

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 95-16      Decided October 7, 1997

Appeal from a decision of the Arizona Strip District Manager, Bureau of Land Management, authorizing limited motorized vehicle use in that part of the Coyote and Pine Hollow Allotment lying within the Paria Canyon-Vermilion Cliffs Wilderness Area for range development maintenance and grazing operations. AZ-010-94-28.

Affirmed.

1. Appeals—Rules of Practice: Appeals: Standing to Appeal

Where the record establishes that the appellant has an interest adversely affected by a BLM decision and was provided insufficient notice to challenge a draft EA during the BLM decisional process, despite providing notice and taking specific actions earlier to address its specific concern over the action ultimately proposed, the appellant will be accorded the status of a party upon its challenge to the final BLM decision and EA upon which that decision was based.

2. Administrative Procedure: Administrative Review—Federal Land Policy and Management Act of 1976: Land-Use Planning—Federal Land Policy and Management Act of 1976: Wilderness

A BLM decision to continue a limited and reasonable vehicle use authorization consistent with the pre-wilderness grazing use authorized within a wilderness area will be upheld on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration of whether to continue the motorized vehicle authorization include the availability of other alternatives and the reasonableness of the authorized use.

APPEARANCES: Heidi J. McIntosh, Esq., Salt Lake City, Utah, for Appellant Southern Utah Wilderness Alliance; Dixie Northcott, pro se, Dewey, Arizona, for herself and Intervenor Otis I. Northcott; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for Respondent Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE TERRY

Southern Utah Wilderness Alliance (Appellant or SUWA) has appealed from the August 22, 1994, Decision of the Area Manager, Vermillion Resource Area, Arizona Strip District, Bureau of Land Management (BLM), to approve the Coyote and Pine Hollow Allotment Range Development Maintenance Agreement (Agreement) AZ-010-94-28 based upon Environmental Assessment (EA) AZ-010-94-25 of August 19, 1994, for those portions of the allotment within the Paria Canyon-Vermillion Cliffs Wilderness Area (Paria Wilderness Area).

Appellant SUWA <sup>1/</sup> is a 12,000 member Utah-based, nonprofit organization dedicated to the protection and preservation of public lands on the Colorado Plateau. The SUWA members regularly visit the Paria Wilderness Area to engage in recreational and other wilderness-related activities. The Coyote Buttes/Wire Pass region of the Paria Wilderness Area presents a beautiful landscape where visitors can enjoy the rare experience of solitude. In this appeal, Appellant objects to the BLM Decision to continue authorization of limited mechanized equipment use necessary for continued grazing within the Paria Wilderness Area.

As background to this appeal, on August 28, 1984, Congress enacted the Arizona Wilderness Act which protected, among other areas, the 112,000-acre Paria Wilderness Area. Congress designated the Paria Wilderness Area to protect some of the most spectacular slickrock canyon and cliff formations on the Colorado Plateau. Grazing existed in the Paria Wilderness Area prior to passage of the Arizona Wilderness Act, and Congress permitted it to continue after wilderness designation. Two reservoirs within Bull Pasture in the Paria Wilderness Area provide water to the cattle on the allotment. The Decision which is the subject of this appeal permits limited maintenance activities for the reservoirs, including the use of a mechanized vehicle to travel to the reservoirs and clear them of debris at regular intervals.

The August 22, 1994, BLM Decision appealed from provides in pertinent part:

Decision

I have reviewed the environmental assessment including the explanation and resolution of any potentially significant environmental impacts. I have determined that the Limited Motorized Vehicle Use Alternative is in conformance with the Arizona Strip District Resource Management Plan and the Paria Canyon-Vermillion

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<sup>1/</sup> The Plateau Group of the Sierra Club had originally joined SUWA in its Statement of Reasons (SOR). The Plateau Group, however, had failed to file a timely notice of appeal and subsequently withdrew from further participation in this appeal.

Cliffs Wilderness Management Plan. It is my decision to implement the Limited Motorized Vehicle Use Alternative as the Range Development Maintenance Authorization for the Coyote Pine Hollow Allotment with the following special provisions.

Special Provisions:

1. The permittees will use nonmotorized means of travel when in the wilderness, except as specified in the Range Development Maintenance Authorization. However, if a situation occurs in which the permittees are not present on the ranch and the nature of the situation is such that waiting for the permittees to return to handle the situation would lead to a bona fide emergency situation, the ranch foreman is authorized to use motorized means to go into the wilderness—since he is unable to ride a horse or walk long distances due to a medical condition. This will be considered only for situations with strong potential for becoming emergencies. Any such use requires prior notification if possible or notification within 48 hours of entry.

2. Annual meetings to review the previous year's maintenance record are required. At such meetings, time frames for maintenance specified [in] the Range Development Maintenance Authorization may need to be adjusted. If so, any adjustments that represent a significant change from the previous use authorization will be re-evaluated through a supplemental environmental assessment.

(Decision at 1.)

The purpose and need for the Decision is explained in the accompanying EA as follows:

The Range Development Maintenance Agreement provides direction for the management of ongoing livestock grazing operations and maintenance of existing range developments in those portions of the of the Coyote and Pine Hollow Allotment lying within the Paria Canyon-Vermillion Cliffs Wilderness in the Vermillion Resource Area and portions of the Kanab Resource Area, Utah (see Map 1).

This is intended to be a temporary agreement, directing maintenance activities until a comprehensive management plan is completed for the Canyons and Plateaus of the Paria Resource Conservation Area (approximately 1996), which will include all wilderness management direction.

(Ex. 1 to SOR.)

Appellant contends in its appeal that while grazing was not precluded by Congress in its establishment of wilderness areas such as Paria, the use of bulldozers and other mechanized equipment to facilitate that use was not grandfathered. Appellant contends that

the BLM bears a heavy burden to demonstrate that the proposed motorized use, with its attendant noise, dust, hazardous waste risk, and lasting scars on the land, existed prior to enactment of the Arizona Wilderness Act and is permissible in the manner contemplated by the proposed action as a preexisting use.

Additionally, appellants contend that the BLM's decision violated NEPA [National Environmental Policy Act of 1969] by 1) failing to consider alternatives which would result in less impact to the wilderness; 2) failing to consider cumulative actions which, when evaluated with the proposed action, would have synergistic impacts on the environment; 3) failing to adequately assess the affected environment and the resulting impacts; and 4) failing to discuss the purpose and need for the action.

Further, because the decision permits a use which has created, and will continue to create, a de facto road within a wilderness area, the decision violates the Wilderness Act of 1964.

(SOR at 5-6.)

Respondent BLM initially addresses Appellant's appeal by asserting SUWA lacks standing. The BLM concedes that while SUWA members used the land involved and thus could be said to be "adversely affected," they nevertheless have not actively participated in the decisionmaking process regarding the subject matter of the appeal, a required prerequisite to standing before this Board. See Mark S. Altman, 93 IBLA 265, 266 (1986). The BLM contends that Appellant's failure to respond to the February 17, 1994, letter sent to it 2/ seeking comments demonstrates Appellant's lack of active participation in the decisionmaking process.

Appellant contends that while it received the notification, it never received the February 17, 1994, cover letter, which was the only document

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2/ See Exhibit A to Respondent's Answer. The subject letter described the intent of the notification process to "notify individuals and organizations who have expressed a special interest, early enough to provide them sufficient time to inform us [BLM] of their viewpoints or concerns before the date we intend to make a decision on or initiate the proposed action." Additionally, the cover letter stated that the notice was "to inform you of the proposed action described in the attachment and who to contact in case you have comments, suggestions or concerns." The mailing list attached to the file copy of the cover letter and notification includes Appellant.

requesting comment. The notification, SUWA contends, did not include the draft EA and provided insufficient information upon which to make a meaningful public comment. (Appellant's Reply to BLM Response to SOR at 4.) Appellant nevertheless asserts that it had earlier advised BLM that it desired to be heard on all issues impacting the wilderness status of the Paria Wilderness Area. Id.

In response to the substantive issue, BLM explains that the use complained of is not a "grandfathered use" under the Arizona Wilderness Act, but is rather a "non-conforming but accepted use" for which the otherwise applicable Arizona Wilderness Act prohibitions at 16 U.S.C. § 1133 (1994) are not absolute. See Pub. L. No. 88-577, § 4(d)(4); 16 U.S.C. § 1133(d)(4) (1994); 43 C.F.R. § 8560.4; and BLM Manual 8560.6B (1988). As such, BLM explains, BLM Manual 8560.15G.1 provides that prewilderness designation grazing use "may include use and maintenance of facilities." Respondent points out that H.R. Rep. No. 96-1126 (1980) (as incorporated in BLM Manual 8560 (Appendix 2, at 1)), clarifies the parameters for use of motorized equipment where it occurred prior to wilderness designation as follows:

2. The maintenance of supporting facilities, existing in an area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.), is permissible in wilderness.

Where practical alternatives do not exist, maintenance or other activities may be accomplished through the occasional use of motorized equipment. This may include, for example, the use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock watering facilities. Such occasional use of motorized equipment should be expressly authorized in the grazing permits for the area involved. The use of motorized equipment should be based on a rule of practical necessity and reasonableness.

(Answer at 15, quoting BLM Manual 8560 (Appendix 2).)

The BLM also notes that while the EA supporting the Agreement in question does not expressly state that there was "preexisting use" of a bulldozer to clean out the two reservoirs in the Bull Pasture, the implication is clear from the language that is used that this is the meaning that was intended. (Answer at 16.) For example, Section II.C of the EA on page 2, states: "Motorized vehicle or mechanized equipment use will be authorized on an occasional basis where it existed prior to wilderness designation, when it is determined that it is the only practical alternative and when such use would not have significant adverse impact on the natural environment."

Furthermore, BLM points to language in Section IV of the EA, on pages 9-10, that the Bull Pasture Reservoirs "were constructed \* \* \* prior

to wilderness designation." This reference to construction of the reservoirs clearly implies the use of earth-moving equipment. Similarly, on page 10 of the EA, language is included to the effect that "(o)pportunities for solitude are reduced [to] excellent or moderate on peak-use weekends or during authorized motor vehicle access periods." This language clearly assumes that occasional, authorized motor vehicle use as part of the existing condition. See Answer at 17.

In response to Appellant's claim that NEPA requirement to consider lesser alternatives to motorized use was not considered, Respondent explains that the subject EA considered three alternatives, "Requested Motorized Use Alternative" (EA at 2-4), "Limited Motorized Use Alternative" (EA at 4-7), and "No Motorized Use Alternative" (EA at 8). Respondent notes that the first two analyzed different levels of motorized use for both fence-line and reservoir maintenance while the third alternative provided for examination of the requirements on a case-by-case basis with one option being no motorized use authorized.

[1] We first examine Respondent's claim that Appellant SUWA lacks standing to bring this appeal. In The Wilderness Society, 110 IBLA 67, 70-71 (1989), quoting Mark S. Altman, supra, at 265, 266, we summarized the development of the doctrine of standing applied by this Board to cases coming before it for review, stating:

43 CFR 4.410(a) provides that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management \* \* \* shall have a right to appeal to the Board." To be a "party to a case" a person must have "actively participated in the decisionmaking process regarding the subject matter of [the] appeal." To be "adversely affected" by a decision "the record must show the appellants have a legally recognizable interest." The interest need not be an economic or property interest; use of the land involved or ownership of adjoining land suffices. "Mere 'interest in a problem' or 'deep concern with the issues' involved, however, does not. The Board will not speculate why an appellant is concerned about a decision, i.e., what interest is adversely affected. Appellant must allege or the record must show an interest that is injured. A person must be both a party to a case and have an adversely affected recognizable interest in order to have a right to appeal to the Board. If either element is lacking, an appeal must be dismissed.

Id. (citations omitted). While Respondent acknowledges that Appellant's members actively use the Paria Wilderness Area and thus can be said to be adversely affected by the Decision, it argues that SUWA did not participate as a party to this case prior to the August 22, 1994, Decision which it challenges. Appellant concedes that it did not respond directly to the February 17 "Notice of Proposed Action in a Wilderness Area," but submits that it was prevented from responding directly by BLM's failure to provide effective notice that the Decision to authorize motorized maintenance

in the wilderness area was pending before the District Manager or that a period for comment had been provided. By the failure to attach the cover letter or the draft EA to the copy of the notice it received, Appellant contends that BLM failed to give actual notice and therefore, Appellant contends, it is protected from dismissal of this appeal. Appellant further contends that it appealed as soon as it learned of the BLM Decision to authorize continued use of motorized maintenance equipment in the wilderness area.

Appellant's statements and actions clearly indicate that it placed itself within that class of persons entitled to notice of further agency proceedings, as described in Utah Wilderness Association, 91 IBLA 124 (1986). In this case, Appellant corresponded, prior to the Decision, with both the Arizona Strip and BLM's Kanab Resource Area on several range improvement projects within the Paria Wilderness Area. The subject matter included the motorized vehicular maintenance of the Bull Pasture Reservoirs, the subject matter of the Decision under appeal here, the Dive pipeline maintenance, and overall motorized vehicular use within the Paria Wilderness Area. See SOR at 3. As in Utah Wilderness Association, *supra*, the correspondence of record in this case and the distribution list maintained by BLM for mailing the notice and cover memorandum concerning the proposed Decision recognized SUWA as having expressed a specific interest in use of motorized maintenance equipment within the wilderness area, and hence, it was entitled to effective notice of the comment period. See Utah Wilderness Association, *supra*, at 129. While SUWA received the notice of the proposed action, it claims the cover letter with the information concerning comment and the EA with details of the proposed action were not received. Upon learning of the Decision, SUWA immediately protested the lack of effective opportunity to comment. See Reply to BLM's Response to SOR at 3.

The purpose of limiting standing to appeal to a party to a case is to afford an intelligent framework for administrative decisionmaking, based on the assumption that BLM will have had the benefit of the input of such a party in reaching its decision. Utah Wilderness Association, *supra*, at 129, citing California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). In a situation such as the present case where a party has actively sought to participate in the issue of motorized vehicular maintenance and motorized vehicle use within a wilderness area, has corresponded with BLM prior to the decisionmaking process in question concerning its interest, and has been recognized by BLM as having expressed a specific interest in limiting motorized maintenance in the Bull Pasture area of the Paria Wilderness Area such that it (SUWA) was included within BLM's mailing list to comment on the proposed Decision, we must conclude this test of standing has been met. Id.

[2] With regard to Appellant's challenge to BLM's August 22, 1994, Decision, 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 and Katherine M. Roush, 112 IBLA 293, 297 (1990); Hoosier Environmental Council, 109 IBLA 160, 172-173 (1989); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA 64, 78, 91 Interior Dec. 165, 174 (1984). A party challenging the determination must show that it is 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, 273-274 (1984). The ultimate burden of proof is on the challenging party. G. Jon and 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). Appellant SUWA in this case has alleged that BLM's approval of motorized maintenance equipment in the Bull Pasture of the Paria Wilderness Area both violates the procedural requirements of NEPA and is based on an inadequate EA, which fails to consider all relevant environmental issues and concerns.

Appellant first argues that BLM's failure to consider all reasonable alternatives to the approved action in the Pariah Wilderness Area fatally flaws the decisionmaking process. (SOR at 7.) 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) (1994). See 40 C.F.R. § 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 environmental impact statement (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) (1994). The requirement that appropriate alternatives be studied applies to the preparation of an EA even if no EIS is found to be required. 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 and Fish Commission, 91 IBLA 364, 369 (1986). Among the alternatives which must be considered pursuant to this mandate is the "no authorized use of motorized equipment" alternative. See Bob Marshall Alliance v. Hodel, *supra*, at 1228.

The EA prepared in conjunction with the Decision to authorize limited motorized equipment maintenance in the Bull Pasture considered three alternatives, "Requested Motorized Use Alternative" (EA at 2-4), "Limited Motorized Vehicle Use Alternative" (EA at 4-7), and the "No Motorized Vehicle Alternative" (EA at 8). The first two alternatives analyzed different levels of motorized use for both fenceline and reservoir maintenance. By contrast, the third alternative provided for a case-by-case analysis with the

possibility in every case that no motorized use would be authorized. The Appellant's proposal, raised in its pleading, of using animals (donkeys) and manual labor to remove large quantities of silt from the two reservoirs is neither a viable nor reasonable alternative, however. Consideration of the no-action alternative through a case-by-case analysis, coupled with the careful analysis of each of the other two alternatives, clearly meets the mandate for NEPA review established in Bob Marshall Alliance v. Hodel, *supra*.

Appellant next argues that the EA is inadequate because BLM failed to consider the cumulative impacts of this proposal combined with past actions in the area, such as the trail created by past motorized equipment use in maintaining the reservoirs in Bull Pasture. The 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 C.F.R. §§ 1508.7 and 1508.27(b)(7); G. Jon and Katherine M. Roush, *supra*, at 305, and cases cited therein.

Although the EA prepared for the Paria Wilderness Area reservoir maintenance activities does not contain an extensive discussion of cumulative impacts, the fact situation at issue is sufficiently confined so that the cumulative impacts are limited. The proposed action described in the EA, on page 1, was to "clean out sediments from the bottom of Adams and Bull Pasture Reservoirs and restore them to their original water holding capacity." The Bull Pasture Reservoirs cleanout was but one of many activities addressed in the EA, although the only one challenged in this appeal. For this reason, the cumulative impacts from removing silt from the two reservoirs are necessarily limited. The EA nevertheless does address "A. Impacts of the Proposed Action and Alternative" on pages 11-16. Moreover, the EA addresses retention of a strip of vegetation on the east side of the lower reservoir for both motorized alternatives on pages 3 and 7. For example, the EA analysis on page 13 states that the lack of vegetation would continue with annual maintenance for the Requested Use Alternative (not selected) while some regeneration would occur if the Limited Use Alternative were selected. This latter alternative was selected.

Appellant further claims, with respect to cumulative impacts, that "significant resource damage" occurred in 1992 during a prior cleanout when the Intervenor's 3/ front loader had a flat tire and required a bull-dozer to pull it from the allotment. Nevertheless, there is no articulation by Appellant as to what damage occurred to the environment and how it was

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3/ The grazers, Odis I. and Dixie Northcott, are directly affected by the BLM Decision under appeal. The Northcotts' Motion to Intervene was granted by this Board on Dec. 13, 1995, after it was determined they were a party to the Decision appealed from and were potentially adversely affected by it. See Kendall's Concerned Area Residents, 129 IBLA 130, 136 (1994), and cases cited therein.

significant. This one-time occurrence due to a mechanical breakdown can only be classified as an unanticipated impact. Unanticipated impacts such as occurred in 1992 are specifically addressed in EA Mitigation Number 3 (for alternatives 1 and 2, EA at 17) and DR AZ-010-24-28, page 2, stipulation number 3. We find that this aspect of the consideration of cumulative impacts was also adequately addressed. See In re Grassy Overlook Timber Sale, 115 IBLA 359, 364 (1990); Oregon Natural Resources Council, supra. The SUWA has failed to demonstrate that BLM did not consider cumulative impacts when assessing the environmental impact of the planned action.

Finally, we review Appellant's claim that BLM failed to address the "purpose and need" for the project. The regulation at 40 C.F.R. § 1502.13 requires that the "purpose and need statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." The "need" is a statement that explains the concern BLM needs to resolve. See 40 C.F.R. § 1502.14.

As noted earlier, the EA addresses all projects and requirements for the allotment included within the Agreement, not merely the contested use of mechanized equipment to clean out the Bull Pasture Reservoirs. The purpose and need for the projects addressed is stated within the EA for the Agreement "to provide direction for the management of ongoing livestock grazing operations and maintenance of the existing range developments in those portions of the Coyote and Pine Hollow Allotment lying within the Paria Canyon-Vermilion Cliffs Wilderness." (EA at 1.) We find that the description above of the purpose and need is consistent with the requirements set forth in 40 C.F.R. § 1502.13. Moreover, the "maintenance of the existing range developments" described above necessarily includes the Bull Pasture Reservoirs, and the silting problem is specifically addressed within the EA in terms of alternatives to accomplish the cleanout requirement.

Our review of the BLM Decision in this case and the attendant EA reflect that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; carefully considered the available alternatives and determined the least harmful to the environment consistent with the purpose and need of the required action; made a reasonable finding that the impacts studied are insignificant; and with respect to any potentially significant impacts, proposed mitigating measures that have reduced the potential impact to insignificance. See Oregon Natural Resources Council, 131 IBLA 180, 186 (1994).

To the extent not expressly or impliedly addressed in this Decision, all other errors of fact or law alleged by Appellant have been considered and are rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, supra, at 156.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge

