

DANIEL T. COOPER

IBLA 96-108

Decided December 13, 2000

Appeal from an action by the Acting Area Manager, Barstow Resource Area, Bureau of Land Management, California, closing certain public lands in the Ord Mountain area to motorized vehicle use. CA-068-01-7123-00-6592.

Affirmed.

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

A BLM decision under 43 C.F.R. § 8341.2 to close certain public lands to off-road vehicle use in order to prevent adverse impacts on wildlife and threatened species habitat will not be disturbed on appeal when it is supported by facts of record, absent a showing of compelling reasons for modification or reversal.

APPEARANCES: Daniel T. Cooper, pro se; Tim Read, Area Manager, Barstow Resource Area, Barstow, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Daniel T. Cooper has appealed the action of the Acting Area Manager, Barstow Resource Area, California, Bureau of Land Management (BLM), closing certain public lands in the Ord Mountain area to motorized vehicle use.

On November 23, 1994, the Barstow Resource Area Office published a notice of emergency closure of specifically described public lands in the Barstow area to motorized vehicle traffic under the authority in 43 C.F.R. § 8341.2. The notice stated that closure was required to mitigate the impacts of vehicles on wildlife, game birds, the desert tortoise, and desert tortoise habitat. 59 Fed. Reg. 60386-87 (Nov. 23, 1994).

On August 7, 1995, BLM published an amendment of the November 23, 1994, notice in order to optimize public opportunities for outdoor recreation, hunting, and camping and to clarify and define the areas open to public camping and parking. The notice again stated that closure was required to mitigate the impacts of motorized vehicles in a class "L"

limited use area as designated in the California Desert District Conservation Area Plan (1980), as amended. The notice further stated that route proliferation was occurring within the area and was impacting the habitat of the desert tortoise. The closure allowed permitted uses, e.g., grazing, recreation, and mining, and did not affect public access by nonmotorized means. 60 Fed. Reg. 40192-3 (Aug. 7, 1995).

In letters of September 6 and 12, 1995, to BLM, Cooper stated that he objected to the closure as described in the August 7, 1995, notice. On September 8, 1995, Cooper submitted a Freedom of Information Act (FOIA) request "pertaining to the Ord Mountain Route Network, as published in the Federal Register on August 7, 1995." Cooper indicated that he was interested in the scoping of this project and related projects. In a letter dated September 18, 1995, Cooper advised BLM that he intended to appeal the August 7, 1995, emergency closure based on his understanding that his notice of appeal could be postmarked, at the latest, October 7, 1995. In a September 20, 1995, letter to BLM, Cooper advised that BLM should consider his previous letters of objection to the closure as "my notice of intent to appeal."

On October 10, 1995, BLM mailed Cooper a response to his FOIA request. By letter of November 28, 1995, the District Manager notified Cooper that his appeal was being forwarded to the Board.

BLM's emergency closure was taken pursuant to 43 C.F.R. § 8341.2, which provides:

(a) Notwithstanding the consultation provisions in [43 C.F.R.] § 8342.2(a), where the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources, the authorized officer shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence. Such closures will not prevent designation in accordance with procedures in subpart 8342 of this part, but these lands shall not be opened to the type(s) of off-road vehicle to which it was closed unless the authorized officer determines that the adverse effects have been eliminated and measures implemented to prevent recurrence.

In his statement of reasons (SOR), Cooper states that he "is a user of the subject lands, for recreational purposes" and "a planner in the employ of various non-profit recreational user organizations, and takes

this appeal forward on behalf of those organizations and their individual members." 1/

Cooper acknowledges that BLM may make an emergency closure of the public lands. He asserts however, that no emergency existed and that in addition to public lands BLM closed "42,000 acres, 31 percent, of private lands and interests, as well," denied access to such lands, and improperly closed such lands to mineral entry. (SOR at 2, 15-16, 19.) Cooper alleges that the major factors impacting on the desert tortoise are predatory ravens and disease, not off-road vehicle traffic. The desert tortoise, Cooper asserts, is not threatened by recreational or commercial use of the public lands. (SOR at 2, 14-15.) Cooper generally alleges that in employing the emergency procedure, BLM circumvented the requirements of various statutes, including the Endangered Species Act and the National Environmental Policy Act. (SOR at 2, 11-12.) He asserts that BLM failed to demonstrate evidence of considerable adverse effects, as required by 43 C.F.R. § 8341.2. (SOR at 14.)

