

Editor's note: Reconsideration denied by Order dated Feb. 4, 1993

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 91-448

Decided March 11, 1992

Appeal from a decision of the Area Manager, Grand Resource Area, Utah, Bureau of Land Management, approving a notice of intent to conduct oil and gas geophysical exploration based on the finding that no significant environmental impacts would result from the exploration. U-922, EA UT-68-91-063.

Set aside and remanded.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Generally

A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

APPEARANCES: Scott Groene, Esq., Southern Utah Wilderness Alliance, Moab, Utah, for appellant; Robert E. Lowe, Vice President, Western Geophysical Company, Houston, Texas, for Western Geophysical Company; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Southern Utah Wilderness Alliance (SUWA) has appealed from a June 6, 1991, decision of the Area Manager, Grand Resource Area, Utah, Bureau of Land Management (BLM), approving proposed geophysical oil and gas exploration by Western Geophysical Company (Western Geophysical) in Grand County, Utah. The Area Manager reached his decision after reviewing the environmental assessment (EA) prepared for the project (EA UT-68-91-063), and determining that the proposed exploration activities with the mitigation measures outlined in the EA would not have any significant impacts on the human environment and conformed to the approved Resource Management Plan (RMP) for the Grand Resource Area.

In May 1991 Western Geophysical filed a notice of intent (NOI) to conduct geophysical oil and gas exploration activities in secs. 3, 4, 5, 7, 8, 9, 10, 11, 16, and 21, T. 26 S., R. 19 E., secs. 29, 32, 33, and 34, T. 25 S., R. 19 E., and sec. 12, T. 26 S., R. 18 E., Salt Lake Meridian, Grand County, Utah. This area, known as Big Flat, lies north and west of the Knoll Prospect and west of Moab, Utah. Western Geophysical's proposal envisioned seismograph operations utilizing vibroseis along four lines totaling approximately 15 miles.

Western Geophysical described the project as consisting of four primary phases:

- 1) A survey crew will survey the line. Temporary, wire pin-flags will be placed in the ground at 82.5 feet intervals. Access trails, roads, gates and the like will be temporarily marked with flagging. Minimal brushing with chain saws or hand tools of tree limbs will take place where necessary.
- 2) Geophones and cables will be temporarily lain on the ground.
- 3) Four vibrator trucks will proceed down line. These trucks will center their vibratory sweeps at 330 feet intervals, with each truck lowering its 3 ft. x 7 ft. pad, in unison, 12 times per interval. Upon lowering and raising their pads, the trucks advance a few feet to lower the pads again, thus lowering and advancing 12 times per 330 feet interval. In the event that an area which cannot be traversed or shook upon is encountered, vibratory intervals will be "stacked" to compensate. Vibrator trucks will be kept as close to line as possible, but if obstacles are present it may become necessary to curve or weave a short distance around them.
- 4) Pin-flags, geophones, flagging, and cables will be removed from the ground.

Western Geophysical planned to begin operations in May 1991 and estimated that the activities would take about 10 days to complete.

On May 13, 1991, citing 43 CFR 3151, BLM authorized Western Geophysical to proceed with the survey and cultural activities associated with the project.

On May 22, 1991, BLM received a letter from SUWA expressing SUWA's general concern about Western Geophysical's planned exploration. SUWA stated that the exploration activities would occur in an area included in Utah Congressman Wayne Owen's wilderness proposal and suggested that the effects of the activities on the environment could be significant. SUWA requested that BLM allow a 30-day comment period on the EA prepared for the project and urged that BLM give serious consideration to the no-action alternative, other alternatives, and the cumulative impacts of all oil and gas ventures in the area.

On June 6, 1991, in order to satisfy the procedural requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1988), BLM prepared an EA for Western Geophysical's contemplated geophysical exploration activities (EA UT-68-91-063). BLM determined that the proposed action, the purpose of which was to gather new seismic information in and around a known hydrocarbon area, conformed to the July 1985 RMP for the Grand Resource Area and had been analyzed earlier in the December 1983 Grand Resource Area Environmental Impact Statement (EIS) and in EA UT-060-89-025. BLM described the proposed action and two alternatives: the conventional drill and shot hole method and the helicopter and portable drill method, and examined their effects on the environment. The EA did not mention the no-action alternative.

Before addressing the specific environmental impacts of the proposed action and alternatives, BLM indicated that the area embraced by the contemplated exploration had been designated in the RMP as category one for oil and gas, i.e., open to oil and gas activities with no special stipulations, and designated as open for off-road vehicle use. BLM also noted that the area was crisscrossed by jeep trails, 4-wheel drive ways, and old seismic lines, and contained no sensitive areas identified as requiring protection. The EA then examined, with varying degrees of comprehensiveness, the environmental effects of the proposed action and alternatives on vegetation and soils, recreation, wildlife (the Desert Bighorn Sheep), and cultural resources, and addressed cumulative impacts. BLM also analyzed mitigation measures and residual impacts. BLM did not circulate the EA for public comment.

In his June 6, 1991, decision the Grand Resource Area Manager approved Western Geophysical's proposed geophysical exploration activities subject to all of the mitigation measures identified for the proposed action in the EA, noting that the mitigation measures would be appended as Conditions of Approval to Western Geophysical's NOI. He based his decision on his review

of the EA which he determined had satisfactorily considered the potential impacts of the proposed action and alternatives. He reasoned:

Although alternatives have been identified, the proposed action is consistent with the existing Grand Resource Area Management Plan. This area has been designated as open to off-road vehicle use, the proposed action would not exceed the allowable [Visual Resource Management] contrast change provisions, and the proponent has agreed to avoid surveyed cultural sites. Western [Geophysical] would also be required to "stack" their vibroseis to stay at a minimum quarter mile away from the canyon rims to reduce possible impacts to Big Horn Sheep. The potential loss of blackbrush, noted as an impact to existing vegetation, may have a beneficial impact to the plant community. Reducing the density of a climax species and allowing for reestablishment of an earlier successional plant community may provide for greater species diversity and available herbaceous forage.

The Area Manager found that the proposed action with the designated mitigation measures would not have any significant impacts on the human environment and that preparation of an EIS for the project was not required. He then stated his decision to implement the project subject to the identified mitigation measures. This appeal followed. 1/

On appeal SUWA challenges the sufficiency of the EA and argues that BLM's approval of the seismic geophysical exploration proposal violates Federal law. Specifically, SUWA contends that BLM failed to consider the no-action alternative in violation of both NEPA and the multiple use mandates of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701, 1702 (1988); BLM approved the project without meeting the FLPMA inventory and planning requirements found at 43 U.S.C. §§ 1711, 1712 (1988); BLM inadequately considered the cumulative impacts of the action in violation of NEPA and its implementing regulations; and BLM did not use high-quality scientific information in the EA as required by NEPA. SUWA further asserts that, contrary to the mandates of 43 CFR 3150, BLM

1/ By order dated Oct. 18, 1991, the Board denied Western Geophysical's petition for expedited review. On Nov. 27, 1991, the Director, Office of Hearings and Appeals, assumed limited jurisdiction over the appeal, pursuant to 43 CFR 4.5(b), to act on requests that the Area Manager's decision be placed in full force and effect pursuant to 43 CFR 4.21(a) by lifting the automatic stay normally imposed by that regulation. By order dated Dec. 24, 1991, the Director placed the decision into full force and effect, returned jurisdiction over the appeal to the Board, and directed the Board to expedite consideration of the appeal. This case became ripe for review on Feb. 7, 1992, when BLM filed the final document necessary to complete the record.

authorized Western Geophysical to perform noncasual geophysical activities prior to approval of the NOI, and that BLM's refusal to provide a public comment period for the proposal violated NEPA and its implementing regulations. SUWA has also submitted a July 22, 1991, letter from the Utah Department of Natural Resources, Division of Wildlife Resources (DWR), to BLM in which DWR criticizes the EA prepared for this project for the sparse analysis of the action's impacts on the diverse wildlife inhabiting the project area, including ground nesting raptors and other birds, and BLM's failure to seek DWR's comments on the EA before approving the project.

[1] This Board has held numerous times that a determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant impacts will occur is reasonable in light of the environmental analysis. See, e.g., Southern Utah Wilderness Alliance, 122 IBLA 6, 12 (1991); G. Jon & Katherine M. Roush, 112 IBLA 293, 297 (1990); Hoosier Environmental Council, 109 IBLA 160, 172-73 (1989); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1984). A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Hoosier Environmental Council, *supra* at 173; United States v. Husman, 81 IBLA 271, 273-74 (1984). The ultimate burden of proof is on the challenging party. G. Jon & Katherine M. Roush, *supra* at 298; In re Blackeye Timber Sale, 98 IBLA 108, 110 (1987). Mere differences of opinion provide no basis for reversal. *Id.*; Glacier-Two Medicine Alliance, *supra* at 144. See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975). SUWA has alleged that BLM's approval of Western Geophysical's proposal both violates the procedural requirements of NEPA and is based on an inadequate EA, which fails to consider relevant environmental issues and concerns.

SUWA first argues that BLM's failure to consider the no-action alternative fatally flaws the decisionmaking process. An EA must include a brief discussion of alternatives as mandated by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1988). See 40 CFR 1508.9(b); 516 DM 3.4(A). See also Oregon Natural Resources Council, 115 IBLA 179, 186 (1990); In re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988). Section 102(2)(E) of NEPA requires, independent of the necessity to file a formal EIS, that every Federal agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1988). The requirement that appropriate alternatives be studied applies to the preparation of an EA even if no EIS is found to be warranted. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); State of Wyoming Game & Fish Commission, 91 IBLA 364, 369 (1986). Among the alternatives which must

be considered pursuant to this mandate is the no-action alternative. Bob Marshall Alliance v. Hodel, 852 F.2d at 1228.

The EA prepared for Western Geophysical's proposed geophysical exploration contains no mention of the no-action alternative. In a memorandum dated August 21, 1991, from the Area Manager to the Moab District Manager, BLM, prepared in response to SUWA's appeal, the Area Manager attempts to justify this failure:

BLM is required to consider a range of reasonable alternatives that may serve to reduce possible impacts. In this situation what possible purpose would the "No Action" alternative serve? If there is no action, there is no impact resulting from the proposal, no further discussion is needed, but is this a reasonable alternative? It serves no purpose in terms of assessment. The manager always reserves the digression [sic] to disapprove the proposal based on the level of impacts that may have an affect [sic] on the environment as discussed in the EA. This is referenced in the rationale for his decision. Therefore, the "No Action" alternative is always a consideration. Merely putting it in the text serves no purpose in this situation. [Emphasis in original.]

(Memorandum at unnumbered page 2, #4). Under this reasoning, BLM would never have to explicitly discuss the no-action alternative in an EA. We find this rationale untenable.

This Board has noted that NEPA is essentially procedural, rather than substantive. See, e.g., Hoosier Environmental Council, *supra* at 173; State of Wyoming Game & Fish Commission, *supra* at 367. Nevertheless, because the purpose of the statute is to "insure a fully informed and well-considered decision," Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978), the procedural nature of NEPA

does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for the decision, adequately explores the reasonably foreseeable impacts, and fairly analyzes alternatives to the proposed activity. Indeed, the opposite is true. Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA.

State of Wyoming Game & Fish Commission, *supra*.

"Informed and meaningful consideration of alternatives - including the no action alternative - is * * * an integral part" of NEPA. Bob Marshall Alliance v. Hodel, 852 F.2d at 1228. BLM's explanation for the lack of discussion of the no-action alternative in the EA reflects a rather cavalier attitude toward its statutory obligation to study available alternatives, including the no-action alternative, and we find that BLM's failure to

address the no-action alternative in its EA requires us to set aside the decision. See Powder River Basin Resource Council, *supra* at 56. 2/

SUWA argues that the EA is inadequate because BLM failed to consider the cumulative impacts of this proposal combined with past actions in the area including the trails created by past off-road vehicle use and with reasonably foreseeable future actions such as recreationists' use of the paths created by the exploration activities. BLM is required to consider the potential cumulative impacts of a planned action together with other past, present, and reasonably foreseeable future actions. See 40 CFR 1508.7 and 1508.27(b)(7); G. Jon & Katherine M. Roush, *supra* at 305, and cases cited therein.

Although the EA prepared for Western Geophysical's project contains only a brief discussion of cumulative impacts, BLM fully explored the cumulative impacts of 150 miles of geophysical lines per year in its December 1988 Grand Resource Area RMP Oil & Gas Supplemental EA (UT-060-89-025), to which Western Geophysical's EA is tiered. BLM need not repeat that cumulative impact analysis in the project EA before us. See In re Grassy Overlook Timber Sale, 115 IBLA 359, 364 (1990); Oregon Natural Resources Council, *supra*. SUWA has failed to demonstrate that BLM did not consider cumulative impacts when assessing the environmental impact of the planned action.

We find, however, that BLM failed to adequately address the possible effects of the proposed activity on wildlife in the project area. The discussion in the EA concentrated solely on the project's impacts on Desert

2/ SUWA also contends that the EA and approval decision contravene FLPMA's multiple use, inventory, and planning provisions because BLM improperly declined to consider alternative multiple uses of the land. Alternative uses of the land were considered in the July 1985 Grand Resource Area RMP and need not be considered anew each time BLM decides to approve a project. Southern Utah Wilderness Alliance, 122 IBLA 165, 172-73 (1992). SUWA's challenges essentially focus on BLM's purported failure to designate areas of critical environmental concern and to weigh the values of diminishing resources such as archaeology and wilderness before BLM adopted the Grand Resource Area RMP. The Board has no jurisdiction to consider challenges to BLM's land-use planning decisions. See, e.g., Southern Utah Wilderness Alliance, 122 IBLA at 173 n.8; Marvin Hutchings v. BLM, 116 IBLA 55, 61 (1990). Such challenges must be pursued through a separate inter-Departmental process. See 43 CFR 1610.5-2. The Board has authority to consider an appellant's challenge to the manner in which an RMP has been implemented. SUWA has not established that the proposed seismic activity violates the RMP. We also note that the project area was not formally designated by BLM as part of a wilderness study area (WSA), pursuant to section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988), and thus is not entitled to protection as a WSA. Southern Utah Wilderness Alliance, 122 IBLA at 172 n.7.

Bighorn Sheep and proposed measures to mitigate those impacts. No other species were discussed. In a July 22, 1991, letter to BLM, the Utah DWR noted that diverse species inhabit the project area and criticized BLM's failure to discuss the project's impacts on these species, focusing specifically on the impacts to nesting raptors and suggesting ways to minimize possibly significant impacts to those and other birds. BLM's insufficient consideration of the potential impacts of the project on wildlife must be remedied on remand. 3/

SUWA further contends that BLM's refusal to allow public comment on Western Geophysical's proposal violated NEPA and its implementing regulations. SUWA asserts that in May 1991 the Moab District Manager announced on television that BLM would grant a 15-day public comment period on EA's prepared for any seismic proposals within the Paradox Fold Belt area involved here, and that SUWA, therefore, delayed providing detailed substantive comments on the proposal before the release of the EA. SUWA also specifically requested a 30-day comment period on the EA in a letter received by BLM on May 22, 1991. BLM responds that allowance of a public comment period is discretionary and that it determined that the concerns expressed by SUWA in that letter did not warrant the additional delay that would result from a public comment period.

NEPA and its regulations do not explicitly require a Federal agency to allow public comment on every EA. 4/ See 40 CFR 1501.4(e)(2) (mandating a 30-day public review period for a finding of no significant impact only if the proposed action is one which is, or is closely similar to, an action which usually requires the preparation of an EIS or the nature of the proposed action has no precedent). The statutory scheme, however, clearly envisions active public involvement in the NEPA process. The Council on Environmental Quality (CEQ) regulations require that all Federal agencies, including BLM, "to the fullest extent possible * * * [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 CFR 1500.2(d); see also 40 CFR 1506.6.

3/ SUWA also argues that BLM failed to use high-quality scientific information. BLM admits that it was unable to quantify exactly the losses of vegetation which will be caused by the project due to the nature of the seismic method being used and the varying vegetation community over the area involved. To compensate for the lack of precision, BLM analyzed the "worst case" situation assuming plant mortality whenever a pad was lowered and shaken. See Aug. 21, 1991, memorandum at unnumbered page 3, #7. We find that BLM adequately considered the project's effects on vegetation, and reject SUWA's argument that the lack of exact data tainted BLM's decisionmaking.

4/ At least one U.S. Court of Appeals, however, has held that public participation is required in the preparation of an EA under NEPA. Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

The Departmental Manual section which implements the CEQ regulations provides that the various bureaus will

utilize procedures to insure the fullest practicable provision of timely public information and understanding of their plans and programs with environmental impact including information on the environmental impacts of alternative courses of action. These procedures will include, wherever appropriate, provision for public meetings or hearings in order to obtain the views of interested parties.

516 DM 1.6. The Manual also provides that public notification of an EA must be provided "and, where appropriate, the public involved in the EA process ([40 CFR] 1506.6)." 516 DM 3.3. Because the statutory and regulatory scheme heavily favor public participation, such participation must be the norm, and BLM must have a compelling reason for not providing any public comment period during the EA process. Cf. Southern Utah Wilderness Alliance, 122 IBLA at 14 (failure to allow public comment on second EA not fatal where public comment had been invited on original EA and other earlier environmental documentation).

Under the circumstances presented here, we find that BLM should have provided a public comment period on this proposal. BLM does not deny that it announced that it would allow public comments on proposals such as this one, or that SUWA specifically requested that public comments be accepted on the EA. The short delay created by permitting public input would have been outweighed by the benefits receiving such comments would have had on the quality of the EA. For example, if BLM had considered the concerns raised by SUWA and the Utah DWR before rendering its approval decision, the deficiencies in the EA highlighted in this decision may well have been rectified earlier, possibly obviating the need for this appeal. At the very least, BLM may have prepared a record to support its decision avoiding the need to set its decision aside on appeal. See, e.g. Southern Utah Wilderness Alliance, 122 IBLA at 170-72. On remand, BLM shall provide a public comment period on the revised EA prepared for this project.

Finally, SUWA challenges BLM's May 13, 1991, authorization of initial geophysical line survey prior to the approval of the NOI. SUWA contends that the survey was not casual use as defined by 43 CFR 3150.0-5 because the survey was performed by cross-country travel off established roads and trails. Therefore, according to SUWA, such work could not have been performed lawfully without an approved NOI. BLM responds that its approval did not give Western Geophysical permission to drive off-road, although it notes that the area is open to off-road vehicle use.

SUWA has not provided any evidence to support its assertion that Western Geophysical drove motorized vehicles off established roads and trails. Thus, it has failed to establish that Western Geophysical violated 43 CFR 3150.0-5 by performing noncasual activities without an approved NOI. BLM could allow flagging prior to final approval of the NOI because flagging

constituted casual use, as defined by 43 CFR 3150.0-5(b). See Southern Utah Wilderness Alliance, 122 IBLA at 175. 5/

To the extent not specifically addressed herein, SUWA's arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for further action consistent with this decision.

Gail M. Frazier
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

5/ We note, however, that where BLM explicitly approves such activities, it should ensure that its approval decision clearly indicates the extent of permissible activities.