

SALMON RIVER CONCERNED CITIZENS, ET AL.
LOIS HOLLINGSWORTH

IBLA 89-190

Decided May 22, 1990

Appeals from a decision of the State Director, California State Office, Bureau of Land Management, approving implementation of a vegetation management program including the use of herbicides and other means of control of undesirable vegetation on public lands in California and northwestern Nevada.

Appeals dismissed.

1. Environmental Quality: Herbicides--Rules of Practice: Appeals: Standing to Appeal

An appeal from a BLM decision approving the use of herbicides as a means to control undesirable vegetation on public lands (based on a programmatic environmental impact statement) is properly dismissed where BLM has reserved the decision of whether and where to authorize actual herbicide spraying until after preparation of site-specific environmental assessments or environmental impact statements.

APPEARANCES: William S. Curtiss, Esq., San Francisco, California, for Salmon River Concerned Citizens, et al.; Lois Hollingsworth, pro se; Lynn M. Cox, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Salmon River Concerned Citizens, et al. (SRCC), and Lois Hollingsworth have appealed from a November 7, 1988, Record of Decision (ROD) of the State Director, California State Office, Bureau of Land Management (BLM), which approved implementation of a program including use of herbicides and other methods for the control of undesirable vegetation on approximately 35,800 acres of public land managed by BLM in California and northwestern Nevada. ^{1/} BLM's decision was based on analysis contained in the August

^{1/} Appeals were originally filed by the following organizations: Environmental Protection Information Center, Southern Oregon Northwest Coalition for Alternatives to Pesticides, Salmon River Concerned Citizens, Safe Alternatives for our Forest Environment, South Fork Mountain Defense Committee, South Fork Residents, and South Fork Trinity Watershed Association. On Apr. 14, 1989, counsel for the Sierra Club Legal Defense Fund entered a

1988 California Vegetation Management Final Environmental Impact Statement (FEIS).

The FEIS, in conjunction with a Draft EIS, issued in December 1987, constituted a programmatic statement which assessed the general environmental consequences of three alternatives for the control of vegetation on public lands in California and northwestern Nevada over an anticipated 10-year period. The proposed action adopted by BLM involved the aerial and ground spraying of herbicides on approximately 6,900 acres of land under designated management constraints. ^{2/} The programmatic statement expressly indicated that it was intended to be supplemented by site-specific environmental analyses (EA's) which would be prepared later, with further public involvement:

This EIS is a programmatic statement for vegetation management on BLM-administered lands in California and northwest Nevada and is intended to guide this program for the next 10 years. Site-specific environmental analysis and documentation will be prepared at the district or resource area level on each proposed site-specific vegetation control plan. During site-specific analysis and documentation, public involvement will occur in accordance with the [Council on Environmental Quality] CEQ Regulations for implementing [the National Environmental Policy Act of 1969]. Interdisciplinary impact analysis will be based upon this and other EISs, such as resource management plan, timber management plan, and grazing management plan EISs. Impacts already addressed by this or other BLM EISs will be referenced while site-specific impacts will be identified in the EA.

If analysis finds potential for significant impacts not already described in an existing EIS, another EIS or a supplement to an existing EA may be required. Site-specific mitigations, project stipulations, and monitoring needs will be determined through the EA process.

(FEIS at 1-15).

fn. 1 (continued)

joint appearance on behalf of all of these organizations. By order dated Apr. 20, 1989, we consolidated these appeals.

Lois Hollingsworth also appealed, but did not file a statement of reasons. Further, along with its answer, BLM submits a June 13, 1989, letter from Hollingsworth in which she states: "I hereby withdraw my name as an appellant in this matter." Hollingsworth's appeal is therefore dismissed.

^{2/} The proposal adopted by BLM was Alternative 1. Alternative 2 provided only for the ground spraying of herbicides on approximately 1,950 acres of land. Alternative 3 eliminated all use of herbicides. For each alternative, BLM proposed to use manual, mechanical, and prescribed burn methods on the remaining land requiring vegetation control but not subject to herbicide spraying.

