

**Editor's note: Appealed – aff'd, Civ.No. 79-1797-N (S.D.Cal. Aug. 5, 1980), aff'd, (9th Cir. Jan. 22, 1982)**

CALIFORNIA ASSOCIATION OF FOUR-WHEEL DRIVE CLUBS, ET AL.

IBLA 77-226      Decided December 29, 1978

Appeal from decisions of the California State Director, Bureau of Land Management, closing certain open corridors in the Imperial Sand Dunes to off-road vehicular use.

Affirmed.

1. Administrative Practice–Federal Land Policy and Management Act of 1976: Public Participation

Public notice and hearing is not required by the Code of Federal Regulations prior to closure of areas of the public lands to outdoor recreation use pursuant to 43 CFR 6010.4, implementing the multiple use management provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732 and 1733.

2. Administrative Practice–Rules of Practice: Generally–Rules of Practice: Appeals: Effect of

While an appeal of one decision of the BLM is pending before the Board, the BLM is without authority to exercise jurisdiction in the matter which is the subject of the appeal. Where the BLM exercises jurisdiction and the subsequent decision presents the same issue as the first, and the parties are given an adequate opportunity at the hearing and on appeal to present evidence and argue as to this issue, the Board will proceed to consider both decisions on their merits.

3. Administrative Procedure: Burden of Proof--Rules of Practice: Appeals: Burden of Proof

Where arguably 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 resolving the conflict 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.

4. Federal Land Policy and Management Act of 1976: Generally

Where off-road vehicles pose a potential threat to plants proposed for listing under the Endangered Species Act of 1973, 87 Stat. 884, as endangered, and interfere with the educational and scientific value of an area of the public lands which its status as a registered natural landmark under the Historic Sites Act, as amended, 16 U.S.C. §§ 461-467, seeks to enhance, the BLM may close such area of the public lands to off-road vehicular use, pending further study, pursuant to the multiple use management provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732 and 1733.

APPEARANCES: Kevin Midlam, Esq., Johnson and Midlam, San Diego, California for appellant; Burton J. Stanley, Esq., Office of the Solicitor, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

California Association of Four-Wheel Drive Clubs and California Off Road Vehicle Association have appealed from two decisions of the California State Director, Bureau of Land Management (BLM), dated February 17, 1977, and December 5, 1977, closing two open corridors, in Area No. 66 of the Imperial Sand Dunes, to off-road vehicle (ORV) use.

Area No. 66 had been closed to ORV use under the California Desert Vehicle Program (BLM's Interim Critical Management Program for vehicle use on the California Desert), effective November 1, 1973. However, two open corridors were set aside for ORV use. These corridors intersect and provide direct access from the town of Glamis,

along the north edge of State Highway No. 78 and through the closed Area No. 66, to the Mammoth Wash Open Area No. 65.

On February 17, 1977, the California State Director, BLM, ordered the closure of the two open corridors in Area No. 66 to ORV use, effective March 17, 1977, and "until further notice."

The stated reasons for the closure were:

This closure of area No. 66 Vehicular Corridors is due in part to past unauthorized vehicular use. The corridors, which were for access only, encouraged "vehicular play" and entry into the closed area. Closure of the corridors to non-vehicular use will provide for better resource management in maintaining the intent of closed area No. 66 in protecting and preserving unique natural values. Four endangered and one threatened species of plants are located in the Imperial Dunes complex in Imperial County, California. The Bureau of Land Management is mandated by the Endangered Species Act, Pub. L. 93-205, to ensure BLM actions do not jeopardize the continued existence of a species or adversely modify its critical habitat. This closure will further protect a registered National Natural Landmark.

42 FR 9725 (1977).

An "inventory to determine the specific location and habitat of endangered and threatened flora" throughout the Imperial Sand Dunes was planned for "Spring, 1977." 42 FR 9725 (1977). The closure order was made pursuant to 43 CFR 6010.3 and 6010.4. Regulation 43 CFR 6010.4, implementing the multiple use management provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1732 and 1733 (Supp. 1978), authorizes the temporary closure of lands open to outdoor recreation use in order to " \* \* \* [p]revent unnecessary destruction of plant life and wildlife habitat, \* \* \* [p]rotect the natural environment \* \* \* [p]reserve areas having cultural or historical value \* \* \* [and] [p]rotect scientific studies or preserve scientific values."

The closure order was also felt to be consistent with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq. (1977), regulations contained in 43 CFR Group 6200, and Executive Order No. 11644, 37 FR 2877 (1972).

Executive Order No. 11644, supra, was issued on February 9, 1972, "in furtherance of the purpose and policy of the National Environmental Policy Act of 1969" and provided for the issuance of regulations controlling ORV use on public lands. Regulation 43 CFR 6292.2, a subpart of 43 CFR Group 6200, was issued pursuant thereto and authorized

[\*364] the temporary or permanent closure of public lands to ORV use. Criteria to be considered were listed under 43 CFR 6292.3:

The ability of the land and its resources to withstand and sustain off-road vehicle use impacts \* \* \*

Consideration of the scenic qualities of the land, and its cultural, ecological, and environmental values \* \* \*

\* \* \* \* \*

The existing or potential quality and quantity of recreational experiences available \* \* \*

Consideration of the need to minimize harassment of wildlife or significant disruption of wildlife habitat \* \* \* [and]

The furtherance of the purposes and policy of the National Environmental Policy Act of 1969.

On March 10, 1977, appellants filed a notice of appeal from the February 17, 1977 closure order. By Order of June 29, 1977, the Board, at the request of the Regional Solicitor, placed the closure order into effect during the pendency of the appeal, pursuant to 43 CFR 4.21(a).

In August of 1977, a study of the "Sensitive Plants" in the Imperial Sand Dunes was conducted by WESTEC Services, Inc., of Tustin, California, for BLM and, based on the study, the public was invited to participate in three public meetings and to submit written comment on management alternatives for the Imperial Sand Dunes. A majority of those commenting did not favor closure of the corridors (Tr. 68-70).

On December 5, 1977, pending completion of a comprehensive land use plan for the California Desert, pursuant to section 601 of FLPMA, 43 U.S.C. § 1781 (Supp. 1978) or "until such time as additional data dictate further changes are necessary to prevent resource damage," the BLM State Director "finalized" his decision closing the two open corridors in Area No. 66 to ORV use. The stated reasons for the decision were:

Closing the corridors will provide an area of continuous closure across the dunes, which is desirable for base line studies of biological resources. Area 66, though, remains open for public use by nonvehicular means, but, enforcement of the closure will prevent "vehicular play" in the area, thereby providing protection for the plant habitats, and adjacent woodland habitats, and insure protection of dune habitats for animals. The closure is consistent with the intent of the existing Outstanding Natural Area designation and the National Natural Landmark status.

The December 5 closure order was made pursuant to the same authority as the original closure order. It was also felt to be consistent with the Endangered Species Act of 1973 (ESA), 87 Stat. 884, and FLPMA, supra, as well as the authorities cited in the original closure order.

By Order of August 12, 1977, this Board had, at the request of the appellants, ordered a hearing to be held as to the February 17 closure order before an administrative law judge and the submission of a recommended decision by him. A hearing was duly held on December 14, 1977, at which time the administrative law judge, pursuant to a stipulation entered into by the attorneys for the parties, consolidated the issues involved in both the February 17 closure order and the December 5 closure order for hearing and decision.

On May 8, 1978, Administrative Law Judge Dean F. Ratzman recommended that both the February 17 closure order and the December 5 closure order be upheld based upon a careful consideration of the issues involved, the evidence presented and the authorities cited. We hereby accept that recommendation.

In their statement of reasons for appeal, appellants assert four reasons why the decisions of the BLM State Director should be set aside:

- 1) The February 17, 1977, closure order was not preceded by public notice and hearing, as required by the Code of Federal Regulations.
- 2) Issuance of the December 5, 1977, closure order, while an appeal was pending on the February 17, 1977, closure order, violated "the basic concept of due process."
- 3) The BLM State Director failed to "properly consider" public comment received prior to issuance of the December 5, 1977, closure order.
- 4) The BLM State Director's action in issuing the February 17, 1977, and December 5, 1977, closure orders was "arbitrary and capricious."

[1] Appellants are mistaken in their assertion that the Code of Federal Regulations required public notice and hearing prior to issuance of the February 17 closure order. The closure order takes its authority from 43 CFR 6010.3 and 6010.4 which are sections of 43 CFR Part 6010, which sets out a "General Program" for the management of the outdoor recreation use of the public lands. There is no requirement anywhere in the regulations in 43 CFR Part 6010, that the public must be invited to participate prior to issuance of an order closing

the public lands to such use. While it might have been more appropriate for BLM to have issued the closure order pursuant to 43 CFR 6292.2, specifically dealing with ORV use on public lands, we cannot say that its choice was improper. Both regulations are equally applicable.

Furthermore, even if BLM had so chosen, we cannot say that it would have been required to invite public participation prior to issuance of the February 17 closure order. The pertinent regulation, 43 CFR 6292.4, provides an exception to the requirement of public participation in the case of "emergency action." The facts in the present case may have necessitated such action. See, discussion infra.

[2] While an appeal was pending before this Board on the February 17 closure order, the BLM State Director was without authority to exercise any jurisdiction in the matter of the closure of the corridors in Area No. 66 of the Imperial Sand Dunes to ORV use. John J. Sexton (On Reconsideration), 20 IBLA 187 (1975); L. D. Crawford, Halvor F. Holbeck, 61 I.D. 407 (1954). Although the December 5 closure order was termed merely a "finaliz[ation]" of the February 17 closure order, it can best be characterized as extra-judicial and should not have been rendered.

The December 5 order of the State Director could, therefore, properly be viewed as a nullity, having been issued when his authority to act upon the matter had been suspended. We recognize that situations might arise where, during the pendency of the appeal, considerations impel immediate action. The proper course of procedure, in such eventualities, is to seek immediate relief with this Board. In the instant matter, however, inasmuch as the December 5 order merely reiterated in "final" form the February 17 closure order this justification can scarcely be said to be of any vitality.

Our traditional approach to this problem has been to ignore such unauthorized actions and limit consideration to the matter properly before the Board. However, in the confines of this case, we will consider both Orders as being properly before us.

A number of discrete factors lead us to so act. In the first place, the December 5 order mandates the closing of precisely the same land as was closed in the February 17 order. Thus, the essential question is the same, viz., the correctness of the corridor closure.

Secondly, appellants are not adversely affected by dealing with both orders. On the contrary, appellants might actually be saved a great deal of time and expense. Appellants' position vis-a-vis the December order suffers from a critical defect. Implicit in their argument is an assumption that if BLM were limited to a review of only the February 17 order, this Board would not consider any data subsequently obtained in justification of the issuance of its order. This assumption is erroneous.

When a factfinding hearing is ordered under 43 CFR 4.415, the very purpose of the hearing is the development of facts which will aid this Board in its decisionmaking process. To limit such a hearing to the facts that were known by BLM at the time of the issuance of the decision under appeal would also necessitate a similar limitation on the freedom of an appellant to develop a factual framework in which to challenge a BLM action. Such a course of action cannot fail to result in only the most artificial decisionmaking.

The cases cited by appellant which relate to judicial review of agency decisions are inapposite. This Board is the determiner of what the final agency decision is and has full de novo review powers to aid it in its determination. Much more relevant here are various Departmental cases relating to contest procedure. Thus, the Board has expressly held that a mining claimant may cause the taking of assays and core drilling even after a withdrawal to confirm a discovery made prior to a withdrawal. United States v. Foresyth, 15 IBLA 43 (1974). While utilization of legal theories not previously raised may engender due process problems relating to the adequacy of notice, see United States v. McElwaine, 26 IBLA 20 (1976), there is no bar to utilization of factual data developed subsequently to an initial decision to either support or undermine such decision.

Moreover, even were this Board to totally disregard the subsequent order and evidence developed, the relief which appellants might receive would only be of the most ephemeral quality. Inasmuch as the Board had not considered the developed data, the State Office could certainly republish a closure order on the grounds that such action was not in contravention of any Board determination. Appellants would then be forced to begin the entire appellate process again, seeking yet another factfinding hearing and an opportunity to contravene the very evidence which it could have attacked at the initial hearing. Thus, in our view, no real purpose would be served in either ignoring the December 5 order or any evidence developed after the February 17 order. The Judge correctly acted on this question.

We note at the outset that the BLM State Director was not required to accede to the wishes of a vocal majority in making his decision regarding closure of the two corridors in Area No. 66 to ORV use. Public comment received prior to issuance of the December 5 closure order represented merely one factor which the BLM State Director had to consider. This he did (Tr. 28-29).

The authority granted to the BLM to temporarily close areas of the public lands to outdoor recreation use was discretionary. See 43 CFR 6010.4. As such, the BLM State Director was entitled to exercise independent judgment in the matter considering all relevant factors. He was not subject to the dictates of the ballot box.

[3] 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).

[4] While the case at bar presents a conflict between ORV use of the two corridors of Area No. 66 of the Imperial Sand Dunes and certain other uses of the corridors and the surrounding areas of Area No. 66, it must be viewed within the context of the management of the entire Imperial Sand Dunes complex. On February 17, 1977, the BLM chose to close the two corridors to ORV use and asserted that it was necessary to protect and preserve "unique natural values," in particular "four endangered and one threatened species of plants" threatened by unauthorized "vehicular play" outside the corridors, and the status of the land as a natural landmark.

Prior to the February 17 closure order, there had been no study made of the impact of off-road vehicles on the "endangered" or "threatened" species of plants (Tr. 53). Nevertheless, the BLM had evidence that off-road vehicles were straying outside the corridors (Tr. 117-18, 125-27), and into areas of vegetation (Tr. 72-73, 97). Realizing that these particular species of plants were "generally present within the area north of Highway 78" (Tr. 22), the BLM, acting pursuant to a directive from the Associate Director, BLM, dated November 5, 1976, took "emergency" action to protect the plants, pending further study (Tr. 27).

This directive, the Interim Plant Management Guidelines—Endangered Species Act of 1973, instructed BLM field offices to undertake a "Statewide (BLM) compilation of plant species which have been proposed for inclusion on the Federal list of threatened or endangered plants" and to consider these plants "in all Bureau land-use planning efforts." The four "endangered" and one "threatened" species of plants which the BLM referred to in its February 17 closure order had been proposed for listing as threatened and endangered, within the meaning of the ESA, supra.

Pending inclusion on the Federal list, the BLM was not "mandated" by the ESA, supra, to protect these particular species of plants as it had stated in its February 17 closure order. Nevertheless, concern for the status of such species is a relevant factor to take into consideration in the management of the ISD. See cf. Pinnacle Mining and Exploration Co., Inc., 28 IBLA 249 (1976); Rosita Trujillo, 21 IBLA 289 (1975).

The threat posed by off-road vehicles straying outside the corridors and into the areas of vegetation and the possible impact of such vehicles on these particular species, might, in and of itself,

justify closure of the corridor pending further study. See cf. Jack E. Griffin, 7 IBLA 155 (1972); Vern K. Jones, 33 IBLA 74 (1977).

The BLM also advanced the status of the land as a natural landmark as a reason for the February 17 closure order. The Imperial Sand Dunes had been registered as a natural landmark pursuant to the Historic Sites Act, as amended, 16 U.S.C. §§ 461-467 (1976). Designation as a natural landmark was intended to:

(1) encourage the preservation of sites illustrating the geological and ecological character of the United States, (2) enhance the educational and scientific value of sites thus preserved, (3) strengthen cultural appreciation of natural history, and (4) foster a wider interest and concern in the conservation of the Nation's natural heritage. [Emphasis added.]

40 FR 19503, 19504 (1975).

The area of the dunes north of Highway 78 has long been considered of educational and scientific value, especially because of its accessibility from the road and its relatively small size compared to the area south of Highway 78 (Tr. 76-80). Numerous classes have utilized the area and much scientific research has been conducted there (Tr. 49, 81, 105). Others have at times been out in the dunes (Tr. 44). ORV use of the dunes has made it both difficult and at times dangerous to be on foot in the dunes (Tr. 82-83). This, too, was a valid factor upon which BLM could rely in making its management decision.

In August of 1977, a study was conducted by WESTEC Services, Inc., of Tustin, California, for the BLM of the "Sensitive Plants" in the Imperial Sand Dunes. The study revealed the location of the five proposed endangered and threatened species of plants and discussed the impact of ORV use on vegetation in the Imperial Sand Dunes. It was found that the two corridors were within a central area of vegetation characterized as "Desert Psammophytic Scrub" (WESTEC study, p. 58). Included within the area were four of the proposed endangered and threatened species of plants. This area of vegetation extended out from the corridors, merging with areas of bush scrub and woodland. (WESTEC study, Figure 3-1).

The study concluded that the impact of ORV use on bush scrub areas could be "significant" and that damage to plants in the central dune areas ranged from "minor" to heavy (WESTEC study, pp. 132-3). It was reported that ORV use could cause "compaction of the soil," resulting in "changes in bulk density, water content and changes in microclimate, particularly thermal changes." This could potentially have a major impact on plants in the central dune areas. Furthermore, the loss of vegetation from ORV use had been documented (WESTEC study, pp. 131-132).

Incident to the WESTEC study, several species of animals were generally observed within the Imperial Sand Dunes (WESTEC study, Appendix D). Other sightings had occurred in the central dune areas of Area No. 66 (Tr. 80-81). The impact of ORV use on such animals was potentially great (Tr. 88-89). See also WESTEC study, p. 131.

Subsequent to the study, the BLM distributed 11 possible management alternatives and solicited both oral and written public comment, as well as other suggested management alternatives. The 11 alternatives ranged from closure of the dunes both north and south of Highway 78 to reestablishing the corridors.

On December 5, 1977, the BLM "finalized" its closure order. In its order, the BLM supplemented its rationale for the February 17 closure order, asserting that the closure was necessary to protect adjacent animal and woodland habitats and the status of the land as an outstanding natural area.

We find that the BLM gave an adequate consideration to all of the factors involved in the December 5 closure order. It had ample evidence that off-road vehicles were straying outside the corridors and into areas of vegetation. The WESTEC study had pinpointed the location of the proposed endangered and threatened species of plants within and outside the corridors, and had revealed the impact of ORV use on them. Furthermore, the BLM had evidence that several species of animals were in and around the central dune areas and were potentially threatened by ORV use. The BLM also gave consideration to other less stringent alternatives that would accomplish the intended purpose of protecting the plant life of the dunes, as well as alternatives which would result in the closure of even more of the Imperial Sand Dunes.

The December 5 closure order noted that Area No. 66 had been designated as an outstanding natural area pursuant to 43 CFR 6225.0-5(b). "Outstanding natural areas" are "established to preserve scenic values and areas of natural wonder," and the public is "encouraged to walk into the area for recreation purposes wherever feasible." (Emphasis added.) 43 CFR 6225.0-5(b). As noted above, ORV use was shown to present certain conflicts with pedestrian use of the dunes. The BLM was entitled to close the corridors to ORV use in order to encourage pedestrian use of part of the dunes.

In their statement of reasons for appeal, appellants assert that the BLM failed to adequately consider stepped-up enforcement of the corridors, with the assistance of the off-road vehicle organizations, as an alternative to closure. We note that stepped-up enforcement was not feasible considering the lack of equipment and personnel, compared to the number of visitors in the dunes (Tr. 31, 118, 125), and the inability of the BLM, due to vandalism and shifting sands, to maintain signs along the corridor boundaries (Tr. 116-117). The enforceability of the corridor perimeters was adequately considered by the BLM.

Appellants also argue that "[a]reas which are established and maintained for the primary purpose of research and education should be designated 'research natural areas'" pursuant to 43 CFR 6225.0-5(a). While Area No. 66 had not been so designated, BLM could, nevertheless, properly seek to protect the educational and scientific values of the dunes in other ways.

Appellants also argue that closure of the corridors has "effectively" denied off-road vehicles the use of the Mammoth Wash Open area No. 65 because such vehicles cannot utilize the other roads giving them access to that area (Tr. 15, 55). We note that such vehicles can be brought into that area on trailers along the Glamis-Niland Road, which parallels the corridor leading into Area No. 65 from Highway 78 (Tr. 129). In fact, most of the off-road vehicles are brought to the Imperial Sand Dunes on trailers (Tr. 128), and continuing on to Area No. 65 would present no greater hardship, though admittedly, the limited amount of land in Area No. 65, compared to that available south of Highway 78 might make it less attractive to ORV enthusiasts.

Finally, appellants contend that the Imperial Sand Dunes are "particularly well suited for ORV use due to [their] topography and location in proximity to the major urban population centers of Southern California." On the other hand, "[d]ue to the existence of vast expanses of Sahara-like dunes, and the extreme heat, [they are] not well suited for back-packers, hiking, picnicing or nature study."

The varied and, at times, inconsistent uses to which the public lands of the United States can be put often elicit from partisans of one use a feeling that other uses of the public land are not worthy of consideration. It is BLM's management responsibility to balance these competing interests, within the confines of the law.

There is no doubt that ORV use has heretofore been considered a valid use of the public domain. See Executive Order No. 11644, 37 FR 2877 (1972). BLM has not attempted to prohibit ORV use in the Imperial Sand Dunes. Rather, faced with a conflict of possible uses, it determined to set aside part of the Dunes system from the general use by off-road vehicles. It must be kept in mind that Area No. 66 was actually closed in 1973 under the Interim Critical Management Program for vehicle use on the California Desert. It was thought, at that time, that maintenance of a corridor through the closed area would not be inconsistent with the rationale which determined that Area No. 66 would be closed to ORV use. The considerations which led BLM to reevaluate the existence of the corridor cannot be said to be irrelevant to its management responsibilities. The decision herein appealed represents a fair and good faith attempt to balance continued ORV use with a range of other uses which would be inconsistent. Thus, the decision to close the corridors in Area No. 66, while maintaining ORV access to other areas within the Imperial Sand Dunes cannot be said to be arbitrary, capricious or lacking a substantial basis in fact.

Absent a showing of "compelling reasons" for reversal the decision of the BLM will be affirmed. Cf. Rosita Trujillo, 21 IBLA 289, 291 (1975). Mere assertions that this area of the public lands is better suited for ORV use will not suffice to compel reversal of a decision to promote other uses of the sand dunes.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski  
Administrative Judge

We concur.

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Frederick Fishman  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

