

SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.

IBLA 91-291

Decided December 2, 1993

Appeal from a decision of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management, affirming a Decision Record and Finding of No Significant Impact approving an application for permit to drill a natural gas well on Lease No. U-43170. U 91-6.

Affirmed in part; set aside and remanded in part.

1. Appeals: Generally--Appeals: Jurisdiction--Application for Permit to Drill--Board of Land Appeals--Oil and Gas Leases: Drilling

When, on appeal from a decision on State Director review affirming a Decision Record and Finding of No Significant Impact approving an application to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

2. Administrative Practice--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--Fish and Wildlife Service--Office of Hearings and Appeals--Rules of Practice: Appeals: Jurisdiction

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); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

3. Application for Permit to Drill--Endangered Species Act of 1973: Generally--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling--Rules of Practice: Evidence

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered

species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during a survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

4. Application for Permit to Drill--Endangered Species Act of 1973: Generally--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling--Rules of Practice: Evidence

Where, in response to a challenge to approval of an application for permit to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

5. Application for Permit to Drill--Endangered Species Act of 1973: Generally--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling--Rules of Practice: Evidence--Wild and Scenic Rivers Act

A determination by BLM that approval of an application for permit to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

6. Application for Permit to Drill--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: Drilling

A determination that approval of an application for permit to drill a natural gas well 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 the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

APPEARANCES: Stephen Koteff, Esq., Salt Lake City, Utah, for appellants; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Southern Utah Wilderness Alliance (SUWA) and the Utah Chapter of the Sierra Club (Utah Chapter) have appealed the April 2, 1991, decision of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management (BLM), affirming a January 31, 1991, Decision Record and Finding of No Significant Impact (DR/FONSI) by the Vernal District Manager approving Samedan Oil Corporation's (Samedan) application for permit to drill (APD) a natural gas well, designated as the Southam Canyon Well No. 1-21, on its Federal lease U-43170, along the north canyon rim of the White River, approximately 30 miles south of Vernal, Utah.

The District Manager based his DR/FONSI on Final Environmental Assessment (EA) 1989-09, dated January 1991, which analyzed five alternatives, designated A through E, including the no-action Alternative (D). 1/

Samedan originally submitted its APD on September 27, 1988, proposing to drill a well in the NE¹/₄ NE¹/₄ sec. 21, T. 10 S., R. 23 E., Salt Lake Meridian. 2/ Because of potential adverse environmental impacts identified by BLM, on October 28, 1988, Samedan submitted a proposal to drill at an

1/ The action alternatives represented different well sites, all located within the White River Recreation and Wildlife Corridor (White River Corridor), an area within the Book Cliffs Resource Area recognized in the Book Cliffs Resource Management Plan (RMP), completed in 1985, as an area of special values (EA at 8-9).

2/ Under the lease stipulations for U-43170, issued effective July 1, 1979, only 40 acres (NE¹/₄ NE¹/₄ sec. 21) of the 480 acres under lease were open to surface occupancy. In 1981, BLM approved an APD for Snyder Oil Company to drill a well in the NE¹/₄ NE¹/₄ sec. 21. Snyder also obtained a right-of-way (U-47488) to the well site. Snyder never drilled a well. Samedan acquired an interest in the lease from Snyder in 1983, and BLM approved assignment of Snyder's right-of-way to Samedan in 1989.

alternative drilling site in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 21. BLM considered these two proposals as Alternatives B and A, respectively, in the EA.

Subsequent to preparation of a draft EA in March 1989, which recommended selection of Alternative A, peregrine falcons were sighted in the vicinity of proposed drilling. Therefore, in accordance with section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2) (1988), BLM initiated formal consultation with the U.S. Fish and Wildlife Service (FWS). See 50 CFR 402.14(a). ^{3/}

On September 11, 1989, FWS issued a biological opinion. See 50 CFR 402.14(h). In the opinion, FWS assumed that Alternative A was the recommended action, and stated that "the potential impact of the proposed project on peregrine falcons in the vicinity is the noise and physical disturbance associated with site development and drill rig operations" which may disturb nesting raptors (Biological Op. at 3). FWS nevertheless issued a "no-jeopardy" biological opinion based upon the fulfillment of three mitigation and conservation recommendations:

1. Construction of access road, drill pad, emergency reserve pits, and drill rig operation will not be permitted during the period from February 1 to August 31.
2. Drill site facilities shall be at least 200 yards from nearest cliff face.
3. Access road shall be constructed as far from the cliff face as possible.

(Biological Op. at 5).

On September 27, 1989, after receipt of a copy of the biological opinion, Samedan proposed a third drilling alternative (Alternative E), also located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 21. The reason for submitting this proposal was that Alternative A had proposed a drill site within 200 yards of the cliff face. ^{4/}

In a memorandum to the Vernal District Manager, dated January 12, 1990, FWS stated that it had learned in a telephone conversation with BLM on January 8, 1990, "that the access road would be as close as 20 feet to

^{3/} The American peregrine falcon was placed on the endangered species list on June 2, 1970, and currently remains on the list. See 50 CFR 17.11. Section 7(a)(2), 16 U.S.C. § 1536(a)(2) (1988), specifically provides for consultations with the Secretary to insure that a Federal agency shall not authorize, fund, or carry out any action "likely to jeopardize the continued existence of any endangered species."

^{4/} The EA also addressed two other alternatives, directional drilling to lease U-43170 from the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15 (Alternative C) and the no action alternative (Alternative D).

the cliff face." FWS stated that construction and use of such an access road would "adversely affect the likelihood of eyrie establishment." ^{5/} Therefore, FWS amended the biological opinion by deleting the No. 3 recommendation that "the access road shall be constructed as far from the cliff face as possible," and substituted the recommendation that the access road "shall be constructed at least 200 yards from the nearest cliff face."

On January 31, 1991, the Vernal District Manager issued the DR/FONSI approving Alternative B with eight protective stipulations. Those stipulations provide that the access road be constructed "as far from the cliff face as feasible" and require the location of the road to be "staked by the company and approved by the authorized officer prior to any surface disturbance" (DR/FONSI at 2). They also include, *inter alia*, a prohibition of vehicular access to the well site between February 1 and August 31 of each year, except that the authorized officer may, after consultation with FWS, allow vehicle access to the site after June 1 during a particular year, if certain conditions in the stipulations are met. *Id.*

In support of approval of Alternative B, the District Manager stated:

Alternative B was selected over Alternatives A and E because this site will require the least amount of road construction and subsequent soil disturbance and will minimize the potential adverse affects on sedimentation, wildlife habitat, and the recreational and visual values. The protective stipulations included in this decision are consistent with the recommendations of the U.S. Fish and Wildlife Service and will assure that the needs of the endangered peregrine falcons are met.

(DR/FONSI at 3).

On February 15, 1991, appellants filed a timely request for State Director Review (SDR) of the DR/FONSI. In support of their request for review, appellants argued that the protective stipulations set forth in the DR/FONSI did not adequately protect the peregrine falcon and were inconsistent with FWS recommendations; that BLM failed to fulfill its requirements under the National Historic Preservation Act; that BLM failed to fulfill its commitment to recreational users pursuant to its multiple-use mandate; that the EA failed to address potential impacts on certain plant and animal species enumerated by appellants, including the bald eagle; and that BLM failed to consider the impact of the proposed action on wilderness suitability.

^{5/} The memorandum stated:

"Peregrine falcons are especially disturbed by the sudden appearance and noise of a vehicle or person from above an eyrie. Continuing disturbance of traffic on the well service road could cause the cliff face to be permanently unsuitable as an eyrie site. While siting the road within 20 or even 50 feet of the cliff face is not precluded by the language of recommendation 3, it does not minimize the adverse impact or contribute to the recovery of the peregrine falcon." (FWS Memorandum, Jan. 12, 1990).

In conclusion, they requested that the State Director reverse the DR/FONSI and require the preparation of an environmental impact statement (EIS) because they had identified numerous significant impacts. ^{6/}

The Deputy State Director's April 1991 decision affirmed the DR/FONSI, noting: "On March 8, 1991, FWS provided written correspondence to the Vernal District Manager stating that they concur with the stipulations in the DR/FONSI * * *." ^{7/} The decision stated that the EA addressed impacts to recreation, wildlife, and wild and scenic values associated with the White River Corridor, as well as special status and threatened and endangered plants and animals. Regarding wilderness suitability, the Deputy State Director held that, under existing law, BLM was required only to protect lands in designated wilderness areas or wilderness study areas (WSA's), and the lands affected by the proposed action did not fall into either of those categories. Finding that "SUWA did not provide any reasons to support their statements that unforeseen cumulative impacts from the proposal would require preparation of an EIS, or that the fact they are protesting the action renders the decision highly controversial," the State Director dismissed those two arguments pertaining to 40 CFR 1508.27. See note 6, supra. ^{8/}

^{6/} Section 102(C) of NEPA, 42 U.S.C § 4332(C) (1988), provides that an EIS will be required if a proposed action constitutes a major Federal action "significantly affecting the quality of the human environment." The term "significantly," as used in NEPA, "requires considerations of both context and intensity." 40 CFR 1508.27(a). "Intensity" is defined as "severity of impact." 40 CFR 1508.27(b). Ten factors are to be considered when evaluating intensity. 40 CFR 1508.27(b)(1)-(b)(10). See Glacier-Two Medicine Alliance, 88 IBLA 139, 140-147 (1985). Appellants argued before the State Director that BLM did not properly consider a number of those factors, including significant unforeseen cumulative impacts involving a taking and a loss of wild and scenic river status and potential wilderness designation (40 CFR 1508.27(b)(7)) and that appellants' objections rendered the decision highly controversial (40 CFR 1508.27(b)(4)).

^{7/} The Mar. 8, 1991, letter from FWS to the Vernal District Manager stated, in pertinent part:

"We have reviewed the subject decision document concerning the issuance of the proposed gas drilling permit. It is noted the stipulations submitted as 'Conservation Recommendations' by the Fish and Wildlife Service (Service) * * * were not included as written. However, the Service concurs with the eight stipulations included in the record of decision. The Service believes they are appropriate measures that will meet the needs of protecting the peregrine falcon * * * and its habitat in the vicinity of the proposed drilling site in the White River Canyon. Therefore, the Service has no comments or objections to offer in regard to these stipulations as written in the decision document of January 31, 1991."

^{8/} 40 CFR 1508.27(b)(4) and 40 CFR 1508.27(b)(7) require, when determining the severity of impact, that consideration be given to "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," and to "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts," respectively.

On appeal to this Board, appellants argue that BLM failed to follow required procedures mandated by the ESA to protect peregrine falcons, bald eagles, and threatened or endangered plants. Appellants contend that BLM's consideration of the project ignores possible effects it might have on the White River's eligibility for inclusion as a wild and scenic river, in contravention of the National Wild and Scenic Rivers Act (WSRA) and Federal guidelines promulgated pursuant to that Act. Furthermore, appellants contend that the area must be maintained in a manner that will preserve its suitability for inclusion within the National Wilderness System.

Appellants argue that BLM has not complied with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C § 4332(C) (1988), in that "the EA does not adequately consider all feasible alternatives" (Statement of Reasons (SOR) at 13). Furthermore, appellants maintain that, under NEPA, the potential cumulative impacts to the peregrine falcon, bald eagles, threatened and endangered plants, bighorn sheep reintroduction plans, wild and scenic river status, and recreation potential, taken as a whole, justify preparation of an EIS. Finally, appellants argue, the mitigation measures set forth in the DR/FONSI and the EA are inadequate.

In its Answer, BLM argues that many of the issues raised on appeal to the Board were not advanced before the State Director, and, thus, are not properly before the Board on appeal. Specifically, it charges that appellants raised no questions pertaining to the WSRA and NEPA.

Even if the Board were to consider arguments relating to the WSRA, BLM contends they are without merit. First, BLM argues, appellants are attempting to challenge a land-planning decision not to include the White River as a proposed wild and scenic river in the context of the present appeal, which did not involve such a consideration. Second, BLM argues, any implication that BLM must manage the White River as if it were nominated for wild and scenic designation is misplaced.

With regard to NEPA compliance issues, BLM asserts that only the question of wilderness designation for the White River Corridor was raised below. Other NEPA compliance issues, even if they had been timely addressed, BLM asserts, would not merit reversal. Complaints regarding lack of consideration of alternatives, insufficient mitigation, and the necessity for an EIS only exhibit differences of opinion, BLM claims. Also, BLM points out that no current plan exists to reintroduce bighorn sheep into the area; therefore, concerns over impacts on such a plan are misplaced.

BLM contends that appellants' allegations that it has violated the ESA are unfounded, as a section 7 consultation was held with FWS and a biological opinion was subsequently issued. BLM asserts that appellants' assertions regarding the impact of the proposed action on the bald eagle and appellants' allegation that BLM failed adequately to determine the presence of threatened or endangered plants are arguments that were not raised before the State Director and should not be entertained by the Board. Nevertheless, BLM contends that the biological opinion considered the impacts on all threatened and endangered species, and found none.

BLM argues that appellants have no basis for assuming that the White River Corridor will be designated a wilderness area or that the White River will be designated a wild and scenic river, and BLM has no duty to manage those area as such. Finally, BLM argues that, under the circumstances, it has no duty to prepare an EIS.

[1] We first address the question whether appellants may raise issues on appeal that were not presented during SDR. In an analogous situation, the Board considered a case where a person filed a protest with BLM challenging the issuance of a simultaneous oil and gas lease, and BLM dismissed the protest following consideration of the merits of the protest. On appeal, the appellant sought to raise additional issues which were not included in the protest and not addressed by BLM in its decision. We held that the Board need not adjudicate issues raised for the first time on appeal, but may confine its review to matters addressed in the decision from which the appeal is taken. Henry A. Alker, 62 IBLA 211 (1982). In addition, we have held that where a protest is subject to dismissal because it depends on conclusory allegations of error in the proposed action, the protestant cannot, in a subsequent appeal, cure such a defect by providing reasons for its allegations. Kenneth W. Bosley, 99 IBLA 327, 333 (1987). ^{9/}

The rationale for the approach taken in these cases is that generally it is best to allow the initial decisionmaker to confront objections to proposed actions and to limit the Board's review to appeals of decisions addressing those objections because such a process follows the logical framework for decisionmaking within the Department, as it relates to BLM actions. See California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977).

This case involves a process different from the standard protest/appeal procedure. Here, an intermediate appeal is available to the State Director. Nevertheless, the rationale for the limitation on review is the same. Accordingly, the Board may limit its review of an SDR decision to allegations of error in the disposition of the issues presented during SDR.

Appellants' SDR statement of reasons, the Deputy State Director's decision, and appellants' SOR do not support BLM's assertion that appellants failed to raise issues involving BLM's compliance with NEPA and the WSRA in the SDR review, except for appellants' argument concerning

^{9/} This is not to imply that on appeal a party may not elaborate on those reasons it has previously raised in support of its objections. Rather, where the objection is not supported by reasons before BLM, the reasons may not be supplied on appeal. In addition, where the allegations contained in a protest have been fully and adequately addressed by BLM in its decision, the Board has summarily affirmed such a decision when the statement of reasons on appeal fails to point out any error in the decision, but, instead, merely reiterates the arguments contained in the protest. In re Mill Creek Salvage Timber Sale, 121 IBLA 360, 361 (1991), and cases cited.

the environmental impacts of approval of this action and related actions, foreseeable and unforeseeable, upon potential reintroduction of bighorn sheep to the White River area. That issue was not presented during SDR, and we decline to consider it.

Even if we were to review it, we would agree with BLM that because no plan currently exists to do so, BLM had no obligation to consider the impact of the proposed well on such potential reintroduction.

[2] We will consider the other arguments raised by appellants. They charge that BLM violated the ESA by failing to adopt adequate measures to mitigate the impact of the drilling operation on the peregrine falcons and by failing to include any analysis of possible effects on wintering bald eagles. They also allege that BLM's survey to determine the presence of threatened or endangered plants is completely without documentation.

Subsection 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (1988), provides in pertinent part:

Each Federal agency shall * * * insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

With respect to protection of the peregrine falcon, appellants argue that BLM should have adhered to the FWS recommendations prohibiting road construction within 200 yards of a cliff face. Appellants contend that the stipulations in the DR/FONSI limiting vehicular access from February 1 through August 31 of each year the well is in operation is inadequate to protect the peregrine falcon nesting habitat. Appellants also assert that emergency access to the well has not been delineated, and the stipulations do not protect the habitat from unauthorized access.

It is clear in this case that the access road stipulation included with the DR/FONSI did not track the recommendations regarding protection of the peregrine falcon included in the FWS revised biological opinion. Nevertheless, following receipt of appellants' request for SDR, BLM secured FWS' approval of its stipulations.

We have recently held, based on a January 8, 1993, memorandum from the Secretary of the Interior to the Assistant Secretary, 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," that the Office of Hearings and Appeals does not have authority to review the merits of biological opinions issued by

FWS under section 7 of ESA. Lundgren v. Bureau of Land Management, 126 IBLA 238, 248 (1993); Edward R. Woodside, 125 IBLA 317, 322-24 (1993).

In this case, appellants attack both BLM's stipulations as being inconsistent with the biological opinion and the merits of the biological opinion itself. Clearly, under the Secretary's memorandum, as interpreted in Lundgren and Woodside, the Board has no jurisdiction to set aside or "second-guess" FWS' biological opinion determinations. However, as we have held in another context, we will review an appellant's objections as they relate to compliance with policy determinations. Thus, in A.C.O.T.S., 60 IBLA 1, 2 (1981), the Board ruled that it had no jurisdiction to entertain appeals concerning matters covered in a Secretarial decision to allow the use of herbicidal spraying for vegetative management purposes, except in the limited circumstance where an appellant's objections relate to BLM's compliance with that decision. Accordingly, under such an analysis, appellant's arguments concerning consistency with the biological opinion would normally be subject to review. In this case, they are not.

The March 8, 1991, FWS letter constitutes a finding by FWS that the stipulations are "appropriate measures that will meet the needs of protecting the peregrine falcon (Falco peregrinus) and its habitat in the vicinity of the proposed drilling site in the White River Canyon." In making such a finding, FWS has, in essence, amended its biological opinion to endorse those stipulations. To the extent of that finding, we will not review those stipulations.

[3] Appellants allege that the EA does not address potential impacts upon the bald eagle, even though the Final EIS on the Book Cliffs RMP (RMP EIS) acknowledges that they are "fairly common along the Green and White Rivers during winter months and into early spring" (SOR at 8; RMP EIS at 117).

An appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species. National Wildlife Federation, 126 IBLA 48, 66 (1993); In Re Bar First Go Round Salvage Sale, 121 IBLA 347 (1991); Upper Mohawk Community Council, 104 IBLA 382 (1988).

Appellants allege in their SOR:

No explanation is given for overlooking the bald eagle, except in a response to public comment that raptors had not been addressed in the draft EA. BLM explained that "no active eyries or nests were located during searches in the vicinity of the proposed well locations" EA at 34. The only searches conducted, however, according to the EA, were done while looking for peregrine falcon nests in the late spring and summer of 1989 and 1990. EA at 13. No evidence is offered that searches for bald eagles were conducted in the winter and early spring when they are known to inhabit the area.

(SOR at 8).

In response, BLM argues that the FWS' biological opinion "considered the potential impacts of the proposed action on all threatened and endangered species, including the Bald Eagle, and concluded that there would be none if appropriate mitigating actions were taken" (Answer at 3).

A reading of BLM's request for consultation and the biological opinion leave little doubt that BLM's interpretation regarding the expansive nature of the biological opinion is incorrect.

BLM's May 1989 letter to FWS requesting a section 7 consultation states, in pertinent part:

A draft environmental assessment of the proposed Samedan 1-21 well was prepared by the Vernal District and published in March, 1989 * * *. Ichthyofauna were addressed in the document and a "no affect" determination was made for the Colorado squawfish * * *. The affected environment for threatened and endangered avian and terrestrial fauna was not addressed, as they were not believed to inhabit the area.

Subsequently, two peregrine falcon * * * sightings have occurred in the vicinity of the proposed well location.

The letter then addresses in detail the peregrine falcon sightings.

Other than a concurrence with BLM's determination that the Colorado squawfish is not affected by the action, the biological opinion is limited by its own terms to the impacts of the proposal to the peregrine falcon. The opinion states:

This is in response to your letter of May 23, 1989, initiating formal consultation according to Section 7 of the Endangered Species Act of 1983, as amended. * * * As noted in your recent letter a "no effect" determination was made for the Colorado squawfish * * *. The Fish and Wildlife Service (Service) concurs and no further consultation is required for this species. However, due to recent and new information, the Service concurs with your determination of "may effect" for the peregrine falcon * * * and this biological opinion addresses impacts of the proposal to this species. [Emphasis added.]

(Biological Op. at 1).

There is no evidence in the record regarding raptor surveys in the area of the proposed drilling, other than the peregrine falcon searches, which appellants allege, and BLM does not dispute, took place in the late spring and summer of 1989 and 1990. Likewise, BLM does not challenge appellants' claim that bald eagles are known to inhabit the area in winter and early spring.

The BLM Manual requires BLM to "[s]creen all proposed actions to determine if * * * T/E [threatened or endangered] species or their habitat may

be affected" (BLM Manual, Part 6840.06 A.2.a.). In screening its activities, BLM must ensure that all actions are carried out in a manner which avoids any appreciable reduction in the likelihood of recovery of affected threatened and endangered species, and either meets or does not interfere with recovery objectives (BLM Manual, Part 6840.11 B.).

The record does not convince us that BLM undertook appropriate screening procedures to determine whether the bald eagle will be affected by the proposed action. While there may, in fact, be no impact upon the bald eagle, the RMP EIS raises questions concerning whether bald eagles may be present in the area affected by Samedan's APD, questions that were not addressed in the EA. Whether bald eagles may be present in the affected environment becomes more critical given the mitigation stipulations in the DR/FONSI, which allow vehicular access to the site annually between August 31 and February 1, which, according to the RMP, encompasses a time during which bald eagles may be found in the White River area. Accordingly, we set aside the Deputy State Director's decision in this regard and remand the case to BLM for consideration of this question.

[4] Appellants also challenge the finding of the Deputy State Director at page 3 of his decision that "no special status plant species, including threatened and endangered plants were found during a survey of the proposed project area."

Appellant states that "[t]he BLM itself has recognized the existence of fourteen threatened or sensitive plants in the Book Cliffs Resource Area," and that "the White River corridor is listed [in the RMP EIS] as threatened, endangered, or sensitive plant habitat. RMP EIS AT 108-09" (SOR at 8). 10/

In support of their position, appellants submit the affidavit by Leila Shultz, a resident of Logan, Utah, who holds a Ph.D. in botany, is the curator of the Intermountain Herbarium, and is the author of the Atlas of Vascular Plants of Utah (SOR, Attachment D). She states that she has been a plant taxonomist in Utah since 1973, and that her peers recognize her as an authority on the classification of plants of the Intermountain Region. She states that she has worked as a consultant for BLM, FWS, and the Forest Service, and she identifies the area around the proposed well sites as habitat for one threatened plant species and five sensitive plant species listed on page 108 of the RMP EIS, and one sensitive species not listed therein.

10/ Sensitive species are defined at page 6 of the Glossary to Part 6840 of the BLM Manual as "those species that are: (1) under status review by the FWS/NMFS [National Marine Fisheries Service]; or (2) whose numbers are declining so rapidly that Federal listing may become necessary; or (3) with typically small and widely dispersed populations; or (4) those inhabiting ecological refugia or other specialized or unique habitats." According to the BLM Manual, sensitive species are to be accorded the minimum level of protection provided by the BLM policy for species listed as candidates for threatened and endangered status (BLM Manual, Part 6840.06 B.).

Shultz described the methodology for surveying for plant species:

A critical part of any environmental study is the documentation of field surveys. In studies of plants, the collection of voucher specimens is considered essential to the verification of species presence. In working with the Bureau of Land Management in surveys of rare species, I have always provided voucher specimens, photographs, and field notes as a part of the study. Provision of these documents is standard operating procedure for field botanists working on Environmental assessments or impact statements and in my experience, has always been part of any agency contract.

Her review of the EA revealed that:

Reference to plant species is restricted to three lines on page 5: "Since there are no known endangered, threatened or sensitive plants, or known critical habitat in the area, there would be no known adverse impacts from the four wells." [11/] Appendices to the study contain no species lists or description of the vegetation of the area. There is no mention of when a field study was conducted, by whom, or where field notes or voucher collections might be found. [12/] Given the sensitivity of the habitat, I would have expected this kind of detail in the environmental assessment. At the least, field notes, voucher specimens, and species lists should be provided before final decisions are made regarding the presence or absence of sensitive plant species in the area.

Shultz found that the EA contained no references to previous BLM-funded botanical studies of the area, and she stated that a number of studies have identified the area along the White River as "critical habitat for a number of Uinta Basin endemics."

BLM's response to this argument is not helpful. It alleges that this matter was not raised before the State Director, and that plant species were covered by the biological opinion. Neither of those allegations is borne out by the record. The issue was raised during SDR, and the Deputy State Director responded to it, citing the EA: "The EA states that no

11/ This reference is found under section III of the EA, entitled "Reasonable and Foreseeable Development," in which BLM analyzes the potential cumulative development that might reasonably be expected to occur in the White River Corridor. BLM projected the drilling of four wells north of the White River in that corridor, including the well in question.

12/ Regarding the timing of a survey, appellants allege that in dry areas such as the area of the proposed well site, timing of the survey is especially important because many plants "tend to be ephemeral, appearing only during short periods" (SOR at 9, n.4). Appellants do not, however, identify any particular threatened and endangered or sensitive plants as being ephemeral.

special status plant species, including threatened and endangered (T&E) plants were found during a survey of the proposed project area" (SDR Decision at 3). Also, as pointed out above in the discussion regarding the bald eagle, the biological opinion was limited by its terms to the peregrine falcon.

A review of the case record discloses a hand-written undated and unsigned note in the case file section entitled "Specialist Input." That note states that "[n]o presently known threatened, endangered, or sensitive plants were found during a survey of the access roads and the alternative locations, so this resource would not be affected." There is no indication of when, or by whom, the survey was conducted. Elsewhere in the case record, under the section entitled "Comments on Final [EA]," is a document styled "ISSUES AND RESPONSES FOR THE PROPOSED SAMEDAN 1-21 WELL EA." The following issue and response appears on page 6 of that document:

Issue: It is not stated at what times and what sort of observations, generated the opinion that --"no T&E plants or known critical habitat exists in the project area." T&E plants may exist in the White River Canyon.

Response: A T&E plant clearance was conducted on the proposed well site, access road, and surrounding area in September 1988, when the original onsite was done. No T&E plants were found at that time nor was T&E habitat identified.

Critical habitat is a legal definition [sic] under the ESA. It is identified when species are listed or when a recovery plan is implemented. Critical habitat for T&E plant species has not been designated in the White River Corridor.

That document states that a plant survey of the Alternative B site was conducted in September 1988. It makes no mention of who conducted the September 1988 survey or the methodology employed; nor is there any reference to any survey of the other sites, although the "specialist input" indicates that such a survey took place. Finally, a review of the record fails to reveal any field notes or report supporting that conclusory statement.

In his decision, the Deputy State Director merely references the EA in response to the charge that BLM had failed to address potential impacts to plant species. The EA, however, contains no support for its conclusion on threatened and endangered plant species, nor does the case record contain adequate support for that conclusion. Accordingly, we have no choice but to set aside BLM's decision on this issue and remand the case in order to allow BLM to remedy the situation. See Southern Utah Wilderness Alliance, 122 IBLA 334, 340-41 (1992).

Appellants also argue that the EA violated NEPA in failing to consider any potential adverse impacts APD approval might have on the area's eligibility for designation as a wilderness area within the National Wilderness System. Specifically, appellants argue that approval of the APD allows development within a potential wilderness area, as proposed

by Utah Congressman Wayne Owens, and that under such circumstances, NEPA requires preparation of an EIS. ^{13/}

First, NEPA does not contain directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation was conducted pursuant to relevant provisions of the Federal Land Policy and Management Act of 1976 and the Wilderness Act. The Wilderness Society, 119 IBLA 168 (1991).

Second, as we have stated on a number of occasions, final administrative decisions relating to the designation of lands as WSA's in Utah were completed in the 1980's. Southern Utah Wilderness Alliance, 123 IBLA 13, 18 (1992); Southern Utah Wilderness Alliance, 122 IBLA 17, 21 n.4 (1992). The lands in question were not included in a WSA. Therefore, BLM may administer them for other purposes, including the approval of drilling for oil and gas. Id.

[5] Appellants further argue that since the White River is listed in the 1982 Nationwide Rivers Inventory (NRI) ^{14/} for potential inclusion within the National Wild and Scenic River System (WSRS), pursuant to section 5(d) of the WSRA, 16 U.S.C. § 1276(d) (1988), BLM should have considered the impact of the proposed action on the White River's eligibility for wild and scenic river status. Appellants argue that section 5(d) requires Federal agencies to consider potential national wild, scenic, and recreational river areas in their project planning reports. Appellants argue that BLM did not fulfill its responsibility under the WSRA in the 1985 RMP, because the RMP did not consider designation under the WSRS for the White River or any river within the resource area.

BLM answers that appellants "are attempting to challenge a land use planning decision not to include the White River as a proposed wild and scenic river," and argues that land-use planning decisions are not reviewable by the Board (BLM Answer at 4 (emphasis in original)).

The Board does not have jurisdiction over appeals from the approval or amendment of a resource management plan, but only over actions implementing such a plan. 43 CFR 1610.5-2(b); Hutchings v. Bureau of Land Management, 116 IBLA 55, 61 (1990); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23 (1987); Wilderness Society, 90 IBLA 221, 224-25 (1986). Therefore, to the extent appellants are attacking some alleged failure in

^{13/} The Owens bill, H.R. 1500, was introduced in the House of Representatives on Mar. 16, 1989, and proposes approximately 12,000 acres in the Book Cliffs Resource Area for inclusion within the National Wilderness Preservation System, to be designated as the White River Wilderness.

^{14/} The 1982 NRI lists 68 miles along the White River, describing its values as "[o]ne of few canoeable rivers in remote areas of Utah; habitat for the Colorado River squawfish, boneytail chub, humpback chum; razorback sucker, Colorado River cutthroat, bald and golden eagles and peregrine falcon."

BLM's development of the 1985 RMP, the Board has no jurisdiction. However, we may consider appellants' contention that BLM has not properly considered the impact of approval of the APD on the possible inclusion of the White River in the WSRS.

The EA includes only the conclusory statement that drilling of the proposed well would "detract" from WSRS eligibility due to impacts on the peregrine falcon, but that it would not "eliminate" the White River from eligibility (EA at 19-20). However, a document provided by appellants on appeal supports that conclusion. That document is BLM's "Guidelines for Fulfilling Requirements of the Wild and Scenic Rivers Act," dated August 1988, included as Attachment F to their SOR. Section VIII of that document outlines the river study process, breaking it down into three steps—eligibility, classification, and suitability. "As part of the first step, to be eligible for inclusion, a river must be 'free-flowing' and, with its adjacent land area, must possess one or more 'outstandingly remarkable' values" (Section VIII.A.1.). That document further provides at Section VIII.A.1.a.2.:

For any river segment to be eligible for designation to the National Wild and Scenic Rivers System, one or more of the following values within the river area must be outstandingly remarkable: scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. Only one such value is needed for eligibility and [it] is a subjective judgment. [Emphasis added.]

There is no evidence in the record that the White River is not free flowing, and because only one outstandingly remarkable value is necessary for eligibility, an impact on only one of the listed values (e.g. wildlife) would not be disqualifying. In addition, there is no evidence in the record that drilling the well in question would adversely affect all the White River's outstandingly remarkable values so as to render it ineligible for WSRS consideration. Moreover, the determination of values is a professional judgment on the part of a study team composed of an interdisciplinary RMP team or a separate team composed of professionals from interested local, State, or Federal agencies (Section VIII.A.1.b.).

[6] A determination that approval of an APD 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 the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal. Southern Utah Wilderness Alliance, 122 IBLA 6, 12 (1991), and cases cited therein.

Appellants argue that the EA does not meet the requirements of NEPA, in that it does not adequately consider all feasible alternatives, it does not consider all potential adverse impacts to the area, and the mitigation

measures contained therein are insufficient to reduce potential environmental impacts to insignificance. Appellants argue that the intensity of the impacts creates significance and requires preparation of an EIS, and that the development of a roadless area within lands suitable for wilderness designation requires preparation of an EIS.

We find no basis in the record which convinces us that BLM did not take a hard look at impacts on the White River Corridor and identify relevant areas of environmental concern with respect to the special management criteria set forth in the RMP. Much of appellants' argument for preparation of an EIS relates to issues which they raised under the WSA, the WSRA, and other issues which we have addressed above. We reject those arguments sum-marily, finding no reason to reiterate our prior holdings at this point.

Our review of the record convinces us that, except for BLM's omissions regarding possible environmental impacts upon the bald eagle and threatened and sensitive plants, a careful review of the environmental problems was made and relevant areas of environmental concern were identified. Accordingly, our remand is limited to those identified omissions, and BLM must determine whether potential impacts to the bald eagle and the threatened and sensitive plant species listed in the RMP EIS exist, and, if so, whether mitigation measures are necessary to adequately protect those species.

We find no other basis for rejection of the EA, and hold that appellants have not otherwise established that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance.

To the extent that appellants have raised other challenges to approval of the APD not expressly or impliedly addressed in this decision, those challenges have been reviewed and we have determined that they have failed to establish error in BLM's decision. See Oregon Natural Resources Council, 116 IBLA 355, 373 (1990); Glacier-Two Medicine Alliance, 88 IBLA 139, 156 (1985).

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 affirmed in part and set aside in part and the case file is remanded to BLM for action consistent with the foregoing.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

Franklin D. Amess
Administrative Judge

