preliminary to a decision to substitute Romtec toilets for the wooden building were met when the Raptor EA was prepared, wherein general principles for handling sanitary requirements at the site were considered. This prior planning provided a base for the project plan embodied in the EA presently under review. HawkWatch has not shown error in the finding by

BLM that construction of the building at the HawkWatch site was inconsistent with conservation of the wilderness resource required by the IMP and prior planning for activity at the site. Further, it has not been shown that the building, which was built without prior approval, was nonetheless compatible with FLPMA section 603(c) or should have been treated as an alternative to a proposed stock trail that has yet to be authorized. The argument that all BLM actions affecting HawkWatch's study operations should have been considered in a single document must also be rejected. The record indicates that BLM took planning action concerning the wooden building when its existence was discovered. The record supports BLM's finding that the continued existence of the HawkWatch building was inconsistent with wilderness standards established to implement FLPMA section 603(c). HawkWatch cannot control BLM planning for the study site by originating a trespass on the public lands. See, generally, James W. Bowling, 129 IBLA 52, 54 (1994), and cases cited therein (finding that trespassers acquire no rights by their unauthorized actions).

We conclude that HawkWatch has not shown, by a preponderance of the evidence of record, that BLM's planning was in error, as must be done if this appeal were to succeed. See, e.g., Oregon Natural Desert Association, 135 IBLA 389, 394 (1996). We therefore conclude that removal of the wooden building from the WSA was consistent with controlling wilderness guidelines for activity in a WSA and that planning for removal of the building conformed to requirements imposed by NEPA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

Franklin D. Amess
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge

