

OREGON WILDERNESS COALITION

IBLA 79-308

Decided February 7, 1980

Appeal from a decision of the District Manager, Salem District Office, Bureau of Land Management, amending Right-of-Way Agreement S-454 to allow construction of a road on public lands.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally -- Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Generally

The provisions of sec. 603(a), FLPMA, requiring the Secretary to review those roadless areas of 5,000 acres or more having wilderness characteristics does not apply to revested Oregon and California (O&C) Railroad lands classified as timberlands.

2. National Environmental Policy Act of 1969: Environmental Statements -- Rights of Way: Generally

The grant of a right-of-way over public lands, authorizing the construction of a roadway involving some 6 acres of public lands in an area of approximately 5,700 acres, does not require the preparation of an environmental impact statement, as no major Federal action is present within the terms of 42 U.S.C. § 4332(c) (1976).

APPEARANCES: Michael D. Kennedy, Esq., Portland, Oregon, for appellant; Donald P. Lawton, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The Oregon Wilderness Coalition (OWC) appeals from a decision of the District Manager, Salem District Office, Bureau of Land Management (BLM), dated March 26, 1979, amending Right-of-Way Agreement S-454 and approving a corresponding right-of-way plat.

By letter of November 12, 1976, Champion International Corporation (Champion) requested the Salem District Office, BLM, to amend Right-of-Way Agreement S-454. The purpose of this request was to allow Champion to construct a road over certain public lands in secs. 8 and 9, T. 7 S., R. 4 E., Willamette meridian. Such road would enable Champion to log approximately 560 acres of timber on lands which it now owns in sec. 16. Section 16 is landlocked by public lands consisting for the most part of revested Oregon and California (O&C) Railroad lands.

On March 28, 1977, the District Manager, Salem District Office, invited the public to participate in assessing the environmental impacts caused by the proposed road construction. Comments were received from some nineteen sources. Thereafter, in September 1978, BLM assembled an Environmental Assessment Record (EAR) of 42 pages and once again sought public comment on the environmental impacts of the proposed project.

A decision to grant the proposed right-of-way was issued on March 26, 1979, by the District Manager. The decision concluded with the statement that no environmental impact statement (EIS) was warranted by the proposed project.

OWC appeals from this decision and sets forth two arguments for reversal in its statement of reasons:

1. The grant of a right-of-way violates section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976).
2. An EIS should have been prepared by BLM prior to granting the right-of-way to Champion.

[1] Section 603(a) of FLPMA (43 U.S.C. § 1782(a) (1976)) requires the Secretary to review "those roadless areas of five thousand acres or more * * * identified * * * as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.)." The definition of a "wilderness" is found at 16 U.S.C. § 1131(c) (1976) and is set forth below in the margin. 1/ Section 603(c) of FLPMA (43 U.S.C. § 1782(c) (1976))

1/ "(c) Definition of wilderness

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where

requires the Secretary to continue "to manage such lands [having wilderness characteristics] * * * in a manner so as not to impair the suitability of such areas for preservation as a wilderness" during the period of review and until such time as Congress has determined otherwise. OWC argues that construction of the proposed road would impair the suitability of the Table Rock area, wherein the proposed road and Champion's land lie, for preservation as a wilderness.

In opposition, the Regional Solicitor, Portland, Oregon, argues that FLPMA's mandatory review provisions do not apply to revested O&C lands which are managed for commercial timber production. In support of this argument, section 701(b) of FLPMA is called to our attention. That section states:

Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a-1181j), and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

The Act of August 28, 1937, referred to in section 701(b), provides for the management of revested O&C lands. Section 1 of the Act, 43 U.S.C. § 1181a (1976), provides in part:

[S]uch portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, * * * shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing

fn. 1 (continued)

the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [sic] * * *.

The gist of the Regional Solicitor's argument is that the Act of August 28, 1937, conflicts with FLPMA, because the former calls for permanent forest production while the latter prescribes management "in a manner so as not to impair the suitability of such areas for preservation as a wilderness." If a conflict or inconsistency exists between these two acts, insofar as they relate to management of timber resources, section 701(b) of FLPMA requires that FLPMA's mandatory wilderness review provisions yield, and consequently the lands need not be preserved as a wilderness.

We agree with the argument of the Regional Solicitor and hold that FLPMA's mandatory review provisions do not apply to revested O&C lands classified as timberlands. We are assisted in this conclusion by a comprehensive memorandum of the Acting Deputy Solicitor, dated June 1, 1977, to the Director, BLM, to the same effect. The inconsistency or conflict between FLPMA and the Act of August 28, 1937, arises upon a careful examination of the use for which revested O&C lands shall be managed under the Act of August 28, 1937. This Act calls for "permanent forest production" of those areas classified as timberland. Timber thereon is to be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. While the Act contains language setting forth a number of uses for the land, including recreation, we read such language to reflect a Congressional finding that permanent forest production would be conducive to such uses. H.R. Rep. No. 1119, 75th Cong., 1st Sess. (1937), cited in Memorandum of Acting Deputy Solicitor, supra at 7. We do not read such language to reflect a Congressional desire to place the various uses on an equal footing with permanent forest production. The Act of August 28, 1937, is a clear directive to "sell, cut, and remove" the timber on revested O&C lands in conformity with the principle of sustained yield. The remaining uses set forth therein, while likely to occur as a result of prudent cutting consistent with sustained yield, are subordinate uses. In brief, we regard the Act as a dominant use act. Accord, Elaine Mikels, 44 IBLA 51 (1979).

The provisions of section 603(c), FLPMA, requiring the Secretary, during the period of review and until Congress determines otherwise, to manage lands having wilderness characteristics in a manner so as not to impair the suitability of such areas for preservation, conflict and are inconsistent with the sale, cutting, and removal of timber in conformity with the principle of sustained yield. We hold, therefore, that the mandatory review provisions of FLPMA do not apply to revested O&C lands classified as timberlands. See also Solicitor's Opinion, M-36910 (Feb. 13, 1979).

The preceding discussion obviates the need for determining a number of factual issues, e.g., whether the Table Rock area qualifies as a wilderness. Appellant's request for a hearing to present evidence on this issue is accordingly denied.

[2] In its second argument on appeal, appellant charges that BLM should have prepared an environmental impact statement before granting the amendment to right-of-way S-454. An EIS is required to be included "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (1976).

OWC maintains that the phrase "major Federal actions" must not be confined to BLM's grant of a right-of-way across public lands, but must instead include Champion's expressed intention to clear cut 495 acres of privately owned land in sec. 16. 2/ The actual road which Champion seeks to build across public lands would extend 4,495 feet in length and have a usable width of 12 feet (single lane with turnouts). BLM estimates that the usable width of the road will require slightly more than 1 acre and that the full right-of-way will require 6 acres.

In support of its position, OWC cites 40 CFR 1500.6(a), wherein it is stated: "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated" (Emphasis added).

As identified in the EAR, BLM's grant of a right-of-way would have various impacts on the environment. Air quality would be adversely affected "to a slight and temporary degree" by the hydrocarbons emitted by vehicles constructing and maintaining the proposed road. The noise caused by construction equipment would drive most animals away temporarily. Clearing the proposed route would expose soil to wind and rain, and some erosion could be expected to occur. However, upon surfacing the road with rock, the rate of anticipated soil erosion could be greatly reduced. Clearing would destroy about three-fourths of the Rubus nivalis population and two-thirds of the

2/ Although Champion owns some 560 acres in sec. 16, it intends to cut only 495 acres therein. As pointed out in the decision of the District Manager of March 26, 1979, Champion has agreed to enter into a restrictive covenant to assure the protection of the archaeologic, historic, and scenic resources in sec. 16 associated with Image Camp, Image Rock, and the trail between Rooster Rock and Table Rock. This covenant will last for 5 years during which time BLM will attempt to complete a land exchange. In addition, the aforementioned areas are being nominated to the National Register of Historical Places.

Calypso bulbosa population along the proposed route. Construction of the road would make additional land more accessible, thereby increasing the number of persons visiting the Table Rock area. The visual impact from the Table Rock Access Road, from the top of Table Rock, and from the hiking trails would be insignificant. Approximately 500 feet of the proposed road would be visible from Table Rock Access Road.

Harvesting of trees and construction of roads on Champion's land would require heavy equipment which would degrade air quality "slightly and temporarily" during operations. Harvesting would also disturb some animals and drive them away temporarily. Removal of mature trees would affect plant life, which in turn would affect certain wildlife, some adversely, some beneficially. Harvesting would expose large areas of soil to wind and rain, and some erosion could be anticipated. Soil particles would be carried downstream and have a "slightly adverse" impact on aquatic species in Image Creek and, to a lesser degree, in Table Rock Fork. Harvesting would probably destroy most of the existing populations of Rubus nivalis, Calypso bulbosa, and Erythronium oregonum on Champion's land. The visual impact from Table Rock Access Road, from Table Rock, and from the hiking trails would be "significant." The proposed road would make an area of high potential for cultural resources more accessible to the public and at the same time increase the risk of disturbance to these resources. The proposed road would allow several hundred acres of private and Federal timberland to be managed extensively.

With the preceding information before him, the District Manager on March 26, 1979, granted Champion's request for a right-of-way across public land and concurrently held that BLM need not prepare an EIS. Implicit in this negative declaration is the District Manager's conclusion that the grant of the right-of-way was not major Federal action significantly affecting the quality of the human environment. We agree.

The road which appellant opposes would begin in sec. 8 as a branch of the existing Table Rock access road. For the greater part of its 4,495-foot length, the proposed road would be located within one-quarter mile of Table Rock access road which forms a half-loop about the proposed road. Still within the half-loop is an unsurfaced "jeep road" used by motorcyclists.

Construction of the proposed route could be completed during a period of two to three months. To reduce the amount of soil erosion and stream sedimentation, construction and surfacing could be required to occur during the same summer season. Seeding of exposed slopes (cut and fill) prior to the winter season could also reduce soil erosion. Disturbances to wildlife could be mitigated by erecting a gate to restrict access to the road. Areas for waste dumping could be limited so as to avoid further damage to the Rubus nivalis population.

Our holding that the grant of the subject right-of-way is not a major Federal action significantly affecting the quality of the human environment is guided by an earlier decision of this Board, Citizens' Committee To Save Our Public Lands, 29 IBLA 48 (1977), aff'd sub nom. Citizens' Committee To Save Our Public Lands et al. v. Andrus et al., No. C-77-633 SC (N.D. Cal. May 19, 1977). Therein, Louisiana Pacific Corporation (L-P) was granted a right-of-way to construct a road, measuring some 3.8 miles, across certain public lands in California. This roadway required some 18 acres of the Big Butte area which contains approximately 10,000 acres. The purpose of the construction was to provide access to privately-held lands whose timber (30 mm board feet) L-P planned to harvest. Although the duration of this right-of-way was limited to 5 years, it occupied approximately three times the acreage as the right-of-way sought by Champion.

As in Citizens' Committee, supra, we hold that the subject right-of-way grant is not major Federal action, and hence the requirements of 42 U.S.C. § 4332(c) (1976) are not triggered. ^{3/} As set forth in the Government's brief, the road surface affected by the right-of-way totals some 6 acres in an area containing approximately 5,700 acres of public land. For the greater part of its length, the right-of-way is within one-quarter mile of an existing unsurfaced jeep road.

If the subject right-of-way were denied, it is possible that Champion would use helicopters to remove its timber. The EAR acknowledges this possibility at page 6: "Should Champion be denied road access to its property, it would be possible for the company to harvest its timber by helicopter. The logs could be transported to the nearest road (Table Rock Access Road)." This possibility is indirectly addressed in Simmans v. Grant, 370 F. Supp. 5, 14 (1974):

To a great extent the determination of whether a project is "major" relies upon an inquiry into whether the federal action, whatever it may be, is the precipitating cause of the resultant environmental impact. If "but for" the federal action the impact would not have resulted, then the federal action might be found to be "major."

^{3/} As set forth in 40 CFR 1500.6(c), the requirements of 42 U.S.C. § 4332(c) (1976), apply to a "(1) 'major' action, (2) which is a 'Federal action,' (3) which has a 'significant' effect, and (4) which involves the 'quality of the human environment'" (Emphasis supplied). Accord Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), cert. denied, 409 U.S. 990 (1972); Kisner v. Butz, 350 F. Supp. 310, 322 (1972). But see Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (1974). "The words 'major' and 'significantly' are intended to imply thresholds of importance and impact that must be met before a statement is required." 40 CFR 1500.6(c).

Our holding in the instant case is consistent with Kisner v. Butz, 350 F. Supp. 310 (N.D. W.Va. 1972). Therein, plaintiffs sued to enjoin the completion of a 4.3-mile segment of roadway through the Monongahela National Forest. The road was to be built along the westernmost perimeter of an area designated as a black bear habitat, one of four such areas in West Virginia. Cost of the roadway was approximately \$320,000. Therein at 324, the court denied plaintiff's petition for an injunction and found that the proposed roadway was not a major Federal action and such roadway would not significantly affect the quality of the environment.

Our holding that no major Federal action is involved by BLM's grant of the subject right-of-way obviates any discussion as to whether the impacts identified in the EAR significantly affect the human environment. Similarly, appellant's contention that an EIS is required for all proposed major actions, the environmental impact of which is likely to be highly controversial, need not be addressed, since no major action is involved in the instant appeal.

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.

Douglas L. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Newton Frishberg
Chief Administrative Judge