BLM's Barstow Resource Area Office filed a response explaining that the closure was intended to "gain control over off-highway vehicle use which was damaging an area of critical habitat, and had the potential to spread." (Response at 2.) BLM states that it identified a network of routes within the closure area to facilitate transportation, recreation and commerce and closed all other public lands because the area is situated between two large and very popular off-highway vehicle (OHV) areas and experienced a large volume of OHV enthusiasts passing back and forth between or straying from the two open areas. The two OHV areas are the Stoddard Valley off-highway vehicle area and the Johnson Valley off-highway vehicle area.

The Barstow Area Manager based his closure decision upon an intimate personal knowledge of the area, a U.S. Fish and Wildlife (FWS) biological

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1/ 43 C.F.R. § 4.410(a) grants a right of appeal to any party to a case who is adversely affected by a decision of an officer of BLM. A person who is the responsible party who has taken the action that is the subject of the BLM decision on appeal, is the object of that decision, or has otherwise participated in the decision-making process leading to that decision will be considered a party to a case. See Missouri Coalition for the Environment, 124 IBLA 211, 216 (1992), and cases there cited. A person will be deemed adversely affected by a BLM decision, within the meaning of 43 C.F.R. § 4.410(a), for purposes of establishing standing to appeal if a legally cognizable interest is shown that may be adversely affected by the decision. Although Cooper meets these requirements and may therefore bring the appeal in his own right, he does not meet the Department's rules of practice for representing recreational user organizations. There is no indication that Cooper is authorized, under 43 C.F.R. § 1.3, to practice before the Department of the Interior on behalf of third parties. See Robert G. Young, 87 IBLA 249, 250 (1985); Robert A. Perkins, 119 IBLA 375, 382 (1991).

opinion, the fact that a 1994 motorcycle event resulted in increased casual use of the area and the fact that "the entire closure area has been designated by the [FWS] as critical habitat for the recovery of the desert tortoise, a threatened species under the Endangered Species Act." (Response at 3.)

BLM stated that measures to eliminate adverse impacts were being developed through the West Mojave Coordinated Management Plan and that closure would be terminated upon adoption and implementation of that plan or when formal route designation is complete. See 65 Fed. Reg. 31927 (May 19, 2000).

The record includes an October 17, 1994, Biological Opinion which was drafted for the then-proposed Johnson Valley to Stoddard Valley Hare and Hound Motorcycle Event. That event was to cross the periphery of an area recommended for inclusion in the Ord-Rodman Desert Wildlife Management Area, an area which FWS included in the Ord-Rodman critical habitat unit. (Opinion at 8.) The Opinion describes in some detail FWS' plan for "recovery and delisting of the desert tortoise." (Opinion at 7.)<sup>2/</sup> Under the plan, the range of the desert tortoise is divided into 6 population segments for which 14 desert wildlife management areas are recommended. Further recommendations include the restriction of human activities that negatively affect desert tortoises, prohibition of all off-road vehicle traffic, and the prohibition of competitive, organized events on roads in all desert wildlife management areas "because they are generally incompatible with recovery of the desert tortoise." (Opinion at 8.) While FWS concluded in the Opinion that this particular motorcycle event was "not likely to jeopardize the continued existence of the desert tortoise or adversely modify critical habitat" (Opinion at 1), it did make several conservation recommendations. One of these was that BLM "should close and revegetate off-highway vehicle trails in critical habitat and in the Ord-Rodman Desert Wildlife Management Area." Another recommendation was that BLM "should evaluate an alternate route that does not cross critical habitat of the desert tortoise in the event anyone applies for a similar permit in the future." (Opinion at 15.)

[1] BLM has the responsibility of administering the public lands and accordingly has the discretion necessary to effectively discharge its duties. So long as BLM's management decision is based on a consideration of all relevant factors and is supported by the record, the Board will not disturb it, absent a showing of compelling reasons for modification

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<sup>2/</sup> On Apr. 2, 1990, FWS determined that the Mojave population of the desert tortoise was a threatened species. 55 Fed. Reg. 12178 (Apr. 2, 1990). On Feb. 8, 1994, FWS designated approximately 6.4 million acres of critical habitat for the Mojave population of the desert tortoise. 59 Fed. Reg. 5820 (Feb. 8, 1994). (Opinion at 7.)

or reversal. See Terry Kayser, 136 IBLA 148, 150 (1996); In Re Grassy Overlook Timber Sale, 115 IBLA 359, 362 (1990); California Wilderness Coalition, 101 IBLA 18, 29 (1988); Wilderness Society, 90 IBLA 221, 232 (1986).

