

CALIFORNIA WILDERNESS COALITION ET AL.
(ON RECONSIDERATION)

IBLA 86-1032 Decided November 2, 1988

Petition for reconsideration of the decision of the Board in California Wilderness Coalition, 101 IBLA 18 (1988), affirming in part and reversing in part a decision of the District Manager, Bureau of Land Management, approving a transportation plan for the King Range National Conservation Area.

Decision of the Board vacated in part on reconsideration; decision of the Bureau of Land Management affirmed.

1. Administrative Procedure: Administrative Review -- Federal Land Policy and Management Act of 1976: Land Use Planning -- Federal Land Policy and Management Act of 1976: Wilderness -- Rules of Practice: Appeals: Reconsideration

In a petition for reconsideration of a Board decision closing roads within the King Range Wilderness Study Area to off-road vehicle use, BLM offered new evidence to show that it increased its law enforcement capability in the area and has purchased property in order to better control illegal off-road vehicle use. In consideration of the new evidence tending to show that BLM will be better able to control off-road traffic as a result, the Board's prior decision will be vacated in part where the evidence shows that these measures will protect against the impact of off-road vehicle use on the natural and cultural resources of the wilderness study area.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, Pacific Southwest Region, Sacramento, California, for the Bureau of Land Management; Lee J. Amaral, Esq., Pleasanton, California, for California Association of 4WD Clubs, Inc.; Susie Van Kirk, Conservation Chair, Arcata, California, for the North Group, Redwood Chapter, Sierra Club; Deborah S. Reames, Esq., San Francisco, California, for the Environmental Protection Information Center, Inc., Sierra Club, California Wilderness Coalition, Northcoast Environmental Center, and The Wilderness Society.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM) has requested the Board to reconsider a portion of its decision in California Wilderness Coalition, 101 IBLA 18 (1988). That decision concerned an appeal brought by the California Wilderness Coalition et al. ^{1/} from approval by the BLM District Manager, Ukiah District, of the King Range Transportation Plan (transportation plan/plan). The Board's decision affirmed in part and reversed in part BLM's transportation plan. BLM asks the Board to reconsider that portion of its decision which reversed BLM's decision designating roads as open or open with restrictions within the King Range Wilderness Study Area (WSA). BLM submitted additional information for our consideration along with its motion for reconsideration.

On January 25, 1988, the same day the Board issued its decision in California Wilderness Coalition, *supra*, the California Association of 4WD Clubs, Inc. (Association), filed an amicus curiae brief with the Board. Then, by letter of February 29, 1988, to Secretary Hodel, the Association requested Secretarial intervention in connection with this decision. Pursuant to 43 CFR 4.5(b), this request was referred to the Director, Office of Hearings and Appeals. By letter dated April 6, 1988, to the Association, the Director prescribed that the Board consider the brief of the Association in reaching its determination on the motion for reconsideration.

In light of the additional information submitted by BLM in connection with this appeal, the Board, by order dated April 19, 1988, granted BLM's motion for reconsideration.

In its motion for reconsideration, BLM requests that the Board reconsider that portion of its decision which requires BLM to close all roads within the King Range WSA. BLM notes that the Board's decision purports to close five of eight roads within the WSA; that the other three roads were closed by BLM in the transportation plan; that the transportation plan called for Smith-Etter Road, Telegraph Ridge Road, and Johnny Jack Ridge Road to be open on a seasonal basis and for Saddle Mountain Road and Prosper Ridge Road to be open all year.

In its motion for reconsideration, BLM disagrees with the Board's finding that BLM's monitoring system would not afford the necessary protection to the WSA if the Smith-Etter Road were opened on a seasonal basis. In regard to BLM's monitoring system, BLM submits new information for the Board's consideration. BLM proposes to hire a full-time law enforcement ranger for the King Range in order to keep environmental damage, if any, to a minimum. Also, BLM states that on March 8, 1988, Humboldt County approved authorization of a sheriff position to be funded in part by BLM to increase county law enforcement capabilities on lands within the King Range.

^{1/} Appellants were the California Wilderness Coalition, Northcoast Environmental Center, The Wilderness Society, the North Group, Redwood Chapter of the Sierra Club, and the Environmental Protection Information Center, Inc.

BLM also offers new information in order to explain an inconsistency in the transportation plan noted by the Board in its decision. That inconsistency resulted from the fact that BLM used the same rationale for closing the Smith-Etter Road in the draft transportation plan as it used for opening the road on a seasonal basis in the final transportation plan. BLM asserts that at the time the draft plan was prepared the terminus of the Smith-Etter Road was located on private land and therefore was not within BLM's control. BLM states that subsequent to the preparation of the draft plan, BLM acquired title to the private parcels thereby permitting it to manage the Smith-Etter Road terminus in order to prevent off-road vehicles (ORV's) from gaining access to the beach.

Citing a section of BLM Manual Release 8-36 of November 10, 1987, BLM reiterates its position that an authorized officer may allow recreational use in WSA's by motorized vehicles on existing ways and trails and within open areas that were designated prior to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1982) (BLM Manual Section H-8550-1 at 19, 35). Therefore, according to BLM, the Board should not force the closure of roads within the WSA on a summary basis without examining the reasons why each road should be so closed.

BLM disagrees with the Board's finding that opening roads to the public within the WSA is inconsistent with the King Range National Conservation Area Management Program (management program). BLM points to the fact that the management program calls for opening Smith-Etter Road, Telegraph Ridge Road, and Saddle Mountain Road, which were all open at the time of the passage of FLPMA. BLM points out that the transportation plan did not purport to open these roads, but rather purported to restrict the use on roads already open and in existence.

BLM asserts that the Board's conclusion that permitted ORV use of roads within the WSA "will result in significant environmental impacts to natural and cultural resources" is without foundation. BLM contends that there is little opportunity for resource or wilderness damage to occur from unauthorized ORV use because of the dense vegetation and steep inaccessible slopes adjacent to these roads.

BLM asserts that the Board has substituted its judgment for that of the district manager who is authorized to weigh the conflicting opinions of the experts available to him in arriving at a decision. BLM states that this undercuts BLM management authority and inhibits the flexible response which BLM must have in order to manage the WSA on a daily basis.

In its amicus curiae brief, the Association presents arguments which support the contentions advanced by BLM on appeal. Like BLM, the Association emphasizes that the roads in question were in existence and have been used for more than 20 years prior to the adoption of the transportation plan. The Association points out that none of the roads provide access to the beach areas, but will be barricaded to prevent motorized use to the beach areas.

In general, the Association contends that BLM considered all the pertinent data in formulating the transportation plan. The plan discussed BLM's management objectives for the King Range which included considerations to eliminate adverse physical and biological impacts of ORV's on vegetation, soil, wildlife, and cultural resources and considerations to minimize conflicts between ORV and non-ORV users. It considered protection of the WSA's within the King Range and indicated that in the event increasing impacts threatened to impair wilderness suitability, BLM would move to control these impacts and may designate the area closed to vehicles causing the problem. The plan also considered Exec. Order (EO) No. 11644 which allows BLM to immediately close an area to ORV use if it determines that ORV use is causing damage to the resources of an area. It considered the resource protection criteria which must be met in order to designate an area closed, open, or limited as to ORV use, including designation to insure that the wilderness suitability of the lands under consideration for inclusion in the wilderness systems will not be impaired. BLM analyzed each of the seven zones within the King Range and the roads, trails, and areas within the zones and considered the benefits and detriments of designating them as open, closed, or limited to certain types of use. In making these designations, BLM analyzed the environmental impacts, considered alternatives and mitigating measures, and proposed surveillance of the area. These considerations are evidenced by BLM's environmental assessment (EA), supplemental EA for the transportation plan, and the management program with accompanying environmental impact statement (EIS). BLM considered EO Nos. 11644 and 11989 in making these designations to enable it to control and direct ORV use to protect resource values, promote safety and minimize conflicts among users of the land. The Association notes that BLM has proposed control of the land by use of log barriers, ditches, dirt mounds, posted signs, gates, surveillance patrols, and has also proposed environmental monitoring.

The Association refers to the draft EIS of June 3, 1974, to support its contention that the roads should be open. That document states that areas will be established and maintained permitting existing road and trail use (Draft EIS at 38). The Association also points out that the management program contemplated ORV use because it recognized the existence of 50 miles of road and projected a need for construction of an additional 37 miles (Management Program at 55-56).

North Group, Redwood Chapter, Sierra Club, filed a brief in response to BLM's motion on May 16, 1988. On the same day, the Environmental Protection Information Center, Inc. (EPIC), Sierra Club, California Wilderness Coalition, Northcoast Environmental Center, and The Wilderness Society jointly submitted a brief in opposition to BLM's motion for reconsideration. 2/

In response to BLM's proposal to acquire additional personnel for surveillance purposes in the King Range area, North Group and EPIC believe that BLM enforcement resources remain inadequate.

2/ We will collectively refer to these parties as EPIC throughout this decision.

North Group and EPIC note that BLM attempted to explain the inconsistency in using the same rationale to close Smith-Etter Road as to open it by stating that a change in ownership occurred between the time the draft plan was prepared and the time the final plan was adopted. North Group and EPIC assert that BLM has failed to explain the inconsistency because the parcels of land in issue were both purchased after the final plan was signed. North Group reiterates its position on appeal that opening the road to within one-quarter mile of the beach effectively opens the beach to ORV's because no barriers will contain them at that point.

EPIC asserts that the manual provision H-8550-1 relied upon by BLM does not eliminate "legal constraints to prevent the use of roads." That section provides that "[t]he use of motor vehicles and motorized equipment is allowed as long as they do not cause impacts that impair wilderness suitability" but that "[r]ecreational use of mechanical transport, including all motorized devices as well as trail and mountain bikes, may only be allowed on existing ways and trails and within 'open' areas that were designated prior to the passage of FLPMA (October 21, 1976)." EPIC points out that this is BLM's internal guidance for compliance with section 603 of FLPMA which mandates BLM to manage WSA's so as not to impair the suitability of such areas for wilderness preservation and to "take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c) (1982). EPIC submits that this is the overriding "legal constraint" on BLM's management of WSA's and applies to every decision which may affect a WSA. EPIC contends that BLM has not met its burden of performing the necessary analysis to demonstrate compliance with the nonimpairment standard. North Group notes that section 102(a)(8) of FLPMA, 43 U.S.C. § 1701(a)(8), requires BLM to manage the lands in a manner that will protect its values. Also, EO No. 11989 authorizes BLM to close roads to ORV's where their use causes adverse effects on the resources.

Furthermore, EPIC asserts that the manual section provides that recreational use of mechanical transport may only be allowed on existing ways that were designated prior to FLPMA. EPIC asserts that these roads were not "designated" within the meaning of 43 CFR 8342.2 which requires that such designations must be announced "through publication in the Federal Register and local news media." In addition, EPIC asserts that while there is no information regarding public use histories for most of the WSA roadways, information in BLM files does establish that the Smith-Etter road was not open to the public at the time of the passage of FLPMA.

EPIC contends that the Board's decision to close the roads within the WSA is consistent with BLM's management program of 1974, regardless of the fact that the program recommends action to prohibit public motorized vehicle use along the beach and on the west slope roads, except the Smith-Etter Road, Telegraph Ridge Road, and Saddle Mountain Road. EPIC believes that the road closures are in keeping with the major objective of the program, that is, to retain the wild and scenic values of steep mountainous slopes facing the ocean and to preserve the unique character of the beach. Also,

EPIC points out that the management program predates both FLPMA and the 1979 designation of the King Range WSA, actions which superceded any management program recommendations which may be inconsistent with the nonimpairment standard.

North Group and EPIC disagree with BLM's statement that there is little opportunity for resource or wilderness damage from off-road use of vehicles. North Group asserts that steep rocky terrain and dense vegetation are no deterrent to these vehicles. North Group's concern is that roads provide access to areas, particularly the beach, where environmental damage can and has occurred. Such impacts were noted by North Group and EPIC on appeal. EPIC asserts that even BLM referenced vehicle travel off the roadbed in its "disadvantages" of open designations in the transportation plan.

North Group disagrees with BLM's reference to "speculation" by environmental groups that resource damage will occur as a result of opening WSA roads to the public. North Group responds that its appeal documented ORV damage.

BLM asserts that it will hire a full-time ranger and partially fund a Humboldt County sheriff position for the King Range to assure that environmental damage, if any, will be minimum. In response, North Group presented the following data:

The Motion states that BLM will hire a full-time law enforcement ranger for the King Range to "assure that environmental damage, if any, will be kept to a minimum" (p. 3). The King Range National Conservation Area covers approximately 55,000 acres of steep, rugged terrain and 24 miles of beach between the mouth of the Mattole and Shelter Cove. According to John Lloyd, [BLM's Arcata Area Manager] the Ranger will be stationed out of the Arcata Office which is about eighty miles from the Smith-Etter Road's entrance into the King Range and, from there, another eleven miles to the beach. The trip from Arcata takes about an hour and a half; to traverse the Smith-Etter Road to the beach takes about an hour because of the steepness and condition of the road. If the Ranger is to patrol the entire King Range, it is obvious that surveillance of the Smith-Etter Road and the beach at its terminus will not be sufficient to fully control illegal vehicle use on the beach or on the King Crest Trail, which would require patrol on foot. Furthermore, Mr. Lloyd indicated that the Ranger would also be expected to be present on BLM's Samoa property near Arcata on a schedule yet to be determined. The Humboldt County Deputy would cover the Shelter Cove and Whale Gulch areas, which are at the southernmost end of the King Range, which indicates that he will rarely, if ever, patrol the north end and the Smith-Etter Road.

(North Group's Response at 4).

The question before us is whether BLM has the ability to control vehicle access to the WSA. It is this question upon which the petition to reconsider is focused.

As BLM has pointed out in the petition for reconsideration of our prior decision, the Smith-Etter road is the only road which was analyzed in our decision. Upon reconsideration, we must find that there is simply no evidence in the record before us concerning the use of the other four roads, Telegraph, Saddle Mountain, Prosper Ridge, and Johnny Jack Ridge Road, which would justify closure of those roads. While there is some mention in the casefile of some of the other roads, our review was concerned almost exclusively with the Smith-Etter road.

While BLM's argument that we have substituted our decision for that of the agency is entirely without merit (we have merely ensured the existence of a sufficient record to explain and support the decision made), it is clearly correct that there is no evidence of record to support closing the other four roads which enter the WSA at some point. It is correct that our decision was concerned almost exclusively with the Smith-Etter Road, and that we did not consider the merits of the closure of the other four roads. To the extent that our prior decision lacks a basis in the record, therefore, it must be vacated.

BLM now has also furnished proof that it has purchased control of the terminus of the Smith-Etter road, a circumstance which it reports will give it an ability to control vehicles using the road which it previously lacked. As we stated in our prior decision, while an area is under wilderness review, and until such time as Congress acts on the WSA's, BLM is required to manage the WSA's pursuant to the Interim Management Policy and Guidelines for Land Under Wilderness Review (IMP) of December 12, 1979, as revised July 12, 1983, 44 FR 72014 (Dec. 12, 1979), 48 FR 31854 (July 12, 1983). Chapter III A. 3. of the IMP established guidelines for ORV use and provides that ORV use may be permitted on existing ways and trails within "open" areas designated prior to the approval of FLPMA. However, the guidelines further provide that if impacts of ORV's either on or off existing ways and trails threaten to impair the area's wilderness suitability, BLM may close the affected lands to the type of ORV causing the problem. BLM's manual release of November 10, 1987, is essentially the same as the IMP discussed in the Board's decision.

On the record now before us, as supplemented by BLM's evidence showing that there will be increased supervision of the roads in the WSA and that the terminus of the Smith-Etter Road is now under BLM ownership and control, we find that BLM's decision to allow certain roads to remain open within the WSA under certain conditions is supported on the record. Accordingly, we approve the King Range Transportation Plan as supplemented by BLM in the course of review before this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, on reconsideration we vacate our decision in California Wilderness Coalition, 101 IBLA AT 18, 3/ and affirm the decision appealed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

3/ We recognize that this action affects two pending appeals which also concern the roads located in this WSA. Therefore, in California Wilderness Coalition, IBLA 88-445 and California Wilderness Coalition, IBLA 88-458 the parties shall be allowed until Dec. 30, 1988, to file additional or amended briefs in light of the decision announced in the instant appeal. Consideration of BLM's motion to approve the stipulation and for other relief filed Oct. 11, 1988, in IBLA 88-445 is taken under advisement until briefing is completed on Dec. 30, 1988.

ADMINISTRATIVE JUDGE GRANT CONCURRING:

I concur in the judgment of my colleagues that the Bureau of Land Management (BLM) has made a sufficient showing on reconsideration to merit vacating our original decision in this case with respect to the roads in the wilderness study area (WSA). Our initial decision in this regard was predicated on the statutory obligation of BLM under section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), to manage the lands so as not to impair their suitability for wilderness designation.

As pointed out by BLM on reconsideration, our prior decision focused entirely on impacts to WSA lands arising from use of the Smith-Etter Road. The Board found that the record before it at the time did not support a conclusion that opening the road from the intersection of Telegraph Ridge Road to within a quarter mile of the beach would not result in impairment of wilderness values. Thus we quoted certain language appearing in both the draft and final transportation plan which indicated a need to close the road to avoid impairment:

Vehicle use must be effectively managed along the King Range beach. The Smith-Etter Road terminates at the central portion of the beach designated "closed" to vehicle use. Some vehicles that travel to the end of the road keep going along the beach to Big Flat or north along the beach and grassy hillsides towards Randall Creek.

Some minor resource damage has occurred and conflicts among backpackers and ORV enthusiasts have intensified. Wilderness values have decreased slightly because vehicles disrupt opportunities for people to find a quiet and secluded place along the beach.

No physical constraints (natural or that BLM could construct) would work to contain vehicles to a parking area at Spanish Flat because the Smith-Etter Road ends on private property.

101 IBLA at 28 n.2, quoting draft plan at 11-12; transportation plan at 11. We also noted the inconsistency of reciting this same rationale for closing the road in the draft plan and for opening the road in the final plan without explanation. 101 IBLA at 30-31. Accordingly, we found the record did not support the BLM decision.

On reconsideration, BLM has provided additional information material to a resolution of this issue. Most significantly, BLM has disclosed the acquisition of title to property at the beachside terminus of the Smith-Etter Road giving BLM the legal right and practical ability to effectively block access to the beach at that point. The question raised by appellants in response regarding the dates of acquisition is irrelevant to the critical issue of whether this affects the ability of BLM to control access to the beach. Given the fact that the initial concern regarding access control was largely based on the inability to control beach access because the road

ended on private property, this eliminates a fundamental basis for our original finding that the decision was unsupported by the record. Additionally, BLM has disclosed evidence of additional law enforcement capability in the area to control illegal intrusions. A full-time law enforcement ranger for the Ring Range is being hired by BLM and funding is being provided for Humboldt County to hire a new law enforcement position to serve the area.

Accordingly, it can no longer be concluded that the BLM decision in this matter is unsupported by the record as supplemented. Notwithstanding appellants' concerns that these steps may not be enough to prevent impairment of wilderness values, this Board will ordinarily not substitute its judgment for that of the BLM officials delegated with the responsibility and authority to make such determinations. Decisions involving the exercise of judgment by authorized Departmental officials are entitled to considerable weight or deference if they are supported by the record, although they may be overcome by a preponderance of countervailing evidence. United States Fish & Wildlife Service, 72 IBLA 218, 221 (1983). Applying this standard, the decision of BLM is properly affirmed on reconsideration.

C. Randall Grant, Jr.
Administrative Judge