

EDWARD C. FAULKNER

IBLA 2001-323

Decided December 21, 2004

Appeal from a decision of the Prineville, Oregon, Field Office, Bureau of Land Management, issuing a Finding of No Significant Impact and Decision Record approving the West Butte Juniper Management Project. EA #OR-056-00-030.

Affirmed.

1. Environmental Quality: Environmental Statements

In challenging an environmental assessment, an appellant must establish by objective proof that the determination was premised on a clear error of law or 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.

2. Administrative Procedure: Burden of Proof

An appellant must affirmatively point out error in the decision from which it directly appeals. It is not enough for an appellant to support its appeal by reiterating comments made to and considered with responses by BLM in its final decision without explaining error in that response.

APPEARANCES: Edward C. Faulkner, Prineville, Oregon, pro se; Robert B. Towne, Field Manager, Prineville Field Office, Prineville, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Edward C. Faulkner appeals a June 6, 2001, Decision Record and Finding of No Significant Impact (DR/FONSI) issued by the Prineville, Oregon, Field Office,

Bureau of Land Management (BLM), approving alternative C for the West Butte Juniper Management Project. EA #OR-056-00-030.^{1/} The purpose of the proposed project is generally to control the juniper population on 5,000 acres of public lands within the West Butte grazing allotment of the Deschutes Resources Area, secs. 19 and 30, T. 19 S., R. 17 E., and secs. 1, 12, 13, 14, 23, 24, 25, T. 19 S., R. 16 E., northeast of Millican, Oregon.^{2/}

The record shows that in July 1989, BLM prepared the Brothers/LaPine Resource Management Plan (RMP) for 1,111,100 acres of public lands in the Prineville District in Central Oregon, which include lands within the Deschutes Resources Area. The record includes the RMP Record of Decision and Rangeland Program Summary (RMP ROD RPS). (AR Tab 67.) The RMP ROD RPS proposed land management treatments including juniper control projects. *Id.* at 88-89. The document specified as a management goal the control of 6,000 acres of juniper for the West Butte Allotment within the Deschutes Resources Area. *Id.* at 81.

On August 12, 1997, the Secretary of the Interior approved the “Standards for Rangeland Health and Guidelines for Livestock Grazing Management for Public Lands Administered by the [BLM] in the States of Oregon and Washington.” (AR Tab. 66.) The Standards are derived from requirements for implementing, *inter alia*, the Taylor Grazing Act, 43 U.S.C. §§ 315, 315a-r (2000), set forth at 43 CFR Subpart 4180, and are to be incorporated into the goals of land use management plans. Under 43 CFR 4180.1, BLM is to take action generally to promote through grazing management the health or progress toward properly functioning watersheds, ecological processes, water quality, and wildlife habitat. The management document establishes standards for rangeland health in each of these categories. (AR Tab 66 at 7-14.) It also establishes guidelines for livestock grazing management. *Id.* at 15. The Standards and Guidelines “are expressions of the physical and biological condition or degree of function necessary to sustain healthy rangeland ecosystems.” *Id.* at 2-3.

The subject EA is a product of BLM’s efforts, beginning in 1998, to implement the Standards and Guidelines and the RMP management goals for juniper in the West Butte allotment. *See* AR 65. BLM conducted public scoping meetings and considered substantial public input in preparing the EA for a proposed action to manage 5,000 acres of juniper in the West Butte allotment. The EA explains:

^{1/} BLM has submitted a full administrative record (AR) of the process leading to the DR/FONSI. The DR and FONSI appear at AR Tab 8, and the EA appears at Tab 31.

^{2/} The EA states that the West Butte allotment is northwest of Millican. Maps in the record reveal that this direction is mistaken.

The RMP * * * lists 6,000 acres of juniper control as being necessary in the West Butte area for the accomplishment of the following management goals: maintain/improve ecological condition; stabilize/improve watershed condition; maintain/improve scenic/natural values; and or maintain/improve mule deer and antelope habitat (RMP, Pages 78-79). Since the RMP was published, less than 200 acres of juniper ha[ve] been cut on public lands here. There is a need to cut juniper to meet the physical, biological and socio-economic conditions sought by this planning direction.

Fire as a natural ecological process has been largely absent from this area. While estimates of natural fire frequency in the project area vary from 15 to 40 years, most sites have not burned during the time of record. Low fuel continuity and laddering in some of the area preclude natural fire or planned ignitions from effectively (and/or safely) accomplishing fire reintroduction. There is a need to manually cut juniper in order to re-establish more natural fuel beds capable and suitable for prescribed and natural fire.

The RMP (p. 35) also provides for an average annual harvest of approximately 2,000 cords of firewood from juniper woodlands within the Brothers portion of the RMP area. There is a need to provide firewood and other wood products (such as fence posts) to the public.

(AR Doc. 31, EA at 2.)

The EA explained that juniper was not a major component of the biologic environment as recently as the mid-19th century. (AR Doc. 31, EA at 1.) BLM explained that fire exclusion, climatic change and human land use created the historic alteration of vegetation which led to juniper growth in Central Oregon. The EA cited research indicating that removal or reduction of juniper growth led to desirable attributes in terms of groundwater recharge, wildlife habitat improvement, diversity, watershed health, and ecosystem attributes. *Id.* Accordingly, BLM proposed action to manually cut up to 5,000 acres of juniper over a 10-year period. BLM considered the no action alternative (A), the proposed action to reduce juniper in a manner uniformly distributed across the project area (B), and the proposed action to reduce juniper in a mosaic pattern to mimic historically fire-induced vegetation (C). It also considered and rejected alternatives D, a commercial juniper removal project, and E, a reduction in livestock grazing. *Id.* at 5-6.

The record shows that a number of parties commented in favor of or against the proposed action. A number of commenters objected to the scientific basis for BLM's conclusions regarding benefits of juniper control, particularly with respect to

improvement in the water budget. E.g., AR Tab 30 (comments of Oregon Natural Resource Council). Faulker commented in writing on behalf of the Juniper Acres Community Committee (AR Tab 17), and participated in public meetings and made oral communications also reflected in the record. E.g., AR Tab 16, 26.

Faulkner's principal concern was not with adverse effects of juniper management on the physical or biological environment, but rather that any beneficial biological effects might have negative impacts on private landowners in the form of increased management by wildlife officials or local regulatory bodies controlling development. According to Mr. Faulkner:

more wildlife (particularly sage grouse) would increase the likelihood that ODFW [(the Oregon Department of Fish and Wildlife)] would have even more of a say in what goes on in the [area]... perhaps even requiring that the development (# of residences) cap be decreased even more, and private property development rights further restricted.

(AR Tab 26, Memorandum discussing BLM communication with Faulkner, Apr. 11, 2001.)

In his written comments, Faulkner reiterated this concern with impacts on what he claims are almost 8,000 acres of private land located within the boundaries of the West Juniper Management Project. (AR Tab 16, Faulkner letter on behalf of the Juniper Acres Community Committee, Apr. 13, 2001.) Faulkner also complained that the EA provided no information regarding the costs of implementation of the project. Id. at 2. Finally, he objected to the EA's connection between juniper reduction and benefits on the Canada Lynx, and other scientific benefits. "Common sense environmentalism says that practically all natural environments can be improved in one way or another above their current physical states. However, are such changes and improvement fiscally responsible and truly necessary?" Id. He stated that the lack of "private sector support" shows that alternatives B and C should not be endorsed. Id.

On June 7, 2001, BLM issued the DR/FONSI signed on June 6, 2001. BLM chose to implement the proposed project as developed in alternative C. As part of the decision BLM established a comprehensive list of 39 conditions imposed on cutting activities, including requirements with respect to size, condition, and special values of junipers to be cut, protections for junipers comprising particular habitats for wildlife, seasonal conditions on cutting to protect wildlife, and restrictions to use of existing roads. In addition to the DR/FONSI, BLM issued a six page list of responses to comments. (AR Tab 8, Public Comments and Responses.) BLM expressly responded to comments raised by Faulkner. Id.

On July 4, 2001, Faulkner submitted to BLM an “official appeal” of the DR/FONSI. The Notice of Appeal (NA) is divided into five sections. First, Faulkner objects to the EA because he claims its goal to “redevelop a pre-European settlement condition.” (NA at 1.) He claims that this goal is not clearly defined and queries whether alternative C will “resemble Pre-European conditions by 30%, or as much as 60%?” *Id.* Second, Faulker complains without explanation that even though a goal of the project is to improve wildlife habitat, it may “potentially cause more wildlife harm than good.” *Id.* at 1-2. Third, he complains that the cost may be \$250,000, yet “no clear and well defined specifications have been established to guide the project” and no standards control its success or failure. *Id.* at 2. Fourth, Faulker comments that, while some land owners who have cattle endorse the project, some landowners who do not own cattle object to it. “As a result our concerns differ. Many people appreciate having juniper trees within their area.” *Id.* Finally, he argues that “alternative C incorporates removal problems and creates potential fire hazards to nearby residents. As a result of this problem, alternative C should be discarded in favor of alternative A.” *Id.*

On July 5, 2001, Faulkner submitted a petition for stay, arguing that the West Butte Juniper Management Project is a “major reconstruction process” which will bring chainsaws, workers and vehicles to the area, potentially causing the departure of wildlife. He asserts that his interviews of a “large number of people” reveal much opposition to the project and doubt as to its efficacy. BLM opposed the stay request and transmitted the appeal on July 18, 2001.

On July 23, 2001, Faulkner submitted a Statement of Reasons (SOR) supplementing his prior arguments. He argues that the FONSI was inappropriate because the State of Oregon regulates private lands adjacent to the project area. Without specifying impacts on private lands which BLM should have considered, he asks that BLM prepare an environmental impact analysis to be “more specific and address development concerns from private landowners more completely.” Presumably, Faulker meant to request an environmental impact statement (EIS) under the National Environmental Policy Act of 1969 (NEPA), 40 U.S.C. § 4332(2)(C) (2000).

