

ROCKY MOUNTAIN TRIALS ASSOCIATION

IBLA 2000-312

Decided December 5, 2001

Appeal of a decision and finding of no significant impact by the Royal Gorge Field Office, Canon City, Colorado, Bureau of Land Management, partially approving a proposal to enhance off-road vehicular trails. CO-057-98-127 EA.

Affirmed.

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

Where, under the general authority of the Secretary of the Interior to regulate the use of public lands pursuant to FLPMA, BLM makes a determination to limit off-road vehicle use in a certain area of public lands, one challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

2. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Land-Use Planning--National Environmental Policy Act of 1969: Finding of No Significant Impact

Activity planning implementing an off-highway vehicle project management plan, based upon an environmental assessment sufficient to support an informed judgment, may not be overcome by a mere difference of opinion.

APPEARANCES: Ken L. White, Colorado Springs, Colorado, for appellant; Jennifer E. Rigg, Esq., Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Rocky Mountain Trials Association (RMTA) has appealed from a Finding of No Significant Impact (FONSI) issued on April 10, 2000, by the Area Manager, Royal Gorge Field Office, Bureau of Land Management (BLM), Canon City, Colorado. The FONSI authorizes construction and maintenance

work on a number of off-road trails in and around the Texas Creek Gulch Off-Highway Vehicle Area (OHVA). It also closes certain trail segments in areas open to limited use by off-highway vehicles in the Texas Creek Gulch area, adopting portions of several alternatives considered in an Environmental Assessment (EA) Record No. CO-057-98-127 EA. RMTA challenges the EA to the extent it closes these trail segments.

The Texas Creek Gulch area lies north of the Arkansas River in central Fremont County, Colorado. ^{1/} Elevations in the area typically range between 6000 and 9000 feet above sea level. (EA at 20; Map.) According to the EA, it is "[o]ne of the last large blocks of public land with relatively little access in [Fremont County]." (EA at 20.) The Texas Creek Gulch OHVA receives approximately 10,000 OHV users per year. (EA at 4.) ^{2/}

The Royal Gorge Resource Management Plan (RMP) designates a portion of the Texas Creek Gulch area as an "open area" for off-road vehicular use. (EA at 1.) All types of vehicular use are permitted in open areas at all times, subject to operating regulations and vehicle standards set forth in 43 CFR Subparts 8341 and 8342. 43 CFR 8340.05(f). Areas surrounding the Texas Creek Gulch open areas are designated by the RMP as "limited to existing roads and trails." 43 CFR 8340.0-5(g). (EA at 1-2.) A "limited area" is "an area restricted at certain times, in certain areas, and/or to certain vehicular use." *Id.* The regulation lists types of restrictions, and includes a category for use "limited to existing roads and trails."

On December 5, 1997, RMTA, with BLM's concurrence, submitted a grant application to the Colorado Off-Highway Vehicle Program requesting \$20,000 to improve public lands managed by BLM in the Texas Creek Gulch OHVA. The money was requested specifically for the purpose of OHV trail improvements, a parking area, an information kiosk, directional signs and posters, and other amenities for enhancing the OHV recreation area. The grant was approved in the late summer or fall of 1998. (BLM Memorandum, "Texas Creek Trail Proposal-EA Meeting with [Colorado Division of Wildlife]," December 15, 1998.)

During 1999, BLM generated an EA analyzing potential environmental impacts of the proposal to enhance the OHVA. The EA commented that OHV use in the area was increasing due to growth of suburban neighborhoods within short distances from Texas Creek. (EA at 12.) The result was an increase in ad hoc "pioneering" of new trails in the OHVA, generating current and potential future and cumulative impacts. Some of the new trails were located within designated open areas while others were located within limited areas, without any effort by BLM to constrain unrestricted use to the open area. (See, e.g., EA at 3, 9, 11, 12.)

^{1/} It is not clear from the record whether the Texas Creek Gulch area and the Texas Creek Gulch OHVA are geographically distinct or coextensive.

^{2/} The EA and FONSI generally refer to "OHV," or off-highway vehicular use. Departmental regulations categorize such use as "off-road" vehicular use. See generally 43 CFR Part 8340. We use these terms interchangeably in this decision.

The EA includes a map of existing trails and trail segments in the area. The map reveals a large central area for open use. It also depicts trails extending outside the open area boundary to the west and north. Segments 3, 8, 9, and 20 extend into limited areas northeast of the open area boundary. Segments 14, 15, 16, and 17 are located in limited areas west of the open area. Portions of segments 12, 13, and 23 also extend into western limited areas. (EA at 2; Map.)

The EA presented three alternative proposals for development and/or restriction of ORV use. All would designate funds for trail improvement, a parking area, directional signs, informational brochures, and other user amenities. (EA at 2, 4, 5-6, 7.) The proposed alternative would allocate funds to existing trails in both open and limited areas. Id. at 1-5. Alternative A would focus funds on the southwestern half of the trail system, including trails in limited areas; however, development would be restricted on the northern and eastern areas. Id. at 5-6. Alternative B would avoid "OHV use in the southwest portion of the area, as well as the northern highlands." Id. at 6. This alternative proposed to close trails located in the "limited use" area and several trail segments in the "open area." Id.

In considering the affected environment, impacts and potential mitigation, the EA noted that the area is not valued for cultural resources, Native American religious concerns, prime and unique farmlands, wilderness, wild and scenic rivers, or areas of critical environmental concern. (EA at 9-17.) However, the EA found that the proposed alternative would "maximize" impacts to air quality, Id. at 9-10, and that it would be likely to degrade management of riparian areas. Id. at 11. The specialist analyzing impacts to riparian areas stated:

Although the entire region of the proposed action is mostly arid, the number of closely spaced riparian areas makes it unique when compared regionally to lower or upstream large public land blocks adjacent to the Arkansas corridor. In addition, riparian inventory/classification work done by the Colorado Natural Heritage Program revealed that the birch/ alder/cottonwood community present in the area is rare and uncommon. The area's riparian resources merit protection for their watershed and wildlife values. In general, the Proposed Action and Alternative A are similar with respect to direct [e]ffects upon riparian resources. * * * These [e]ffects include: travel in the riparian areas, creation of trails that channel sediments at rates above normal to riparian and stream systems, changes to areas surrounding uplands (e.g. rutting) that can cause localized changes to the water table (french drain concepts) in wetland or recharge areas, and, if trails are traveled when wet, the area of disturbance will enlarge as craft go around puddles.

Existing impacts to riparian areas are minor, but the trend

in riparian disturbance is likely to degrade with increasing use.

* * * * *

Alternative B would clearly be much less intrusive to riparian areas * * *.

(EA at 10-11.)

All of the proposed alternatives would be expected to have impacts on soils, water quality, and vegetation, with the proposed alternative's greater trail use having the greatest effects. Alternative B was associated with the least impacts. EA at 13-15, 16-17, 17-18. Soils in the area have a "high water erosion potential." Id. at 12. The soils specialist stated that "with the advent and increased use of 'Utility Vehicles' and 'All Terrain Vehicles,' the creation of new trails have proliferated and use periods have expanded to include most of the year, especially the summer. Consequently, little or no recovery occurs, the trail/road areas become barren, and erosional cuts begin." Id. The specialist determined that "[f]rom a landscape perspective, only reduction in trails would result in a move to meeting health of the land standards for soils." Id. According to the botanical specialist, vegetation in riparian areas in segments 14, 15 and 20 would be jeopardized. This vegetation is critical for creek bank stabilization during flash floods commonly occurring in July and August. Id. at 16.

The EA cited the Texas Creek Gulch area as "extremely valuable as wildlife habitat" for birds and large mammals, "because so few areas remain." (EA at 20.) The EA cited impacts from all alternatives but noted that Alternative B had the least potential impacts given the limitations on trail construction. Id. at 20-25. The wildlife specialist stated that the proposed alternative had the potential to disturb 11,951 acres of wildlife habitat "so heavily that some wildlife will cease to occupy the OHV area," particularly "the large ungulates: mule deer, elk and bighorn sheep," which are "much less tolerant of human disturbances and will likely abandon the area" to their critical detriment during "the rigors of winter weather." He concluded that "[t]rail segments 11-17, 23, and 20 have the potential to cause the greatest impacts to terrestrial wildlife by disturbing critical wildlife habitat." (EA at 22.)

Of the 24 numbered segments in existence, the EA identified segments 11, 13, 16, 17, 20, and 23 as having been created by users since 1996 without authorization by BLM and avoiding review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994). (EA at 31; Appendix 1.) The unauthorized trails have "grades double and even triple of those allowed by BLM engineering specifications." Id. at 33. The transportation analyst recommended that, for erosion control, no trail should have a grade steeper than 12%, and that BLM should "not allow continued use of trails, built without authorization" and should close pioneered roads which had grades of 40% and 55%. Id. He also recommended closure of all unauthorized trails pending required environmental review,

with the potential exception of segment 11, for the reason that it was being used as a BLM road for ATV use. The recommendation was that segment 11 should be redesigned. Id.

Some resource specialists suggested as mitigation a preference for re-evaluating the OHV policy for the entire area, including redesignating the open area as a limited area. E.g., EA at 9. The consensus among analysts examining environments which will suffer impacts from the proposal was that BLM should establish a sound policy against ad hoc expansion of use. Id. at 9, 11, 15. They advocated focusing trail work on erosion control, and recommended closing trails which were created without proper authorization and/or located in limited use areas. Id. at 9, 33.

On April 10, 2000, the Area Manager issued the FONSI approving the improvement project. The FONSI combined "actions from all of the alternatives," but rejected the proposal to permit continued use outside of designated "open areas." (FONSI at 1.) It restricted OHV use to open areas where it is already the predominant use. It reduced the number of routes available for off-road use, although it did not preclude further application for additional routes in the "open" area. Id. The FONSI then proceeded to set out a particular prescription for each trail segment analyzed in the EA. (FONSI at 2-5.)

The FONSI eliminated access to all trails located to the west of the boundary of the designated open area by closing segments 14, 15, 16, 17, and 23, as well as small portions of segments 12 and 13 which connect to those segments. The decision also closed segment 20, which connects segments 8 and 3 to form a loop outside the northern boundary of the open area. The Area Manager noted in the FONSI that use on all of these segments has damaged riparian health, vegetation, and wildlife, and compelled rehabilitation. (FONSI at 3-5.) The FONSI determined that "steep, erosive slopes" on segments 16 and 17 render them "improper location[s] for a vehicular trail." (FONSI at 3-5.)

In its Notice of Appeal and Statement of Reasons (SOR), RMTA contends that "the proposed closure of * * * well-established trails outside the 'open' area is unreasonable and is not in the best interest of the OHV population." RMTA specifically objects to closures of segments 14 through 17, and segments 20 and 23.

According to RMTA, segment 14 could be rerouted away from riparian areas. "Only a small portion of this trail segment is constructed near wet areas," RMTA maintains. (SOR at 1.) Segment 15, RMTA avers, "has provided local residents with access to the Texas Creek area for many years." Id. According to RMTA, segments 16 and 17 "are considered by OHV users as the best areas for recreational riding." Id. RMTA is willing to reconstruct portions of those segments "to BLM standards." Id. RMTA claims that damage to riparian areas intersecting segment 20 will be "minimal," because "most * * * crossings have hard, rock bottoms which will result in minimal damage and can be easily maintained." Id. at 1-2. RMTA asserts that, "[d]ue to the high technical difficulty of [segment 23], the use will

be minimal, which will have little or no impact on wildlife." Finally, RMTA maintains that

[t]here is strong evidence that these trail segments proposed to be closed have been in existence long before the OHV users had discovered them. If the closure of these OHV recreational trail segments in the Texas Creek area are implemented, more unauthorized use will occur due to decreasing the number of miles of trail. The area will no longer provide OHV riders enough trail for a full day of riding enjoyment.

(SOR at 2.)

BLM defends the FONSI as a rational exercise of its discretion. (Answer at 5.) BLM states that the area is not only popular with ORV recreationists, but with wildlife enthusiasts as well. (Answer at 1.) BLM explains that the area supports other multiple uses, including grazing, and that the history of the area's vehicular use has led to ever increasing trail expansion without environmental control. According to BLM,

[t]he Texas Creek area has been used by hunters, OHV enthusiasts, as well as other recreationists, for at least 25 years. For many years, however, the vehicle use in the area was sporadic, with highest use occurring in the fall during hunting seasons. Consequently, even though new trails might have temporarily appeared, most would recover during summer vegetative growth periods. More recently, however, with the advent and increased use of "sport utility vehicles" (SUVs) and all-terrain vehicles (ATVs), the creation of new trails has proliferated and use periods have expanded to include most of the year, especially the summer. The area now has an extensive network of trails built with no consideration for trail construction standards or resource concerns.

(Answer at 2 (citations to EA omitted).)

BLM attaches a segment-by-segment response to each of RMTA's statements objecting to a segment closure. With regard to segment 14, BLM states that the narrow nature of the canyon, the fragility of the soils, the potential for further siltation, and the impacts to wildlife, no matter where a route is located, make rerouting portions of it infeasible. (Answer, Attachment A at 1.) Segment 15, BLM points out, functions as a connector between segments 14 and 23, and is no longer needed, since both segments 14 and 23 will be closed. It did not recommend rerouting segments 16 and 17, BLM avers, because portions pass through very steep and rough country, and it determined that rerouting would lead to more erosion and impacts to wildlife habitat. BLM points out that "steep erosive slopes * * * are an improper location for vehicular trail." (Attachment A, citing the EA at 23, 24 and 33.) According to BLM, Segment 20 was closed because of impacts on wildlife habitat. That segment, BLM states, is

located in the highest elevations of the project area, and is critical for wintering wildlife. With regard to RMTA's assertion that segment 23 is minimally used and therefore will not negatively impact wildlife, BLM states: "This segment passes through an area that the Colorado Division of Wildlife sees as very important to wildlife (EA, pp. 22-24). Closing this route would also preclude the development of new trails into Fernleaf Gulch." (Answer, Attachment A at 3; see also Comment Letter from Colorado Division of Wildlife, January 27, 1999, at 2.)

[1] BLM has the authority, pursuant, inter alia, to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1994), to regulate the use and operation of ORV's on the public lands. See 43 CFR Part 8340 (Off-Road Vehicles); Robert P. Muckle, 143 IBLA 328, 332-33 (1998). BLM is authorized to "close portions of the public lands to use by off-road vehicles, except those areas or trails which are suitable and specifically designated as open to such use * * *." 43 CFR 8341.2(b). Even in areas designated as open, departmental regulations grant BLM authority to close an area "where the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, or other resources." 43 CFR 8341.2(a).

In Robert P. Muckle, this Board articulated the standard for reviewing a permit decision regarding ORV use. The Board stated: "In cases in which we have reviewed BLM decisions relating to its authority to authorize ORV use through the permitting process, this Board has held that absent compelling reasons for modification or reversal, a BLM determination will be affirmed if the decision is supported by the record. Stan Rachesky, 124 IBLA 67, 70 (1992); American Motorcycle Association, District 37, 119 IBLA 196, 199 (1991), and cases cited therein." 143 IBLA at 133. While that precedent covers applications for permits for ORV use, it is entirely consistent with our precedent governing a challenge to a BLM action implementing a management plan. In James R. Sebastian, 146 IBLA 138, 142 (1998), we held that in reviewing such action

the Board looks to whether BLM has articulated a reasoned analysis, adequately considered all relevant factors including the impact on the environment, and whether its action conforms to applicable Federal statutes. The Board also looks to whether there has been a showing of compelling reasons for modification or reversal of the BLM action under appeal. See National Organization for River Sports, 140 IBLA 377, 387 (1997); Deschutes River Public Outfitters, 135 IBLA 233, 244 (1996).

These standards converge in High Desert Multiple Use Coalition, 124 IBLA 125, 128 (1992), where this Board required appellants to show "compelling reasons for modification or reversal" of an action implementing a program specifying ORV use on BLM lands. See also Stan Rachesky, 124 IBLA at 70 (1992).

Applying these principles here, we affirm BLM's FONSI and decision. There is no dispute that the Royal Gorge RMP defined which areas within

the Texas Creek Gulch are open to unrestricted ORV use as delineated in the map attached to the EA. In the April 2000 decision, BLM exercised its discretion in favor of restricting ORV use to designated open areas within the Texas Creek OHVA, and closing road segments within the area designated for limited use. This action is consistent with the regulations governing ORV use and BLM's ability to regulate it on BLM lands, and with BLM's authority to close roads to ORV use within the parameters of 43 CFR 8341.2. See Daniel T. Cooper, 154 IBLA 81, 84-86 (2000). RMTA, in failing to address this authority, has not met its burden of providing a "compelling reason" for reversing BLM's decision on the basis of BLM regulations.

Considering RMTA's arguments regarding individual road segments, we cannot find compelling reasons for modifying BLM's decision to close segments 14-17, 20 and 23. We find BLM's explanation for why it is not advisable to re-route segment 14, as RMTA suggests, persuasive. Similarly, the concern for protection of wildlife that led BLM to close segment 23 is not overcome by RMTA's assertion that its limited use would cause minimal impact, and RMTA does not address BLM's interest in precluding the development of new trails into Fernleaf Gulch from that segment. RMTA's request that segment 15 be retained as access to the ORV open area cannot be fulfilled, as BLM points out, because that access would be via segments 14 and 23, which are to be closed. Although RMTA acknowledges that relatively short portions of segments 16 and 17 should be reconstructed, it has not overcome BLM's concern that either reconstruction or re-routing would cause erosion and damage to vegetation and wildlife habitat. Finally, RMTA's statement that the water crossings on segment 20 have hard rock bottoms does not address BLM's principal concern that this segment is disruptive to wildlife habitat. Nor does RMTA's argument that some of these segments were in existence before OMV users discovered them refute BLM's reasons for closing them to that use. In sum, RMTA has not carried its burden of persuasion that BLM's decision was mistaken or its reasons for making the decision were inadequate. Taylor Energy Co., 148 IBLA 286, 294 (1999); Animal Protection Institute of America, 122 IBLA 290, 295 (1992).

[2] Finally, RMTA's difference of opinion is insufficient to overcome a BLM FONSI for which there is abundant support in the record. Larry Thompson, 151 IBLA 208, 218 (1999). While RMTA makes no argument that the FONSI violated NEPA or its implementing regulations in any way, an appellant challenging a FONSI "must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. * * * The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal." 151 IBLA at 217 (citations omitted). RMTA's assertions fail to meet any standard of proof required of an appellant to overturn a FONSI.

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

Lisa Hemmer

Administrative Judge

I concur:

Will A. Irwin

Administrative Judge