Incorporated in the FEIS was an assessment of the risk to human health from single and multiple exposure to the herbicides proposed for use in the vegetation control management program. The assessment involved a three-pronged analysis determining the toxic properties of the herbicides, estimating the potential levels of exposure to the herbicides under various scenarios, and finally, based on this information, assessing the risks of adverse effects to human health from such exposure. Because of gaps in relevant information and scientific uncertainty regarding certain of these matters, the assessment incorporated a worst-case analysis pursuant to the applicable regulation of CEQ (40 CFR 1502.22 (1985)). See Idaho Natural Resources Legal Foundation, 88 IBLA 201 (1985).

In his November 1988 ROD, the State Director adopted the proposed action advanced in the FEIS, concluding that the risks to the human environment, especially human health, from using herbicides to control undesirable vegetation were minimal and were outweighed by the benefits to be derived from herbicide use and the costs which would be incurred if herbicides were not used. Thus, the risks were regarded as acceptable. Accordingly, the State Director approved the use of designated herbicides under the management constraints set forth in the FEIS. ^{3/}

At page 2 of the ROD, the State Director echoed the proviso in the FEIS that additional site-specific environmental analysis would be required for specific vegetation-control projects:

Before any vegetation treatment can be undertaken a site specific Environmental Analysis (EA) will be prepared and public involvement will occur in accordance with CEQ regulations. The EA will be tiered to the California Vegetation Management EIS and the appropriate land use plan (MFP or RMP) for the location and will focus specifically on the site-specific impacts. The EA shall consider all appropriate alternative vegetation treatment techniques.

In addition, the State Director noted that an EA might result in more restrictions on the application of herbicides. Finally, the State Director concluded at page 3 of the ROD: "Through these future site specific project analyses it will be determined whether any herbicides are actually applied. At this time the ROD has only determined that the option of using herbicides is available for consideration under the limitations identified herein." Between December 12 and 28, 1988, SRCC and Hollingsworth filed appeals from the State Director's November 1988 ROD.

On April 19, 1989, BLM filed, pursuant to 43 CFR 4.21(a), a request that we place the State Director's November 1988 ROD into full force and

^{3/} The State Director specifically approved for use herbicides containing the following active ingredients: amitrole, asulam, atrazine, bromacil, 2,4-D, 2,4-DP, dalapon, dicamba, diuron, fosamine, glyphosate, hexazinone, picloram, simazine, tebuthiuron, and triclopyr. Only atrazine, hexazinone, picloram, 2,4-D, and triclopyr were approved for aerial application.

effect in part. BLM specifically desires that the stay imposed by that regulation be partially lifted during the pendency of this appeal in order that it may proceed, after preparation of site-specific EA's, to undertake the aerial and ground spraying of herbicides in Lassen and Modoc counties, California, so as to eradicate scattered infestations of Scotch thistle and yellow starthistle on approximately 57 acres (out of a total of 25,036 acres) of public land and the spot application of herbicides so as to eradicate infestations of tamarisk in selected locations in the California Desert Conservation Area. BLM states that the

likely results of the Bureau's failure to act will be a loss of forage and browse for domestic livestock and wildlife and a corresponding decline in bird diversity and sensitive animal species, such as the bighorn sheep, and the displacement or outright elimination of native plant species on the surrounding public lands. * * * The severity of the known environmental damages that will result from inaction far exceeds any impacts * * * that might result from the Bureau's carefully controlled spraying efforts. [Emphasis in original.]

BLM supports its request to place the State Director's November 1988 ROD into full force and effect in part with the April 18, 1989, declaration of John W. Willoughby, State Botanist, California State Office, BLM, and various other attachments to the request.

In its SOR filed with the Board on May 26, 1989, SRCC did not specifically object to the herbicide spraying which BLM sought to undertake during the pendency of its appeal. Nevertheless, we cautioned in a June 12, 1989, order that this should not be construed as indicating SRCC's non-opposition to BLM's request to place the State Director's November 1988 ROD into full force and effect, because SRCC raised serious objections to any herbicide spraying as a means to control undesirable vegetation.

Thereafter, on June 20, 1989, SRCC filed a response to BLM's request that the State Director's November 1988 ROD be put into full force and effect in part, stating that SRCC has not specifically objected to the herbicide spraying which BLM seeks to undertake during the pendency of this appeal because it regards any decision on that request as "premature" because no spraying can, in accordance with the ROD, take place until BLM has prepared site-specific EA's and no such EA's have been prepared. However, SRCC states that it remains generally opposed to any herbicide spraying as a means to control vegetation and, thus, its lack of specific objection "cannot be stretched to signify a lack of opposition to placing the challenged vegetation management program in effect while this appeal is decided." Thus, SRCC states that it reserves the right to specifically object to the spraying with respect to which BLM seeks to place the State Director's November 1988 ROD into full force and effect, but that it now only generally objects thereto for the reasons stated in its statement of reasons (SOR).

We need not address BLM's request that we place the State Director's November 1988 ROD into full force and effect in part because we conclude that SRCC's present appeal is not justiciable because it is not "adversely affected by a decision of an officer of the Bureau of Land Management," as required under 43 CFR 4.410(a). An appellant will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. See Colorado Open Space Council, 109 IBLA 274 (1989), and cases cited therein. Specifically, an appellant must establish that it has suffered an "injury in fact" as a result of the challenged BLM action. Id. at 280; see also Oregon Natural Resources Council, 78 IBLA 124, 125 (1983).

SRCC argues that it should be recognized as having standing because the "risk that environmental effects will be overlooked" because of a deficient environmental statement constitutes an "injury in fact" which is adequate to afford an appellant judicial standing to challenge a proposed Federal action, citing Oregon Environmental Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987), and City of Davis v. Coleman, 521 F.2d 661, 670-71 (9th Cir. 1975). ^{4/} We cannot say that SRCC has suffered an "injury in fact" as a result of the State Director's November 1988 ROD approving the use of herbicides as a means for controlling undesirable vegetation. By itself, the ROD does not have any consequences, actual or threatened, so far as the environment and any members of the public are concerned.

The State Director's November 1988 ROD only authorizes use of herbicides in the control of undesirable vegetation as an option which may be employed. With the exception of the proposed spraying with respect to which BLM seeks to place the ROD into full force and effect, there is nothing in the record indicating where or whether herbicides will actually be used. Indeed, no activity (including the spraying identified by BLM in its full force and effect request) can take place until after preparation of site-specific EA's. Any adverse consequences will occur, if at all, only if BLM decides to engage in herbicide spraying at particular sites in California and northwestern Nevada, and only after preparation of site-specific EA's. ^{5/}

In announcing its rule that standing could be conferred by the creation of a risk that serious environmental impacts would be overlooked, the court

^{4/} Standing is properly afforded to parties who may be adversely affected by a proposed Federal action where the agency might have chosen not to authorize the action but for the fact that it was unaware of adverse environmental consequences because of an asserted deficiency in the environmental review process leading up to authorizing the action. City of Davis v. Coleman, *supra* at 671; see also United States v. 18.2 Acres of Land, 442 F. Supp. 800, 805 (E.D. Cal. 1977); Conservation Law Foundation of Rhode Island v. General Services Administration, 427 F. Supp. 1369, 1373-74 (D. R.I. 1977).

^{5/} Members of the public who use or own land adjacent to targeted areas would then clearly have standing to pursue an appeal. United States v. SCRAP, 412 U.S. 669, 685 (1973); Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

in City of Davis cautioned that such injury must be alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have. Id. at 671. There is no evidence that BLM has yet even designed the plans which will be subjected to further environmental review. Thus, there is no way of knowing at the present time whether appellants are within such geographical nexus of proposed herbicide spraying that they may be affected by such spraying should spraying result in adverse environmental consequences.