At the outset we note that it is difficult to discern a violation of law which Faulkner believes has occurred in this matter. While it is clear that Faulkner wishes that BLM would retain the status quo in the West Butte Juniper Management Project Area, his arguments fail to identify a specific law or regulation allegedly violated, and contain commentary and unexplained speculations regarding impacts to wildlife and fire hazards. The only statutory reference appears in the SOR, in which Faulkner alleges that BLM should have prepared an EIS because the State government has regulatory authority over private lands. Thus, we address this appeal as a challenge under NEPA.

[1] Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), requires Federal agencies to prepare an EIS for a major Federal action significantly affecting the quality of the human environment. The agency must consider its preferred course of action and alternatives to that action and take a “hard look” at the environmental consequences. 42 U.S.C. § 4332(2)(E) (2000); 40 CFR 1501.2(c). If the agency chooses to, it may prepare an EA for a proposed action and go forward if it makes a “finding of no significant impact,” subject to agency rules and those of the Council on Environmental Quality (CEQ) at 40 CFR Subpart 1500. An EIS is required only if a significant impact is anticipated.

The Board has recently explained the standard of review applicable to an appeal from a BLM decision to undertake an action which was analyzed in an EA and for which a FONSI has been issued. Such a decision

will be affirmed when the record demonstrates that BLM has considered the relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. * * * As a general rule, the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. * * * The record should therefore establish that the FONSI and decision to proceed were based on reasoned decisionmaking.

Fredric L. Fleetwood, 159 IBLA 375, 382 (2003) (citations omitted).

In order to convince the Board that BLM did not correctly implement its obligations under NEPA an appellant must demonstrate either an error of law or fact and that burden must be satisfied by objective evidence; mere differences of opinion provide no basis for reversal. Larry Thompson, 151 IBLA 208, 217 (1999); Rural Information Network, 149 IBLA 336, 342 (1999), citing The Ecology Center, 147 IBLA 66 (1998). It is simply not enough to speculate and assert a desire for more information, “without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance.” In re Stratton Hog Timber Sale, 160 IBLA, 329, 332 (2004).

We find that Faulkner fails to meet his burden. Faulkner postulates that dominoes may fall in a direction different from the one BLM intends, particularly with respect to wildlife management. His only explanation for this averment appears in his assertion in his petition for stay where he asserts that undisclosed species of

wildlife could decide to leave in response to the workers performing the juniper removal. This speculation is entirely devoid of factual support. More importantly, Faulkner fails to acknowledge the 39 specific conditions imposed on the workers performing juniper removal and incorporated into the EA and DR/FONSI. Many of these conditions are imposed expressly to protect the wildlife living within and surrounding the juniper bushes. Faulkner's seeming obliviousness to the actual parameters of the project amounts to a failure to meet his burden to show with objective evidence that BLM failed to consider a substantial environmental question under NEPA.

Moreover, the speculative nature of his assertions shows that Faulkner's essential point is that the existence of a possibility of failure means that BLM should not take action and retain the status quo. Such conceptual argument does not meet an appellant's burden under NEPA, nor does it posit the appropriate position of the Department in implementing statutory authority. The Department is obligated by law including the Federal Land Policy and Management Act, 43 U.S.C. § 1740 (2000), the Taylor Grazing Act, 43 U.S.C. §§ 315, 315a-r (2000), and various regulations, including 43 CFR Subpart 4180, to manage the public lands, including grazing lands, to promote rangeland health. BLM has the legal obligation to implement that authority. If an appellant wishes to show that attempts to meet goals of rangeland health will fail, the appellant must substantiate the suggestion.

[2] It is worth noting that BLM responded expressly to comments Faulkner raises in his appeal, some raised by Faulkner in his comments and some presented by others during the comment period with respect to the EA. For example, BLM expressly rejected a suggestion that it was attempting to return the land to a "pre-European settlement period condition." (AR Tab 8, Comments and Responses II.A.) BLM stated that such an expectation would not be possible. In response to Faulkner's comment that juniper removal was not justifiable from a financial perspective, BLM explained that its experience with juniper removal on other public lands was proving the "high efficacy of these actions in slowing or stopping soil erosion; improving vegetation diversity; increasing livestock/wildlife forage; and restoring fuel structures." *Id.* BLM made responses to comments regarding wildlife, including that increases in sage grouse and other species would continue to be controlled by ODFW. *Id.* at II.B.

In analogous circumstances, the Board has held that the appellant must point out error in the decision from which it appeals. *Watts v. United States*, 148 IBLA 213 (1999). There we stated: "In *Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990), we held that the requirement to affirmatively point out how the decision appealed is in error is not satisfied if the appellant "has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision * * * addressing those points." 148 IBLA at 217, citing *In re Mill Creek Salvage Timber Sale*, 121 IBLA 360,

362 (1991). In some cases, the Board has gone so far as to dismiss appeals for such a failure.

Faulkner's appeal documents merely reiterate comments raised to BLM, to which BLM responded in issuing the DR/FONSI. Faulkner makes no effort to point out error in BLM's responses. For this reason, too, we would find that Faulkner failed to point out affirmative error in the DR/FONSI.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is denied, and BLM's decision is affirmed.

Lisa Hemmer
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge