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March 13, 2017

IBLA 2017-75)	DOI-BLM-UT-090-06-05-EA
)	
SOUTHERN UTAH WILDERNESS)	All-Terrain Vehicle Trail Construction
ALLIANCE, <i>ET AL.</i>)	
)	Petition for Stay Granted

ORDER

The Southern Utah Wilderness Alliance, Grand Canyon Trust, Great Old Broads for Wilderness, and the Sierra Club (appellants) appeal and petition to stay the effect of a Bureau of Land Management (BLM) decision to construct recreational all-terrain vehicle (ATV) trails in San Juan County, Utah. Under the Department's regulations, we may grant a stay if an appellant shows sufficient justification based on four criteria to warrant a stay. Because we find that appellants have met their burden under these criteria, we grant their petition and stay the effect of BLM's decision pending the resolution of this appeal.

Background

Appellants appeal from and petition for a stay of the effect of a December 14, 2016, Decision Record (DR) issued by BLM's Monticello Field Office. In the DR, BLM approved the construction of ATV trails and associated parking areas in the Indian Creek area in San Juan County near Canyonlands National Park in southeastern Utah. The DR relied upon an environmental assessment (EA)¹ that BLM prepared pursuant to the National Environmental Policy Act (NEPA) and its implementing regulations² and BLM's subsequent Finding of No Significant Impact.³

¹ Environmental Assessment DOI-BLM-UT-Y020-06-05, Proposed Right-of-Way by San Juan County for an ATV Trail in the Indian Creek Area (Dec. 2016).

² 42 U.S.C. §§ 4321-4370h (2012); 40 C.F.R. Parts 1500-1508; 43 C.F.R. Part 46.

³ Finding of No Significant Impact, Environmental Assessment UT-090-06-05, Proposed Right of Way by San Juan County for an ATV Trail in the Indian Creek Area (Dec. 14, 2016).

The events leading to this appeal began when San Juan County applied for a right-of-way (ROW) grant to construct and maintain ATV trails in the Indian Creek area in 2005.⁴ BLM analyzed the ROW application in three draft EAs during the years 2011 through 2014.⁵ BLM issued a final EA and decision in February 2015.⁶ In its 2015 DR, BLM denied the County's ROW application and instead elected to authorize its own construction of ATV trails and designate them as part of the Monticello Field Office's Travel Management Plan.⁷

Appellants appealed the 2015 DR to the Board and petitioned for a stay pending our resolution of the appeal. We granted a stay by Order dated May 14, 2015. BLM then requested that we vacate its DR and remand it for "further analysis of the visual impacts of the proposed ATV trail and other project details."⁸ We vacated and remanded BLM's 2015 DR by Order dated August 10, 2015.

BLM thereafter revised the EA with "a well-documented visual analysis, more assessment and documentation of effects on cultural resources along connecting routes, a better explanation of riparian procedures and riparian mitigation, and an expanded noise analysis."⁹ Based on the analysis in that EA, the Monticello Field Manager issued the December 2016 DR, approving construction of 6.38 miles of trails, 65-inches wide, and associated parking areas.¹⁰ As it did in 2015, BLM denied San Juan County's ROW request and decided to construct the trails itself.¹¹ The Bureau further stated that it "will designate the ATV trail[s] as part of the Monticello Field Office's Travel Management Plan."¹²

Appellants filed a timely notice of appeal and petition for stay of the DR.¹³ San Juan County and the State of Utah filed motions to intervene in the appeal, which we granted by Order dated February 23, 2017. BLM and Utah opposed

⁴ See DR at 1.

⁵ *Id.* at 1.

⁶ Environmental Assessment UT-090-06-05, Proposed Right-of-Way by San Juan County for an ATV Trail in the Indian Creek Area (Feb. 2015); Decision Record, Environmental Assessment UT-090-06-05, Proposed Right of Way by San Juan County for an ATV Trail in the Indian Creek Area (Feb. 26, 2015) (2015 DR).

⁷ 2015 DR at 1.

⁸ BLM's Motion to Vacate and Remand, IBLA 2015-127 & IBLA 2015-135 (Consolidated) (Aug. 5, 2015) at 2.

⁹ DR at 13.

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² *Id.*

¹³ Notice of Appeal and Appellants' Petition for a Stay (Jan. 13, 2017) (Petition); see *id.*, Ex. K (Declaration of Ray Bloxham); Ex. L (Declaration of Tim Peterson).

appellants' stay petition,¹⁴ and appellants filed a reply in support of their stay petition that responds to arguments made by BLM and Utah.¹⁵

Appellants Have Met the Requirements for a Stay

Under the Department's regulations, a party requesting a stay bears the burden of proof to demonstrate that a stay should be granted.¹⁶ Specifically, the petition for a stay must show sufficient justification based on the following criteria: the likelihood of immediate and irreparable harm if the stay is not granted; the relative harm to the parties if the stay is granted or denied; the likelihood of appellant's success on the merits; and whether the public interest favors granting the stay.¹⁷ A failure to satisfy any one of the stay criteria will result in denial of a petition for stay.¹⁸

1. Immediate and Irreparable Harm is Likely to Occur in the Absence of a Stay.

Appellants state that, without a stay, construction of the trails will begin "almost immediately and significant environmental damage will result."¹⁹ In support, appellants cite the EA, in which BLM states that "[w]ork is expected to begin immediately after authorization" or "in the spring of 2017."²⁰ Based on BLM's representations in the EA, we find that the construction activities appellants allege would cause harm would occur in the immediate future, most likely before we reach the merits of the appeal. BLM does not dispute the immediacy of appellants' alleged harm.

Appellants allege that construction of the trails would impair lands BLM identified as having wilderness characteristics in the Indian Creek area, "resulting in a complete and permanent loss of wilderness characteristics on 939.51 acres of BLM-

¹⁴ BLM's Response to the Petition for Stay (Feb. 10, 2017) (Response); State of Utah's Opposition to Appellants' Petition for a Stay (Feb. 17, 2017) (State Opposition).

¹⁵ Appellant's Reply in Support of Their Petition for a Stay (Feb. 24, 2017) (Reply).

¹⁶ 43 C.F.R. § 4.21(b)(2).

¹⁷ *Id.* § 4.21(b)(1).

¹⁸ *Blue Mountains Biodiversity Project*, 188 IBLA 143, 152 (2016); *Petan Company of Nevada v. BLM*, 186 IBLA 81, 91 (2015) (citing *Oregon Natural Resources Council Action*, 148 IBLA 186, 188 (1999)).

¹⁹ Petition at 10.

²⁰ *Id.* at 8 (citing EA at 13, 44).

managed public lands.”²¹ Appellants also assert that the trails “will degrade the recently created Bears Ears National Monument, a land-protection designation that promotes Appellants’ interests in securing lasting preservation of the region,” which encompasses the land on which BLM would construct the trails.²²

BLM recognizes that constructing the trails will impact the wilderness characteristics of the project area, removing approximately 940 acres from the wilderness character inventory.²³ On appeal, BLM also concedes that “Appellants’ aesthetic interests will be harmed if the ATV trails are built.”²⁴ However, BLM questions whether this harm is irreparable, arguing that “[a]t bottom, ecosystems recover.”²⁵ BLM argues that if the Board ultimately decides the appeal in favor of appellants, the Bureau could “obliterate[]” the trails and associated parking areas and reclaim the land, which would ultimately “return[] to the same degree of naturalness it has now.”²⁶

As appellants note, the Supreme Court has held that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.”²⁷ Accordingly, the Supreme Court recognizes that it is not only permanent but also long-lasting environmental harm that is irreparable.²⁸ We agree and find that the possibility of “obliterating” the trails in the future is insufficient to render the environmental injury caused by construction of the ATV trails repairable. We conclude that appellants have shown a likelihood of immediate and irreparable harm to the environment.

2. *The Relative Harm to the Parties Favors Granting a Stay.*

Again citing the Supreme Court, appellants allege that the balance of harms weighs in their favor: “If [environmental] injury is sufficiently likely . . . , the balance of harms will usually favor the issuance of an injunction to protect the

²¹ *Id.* (citing EA at 65, 79); *see also* EA at 43 (describing BLM’s 2012-2013 inventory and determination that 6,350 acres of land in the Indian Creek area possess wilderness characteristics).

²² Petition at 10; *see* Reply at 4.

²³ EA at 65, 79.

²⁴ Response at 9.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (*quoted in* Petition at 9).

²⁸ *Id.*

environment.”²⁹ As noted above, BLM concedes that appellants’ aesthetic interests will be harmed if the ATV trails are built.³⁰

On the other hand, BLM claims that the ATV community will be harmed if a stay is granted because a stay would delay new recreational opportunities for the ATV users. BLM argues that a stay would also delay safety benefits associated with construction of the trails because ATV users will continue to use full-sized vehicle roads, which presents a safety risk to the ATV users and vehicle users.³¹ Furthermore, BLM asserts that a stay would potentially harm BLM’s credibility with the public because the County applied for the ATV-trail authorization 12 years ago.³²

We find that BLM’s alleged harms to its ability to provide recreational opportunities and its credibility caused by delaying construction of the trails do not outweigh the likelihood of immediate and irreparable harm to appellants’ interests. As for safety concerns, BLM’s citation to the EA to support this argument refers only to alternatives briefly considered but not analyzed by the Bureau in detail because BLM found that the alternatives would pose safety hazards.³³ While that discussion in the EA may imply that the chosen trails will provide some safety benefits, BLM did not articulate safety as a need or purpose for the trails, nor did the County identify safety as a purpose for the trails in its ROW application.³⁴ The balance of harms therefore weighs in favor of granting a stay in this case.

²⁹ Petition at 10 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. at 545).

³⁰ Response at 9.

³¹ *Id.* at 9-10.

³² *Id.* at 10; *see also* State Opposition at 7-8 (“BLM will be harmed by a stay because a stay would disregard the diligence and good faith exercised by the BLM in pursuit of its statutory mandate. . . . The BLM has performed the required environmental analysis and review throughout the ensuing eleven years . . .”).

³³ Response at 10 (citing EA at 22-23 (alternatives considered but eliminated from further analysis), 54 (discussion of environmental impacts of alternative A, which was not the alternative selected in the DR)).

³⁴ EA at 3-4 (discussing purpose and need for proposed trails, focusing on recreational uses and opportunities); Application for Transportation and Utility Systems and Facilities on Federal Lands (signed Nov. 1, 2005) (Question #15 Attachment (“The need for these [ROWs] is to provide the necessary connections to help complete our proposed master trail in San Juan County. . . . We believe this major trail will bring more ATV riders to our county and help improve a slumping economy.”)).

3. Appellants Have Demonstrated a Likelihood of Success on the Merits.

Appellants contend that BLM's decision to approve and construct the trails violates the proclamation establishing the Bear's Ears National Monument,³⁵ the land use plan conformance requirements of the Federal Land Policy and Management Act (FLPMA),³⁶ the National Historic Preservation Act (NHPA),³⁷ and NEPA. In considering whether to stay a decision, our review is by nature preliminary and necessarily more cursory than a full review of the merits of the appeal.³⁸ Based on this standard, we conclude that appellants have demonstrated a likelihood of success on the merits of their Proclamation claim.

The lands at issue in this appeal are included in the Bears Ears National Monument.³⁹ President Obama established the Monument on December 28, 2016, to protect "numerous objects of historic and of scientific interest,"⁴⁰ including petroglyphs and rock art, other Native American cultural resources, paleontological resources, and flora and fauna.⁴¹ With respect to ATV trails, the Proclamation specifies that the Secretaries of the Interior and Agriculture "shall prepare a transportation plan that designates the roads and trails where motorized and non-motorized mechanized vehicle use will be allowed."⁴² The Proclamation limits vehicle use to "roads and trails designated for such use, consistent with the care and management of [] objects" to be protected under the Proclamation.⁴³ The Proclamation further states that "[a]ny additional roads or trails designated for motorized vehicle use must be for the purposes of public safety or protection of [] objects" to be protected under the Proclamation.⁴⁴

Appellants contend that BLM's decision is inconsistent with the Proclamation and is therefore not in accordance with law.⁴⁵ Appellants argue, and BLM does not dispute, that the Proclamation requires that BLM only designate new roads and trails if they are necessary for public safety or protection of the objects protected under the

³⁵ Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139 (Jan. 5, 2017) (Proclamation).

³⁶ 43 U.S.C. § 1732(a) (2012).

³⁷ Pub. L. No. 113-287, §§ 3001-3071 (Dec. 19, 2014) (codified at 54 U.S.C. §§ 300101-307108).

³⁸ *Blue Mountains Biodiversity Project*, 188 IBLA at 152-53.

³⁹ 82 Fed. Reg. at 1143, 1147.

⁴⁰ *Id.* at 1143.

⁴¹ *Id.* at 1139-43

⁴² *Id.* at 1145.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Petition at 11-13 (citing the Administrative Procedure Act, 5 U.S.C. § 706(2)).

Proclamation.⁴⁶ The Proclamation's plain language, requiring that new roads or trails "be for the purposes of public safety or protection"⁴⁷ supports appellants' argument. Because the ATV trails here are for recreational purposes, and not for public safety or protection of objects protected under the Proclamation, we conclude, at this preliminary stage of the proceedings, that the trails are inconsistent with the Proclamation.⁴⁸

But because BLM issued its decision to construct the trails two weeks before the President issued the Proclamation, we must consider whether BLM's decision is subject to the Proclamation's restriction on new ATV trails. Appellants allege that the answer is yes, because the Proclamation issued before the DR went into effect pursuant to the Department's regulations. The first of the applicable regulations, found at 43 C.F.R. § 4.21(a)(1), states that "[e]xcept as otherwise provided by law or other pertinent regulation . . . [a] decision will not be effective during the time in which a person adversely affected may file a notice of appeal." Likewise, the following subsection of that regulation, 43 C.F.R. § 4.21(a)(2), states that "[a] decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal" The second regulation, at 43 C.F.R. § 4.411(a)(2)(i), provides for a 30-day appeal period. Courts have examined these regulations in the context of deciding what constitutes final agency action for purposes of judicial review. In so doing, they have determined that when BLM issues a decision subject to appeal to this Board, the decision "will become effective and final following the expiration of the appeal period, in accordance with 43 C.F.R. § 4.21(a)(2)."⁴⁹

Based on these regulations and case law interpreting their effect, appellants argue that BLM's DR, issued December 14, 2016, was not and could not be effective until the 30-day appeal period closed on January 14, 2017.⁵⁰ Given the plain text of the governing regulations and the case law interpreting their effect, we agree. Under the governing regulations, BLM's DR was not effective for the 30-day appeal period following its issuance, and so was not yet in effect when the Proclamation issued on December 28, 2016.

⁴⁶ *Id.* at 12-13; Response at 11 n.3 ("BLM in this appeal takes no position as to the interpretation of the proclamation").

⁴⁷ 82 Fed. Reg. at 1145.

⁴⁸ EA at 3 (identifying the need to "provide for multiple recreational uses of the public lands and to sustain a wide range of recreation opportunities and potential experiences for visitors and residents while supporting local economic stability and sustaining the recreation resource base and other sensitive resource values").

⁴⁹ *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2010).

⁵⁰ Petition at 12 (citing 43 C.F.R. § 4.21(a)); Reply at 6.

BLM's argument to the contrary is not persuasive. BLM argues that appellants "misconstrue the effect" of the regulations, stating that the regulations do not render the decision "ineffective for all purposes."⁵¹ BLM, however, does not address the plain language of the regulation or the case law directly on point. Instead, BLM states that if its decision were not appealed to the Board, "there is no question that the statute of limitations for obtaining judicial review would begin to run on the date the decision was issued if plaintiff had notice of it."⁵² However, this argument regarding the statute of limitations fails to demonstrate that the decision was effective at the time of its issuance, instead of 30 days later, and therefore was not affected by the Proclamation.

In sum, the plain language of the regulations supports appellants' argument that the decision at issue was not effective prior to the designation of Bears Ears National Monument. We therefore conclude that appellants have demonstrated a sufficient likelihood of success on its claim that the decision on appeal is inconsistent with the Bears Ears National Proclamation such that a stay is warranted pending a decision on the merits of the appeal. Because appellants have shown a likelihood of success on the merits of this claim, we need not consider the likelihood of success on appellants' NEPA, NHPA, and FLPMA claims.

4. The Public Interest Favors Granting a Stay.

Appellants contend that staying BLM's decision would serve the public interest because it would protect the environment and the new Monument during the pending appeal, preventing "unnecessary environmental degradation" to the lands at issue, which "would remain damaged long after the appeal is resolved."⁵⁴ BLM responds that the public interest favors denying the stay because a stay would delay the safety benefits associated with the trails by requiring ATV users to continue to use larger roads, presenting a risk to those ATV users and the vehicle users.⁵⁵ These arguments essentially repeat those made regarding the balance of harms criterion. As discussed above, we find BLM's claims of safety impacts less compelling than appellants' arguments about harm to the environment and their aesthetic interests. We similarly conclude that the public interest would be best served by staying the construction of the trails at issue during the pendency of this appeal to prevent harm to the environment and preserve the status quo.

⁵¹ Response at 11.

⁵² *Id.* (citing 28 U.S.C. § 2401(a)).

⁵⁴ Reply at 6; Petition at 29.

⁵⁵ Response at 24.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁵⁶ the Board grants appellants' Petition for a Stay.

Silvia M. Riechel

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Administrative Judge

⁵⁶ 43 C.F.R. § 4.1.

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