Moreover, the situations present in Oregon Environmental Council and City of Davis are distinguishable from the instant case. In both those cases there was a specific Federal action which was subject to imminent authorization either without preparation of a required EIS or following preparation of an allegedly deficient EIS and EA. ^{6/} These alleged procedural violations clearly posed a risk that activities with unrecognized adverse environmental consequences would take place, and that the plaintiffs would be adversely affected, as a direct result of the incomplete or allegedly inadequate environmental review. Herein, while we may conclude that the adoption of the vegetation management plan advances the possibility that environmental consequences might eventually ensue, we cannot say that

^{6/} In City of Davis, the Federal Highway Administration had concurred in a determination by the Division of Highways of the California Department of Public Works that no EIS was necessary prior to authorizing construction of a proposed highway interchange and then had authorized such construction. Here, BLM has prepared an EIS and has committed itself to preparing site-specific EA's or EIS's, thus greatly reducing risk that a serious environmental impact will have been overlooked when any weed control action is eventually authorized.

In Oregon Environmental Council, the U.S. Department of Agriculture (DOA) had prepared not only a programmatic EIS, but also a site-specific EA at the time a proposed pesticide spraying program for an identified 6,400-acre area of South Salem, Oregon, was initially challenged. The court concluded, relying on City of Davis, that various environmental groups and individuals had standing to challenge the proposed spraying program because they had alleged various environmental consequences that they might be expected to suffer should the spraying program proceed, which consequences DOA had arguably overlooked. In the instant case, because planning is incomplete, environmental analysis is likewise incomplete, so that we cannot speculate about what environmental consequences have been overlooked, because we have no specific geographical context in which to assess these consequences.

Further, unlike the present case, both City of Davis and Oregon Environmental Council concerned proposals that had reached the implementation stage, allowing the courts to analyze whether plaintiffs had a sufficient geographical nexus to the sites of the challenged projects that they might be expected to suffer whatever environmental consequences the projects might have.

there is a risk that appellants will be affected by allegedly inadequate environmental review, because this review is not complete, and because use of herbicides remains only an option.

In cases where standing is asserted on the basis of a threatened injury, as is the case herein, standing turns on the likelihood of the occurrence of that injury. Wilderness Society v. Griles, 824 F.2d 4, 12 (D.C. Cir. 1987). Standing will only be recognized where the threat of injury is "real and immediate." O'Shea v. Littleton, 414 U.S. 488, 494 (1974). In the present case, in the absence of the specification of the land that will be subjected to herbicide spraying, we cannot make any determination that appellants are likely to be affected by such spraying, let alone conclude that the threat of injury is real and immediate. See Wilderness Society v. Griles, *supra* at 15. The mere possibility that BLM may at some future time authorize the spraying of herbicides, pursuant to the authorization contained in the State Director's November 1988 ROD, in such a way as to potentially affect appellants is not sufficient to confer standing. See James W. Smith, 85 IBLA 237, 239 (1985); Cascade Holistic Economic Consultants, 58 IBLA 332, 334-35 (1981).

Not according standing to SRCC to challenge the State Director's November 1988 ROD adopting the proposed action considered in the programmatic EIS does not foreclose appellants from later challenging the adequacy of the EIS in the context of a specific instance of proposed herbicide spraying. In an appeal from a BLM decision to use herbicide spraying in a particular area after preparation of a site-specific EA, the EA would undoubtedly be tiered to the programmatic EIS, thus affording appellants at that time standing to challenge the adequacy of the EIS, as well as of the EA.

Appellants argue, however, that the Board should consider the adequacy of the EIS, including the worst-case analysis, at the present time because the vegetation management program approved by the State Director's November 1988 decision placed "constraints on future decisionmaking" (SOR at 27). Specifically, appellants contend, first, that this program "emphasiz[es] * * * as the primary tool for vegetation management activities" the use of herbicides and aerial spraying, in effect adopting herbicides and aerial spraying as the preferred approach for controlling undesirable vegetation. *Id.* The ROD, however, did not adopt herbicides and aerial spraying as the preferred approach. Rather, as noted above, herbicides and aerial spraying were recognized merely as among the options available to BLM district and resource area offices.

Secondly, appellants contend that the vegetation management program adopted by the State Director determines that the herbicides approved for use by the ROD and aerial spraying are acceptable and reject biological alternatives for controlling vegetation, in effect precluding further consideration. *Id.* We recognize that, by virtue of the FEIS, BLM, when it comes to designing a site-specific plan and preparing an associated EA, may elect not to reassess the acceptability of using the approved herbicides or engaging in aerial spraying or its decision to reject biological

alternatives in the absence of evidence that there has been a significant change regarding such matters since preparation of the FEIS, but may instead tier its site-specific EA to the FEIS. See In re Humpy Mountain Timber Sale, 88 IBLA 7, 8 (1985); Preserve Our Scenic Environment, 47 IBLA 276, 279 (1980). Thus, BLM might simply rely on its programmatic EIS and not reassess the matters addressed in the EIS in the context of the specific proposal. However, as the physical nature of an area will be an important factor in determining the environmental effects of herbicides, its decision not to do so might be regarded as a failure to analyze these important questions. The Board is not precluded from reconsidering the acceptability of using herbicides and engaging in aerial spraying and the decision to reject biological alternatives in deciding an appeal from a decision to proceed with a site-specific plan. However, we are constrained to consider these matters only in the context of an appeal from a party adversely affected by a BLM decision, which is not the situation here.

Appellants contend that the adoption of the vegetation management program approved by the State Director would foreclose reevaluation of the BLM land management plans which established the need for vegetation control. We cannot accept this assertion. Land management plans are developed during BLM's land use planning process and, while they set forth general management objectives which may generate BLM's conclusions regarding issues such as the need for vegetation control, they may be amended at any time. See 43 CFR 1610.5-5 and 1610.5-6. It is inaccurate to say that BLM is foreclosed from reevaluating such plans. In any case, for our purposes, such plans were not the subject of the State Director's November 1988 ROD and, thus, are not properly the subject of an appeal from the ROD. More importantly, the Board does not have the authority to review BLM land management plans in any event, whether now or at some later point in time. The Wilderness Society, 109 IBLA 175, 178 (1989). This is not to say, however, that the Board will not review a land management plan in the context of its application to a specific action by BLM. It is equally well established that such review is appropriate. California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 142 (1989); Harold E. Carrasco, 90 IBLA 39, 41 (1985); Wilderness Society, 90 IBLA 221, 224 (1986).

SRCC is concerned that BLM has committed itself to using herbicides to control vegetation when it undertakes specific weed eradication projects. It is by no means a foregone conclusion that BLM will use herbicides in any particular project. Rather, that determination will be made after assessing local circumstances. Thus, we cannot say that BLM has irreversibly and ir retrievably committed itself to herbicide spraying such that it is crucial that the adequacy of the FEIS be assessed at this point. Compare California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). In this respect, BLM, much as it does in cases of staged oil and gas or geothermal leasing with respect to drilling or other development activity, has properly reserved to itself the ability to preclude any and all herbicide spraying. See Southern Utah Wilderness Alliance, 108 IBLA 318, 326 (1989), and cases cited therein. When those EA's are prepared, the adequacy of the entire environmental review process leading up to actual authorizations of herbicide spraying, if BLM decides to employ such method of vegetation control, can then be properly assessed. See Dolores M. Lisman, 67 IBLA 72 (1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

David L. Hughes
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge