

NATIVE ECOSYSTEMS COUNCIL

IBLA 2004-12

Decided January 22, 2004

Appeal from a decision of the Butte Field Office, Bureau of Land Management (BLM), denying a protest to a Decision Notice implementing the South Elkhorns Range and Vegetation Treatment, and the South Elkhorns Forest Treatment Timber Sale decision on public lands managed by BLM.

Affirmed.

1. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

A BLM decision notice and finding of no significant impact approving a vegetation treatment plan and noncommercial timber sale is properly affirmed on appeal where a party challenging the finding of no significant impact has not shown that the determination was premised on a clear error of law, that there was a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no support for reversal of BLM's decision, if the decision is reasonable and supported by the record on appeal.

2. Endangered Species Act of 1973: Generally--Endangered Species Act of 1973: Section 7: Consultation--Fish and Wildlife Service

Under the Endangered Species Act, BLM is obligated to ensure that any authorized project is not likely to jeopardize the continued existence of any threatened or

endangered species or adversely affect its critical habitat. A “no effect” determination in a Biological Assessment/ Biological Evaluation does not trigger formal consultation with the U.S. Fish and Wildlife Service.

APPEARANCES: Sara Jane Johnson, Willow Creek, Montana, for appellant; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Native Ecosystems Council (NEC) has appealed the September 18, 2003, full force and effect decision of the Butte Field Office, Bureau of Land Management (BLM), denying NEC’s September 10, 2003, protest to BLM’s decision to implement the South Elkhorns Forest Treatment Timber Sale and South Elkhorns Vegetative Treatment Thinning/Fuel Reduction Project (both referred to herein as the South Elkhorns Vegetative Treatment Project). NEC has filed a document captioned “Notice of Appeal, Request for Stay, Statement of Reasons, and Request for Relief.” On December 10, 2003, the Board denied NEC’s stay request, noting that our review of the stay request and our final decision on the merits is controlled by 43 CFR 5003.1 and 43 CFR 4.416.

The record before the Board discloses that on August 25, 2003, BLM sent NEC and other interested citizens a treatment and sale notice dated January 9, 1999, which implements the South Elkhorns Vegetative Treatment Project on lands managed by BLM. This decision involves public lands in sections 4, 5, 6, 9, and 18, T. 5 N., R. 1 W., in section 6, T. 5 N., R. 2 W., in sections 2 and 11, T. 5 N., R. 3 W., and in section 12, T. 6 N., R. 4 W., P.M.M., in Jefferson and Broadwater Counties located in the South Elkhorns Landscape Implementation Area 26 miles southeast of Helena, Montana. (Dear Interested Citizen Letter at 1.) BLM explained that the Environmental Assessment (EA), developed cooperatively by BLM and the U.S. Forest Service (FS), with input from and consultation with the Montana Department of Fish, Wildlife and Parks (MDFWP) (hereinafter referred to as the “agencies”), closely examined 5 alternatives.

The EA, issued in July 1998, discusses the effects of all vegetative treatments, which “in general, included increasing forage on seasonal ranges and decreasing the amount of hiding cover and security areas (Hillis et al. 1991).” (EA at 3-106.) The EA identifies impacts for the two elk herds in the South Elkhorn Mountains--the Devils Fence Herd unit and the Elkhorn Herd unit. The EA addressed five vegetation treatment alternatives.

The EA's evaluation of the no action Alternative (Alternative 1) included the observation that over the short term, hiding cover and security areas would increase, but that over the long term, the increased probability of wildfire, one of the key reasons for BLM's decision, would have negative effects on security and hiding cover. BLM rejected the "no action alternative" because the "cost of doing nothing" would be unacceptable in long-term environmental effects, and doing nothing would result in a steady loss of diversity in both the vegetative and wildlife communities in the Elkhorn Mountains. (Decision Notice/Finding of No Significant Impact (DN/FONSI at 12.)

Alternative 2 would treat the least amount of summer and winter range, would involve the least amount of commercial timber harvest, and would have the least impacts on security areas and hiding cover on both the Devils Fence Herd and the Elkhorn Herd units. (EA at 3-107, 3-110.) Under this Alternative, the amount of Devils Fence Herd unit security areas would decrease only 0.3% and only 2.2% of hiding cover would be impacted. (EA at 3-110; Table 40 at EA at 3-107.) Under Alternative 2 even less winter and summer range would be treated in the Elkhorn Herd unit than in the Devils Fence Herd unit, no security areas for the Elkhorn Herd unit would be impacted, and only 1.1% of hiding cover would be affected. (EA at 3-10; Table at 40 EA at 3-107; 3-110.)

Alternative 3 would treat significantly more acres than Alternative 2, security areas for the Devils Fence Herd unit would decline by 1.2%, and existing hiding cover would be reduced by 7.6%. Disturbance and displacement of elk onto private land would occur in the short term, which would increase mortality for the Devils Fence Herd unit. (EA at 3-111; Table 40 at EA at 3-107.) For the Elkhorn Herd unit, a slightly greater amount of winter range (19%) would be affected as compared to Alternative 2 (16%), and more summer range would be affected (24% as compared to 18%). Security areas would decline by 0.8% and hiding cover would experience the largest decrease of all considered alternatives (4.5%), albeit distribution patterns on winter range would probably be similar to Alternative 2.

Under Alternative 4, significantly more winter and summer range of the Elkhorn Herd unit would be treated and "the amount of the herd unit comprised of security areas would decline by 0.5%. About 1.8% of existing hiding cover would be lost." (EA at 3-111; Table 40 at EA at 3-107.) For the Devils Fence Herd unit the amount of winter and summer range treated under Alternative 4 is similar to Alternative 3. The "amount of the herd unit comprised of security areas would decline by 0.8%. About 7.4% of the existing hiding cover would be lost." (EA at 311; Table 40 at EA at 3-107.)

Under Alternative 5, the amount of the winter range treated for the Devils Fence Herd unit is similar to Alternatives 3 and 4, and “[m]ore summer range is treated than any other Alternative.” (EA at 3-112.) Security areas would decline by 1.0%, and existing hiding cover would be reduced by 9% for the Devils Fence Herd unit. (EA at 3-112; Table 40 at EA at 3-107.) In the case of the Elkhorn Herd unit, this alternative would treat the least amount of winter and summer range, security areas would decline by 0.5%, and there would be a reduction of only 1.1% of hiding cover. (EA at 3-112; Table 40 at 3-107.)

The agencies issued a DN/FONSI in January 1999. As stated in the DN/FONSI, BLM and FS, while separate agencies,

have agreed to work together and manage the Elkhorns as one mountain range. The agencies have made their separate decisions on grazing management and vegetation treatments. However, [they] have elected to jointly document these in one Decision Notice in order to reflect the collaborative nature of resource management in the Elkhorn Mountains, and to clearly and concisely communicate to the public the decisions, rationale, and the estimated effects, both positive and negative, on the geographic area as a whole.

(DN/FONSI at 2.)

As described in the DN/FONSI, a “modified Alternative B” was selected, reflecting elements from all five alternatives proposed in the EA, as summarized above, to maximize benefits to all wildlife species and minimize the impacts on big game hiding cover and security areas. As stated in the DN/FONSI, and as discussed more fully below, the combined noncommercial mechanical thinning, harvest, and forest burn treatments are expected to involve 591 acres of public forest land, using noncommercial thinning on 113 acres and forest product harvesting on 478 acres to deal with a “serious forest-health and fuel threat and to promote vegetative productivity and diversity.” (Dear Interested Citizen Letter at 1.) The harvesting is expected to make “[a]pproximately 1,991 hundred cubic feet (CCF) of forest products \* \* \* available for commercial consumption.” *Id.* BLM stated further:

While implementation of this project is through a noncommercial thinning and forest products sale, the purpose of the sale is to reintroduce low intensity prescribed fire on approximately 350 acres of forest and to re-establish the historic structure of conifer stands which were dominated by large open-grown trees. These actions are expected to promote soil productivity, nutrient recycling, understory plant

diversity, and reduce fuels in the urban interface promoting important vegetative features and a wildlife habitat disappearing from the Elkhorn Mountains. Public comments and forest conditions were seriously considered, and resulted in the inclusion of treatment features in the alternative selected that substantially increased the cost and reduced the commercial value of timber harvested with traditional logging techniques.

Id.

[1] This Board has consistently held that an EA must take a hard look at the environmental consequences of a proposed action, identify relevant areas of environmental concern, and make a convincing case that environmental impact is insignificant. Lee and Jody Sprout, 160 IBLA 9, 12-13 (2003); Southern Utah Wilderness Alliance, 123 IBLA 302, 308 (1992). A party challenging an EA/FONSI must demonstrate either an error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Lee and Jody Sprout, *supra*; Oregon Natural Resources Council, 131 IBLA 180, 186 (1994). The agencies' EA and DN/FONSI are impressive in the degree of their detail. As discussed below, NEC's arguments fail to show that BLM did not meet the standards imposed by section 7 of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. § 1536 (2000), section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), and this Board's precedent. Here, NEC has simply failed to show an error of fact or that the agencies failed to consider a substantial environmental question of material significance. We conclude that the DN/FONSI is well supported by the record on appeal. While NEC clearly disagrees with BLM's chosen action herein, as it relates to BLM administrated lands, this disagreement is not tantamount to proof of error.

NEC argues that the affected old-growth forests will be irreplaceable for hundreds of years in the harsh, dry South Elkhorns landscape, and that the "value of these existing forests to old-growth wildlife will be lost within any reasonable planning time frame as per the BLM." (Request for Stay at 3.) NEC contends that the value of the old-growth forests as thermal cover for big game species during both the winter and summer seasons will also be eliminated for decades. NEC contends that "[t]hermal cover is almost nonexistent for wildlife on this landscape, and losses of thermal cover will surely result in significant changes in big game habitat use of this land," and that "hiding cover that provides big game security, including concealment from hunters, cover for new deer fawns and elk calves, will also be lost for decades with potentially significant alterations in big game habitat use and

recruitment on this harsh open landscape.” *Id.* NEC states that “big game vulnerability, a serious problem on this landscape, will increase, without the option for any recovery,” that the addition of over two miles of road “will also increase big game vulnerability,” and that “small, scattered patches of old-growth forests, and the hiding and thermal cover, provided in ecotone areas of sagebrush and juniper trees also provide dispersal habitat for many wildlife species between mountain ranges, including the threatened Canada lynx.” *Id.* NEC insists that the “project will reduce movement of wildlife between mountain ranges for decades, with potentially irreparable harm to population viability as a result.” *Id.* at 4.

In response, BLM emphasizes that the EA, on pages 3-106 through 3-108, describes the effects of vegetation treatment on elk hiding and security cover common to all alternatives. BLM states that “[e]ach of the alternatives, starting on page 3-110 to 3-112 [of the EA] addresses affected number of acres of hiding cover and security areas and change in the percent of security areas.” (Response at 3.) In response to concerns over the loss of hiding cover and security areas for elk, the agencies adopted a new alternative. In the DN/FONSI, at page 12, they explain:

Although we felt we had a full range of alternatives, we wanted to take the best components from each alternative to maximize benefit to **all** wildlife species. The selected alternative, mostly the result of biologists from the 3 different management agencies putting their collective knowledge together, provides a great opportunity to enhance grasslands, shrublands, and forests, while still protecting important winter forage, and hiding cover and security cover for big game animals during the hunting season.

A special effort will be made to thin the overgrown forests near the historic town of Elkhorn to help protect the town and historic structures from the threat of forest fires. We have included units ELK2, ELK3, ELK4 in the decision to respond to concerns from the people who reside in the town of Elkhorn.

\* \* \* \* \*

Another important factor in selecting this alternative is maintenance of existing hiding cover and security areas for elk. The commitment on the part of the federal agencies to maintain these cover components will help [the Montana Department of Fish, Wildlife and Parks] maintain the current hunting season structure for elk. Alternatives 2, 3, 4, or 5 all included units that compromised hiding cover and/or security areas.

Id. (emphasis in original.) The agencies emphasize that they are committed to maintaining existing cover components and security areas for elk, so that “MDFWP can maintain the current hunting season structure for elk.” Id.

In addition, the DN/FONSI addresses the “Changes in Effects” on vegetation as a result of the selection of modified Alternative B:

In general, the effects of the selected alternative are less than Alternative 3 but greater than Alternative 2, in terms of the number of acres affected. The main difference is that the selected alternative avoids impacts on hiding cover and security [areas], and reduces the amount of temporary road construction (dropping the commercial unit in Alternative 3 in Nursery Creek which potentially impacted westslope cutthroat trout). The intensity of the treatments will generally be less than Alternative 2, since more acres treated means less ability to prepare units and put fuel on the ground to achieve more complete combustion. This means that it will take longer to achieve the desired conditions on the landscape, but have less impacts in the short-term.

(DN at 16.)

Tables 2, 3 and 4 of the DN/FONSI compare the effects of vegetation alternatives discussed in the EA with modified Alternative B. Table 2, on page 17 of the DN/FONSI, contains a “Comparison of Effects of the Vegetation Alternatives,” using Alternatives 1-5 discussed in the EA, as summarized supra, and the selected alternative adopted in the DN/FONSI. That Table identifies the impacts of changes in elk hiding cover and security areas as being “[m]inimal for both herd units” for the selected alternative, which is the same as the evaluation of Alternative 2 in the EA. Hence, the selected alternative devised in the DN/FONSI was most protective of security areas and hiding cover, and at the same time allowed a significant amount of low elevation acres to be treated.

Under modified Alternative B, the agencies anticipate a moderate increase in diversity over a large area “with a focus on low elevations,” with “minimal [impacts] for both herd units” on security areas and hiding cover. In terms of elk distribution, as compared with the no action alternative characterized by continued elk depredation on private lands, under the selected alternative, elk are expected to stay longer on public land during the summer and may stay on public lands during the winter. (DN/FONSI, Table 2 at 17.)

Describing the existing environment, the EA states at 1-7: “Vegetation in the South Elkhorns has been influenced by many factors, but the landscape analysis (South Elkhorns 1A document, October 1996) indicated that many of the current vegetation conditions result from a combination of past timber harvest, fire suppression, and past livestock grazing.” Specifically, with reference to lower elevation BLM lands, the EA states:

In an area where studies showed a more frequent influence of natural fire prior to about 1930, the vegetation has been slowly changing to include more shrubs and trees in historic grasslands, aspen stands, and meadows. Dry, lower elevation forests, once thinned by frequent, low intensity fires, are now mostly very dense and shaded. There are no grasses or wildflowers under these trees, and in some cases, insects and disease are more common due to the competitive stress of too many trees for the limited amount of nutrients and water.

(EA at 1-7.) The EA makes clear that the stated “purpose and need” for the project relative to forest vegetation is to

[d]ecrease stand densities particularly in areas of “ladder-fuels” to promote old growth conditions which reflect species and site types. Provide a structure that is sustainable. That is, in places where large old trees occur and survived historic fires, thin fuels around these trees such that future fires would “underburn” and not result in “stand replacement.” Apply fire in the understory to promote healthy understory communities for a given habitat type.

(EA at 1-8, 1-9). The DN at page 11 incorporates the foregoing paragraph from the EA and repeats that the reason to treat vegetation in the South Elkhorns is to increase the diversity and health of wildlife habitats.

NEC’s other primary argument is that the project violates management of the threatened Canada lynx, “a species that was listed five years before project implementation.” (Stay request at 4-5, 6.) NEC asserts that the decision to implement the forest thinning project is outdated due to its failure to address the current status of the lynx, and that BLM’s current management direction regarding the lynx should be to complete consultation with the U.S. Fish and Wildlife Service (USFWS) regarding project impacts on the lynx population in this landscape. (Stay Request at 5, 10-11).

Citing the fact that the Canada lynx was Federally listed as a threatened species "in March 2000" (see note 2 infra), NEC claims that this project "is outdated with regard to the lynx, and a new decision needs to be made to address this problem," which should include "consultation with the [USFWS] on project impacts to lynx persistence in this landscape." (Stay Request at 5, 10.) NEC states that current management direction consisting of the "Lynx Conservation Assessment Strategy," is not being followed because the guidelines did not exist when the South Elkhorns project was developed. Although BLM was a contributor to the August 2000 interagency report on management direction for the lynx, NEC argues that "[n]one of the proposed management guidelines or actual standards for the lynx are addressed in the South Elkhorns Decision Notice or EA." (Stay Request at 5-6, 10.) NEC states that "[a]lthough technically consultation would not be needed if listing occurs after an agency decision is made, one has to consider the time element involved." (Stay Request at 10.) NEC maintains that "given the project will not be completed until almost five years after the lynx was listed as threatened, and no management guidelines are included in the project to address this species, the potential for significant effects on habitat occupancy of the lynx in the South Elkhorns landscape, both now and in the future, exists." (Stay Request at 10-11.)

BLM responds that pages 3-79 and 3-89 of the EA discuss the Canada lynx:

Landtype associations in the South Elkhorns which may have lynx habitat are found only at the higher elevations. Most grazing and vegetative treatments occur at the lower elevation, in the Douglas fir zone, while optimal lynx habitat is found at higher, subalpine fir forests. The Lynx Conservation Assessment and Strategy (Ruediger et al 2000) identifies lynx habitat in Montana. The primary forest vegetation types that contribute to lynx habitat is lodgepole pine, subalpine fir, and Engelmann spruce. Secondary vegetation that, when interspersed within subalpine forests, may also contribute to lynx habitat, includes cool, moist Douglas-fir and aspen forests. Dry forest types, such as those found in the project do not provide lynx habitat.

(Response at 4.) BLM relates further:

A "Biological Assessment and Evaluation for Terrestrial Species" (BE) was completed for the South Elkhorns Range and Vegetation Project. Even though lynx were not listed under the Endangered Species Act at the time the BE was completed, the effects of the project to the lynx were considered and lynx were treated as a listed species. The forest treatments focus on lower elevation, warm, dry Douglas-fir stands in

the foothills of the Elkhorns. The analysis area does not provide lynx habitat and thus the project was found to be a “No Effect” to the lynx. This effects determination was revisited when a Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) for the remaining untreated areas of the South Elkhorns was issued on August 11, 2003 by the Butte Field Office. The BE effects determination of “No Effect” was found to be the same and no consultation with USFWS was required.

(Response at 4; Answer at 5-6.) BLM emphasizes in its Answer that one reason for developing a DNA was because the lynx had been listed. (See Answer at 6.)

[2] Under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2000), BLM is obligated to ensure that an authorized action is not likely to jeopardize the continued existence of an endangered species or threatened species or result in the destruction or adverse modification of its critical habitat. The ESA imposes the same obligation on BLM for species which have been proposed for listing, but does not require a limitation on the commitment of resources as in the case of listed species under 16 U.S.C. § 1536(d) (2000). See 16 U.S.C. § 1536(a)(4) (2000); Wyoming Outdoor Council, 159 IBLA 388, 403 (2003). Regulations implementing the ESA establish a staged process for complying with the ESA. First, an agency must determine whether an endangered or threatened species may be present in the proposed action area. If such a species may be present, the agency determines by preparing a Biological Assessment (BA) whether the species or its critical habitat is likely to be adversely affected by the proposed action. If a species or its critical habitat is likely to be adversely affected, a formal consultation or a conference with USFWS is required. If it is determined that formal consultation is required, USFWS will render a Biological Opinion (BO). Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985); The Sierra Club, Angeles Chapter, 156 IBLA 144, 164-65 (2002); Desert Vipers Motorcycle Club, 142 IBLA 293, 300 (1989); The Sierra Club, 104 IBLA 76, 87 (1988).

As a threshold matter, the Office of Hearings Appeals lacks authority to review the merits of a BO issued by USFWS under section 7 of the ESA, 16 U.S.C. § 1536 (2000). The Sierra Club, Angeles Chapter, 156 IBLA at 165; Daniel T. Cooper, 154 IBLA 81, 85 (2000); Southern Utah Wilderness Alliance, 128 IBLA 52, 59-60 (1993); Lundgren v. BLM, 126 IBLA 238, 248 (1993); Edward R. Woodside, 125 IBLA 317, 322-24 (1993) (quoting a January 8, 1993, memorandum from the Secretary of the Interior to the Assistant Secretary For Policy, Management and Budget, entitled “Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act”). The administrative review authority delegated to this Board

encompasses decisions made by BLM, but does not include review of findings or decisions made by USFWS. See 43 CFR 4.1(b)(3), 4.410. However, this Board may look at the BO to determine for itself that a BO contains the findings and conclusions on which BLM relies in its decision. See Wyoming Outdoor Council, 159 IBLA at 403 (2003).

Consequently, we have held that on administrative review of a BLM decision the Board properly considers whether the record discloses that BLM has analyzed the potential impact to threatened or endangered species and determined whether its actions “may affect” listed species or critical habitat and prepared a BA as required under the ESA. The Sierra Club, Angeles Chapter, supra at 165; Richard Rudnick, 143 IBLA 257, 266 (1998); Wade Patrick Stout, 153 IBLA 13, 24 (2000); Southern Utah Wilderness Alliance, 122 IBLA 6, 15-16 (1991). Exercising this authority, we have held, for example, that remand of a case was required only where the record did not show that BLM had considered the impact on threatened or endangered species. See Richard Rudnick, supra.

As stated above, for listed and proposed listed species, BLM is required to prepare a BA in order to determine as a preliminary matter whether any threatened or endangered species that might be present in the action area “is likely to be affected by an action.” 16 U.S.C. 1536(c) (2000); Enos v. Marsh, 769 F.2d 1363, 1368 (9th Cir. 1985). Preparation of a BA is required so that BLM may determine whether it is required by section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2000), to confer with or formally consult with USFWS to decide whether the proposed action is likely to jeopardize the continued existence of the threatened and endangered species or destroy or modify its critical habitat, and whether such action must be rejected or changed to avoid jeopardy, destruction, or adverse modification. Enos v. Marsh, supra at 1368; Save Medicine Lake Coalition, 156 IBLA 219, 258 (2002); Oregon Natural Resources Council, 116 IBLA 355, 366-67 (1990).

Although NEC acknowledges that at the time the EA and DN/FONSI were issued the Canada lynx was not listed as a threatened or endangered species, it nevertheless contends that BLM did not consider impacts on the threatened lynx or its habitat, maintaining that “the project could potentially impact the recovery of the lynx.” (Stay Request at 5.) However, the record clearly demonstrates otherwise. The BA which BLM prepared expressly states that it “records the findings for both the Biological Assessment (the legal record of findings for U.S. Department of the Interior Fish and Wildlife Service proposed, threatened, or endangered species) and the Biological Evaluation (the legal record of findings for U.S. Forest Service Region 1

and BLM sensitive species).” (BA at 1).<sup>1/</sup> In Table 1 of the EA, which is a “List of the threatened, endangered, proposed and candidates species in the Elkhorns” the lynx is listed as a proposed “P” species that is a “Resident” with “Habitat Present.” (BA at 2). Table 3 is a summary of the BA record for “Determination of effects for threatened, endangered, and proposed species by alternative.” The Table shows “NE,” meaning “No Effect” (BA at 21) of the “Vegetative and Grazing Alternative on the Lynx canadensis.” (BA at 4.)

The stated rationale for this “No Effect” conclusion is explained in the BA under the subheading “North American Lynx (*Lynx canadensis*).” In detailing the biological requirements for the lynx, the BA states that the species “occur in the temperate forests of North America, primarily in the boreal forests of Alaska and Canada. Its range extends south into northern portions of the western mountains, where environmental conditions at high elevations support boreal forest habitats similar to those found in northern regions. (Koehler and Aubry 1994).” (BA at 9). The BA continues:

Lynx occupy Engelmann spruce (*Picea engelmannii*), subalpine fir (*Abies lasiocarpus*), Douglas fir (*Pseudotsuga menziesii*), lodgepole pine (*Pinus contorta*) and aspen (*Populus tremuloides*) forests above 1,463m (4,500 ft.) (Koehler et al. 1979). They typically occur where low topographical relief creates continuous forest communities of varying stand ages. Lynx habitat consists of two structurally different forest types: early successional forests which contain higher numbers of prey, especially snowshoe hare, and late successional forests which provide cover for denning and kittens. (Koehler and Brittell 1990). Intermediate successional stages may serve as travel cover for lynx, and help provide connectivity within a forested landscape. These areas fill in the gaps between foraging and denning habitat within a landscape (Koehler and Aubry 1994). Early successional forests, where snowshoe hares are abundant, are favored by lynx for hunting. These areas result from fires, timber harvest, wind throw and disease.

(BA at 9). In terms of “Area Use,” the BA states:

Lynx are known to occur on the Forests; however, their range and extent of use in the Elkhorns is unknown (records from the north end

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<sup>1/</sup> The pages of the BA/BE are not numbered. For convenience here we have assigned the unnumbered pages page numbers.

MDFWP, 12/97). It is believed that current populations are considerably lower than historical levels. Lynx need high populations of prey [snowshoe hare] in relatively secure habitats (those with limited access). The distribution of lynx in the Elkhorns is probably related to the fact that the Elkhorns are a small, isolated mountain range, the south end is relatively warm and dry, and most secure habitat in the analysis area are found at higher elevations.

(BA at 9-10).

Addressing the “Direct, Indirect and Cumulative Effects” of the modified Alternative B on the lynx or its critical habitat, the BA states:

The forest vegetation treatments focus on lower elevation, warm, dry Douglas-fir stands in the foothills of the Elkhorns. The area is not continuous forest, and sage/grass openings are interspersed. All forest treatments focus on retaining the larger trees but will result in a decrease in understory conifers. It is expected that there will be an increase in grasses and shrubs in the understory. No units are proposed at higher elevations where the habitat is more suitable, and foraging and denning habitat will be maintained.

Conclusion of Effects: As a proposed species under ESA, it is believed that this project will have **NO EFFECT** on lynx or critical habitat. It is likely that this species will be listed as threatened by June 1999. [ <sup>2/</sup> ] Again, the determination will be **NO EFFECT**.

(BA at 10; emphasis in original).

Based upon our review of the record, we conclude that NEC has submitted no evidence whatsoever disputing or establishing error in the BA’s “No Effect” determination. The law is well settled that a “no effect” determination by an agency obviates the need for formal consultation with USFWS. Pacific Rivers Council v. Thompson, 30 F.3d 1050, 1054, n.8 (9<sup>th</sup> Cir. 1994), cert. denied, 514 U.S. 1082 (1995); Southwest Center for Biodiversity v. U.S. Forest Service, 100 F.3d 1443, 1447 (9<sup>th</sup> Cir. 1996). Although NEC claims that BLM has not followed the Canada Lynx Conservation Assessment and Strategy (Strategy), it is clear from the record that BLM considered this document in the DNA which it prepared. NEC has not explained

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<sup>2/</sup> USFWS listed the lynx as a threatened species effective Apr. 24, 2000 (65 FR 16052 (Mar. 24, 2000)).

specifically how BLM has failed to comply with the Strategy. NEC's unsupported allegations of potential adverse effect are an insufficient basis on which to set aside the BA determination of no effect and BLM's adherence to that determination in the DNA after the species was listed. NEC's claim that BLM was obliged to consult with USFWS assumes error in BLM's "no effect" determination, error which we hold has not been established.

Among other arguments, NEC maintains that the proposed management direction in the South Elkhorns is based on a multiagency planning document that was developed without any public involvement. (Stay Request at 6-7.) NEC states that the South Elkhorns Range and Vegetation Project is based in part on the Elkhorns Landscape Analysis (1993) and the South Elkhorns Implementation Area Analysis (1996), as documented in the EA at 1-11. NEC states that these documents established a "desired future condition" that is the guiding direction for the South Elkhorns, and that these documents never had any public involvement and are therefore in violation of section 102(2) of NEPA, 42 U.S.C. § 4322(2) (2000).

By contrast, BLM insists that the South Elkhorns Range and Vegetation Project "had extensive public involvement," including [NEC] who was invited on several occasions to attend public meetings but declined. (EA at 2-1; Administrative Record (AR) Vol. 2, 2-4)." BLM notes that "public involvement and correspondence was comprehensive and included public open house meetings, news releases, field tours, local government public scoping notices, and public comments." Citing the administrative record (Volume 2 at 2-21), BLM notes that the mailing list alone for public comments was extensive, which again also included NEC.

To the extent that it can be contended that BLM's decision to implement the South Elkhorns Range and Vegetation Project with respect to BLM lands also turns on other documents in which BLM participated jointly with FS, the record does not support NEC's contention that the public, including NEC, was not properly involved. The EA at page 2-1 states in pertinent part:

The agencies [(represented by a list of specialists)] involved in this project encouraged public participation in several ways. Following completion of the South Elkhorns Implementation Area Analysis, several public field trips were conducted to the area to engage public participation in the identification of a proposed action. These trips were held in the summer-fall of 1996.

Over the winter, the IDT [interdisciplinary team] developed the proposed action. A scoping statement, which outlined the proposal,

was mailed to 132 groups, individuals, and agency representatives in February 1997. News releases were also sent to Boulder, Whitehall, Butte, Helena, Townsend, and Three Forks papers. Following the release of the proposed action scoping statement, many presentations and project updates were given to a variety of local individuals and groups.

The scoping statement included a description of the proposal, some background information on the purpose and need for the proposal, a list of the preliminary issues, a location map, and a comment sheet. The return-addressed comment sheet included blocks for comments on issues and alternatives. In addition the respondent was asked to indicate their interest in future mailings and information about the project. Responses were requested by March 14, 1997. The comment period was extended, at the request of several individuals, for an additional 2 weeks. Scoping ended on March 31, 1997.

Including one letter submitted in mid-April, 35 letters and comment sheets were received. \* \* \*

All public comments were read for content to identify substantive issues and concerns. The IDT considered each letter or comment sheet in identifying issues that would help identify meaningful alternatives to the proposed action.

The EA summarized the public and IDT issues. Noting that some issues did not lend themselves to the development of an additional alternative, the EA stated that these issues “will be addressed in some aspect of the alternative or in the effects disclosed in the environmental analysis.” These issues include, *inter alia*, effects on wildlife and wildlife habitat, including threatened, endangered, sensitive, big game and other wildlife species associated with various vegetation communities, habitat fragmentation, habitat effectiveness, and snags; effects on future fire management; and effects on recreation (including travel management), scenery and cultural resources. (EA at 2-5.)<sup>3/</sup>

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<sup>3/</sup> The EA or summary of the EA was mailed to 150 interested parties in July 1998. Scoping ended on August 7. By that date, 18 letters and comment sheets were received in the BLM office. A public field tour was held on October 22, 1998, to visit actual proposed units and grazing adjustments on the ground with interested parties. Eighteen people attended. Appendix A-1 through A-29 is the “Response to Public (continued...)”

NEC contends that the proposed management of wildlife habitat in the South Elkhorns, as reflected in the challenged EA and DN/FONSI, is not based on either BLM management direction or any current science. (Stay Request at 7.) Asserting that almost all the lands to be logged appear to be “old-growth habitat,” the NEC asserts that BLM has no current management direction toward the old-growth as a “restoration” program for old-growth wildlife. It denies that any scientific evidence was provided in the South Elkhorns EA or DN/FONSI to demonstrate that logging old-growth will restore it for wildlife. NEC states that BLM “identified no criteria for ‘restored’ old-growth.” (Stay Request at 7.) NEC charges that no information was provided as to why logging was needed or why it will benefit wildlife, and that “[n]o standards were identified for old-growth habitat on BLM lands.” *Id.* NEC maintains that it is clear that the proposed logging of old-growth habitats is nothing more than a timber sale, not wildlife habitat management. NEC denies there are any “specific management standards/guidelines identified for logging, burning and slashing of big game habitat on BLM lands.” *Id.* NEC claims that “all of the Resource Management Area direction that exists at this time are vague and only direct that big game habitat be managed to provide sufficient cover for wildlife.” *Id.* NEC urges that “[s]ince cover is already extremely limited in the South Elkhorns, management to reduce it further seems in direct conflict with limited management direction,” and “would constitute degradation of wildlife habitat, in conflict with [section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (2000)], \* \* \* which requires BLM to prevent unnecessary degradation of the lands they are managing.” (Stay Request at 7-8.)

BLM responds that the project involves very little actual old growth “as defined under USFS Region 1 guidance from April 1992.” According to BLM, as discussed at page 3-47 of the EA, the project involves only 86 acres in one unit that is highlighted by the limber pine forest type, a stand which is 130 years old. Forest treatments, both commercial and noncommercial, are intended to retain or develop the important old-growth characteristics of large trees, with some large snags and healthy ground shrubs and grasses. (Response at 3.)

BLM notes that the EA at page 3-4 summarizes the condition of the resources that provides the need to implement the South Elkhorns Vegetation Project. “The condition summary in the EA is followed by a description from a wildlife perspective of the current conditions of forests in the South Elkhorns including old-growth.”

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<sup>3/</sup> (...continued)

Comments on the EA and How Comments Were Used in Making the Decisions.” The Appendix records 98 comments.

(Ea at 3-76.) BLM emphasizes that “[r]esource specialists considered all available science when analyzing the effects to the resources.” As required under section 102(2) of NEPA, as amended, 43 U.S.C. § 4322(2) (2000), the EA “documents a systematic, interdisciplinary approach in assessing the impacts of the project.” The project was designed on the coarse filter theory of wildlife habitat management, as described in the EA at page 1-7, and the assessment looked at a wide variety of wildlife issues in determining the impacts of the project. See pages 3-76 through 3-75 of the EA.

A strong component of larger trees will remain after the project is completed, as shown in Appendix D for each treatment unit described in the DN. The result will be an “open forest structure that is more characteristic of growth stands that have frequent natural fire events,” as described in the EA at 3-47 and 3-48, and outlined in Appendix D for each unit. BLM notes that, out of approximately 17,500 acres of BLM managed forest land in the South Elkhorns, this project would treat 591 acres. BLM described the forest effects in the EA at 3-93 through 3-96 for forest associated bird species, 3-102 for forest grouse, 3-107 for elk, 3-110 through 3-111 for the individual elk herds, 3-114 through 3-116 for mule deer, and 3-120 for other game species. We note that the EA at 3-47 addresses the old-growth issue:

Old growth enhancement treatments are intended to maintain or enhance stands which are functioning or have the potential to function as old-growth. In some cases, minimum standards such as tree age or diameter may not be met, but the structure created by treatment will be more in alignment of the Northern Region guidelines. Treatment within existing old-growth or old-growth recruitment stands will retain the large diameter trees creating a more open appearance. Removing small diameter trees and underburning will create snags, allow an increase in shrubs and grasses and also reduce the risk of stand replacement fire.

The EA states further:

In warm, dry Douglas fir habitat types, a fire return interval of 5-25 years is needed to maintain the old-growth conditions that include open grown stands of ponderosa pine (Fisher and Clayton 1983). This fire interval would create conditions to support bunch grasses in the understory. Maintaining a fire return interval once these sites have been treated would reduce the chance of a severe fire from consuming most of the vegetation. Mechanical thinning of conifers prior to burning may be more effective than burning only (Alternative 4) at

reduc[ing] fuels such that the desired fire intensities can be achieved. In the cooler drier sites that contain Douglas fir as the climax species, commercial harvest or noncommercial harvest followed by underburning would reduce competition between overstory vegetation and the plants within the understory. A desirable condition for these sites is to maintain a canopy coverage less than 55% so that grasses, forbs, and shrubs can increase the structure and functions within these sites. A fire return interval of 35-50 years would maintain these stands within their natural range (Fisher and Clayton 1983). The stands would require a mechanical thinning for commercial or noncommercial use of conifers prior to burning so that the desired fire intensities could be achieved and therefore restore a natural fire return interval.

(EA at 3-47 through 3-48.) The EA notes that most of the changes in the forest structure under all alternatives will occur on low elevation BLM lands. (EA at 3-48.)

Among questions posed by commenters on the EA was whether there is evidence that if a natural fire occurring in the South Elkhorns area today would be catastrophic. The response unfortunately echoes the experience of recent fire seasons:

While every natural fire won't produce a fire with unwanted or severe effects, the likelihood of a fire with unwanted and/or severe effects increases every year due to fuel build-up from past suppression efforts. This is evidenced by the increase of large fires nationally over the last ten years. The 47,000 acre Warm Springs fire in 1998 was a stand replacement fire in warm, mature, dry Douglas fir sites, as well as the cool, dry, Douglas-fir sites and cool, wet lodgepole pine sites. This fire was located just northeast of the project area in the Elkhorn Mountain Range. In Lehman's 1995 study of the fire intervals in the South Elkhorns showed that typically, the Douglas fir sites burned with a fire periodicity of every 7-37 years. This resulted in forest stands of fewer, larger trees and grassy understories. Fire has effectively been eliminated from the South Elkhorns for the past 100 years due to grazing and fire suppression (see response to #74). The fuel profiles developed both horizontally and vertically due to the lack of fire disturbance on these sites. Current stands have fuel loading that would carry a fire into the forest canopies on a typical August day with 90 degree temperatures, 5 mile an hour eye level wind, and 18 percent humidity.

(DN at A-24.)

We further reject as unsubstantiated NEC's claim that this is nothing more than a timber sale. The DN at page 12 makes it clear that while there are some commercial timber thinning units, the goal is not to sell timber but to utilize timber harvest as a "fuel removal" tool to meet wildlife habitat objectives for this area. Significantly, the DN states that "products that will be removed are not high quality large trees, but we think the risk of using fire alone to accomplish habitat objectives will be too great in some areas." The DN states:

If we do not remove some of the fuels through mechanical means in some areas, our opportunity to use fire to improve wildlife habitat in these areas is low. \* \* \* The objective of using timber harvest to create conditions such that in the future, no harvest would be needed -- the more open stand structure could be maintained with prescribed fire treatments.

(DN at A-9.)

The point of the foregoing extensive summary of the record in this case is to demonstrate that we are unable to find that NEC has established error in the challenged DN/FONSI with respect to the South Elkhorns Vegetative Treatment Project. To the contrary, the cooperative action of the involved agencies is designed to ensure preservation and enhancement of old growth through removal of conditions that experience has shown will lead to wholesale stand replacement or destruction of old growth by fire. Moreover, we find that modified Alternative B, as reflected in the DN/FONSI, will protect the elk herds and the Canadian lynx population to a greater degree than any of the five considered alternatives. To the extent that additional arguments have been made which have not been specifically discussed, they have been considered and rejected.

Therefore, 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.

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James F. Roberts  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge