

YUMA AUDUBON SOCIETY
CITIZENS FOR MOJAVE NATIONAL PARK

IBLA 85-60

Decided April 15, 1986

Appeal from a decision of the Area Manager, Needles, California, Resource Area, Bureau of Land Management, issuing special recreation use permit for the 1984 Barstow-Las Vegas motorcycle race. CA-060-SR3-24AA.

Affirmed.

1. Environmental Quality: Generally--Federal Land Policy and Management Act of 1976: California Desert Conservation Area--Federal Land Policy and Management Act of 1976: Permits--National Environmental Policy Act of 1969: Generally--Public Lands: Special Use Permits--Special Use Permits

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

APPEARANCES: Jim Rorabaugh, conservation chairperson, for the Yuma Audubon Society; Peter Burk for the Citizens for Mojave National Park; David A. Juhnke, Esq., Los Angeles, California, for the Sports Committee, District 37 of the American Motorcyclist Association, Inc.; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Yuma Audubon Society (Yuma) and the Citizens for Mojave National Park (Citizens) have appealed from a decision of the Area Manager, Needles, California, Resource Area, Bureau of Land Management (BLM), dated September 14, 1984, issuing a special recreation use permit, CA-060-SR3-24AA, for the 1984 Barstow to Vegas motorcycle race to the Sports Committee, District 37 of the American Motorcyclist Association, Inc. (AMA). Counsel for AMA, a party adversely affected by the appeal, has filed a brief in support of the BLM decision.

On May 17, 1983, in a "Record of Decision," the District Manager, California Desert, with the concurrence of the State Director, California, approved Amendment No. 6 to the California Desert Conservation Area Plan, as modified, thereby establishing a motorcycle racecourse from Alvord Road to Stateline, Nevada, which, with the Nevada segment of the course, would be known as the Barstow to Vegas course. The primary use of the course is an annual "mass-start" Barstow to Vegas race. The May 1983 BLM decision reinstated a racecourse which had been used every year from 1967 to 1974 for the Barstow to Vegas race, but had not been used since the cancellation of the 1975 race. The May 1983 BLM decision was based on a Final Environmental Impact Statement (EIS), entitled "Proposed 1982 Amendments to the California Desert Conservation Area Plan and the Eastern San Diego County MFP [(Management Framework Plan)]," which assessed the environmental consequences of motorcycle use of the proposed racecourse, course options, and a no-action alternative. ^{1/} Attached to the May 1983 BLM decision was a document entitled "Supplemental Information," which set forth the approved course, also depicted in maps, and certain "permit/use guidelines." BLM stated that a use permit is "required for any competitive or commercial event using public land" and that:

The EIS fulfilled the NEPA requirements for the first (1983) event. For each future event, an Environmental Assessment (EA) will be prepared. The EA will be based on the results of compliance and monitoring of preceding events. The type of event will be described, the course mapped, and any modification to the course or guidelines in the EIS will be analyzed. Each EA and permit will include a complete list of stipulations. These will generally follow the guidelines below; appropriate BLM specialists and the race sponsor will develop detailed measures to implement the guidelines. To insure that these measures are carried out, a performance bond will be posted with BLM before a permit is issued. Bonds will vary from \$500 to \$5,000 depending on the type of race proposed and number of entrants.

Record of Decision at 31.

The Sierra Club and other plaintiffs subsequently sued in Federal district court in an action entitled Sierra Club v. Watt, Civ. No. CV 83-5878-AWT (C.D. Cal.), challenging the validity of Amendment No. 6 and BLM's issuance of a permit authorizing the 1983 Barstow to Vegas race, to be held on November 26, 1983. The plaintiffs in Sierra Club also moved to enjoin the 1983 Barstow to Vegas race. In a judgment and memorandum opinion dated November 18, 1983, the court denied the motion for a preliminary injunction. The court stated that the merits of Amendment No. 6, i.e., the "race course designation," would be addressed in a subsequent hearing and that "all parties will have the opportunity to monitor the running of the November 26, 1983 race." Sierra Club v. Watt, Civ. No. CV 83-5878-AWT, Memorandum Opinion at 24 (C.D. Cal. Nov. 18, 1983).

^{1/} Both appellants apparently responded to the draft EIS concerning Amendment No. 6. See EIS at 2-9 and 3-9 to 3-22. Comments made by Yuma were answered by BLM. See EIS at 3-9 to 3-22.

On October 31, 1984, the court issued a judgment and memorandum opinion on the merits of Amendment No. 6, upholding the validity of that amendment. Sierra Club v. Clark, Civ. No. CV 83-5878-AWT, (C.D. Cal. Oct. 31, 1984). The court considered evidence regarding the 1983 Barstow to Vegas race for the purpose of determining the plausibility of BLM's assumptions in promulgating Amendment No. 6. The court considered a May 1984 Evaluation Report (ER) prepared by BLM, which evaluated the 1983 Barstow to Vegas race. That report included BLM's assessment of whether the AMA and race participants had complied with the stipulations set forth in the race permit; the results of the monitoring of specific resources considered to be significant or sensitive, viz., air, soils, cultural artifacts, recreation, social and economic concerns, vegetation, wildlife and wilderness; and recommendations for future races.

In July 1984, BLM prepared a draft environmental assessment (EA) with respect to the California portion of a proposed 1984 Barstow to Vegas race, to be held November 24, 1984, which incorporated by reference the 1982 draft and final EIS and the May 1983 BLM decision approving Amendment No. 6. BLM stated "[t]hese documents [are] available for inspection at all BLM offices in the California Desert District" (Draft EA, at 1). For 1984, BLM proposed to change in small part the course used for the 1983 Barstow to Vegas race to avoid crossing a wilderness study area and to modify somewhat the permit/use guidelines previously adopted. The draft EA assessed the environmental impact of these changes. The draft EA included the May 1984 ER.

In September 1984, BLM prepared a final EA, which considered and addressed in part the comments of Yuma on the draft EA. ^{2/} The final EA made some minor changes to the draft version. On September 14, 1984, the Area Manager, Needles Resources Area, approved the final EA, the decision record, and the use permit for the 1984 Barstow to Vegas race. The permitted racecourse is within the California Desert Conservation Area (CDCA), established pursuant to section 601 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781 (1982). The decision record, at page 1, stated that the course had been changed since the 1983 race only to avoid private lands and a wilderness study area, that "[n]o significant adverse impacts will result from [the race] * * * using the amended course and following the revised use guidelines or stipulations," and that no additional EIS is required. The decision record also stated the permit "will be issued with the condition that Section 106 [National Historic Preservation Act (NHPA), as amended, 16 U.S.C. § 470f (1982)] consultation with the California State Historic Preservation Office be completed before race day." Id. This term appears in the conditions attached to the permit. Appellants have appealed

^{2/} By letter dated Aug. 2, 1984, Citizens commented on the draft EA. The Area Manager, Needles Resource Area, responded to these comments in a letter dated Oct. 4, 1984, stating that appellant's letter had been "misplaced" and was not available for incorporation in the final EA, but that it had been "read and considered by myself and Gary Ryan, Environmental Coordinator, prior to sign off on the final EA." This rebuts appellant's contention that BLM "failed in the NEPA process to evaluate all letters received in response to its [draft EA]," referring specifically to its August 1984 letter.

from the September 1984 BLM decision issuing the permit for the 1984 Barstow to Vegas race.

In its notice of appeal filed October 15, 1984, and received by the Board on October 22, 1984, Yuma requested a stay of the effect of the September 1984 BLM decision pending the resolution of its appeal. By order dated November 14, 1984, the Board held it did not have jurisdiction under 43 CFR 8372.6(b) to consider a stay of a special recreation permit and referred the motion to the Secretary of the Interior. ^{3/} The Secretary subsequently denied the request for a stay and informed appellant by letter dated November 19, 1984. The 1984 Barstow to Vegas race was held, as planned, on November 24, 1984.

On December 17, 1984, the Office of the Regional Solicitor, on behalf of BLM, filed a motion to dismiss the present appeal on the basis it is moot because the disputed race has already been run and "no useful purpose would be accomplished in further examining the circumstances leading up to an event which has already taken place." AMA has essentially joined in this motion. Regarding those cases where a decision is put into effect pending administrative review by order pursuant to 43 CFR 4.21(a), the Board has previously expressed a jaundiced view of motions to dismiss for mootness which would have the effect of depriving appellant of the right of objective administrative review, especially where the underlying issue is of a recurring nature. Sierra Club, Grand Canyon Chapter, 81 IBLA 352, 355 (1984). Similarly, we are disinclined to dismiss for mootness where the decision appealed from is, by the terms of a special regulation, effective pending administrative review. We think the better approach is that taken in Sierra Club, 57 IBLA 79, 80 (1981), where we specifically concluded, in similar circumstances, that an appeal had not become moot by the running of the challenged race because of the recurring nature of the dispute due to the fact the race is an "annual event" and "[f]uture races are likely to occur." That is the situation herein. Accordingly, the Solicitor's motion to dismiss is denied. The need to reach the merits of the appeal is especially compelling because the current regulation dealing with stays in connection with decisions on special recreation permits, i.e., 43 CFR 8372.6(b), provides for the immediate effectiveness of BLM decisions unless the Secretary elects to grant a stay. In such circumstances, a protestant of the annual race might be deprived of the right to administrative review unless BLM and the Board act prior to the running of the race.

[1] In preparing an EA, which assesses whether an EIS is required under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 43 U.S.C. § 4332(2)(C) (1982), an agency is required to take a "hard look" at the problem addressed, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal

^{3/} 43 CFR 8372.6(b) provides: "All decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise. Petitions for stay of decisions may be made to the Secretary." The "part" referred to is 43 CFR Part 8370 which governs the issuance of special recreation permits.

Service, 487 F.2d 1029 (D.C. Cir. 1973). Moreover, preparation of an EA is governed by regulations of the Council on Environmental Quality (CEQ), i.e., 40 CFR Parts 1500 to 1517.

Yuma contends that the EA is inadequate because it does not contain a list of agencies and persons consulted, as required by 40 CFR 1508.9(b), which it asserts is necessary for an evaluation of the "thoroughness of an agency's approach to NEPA compliance." In a response appended to BLM's motion to dismiss, the California Desert District Office states the draft EA was sent to a "wide range of individuals or agencies with an interest in this project." Moreover, the final EA, at page 3, lists those who submitted comments on the draft EA and contains the BLM response to those comments at pages 3 through 5. The record reflects comments by six different parties including two agencies of state government. In addition, the 1982 final EIS, at pages 3-9 to 3-22, details the input of those individuals and agencies who commented on the draft EIS together with the BLM response to the comments. We conclude that the EA did substantially comply with 40 CFR 1508.9(b).

Further, Yuma challenges the fact that the EA incorporates by reference the EIS and associated documents in discussing the need for the race and a no-action alternative. Yuma asserts this discourages public involvement in the NEPA process, in violation of 40 CFR 1500.2(d). We disagree with appellant's contention. The regulation at 40 CFR 1500.2(d) requires Federal agencies, "to the fullest extent possible," to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." The CEQ regulations also specifically provide for incorporation by reference, with the proviso that incorporated documents be available for public review. See 40 CFR 1502.21. BLM states in the response appended to its motion to dismiss that the documents cited in the EA were "available upon request." We conclude that BLM did not violate 40 CFR 1500.2(d). Any interested member of the public could have amassed all of the pertinent documents in order to fully understand and comment on BLM's decision to permit the 1984 Barstow to Vegas race. The practice of tiering an EA which analyzes the impact of specific variations in a proposed permit from those analyzed in a broader EIS covering the entire project is widely accepted. 40 CFR 1508.28; see In Re Humpy Mountain Timber Sale, 88 IBLA 7, 8-9 (1985). Similarly, incorporation by reference of the relevant analysis in the EIS is not improper.

Yuma also argues the EA did not provide "sufficient evidence" for BLM to assess the significance of the impact of the race, in order to determine whether to prepare an EIS, in violation of 40 CFR 1508.9(a)(1). In particular, appellant states BLM had identified several cultural resource locations along the newly proposed 13-mile segment of the racecourse as having a "reasonable potential" for designation as National Register historic sites, but had concluded the race would not adversely affect the characteristics which make the sites eligible for designation. Appellant states that BLM failed, however, to consult with the California State Historical Preservation Office (SHPO), as required by 36 CFR 800.4(a)(3) and (b). In response, BLM states that: "Because of delays in the consultation process with SHPO, the BLM issued the 1984 permit with a reservation allowing BLM to add to the stipulations any clause proposed by SHPO." Indeed, the permit specifically provides that it is "approved, pending completion of [the] * * * consultation

with the California State Historical Preservation Office." ^{4/} The District Court, in reviewing a similar sequence of events involved in issuing the 1983 race permit, found that the concurrence of the SHPO in permit issuance together with the mitigating measures implemented after consultation with the SHPO satisfied the requirements of the NHPA and the regulations promulgated thereunder. Sierra Club v. Watt, *supra* at 20; Sierra Club v. Clark, *supra* at 22-23. Although this procedure may not present the ideal sequence of analysis, appellants have not shown that BLM committed reversible error.

Finally, Yuma contends BLM improperly segmented the race for purposes of environmental review into two parts, the California and Nevada portions of the course, in violation of 40 CFR 1502.4(a). Appellant avers that BLM thereby minimized the appearance of adverse environmental impact. The regulation at 40 CFR 1502.4(a) essentially requires closely related proposed actions to be evaluated together. While the regulation specifically applies to the preparation of EIS's, it is equally applicable to EA's. The reason is obvious. A particular action may, otherwise, be segmented in such a way that each segment has no significant environmental impact, thereby not requiring the preparation of an EIS, whereas in fact, taken together, all the segments have such an impact. See Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975). BLM states that separate EA's were prepared for the California and Nevada portions of the course in order to "take into account the difference in issues and existing policies in each BLM district," and not to minimize the appearance of adverse environmental impact. Moreover, appellant has identified no environmental impact which would have been considered significant if the race had been considered *in toto*, and we can discern none. In addition, the bulk of the racecourse is in California, with approximately 110 miles running through the CDCA and an additional 45 miles on BLM lands in Nevada. It would not appear that the Nevada portion would measurably alter the significance of the environmental impact of the California portion. ^{5/} Moreover, in Sierra Club v. Watt, *supra* at 19, the court specifically concluded:

Over two-thirds of the Barstow to Vegas course is located in the CDCA, an area of land subject to specific statutory and regulatory provisions under FLPMA; conversely, the CDCA does not cover lands in Nevada. Thus, unlike Alpine Lakes Protection Soc. v. Schlapfer, 518 F.2d 1089, 1091 (9th Cir. 1975), the Barstow to Vegas race course has not been artificially segmented to minimize apparent environmental impacts.

^{4/} Counsel for AMA, in a response to appellants' statement of reasons, at page 8, states that BLM did consult with the SHPO "in late September 1984."

^{5/} Appellant also intimates BLM has overlooked, and will overlook, the cumulative nature of the yearly running of the Barstow to Vegas race. However, the 1984 EA was based on a monitoring of the 1983 race, which established a baseline of data as to the environmental impact of that race. In addition, the draft EA states, at page 41, that "[w]ildlife/vegetation transects and photoplots will be read once a year within two months of a race." Such monitoring should help to assess the cumulative impact, if any, of the race.

In its statement of reasons, Citizens primarily contends that BLM failed to assess the environmental impact of the Barstow to Vegas race on the East Mojave scenic area or alternative routes which would avoid the scenic area. Appellant offers two established routes that the race could use to avoid the Soda Lake and Clark Mountain portions of the scenic area. In a response dated October 17, 1984, the Area Manager, Needles Resource Area, stated:

Your comments on possible reroutes that would avoid the Scenic Area were not ignored, but were indeed given consideration at several stages during the environmental review process. The Draft EIS for the 1982 Desert Plan Amendments, page 2-20, lists course options the BLM considered but did not study; many would have avoided the Scenic Area, but had to be rejected because of other considerations. The Record of Decision approving the Barstow to Vegas course authorized an optional route in the Clark Mountain area identical to your proposal. As I stated in my letter of October 4, the use of such high speed roads is a definite safety hazard. I might add that with construction work on the IPP transmission line now in full swing, use of the Los Angeles Department of Water and Power road presents an even greater danger to Barstow to Vegas race participants.

Your proposed reroute to avoid the Soda Lake area was given consideration in 1982. Unfortunately, the owner of a critical private land section which that route crosses made it very clear, in writing, that he would not give permission for its crossing, even though he had been a participant in previous Barstow to Vegas races.

Appellant also contends the race would have an unacceptable adverse environmental impact on the scenic area, but provides no evidence to support this assertion. BLM responded that the race was intended to avoid any adverse impact from unauthorized use of the scenic area and to mitigate the adverse impact from the race itself:

As you are aware, one of the reasons BLM reinstated a permitted Barstow to Vegas race was to gain control of increasingly large, potentially damaging "trail rides" that passed through the Scenic Area in an admittedly uncontrolled fashion. The 1983 race, on the other hand, was highly controlled, and certainly provided the BLM with a tool to mitigate adverse impacts to the Scenic Area.

Overall, appellants have provided no evidence which would lead us to conclude that BLM did not take a hard look at the environmental impact of the 1984 Barstow to Vegas race on the California Desert Conservation Area, based on a proper and sufficient environmental analysis record compiled in accordance with established procedures, or that the decision to permit the race was not the reasonable result of this review process. Accordingly, we conclude that the Area Manager, Needles Resource Area, properly decided to issue a permit for the race. See Sierra Club, 57 IBLA at 84.

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.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

John H. Kelly
Administrative Judge