We find no support in the record for Cooper's allegation that BLM's closure resulted in denying access to private properties or withdrawing land from mineral entry. BLM's August 7, 1995, notice specifically disclaimed jurisdiction over and any intent to "affect the rights of private land owners, or their interests within the closure area, with respect to private lands." 60 Fed. Reg. 40192 (Aug. 7, 1995).

In response to Cooper's disagreement with certain conclusions of the FWS biological opinion, or with BLM's reliance thereon in its closure action, we note that the Office of Hearings and Appeals does not have authority to review the merits of biological opinions issued by FWS under section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536 (1994). Southern Utah Wilderness Alliance, 128 IBLA 52, 59-60 (1993); Lundgren v. Bureau of Land Management, 126 IBLA 238, 248 (1993); Edward R. Woodside, 125 IBLA 317, 322-24 (1993). Although we do not have jurisdiction to set aside or second-guess FWS biological opinions, we may review a party's objections concerning compliance with or consistency with policy determinations. Southern Utah Wilderness Alliance, 152 IBLA 216, 223 (2000). In this case we find BLM's closure consistent with the 1994 FWS biological opinion.

With respect to Cooper's assertions that no emergency existed, we find the record supports BLM's determination that off-road vehicles were a threat to wildlife, game birds, and desert tortoise habitat and therefore its judgment that this caused considerable adverse effects was not arbitrary or capricious.

In response to Cooper's complaint that BLM circumvented statutory requirements for consultation and that he was excluded from decision-making leading to the closure, we note that 43 C.F.R. § 8341.2 specifically dispenses with consultation requirements where BLM's authorized officer makes the findings upon which a closure of lands to vehicle traffic must be based. This regulation gives the authorized officer the discretion to take such action where adverse effects are determined or anticipated if the action is not taken. In this case, the adverse effects are analyzed in the FWS biological opinion. <sup>3/</sup>

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<sup>3/</sup> Cooper also challenges the timeliness and critiques the merits of the critical habitat designation and the "final recovery plan for the desert tortoise." (SOR at 5-11.) He asserts that he was not provided sufficient notice for participating in the scoping for the recovery plan and charges that BLM excluded him from that process. (SOR at 6.) Neither the FWS critical habitat designation nor the tortoise recovery plan is at issue in this appeal.

In California Association of Four-Wheel Drive Clubs, Inc., 38 IBLA 361, 372 (1978), aff'd, California Association of Four-Wheel Drive Clubs v. Andrus, No. 80-5666 (9th Cir. Jan. 22, 1982), the appellants had challenged two decisions of the California State Director closing two corridors to OHV use in the California desert. In the closure area, one threatened and four endangered species were present. The BLM had ordered closure, citing the ESA, 16 U.S.C. § 1531 (1994), and the National Environmental Policy Act, 42 U.S.C. § 4321 (1994). We stated at pages 367-68 of that decision:

Where conflicting uses of the public lands are at issue and the matter has been committed to the discretion of the BLM, the Board will uphold the decision of the BLM unless appellant has shown that the BLM did not adequately consider all of the factors involved, including whether less stringent alternatives would accomplish the intended purpose, or that there is sufficient reason to change the result. Cf. Questa Petroleum Co., 33 IBLA 116 (1977); Rosita Trujillo, 20 IBLA 54 (1975).

Desert Vipers Motorcycle Club, 142 IBLA 293, 299 (1998), also involved a motorcycle event in desert tortoise habitat. We held there that BLM's decision to deny a permit for the event

was based on a concern to prevent harm to the desert tortoise and its habitat, which are listed as "threatened" under the ESA, 16 U.S.C. § 1531 (1994). Given the critical habitat determination for the desert tortoise published by FWS on February 8, 1994, and the June 28, 1994, FWS Recovery Plan which recommended prohibiting competitive events on existing roads in DWMA's [Desert Wildlife Management Areas] identified in the Recovery Plan, we believe BLM did consider all factors involved, and we further conclude that protection of the desert tortoise required denial of the Appellants' application. The BLM's March 15, 1996, Decision is based on facts of record and there are no compelling reasons to modify or reverse it. [Citation omitted.]

Although there is a difference between denying an application for a special recreation permit, as in Desert Vipers, and closure of the public lands, the considerations are similar. See Daniel T. Cooper, 150 IBLA 286, 291 (1999). In the case before us, we find BLM's closure is based on the record and that Cooper has not shown compelling reasons to modify BLM's decision.

To the extent not specifically addressed, Cooper's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's August 7, 1995, closure action is affirmed.

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Will A. Irwin  
Administrative Judge

I concur:

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John H. Kelly  
Acting Chief Administrative Judge

