

INTERIOR BOARD OF LAND APPEALS

Edward R. Woodside

125 IBLA 317 (March 25, 1993)

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EDWARD R. WOODSIDE

IBLA 91-170

Decided March 25, 1993

Appeal from a decision of the Clear Lake Resource Area Manager, Bureau of Land Management, rejecting an application for a right-of-way. CACA-27373.

Affirmed.

1. Administrative Practice--Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Delegation of Authority--Endangered Species Act of 1973: Generally--Endangered Species Act of 1973: Section 7: Consultation--Office of Hearings and Appeals--Officers and Employees--Rules of Practice: Appeals: Jurisdiction

Although the Office of Hearings and Appeals does not have authority to review the merits of biological opinions issued by the U.S. Fish and Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by the Bureau of Land Management of an application for a right-of-way on the grounds that the right-of-way would destroy a Category-1 candidate species of plant and its habitat.

2. Endangered Species Act of 1973: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Act of October 21, 1976 (FLPMA)--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category-1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb the Bureau of Land Management's decision.

APPEARANCES: Edward R. Woodside, Salt Lake City, Utah, pro se; Clear Lake Resource Area Manager, Ukiah, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Edward R. Woodside has appealed the January 29, 1991, decision of the Acting Area Manager, Clear Lake Resource Area, Bureau of Land Management (BLM), rejecting his application for a right-of-way for a 3,200-foot access road across public lands in sec. 30, T. 10 N., R. 6 W., Mount Diablo Meridian, in the Three Peaks area of Lake and Napa Counties, California, to his land in sec. 29.

BLM rejected the application because the proposed right-of-way would cross the habitat of the Three Peaks jewelflower (Streptanthus morrisonii ssp. elatus), a Federal Category-1 candidate species under the Endangered Species Act of 1973, 16 U.S.C. § 1531 (1988). 1/ BLM's decision states:

It is Bureau policy to conserve sensitive plant species, and pending formal listing, all sensitive plants will be afforded the protection of the Endangered Species Act of 1973, as amended * * *. Section 7 of the Endangered Species Act of 1973 requires that all Federal agencies ensure that activities authorized, funded or carried out by them, not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. In a Section 7 conference with the U.S. Fish and Wildlife Service, they said it would pursue emergency listing of the species if the Bureau were to approve the right-of-way as proposed through the serpentine habitat.

* * * [I]t has been determined that your proposal is not consistent with Bureau policy on protecting and managing a Federal Category-1 candidate plant species and its habitat or the intent of the Endangered Species Act. The granting of right-of-way CACA-27373 would destroy an undetermined number of the Three Peak jewelflower and the habitat that supports it. Therefore, in order to prevent unnecessary and undue damage to the Three Peaks

1/ Category 1 covers:

"Taxa for which the [U.S Fish and Wildlife] Service [(FWS)] has on file enough substantial information on biological vulnerability and threat(s) to support proposals to list them as endangered or threatened species. Development and publication of proposed rules on these taxa are anticipated; however, because of the large number of category 1 taxa, it will take several years to clear the backlog."

Endangered and Threatened Wildlife and Plants; Review of Plant Taxa for Listing as Endangered or Threatened Species, 55 FR 6184, 6185 (Feb. 21, 1990).

jewelflower and its habitat, right-of-way application CACA-27373 is hereby rejected.

On appeal, Woodside argues (1) BLM has engaged in "[t]axonomic hairsplitting which names a new variety of a miniscule plant species in order to establish an endangered species;" (2) "[t]here is a lack of scientific evidence to conclude that the geographic range of Streptanthus morrisonii elatus, the 'Three Peaks Jewel Flower,' is indeed restricted geographically to Serpentine soils only in the Three Peaks area;" and (3) "one hundred and fifty years of intensive prospecting, mineral exploration and mining in this part of the Eastern Mayacmus Quicksilver District apparently has had no adverse effect on the viability of the so-called endangered plant variety." (Notice of Appeal dated Feb. 6, 1991, at 1-2; emphasis in original.)

BLM based its decision on Environmental Assessment (EA) No. CL-336. The EA states that Instruction Memorandum (IM) No. CA-89-163, issued by the State Director, California State Office, BLM, on February 13, 1989, provides that

all plants identified as candidates for listing are to be considered as BLM sensitive species. As such, these plants will be afforded the full Endangered Species Act protection (excluding formal but not informal Section 7 consultation with the Fish and Wildlife Services) unless the State Director judges on a case-by-case basis that the evidence against listing a particular plant species is sufficient to allow a specific action.

(EA at 1). 2/

The EA refers to a December 11, 1990, memorandum from the Clear Lake Resource Area Biologist that recommends "from a biological standpoint that no road construction through serpentine barren habitat be authorized." The December 11 memorandum relies on a 1987 report done for BLM by Tierra Madre Consultants that states:

Because of it[s] single occurrence, past losses of habitat, and the disturbed nature of the remaining barrens, the tall jewelflower is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range. * * * The taxon is very limited in area and numbers, making it vulnerable to environmental perturbations.

The EA also referred to the record of a December 19, 1990, telephone conversation between the Clear Lake Resource Area Biologist and Jim Bartel, Botanist, FWS, who stated that "because of the rarity of this subspecies,

2/ The source of the quoted language is Enclosure 1 of IM No. CA-87-29, entitled "BLM Policy on Conserving Sensitive, Rare, Threatened, and Endangered Plants in California," issued Oct. 23, 1986, which was continued by IM No. CA-89-163.

the Fish and Wildlife Service would pursue an emergency listing if the Bureau of Land Management were to approve the subject right-of-way through the serpentine habitat" (EA at 2). Bartel said the conversation could be considered as a conference for purposes of section 7 of the Endangered Species Act.

By letter dated February 19, 1991, Woodside supplemented his reasons for appeal of BLM's decision. He argued:

(1) the Tierra Madre Consultants report "does not indicate the presence of the variety elatus along the route of the proposed WOODSIDE right-of-way even though the road proposed is within the botanical survey area;"

(2) a 1980 draft environmental assessment by BLM of proposed geothermal leasing in the Geyser Peak mineral reserve lists the subspecies elatus as a species that may exist in the area, which is 17 miles northwest of the proposed right-of-way;

(3) ultramafic rocks such as serpentine cover 704,000 acres in California and commonly "possess unusual floras characterized by narrow endemics * * *. It is therefore ludicrous in the extreme for the B.L.M. to try to protect serpentine barrens throughout Napa, Lake, and Sonoma Counties solely because they might provide a habitat for rare plant species or varieties;"

(4) "the eight subspecies of the Streptanthus morrisonii complex have also been substantially over-split taxonomically. It is highly unlikely that all eight of the S. morrisonii complex will survive as valid taxa when subjected to the type of scientific scrutiny conducted by A.R. Kruckeberg in his study of the S. glandulosus complex. [3/] * * * Certainly, the varieties of

3/ "Populations of the annual crucifer, Streptanthus glandulosus Hook., are largely restricted to the discontinuous outcrops of serpentine soil in California. Many of the partially isolated serpentine habitats support morphologically distinguishable strains of the species complex. Such polymorphism has led taxonomists in the past to recognize no less than 12 species. More conservative treatments, however, define the complex taxonomically as one or two species with several infraspecific taxa." A.R. Kruckeberg, "Variation in Fertility of Hybrids Between Isolated Populations of the Serpentine Species, Streptanthus glandulosus Hook," 11 Evolution 185, 210 (1957).

Woodside also refers to a 1983 paper by Kruckeberg and Morrison in 30 Madrono at 242 (1983): "Recent studies (Dr. J. A. Neilson, unpubl.) made in connection with environmental impact surveys of geothermal power sites in the vicinity of these endemics [S. morrisonii Hoffman and S. brachiatus Hoffman], suggest the presence of considerable interpopulational variation in S. brachiatus. Hoffman's (1952) taxonomy of this remarkable and polymorphic group may have to be modified."

S. morrisonii such as var. elatus do not belong on the Candidate Category List of Endangered Species, if there is a probability of these taxa being declared invalid;"

(5) "Most species of the Genus Streptanthus have been around for a long time and have adapted well to the particular ecologic niches in which they occur. * * * [T]he private access road proposed by WOODSIDE is highly unlikely to threaten the continued viability of any Streptanthus species or varieties which may exist in the general vicinity;"

(6) "A subspecies cannot be logically classified as either threatened or endangered if it can be successfully grown from seed in a laboratory. F. W. Hoffman grew his yet to be described subspecies, Streptanthus morrisonii var. elatus in his laboratory from seed collected from the type locality [of the proposed right-of-way]." [Emphasis in original.]

(Additional Statements to the Notice of Appeal for BLM Case Serial No. CACA-27373, dated Feb. 19, 1991, at 1-4).

In a February 19, 1991, letter, BLM related Woodside's arguments to the FWS and sent copies of correspondence it had received from him. BLM asked the FWS to explain the "emergency listing" procedure it mentioned it would have pursued if BLM had granted the right-of-way.

The FWS responded that it had included the Three Peaks jewelflower in the 1990 notice of review
4/

based primarily on the ecological and distributional work of Rebecca Dolan and Lawrence LaPre (1987), including their subsequent taxonomic paper that recognized S. morrisonii subsp. elatus as a distinct subspecies (Madrono 36:33-40, 1989). [5/]
To our knowledge, no taxonomic paper has been published contradicting or questioning the results of Dolan and LaPre (1989).
As a result, the Service considers the "taxonomic issue" raised in the letters of Mr. Woodside * * * "settled" * * *.

The FWS stated that Woodside had presented no substantial data indicating Category-1 status was inappropriate and that it believed "sufficient information exists on biological vulnerability and threats to substantiate the appropriateness of proposing to list the subspecies under the Endangered Species Act."

4/ Endangered and Threatened Wildlife and Plants; Review of Plant Taxa for Listing as Endangered or Threatened Species, supra note 1, at 6226.

5/ Dolan and LaPre, "Taxonomy of Streptanthus Sect. Biennes, the Streptanthus morrisonii Complex (Brassicaceae)," 36 Madrono 33-40 (1989).

The FWS explained in a March 22, 1991, memorandum that if BLM approved the right-of-way, it would determine under section 4(b)(3)(C)(iii) of the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(C)(iii) (1988), whether the effect of BLM's action would present a "significant risk to the well-being of" the Three Peaks jewelflower. ^{6/}

If the Service determined that emergency listing was needed to prevent a significant risk * * *, the Service would publish an emergency rule in the Federal Register. Such an action would accord S. morrisonii subsp. elatus the full protection of the Act for 240 days. The Service likely would simultaneously publish a proposed rule with a final decision regarding the ultimate status of the subspecies within one year.

Woodside replied to the FWS, citing Kruckeberg and Morrison's 1983 paper, supra note 2, as contradictory of Dolan and LaPre's 1989 results and stating that "Dolan and La Pre are guilty of prostituting their science for profit."

[1] On January 8, 1993, the Secretary of the Interior issued a memorandum to the Assistant Secretary for Policy, Management, and Budget entitled "Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act." It states:

The Department's Office of Hearings and Appeals (OHA) has recently received numerous appeals of Bureau of Land Management (BLM) grazing decisions based on Section 7 biological opinions issued by the Fish and Wildlife Service (FWS). Appellants-permittees are asserting that the FWS opinions are arbitrary and capricious and may not be relied upon by the BLM in its decision-making process.

In one written opinion, an Administrative Law Judge handling one of these appeals for OHA found that BLM's reliance on biological advice provided by the FWS under Section 7 of the Endangered Species Act (ESA) was arbitrary and capricious. In effect, this

^{6/} This subsection was added by section 1002(a) of P.L. 100-478, 102 Stat. 2306, in October 1988. It provides: "The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) [15 U.S.C. § 1533(b)(3)(B)(iii) (1988)] and shall make prompt use of the authority under paragraph [(7), 15 U.S.C. § 1533(b)(7) (1988)] to prevent a significant risk to any such species." Although section 4(b)(3)(B)(iii), 15 U.S.C. § 1533(b)(3)(B)(iii) (1988), in terms applies only to species for which a finding has been made that action petitioned for under section 4(b)(3)(A) is warranted but precluded, "[t]he Service has implemented new procedures to ensure that the status of these candidate plants will be monitored in accordance with this [1988] amendment." Endangered and Threatened Wildlife and Plants; Review of Plant Taxa for Listing as Endangered or Threatened Species, supra note 1, at 6185.

ruling represents a review not only of the merits of the BLM decision, which is appropriate, but a review of the merits of the FWS biological advice as well.

These types of challenges to the FWS's Section 7 process (*i.e.*, biological opinions and findings) have the effect of amending existing delegations of authority within the Department. Under the existing delegations set out in 209 DM 6 and 242 DM 1.1A, the Director of the U.S. Fish and Wildlife Service is authorized to exercise the authority of the Secretary concerning endangered and threatened species. [7/] Joint regulations promulgated by the Department of Commerce and the Department of the Interior vest responsibility in Regional Directors of the FWS to carry out consultations and to issue biological opinions under Section 7 of the ESA (subject to review by the Director, at his election). 50 CFR §§ 402.02 (definition of "Director") and 402.14 [formal consultation]. Neither the Departmental Manual nor the regulations at 50 C.F.R. Part 402 provide an administrative appeal remedy to interested parties.

In summary, OHA has no authority under existing delegations to review the merits of FWS biological opinions. Any review of biological opinions would necessarily be limited to the federal district courts pursuant to Section 11(g) of the ESA. The long-standing administrative practice of not providing OHA review of the biological determinations of the FWS under the ESA, the specific remedies provided by the ESA itself, and the need for expedited treatment, all militate against a change to the existing delegations.

7/ 242 DM 1.1A provides that the:

"Director, U.S. Fish and Wildlife Service may, except as provided in 242 DM 1.2, exercise the authority of the Assistant Secretary for Fish and Wildlife and Parks with respect to any matter relating to fish, wildlife, and plants. This includes, but is not limited to, matters relating to migratory birds, game management, wildlife refuges and monuments, endangered and threatened species, sport fisheries, sea mammals (except whales, seals and sea lions), international treaty responsibilities concerning the conservation of fish, wildlife or plants, and other activities of the Service."

242 DM 1.2 states that "[t]he authority granted in 242 DM 1.1 relates to the authority found in 209 DM 6, but does not include" authority which either the Secretary or the Assistant Secretary may not redelegate and authority to make final decisions regarding issuance of mineral leases on national wildlife refuges.

209 DM 6 provides that the Assistant Secretary for Fish and Wildlife and Parks is authorized to exercise all of the authority of the Secretary and may (except where otherwise prohibited) "redelegate general administrative authority and those program authorities specifically related to the functions and responsibilities assigned to the Assistant Secretary for Fish and Wildlife and Parks in 109 DM 6."

This memorandum does not affect the discretion of Departmental bureaus on how to best implement a biological opinion from FWS. Consistent with case law and the Section 7 regulations, the action agency determines how to implement the opinion, giving due deference to the biological findings of the FWS. The issue is whether OHA, instead of limiting its review to the merits of the BLM decision, should be allowed to look behind that decision and review the merits of the FWS biological opinion. When BLM decides to implement a reasonable and prudent alternative set out in a biological opinion, or if it decides to implement the mandatory terms and conditions of an incidental take statement attached to that opinion, OHA is not authorized to "second-guess" the biological opinion or findings of FWS when reviewing BLM's decision

to adopt the measures prescribed in that opinion or advice. As stated above, OHA has not been delegated the authority to carry out such a review.

Please inform the Director of the Office of Hearings and Appeals of my position on this subject and, accordingly, the present limits on the jurisdiction of OHA in this regard.

Although the Secretary's memorandum states an important limitation on the Office of Hearings and Appeals' authority, we have jurisdiction in this case. We may not review the merits of biological opinions issued by the FWS. Biological opinions are issued after formal consultation when a species listed as threatened or endangered may be jeopardized or its critical habitat may be destroyed or adversely modified by a proposed action. 50 CFR 402.02, 402.14. The Three Peaks jewelflower is not a listed species but a candidate species, *i.e.*, it is being considered for listing but is not yet the subject of a proposed rule. 50 CFR 424.02. "While it is prudent to take candidate taxa into account during environmental planning, none of the substantive or procedural provisions of the [Endangered Species] Act apply [*sic*] to a species that is designated as a candidate for listing." 8/ Although the California State Office of BLM designates candidate species of plants as "sensitive plants" and accords them protection under the Endangered Species Act, the IM notes that this protection does not include formal consultation. The consultation which took place between BLM and the FWS in this case was informal. 9/

8/ "Endangered and Threatened Wildlife and Plants; Review of Plant Taxa for Listing as Endangered or Threatened Species," supra note 1, at 6184. The FWS "encourages * * * consideration [of taxa in Categories 1 and 2] in environmental planning, such as in environmental impact analysis under the National Environmental Policy Act of 1969 (implemented at 40 CFR parts 1500-1508)." Id. at 6185.
9/ 50 CFR 402.02. Because a "conference" involves discussions concerning a proposed species or a proposed critical habitat under section 7(a)(4) of the Endangered Species Act, 16 U.S.C. 1536(a)(4) (1988), see 50 CFR 402.02, we think the characterization of the Dec. 19, 1990, phone conversation between BLM and FWS as a "conference" is incorrect in this case.

[2] A BLM decision to grant or deny an application for a right-of-way is an exercise of discretion granted to the Secretary under section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1988). When we review a BLM decision granting or denying an application for a right-of-way, we consider whether the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason is shown to disturb the decision. Alvin R. Platz, 114 IBLA 8, 15-16, 97 I.D. 125, 128-29 (1990). See also Coy Brown, 115 IBLA 347, 356 (1990). In this case BLM's decision to reject the application was based on its policy of conserving sensitive plant species. Affording a sensitive plant species "full Endangered Species Act protection" under this policy includes insuring that an action is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2) (1988). Denial of an application for a right-of-way in order to prevent destruction of plants of a Category-1 candidate species and its habitat is a reasoned exercise of BLM's discretion and is in the public interest. Woodside's showing that there is a possible difference of scientific opinion on the issue of whether the Three Peaks jewelflower is properly regarded as a subspecies is not sufficient to disturb BLM's decision. As we said in Animal Protection Institute of America, 122 IBLA 290, 295 (1992):

In circumstances such as those presented here, we are unwilling to overturn a BLM decision if the appellant merely presents some other course of action which may be theoretically as correct as that chosen by BLM. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the interpretation of data demonstrates that another course of action or interpretation is available or that the party's proposed course of action is also supported by the evidence. The appellant must demonstrate by a preponderance of the evidence that the * * * BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 29, 1991, decision of the BLM is affirmed.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge