April 30, 2019

IBLA 2019-51

DOI-BLM-MT-B050-2018-0009-EA

NATIVE ECOSYSTEMS COUNCIL

Vegetation Management Treatments

Motion to Dismiss Granted;

Appeal Dismissed;

Petition for Stay Denied as Moot

ORDER

The Native Ecosystems Council (NEC) has appealed from and petitioned to stay the effect of portions of a December 6, 2018, Decision Record (DR) of the Field Manager, Dillon (Montana/Dakotas) Field Office, Bureau of Land Management (BLM), that authorizes various land management actions, including vegetation treatments, on public land within the Red Rock/Lima Watershed (RRLW).1 The DR and accompanying Finding of No Significant Impact (FONSI) were based on a May 2018 RRLW Environmental Analysis (EA), DOI-BLM-MT-B050-2018-0009-EA, as amended on December 6, 2018,2 which was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA)3 and its implementing regulations.4

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1 The DR is included in the administrative record (AR) as document 3-1 and is available at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite &projectId=95669&dcmId=0b0003e8810462b0 (last visited April 2, 2019).
2 AR 3-11 (EA); AR 3-4 (EA Amendment).
4 40 C.F.R. Chapter V (Council on Environmental Quality) and 43 C.F.R. Part 46 (Department). The FONSI (AR 3-2), EA (AR 3-11) and EA Amendment (AR 3-4) are also available at BLM’s eplanning website, supra note 1.
BLM moves to dismiss, claiming NEC lacks standing to pursue this appeal. Because we find NEC does not have standing under 43 C.F.R. § 4.410, we grant BLM’s motion, dismiss NEC’s appeal, and deny its stay petition as moot.

BACKGROUND

The RRLW encompasses approximately 338,027 acres of Federal, State, and private lands in southwestern Montana, of which roughly 69,730 acres are managed by BLM in 28 grazing allotments. The DR authorizes, inter alia, vegetation management on public lands managed by BLM in the RRLW, including: commercial timber harvesting on up to 1,188 acres, non-commercial mechanical and prescribed burn treatments on up to 1,913 acres, and conifer removal along up to eight miles of riparian areas and one undeveloped spring. BLM also approved the renewal of grazing permits for each of these 28 allotments, but NEC does not appeal from BLM’s approval of these renewed grazing permits. Its Notice of Appeal from the DR and FONSI also identified the EA and EA Amendment and stated they failed adequately to consider issues that were also identified in its protest of the grazing decision (e.g., “mitigation measures” to protect sage grouse from fence strikes, “burning impacts,” the effect of livestock utilization on “new water developments,” grazing impacts on aspen, and “conifer removal from riparian areas”).

BLM developed its EA and DR using an interdisciplinary team (IDT) of resource specialists who assessed whether public lands in the RRLW were meeting the Montana/Dakotas Standards for Rangeland Health and Guidelines for Livestock Grazing Management (Uplands, Riparian and Wetland Areas, Water Quality, Air Quality, and Biodiversity), using upland and riparian monitoring data and field assessments. The IDT issued an Assessment Report on December 21, 2017, which found only 3 of 28 allotments were not meeting all Standards and that grazing was contributing to the failure of only one allotment to meet applicable Standards, the Snowline AMP allotment (Riparian and Wetland Areas and Water Quality Standards). Based on its rangeland

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5 See EA at 1-2, 4-7; EA Amendment at unpaginated (unp.) 2.
6 See DR at 2, 6-8.
7 Final Decision and DR dated Oct. 29, 2018 (AR 3-6) (October 2018 Decision) at 2-11.
11 RRLW Assessment Report (AR 3-13), also available at BLM’s ePlanning website, supra note 1; EA at 3-7.
health assessment, BLM proposed three action alternatives to improve rangeland health and enhance biodiversity by addressing key issues identified during the assessment. The IDT analyzed likely environmental impacts of these management alternatives, plus a no action alternative, in the EA and EA Amendment.

The Field Manager issued a FONSI, Notice of Proposed Decision on livestock management, and Draft DR for vegetation treatments that were based on the May 2018 EA;\textsuperscript{12} NEC commented on the Draft DR and protested the proposed grazing decision.\textsuperscript{13} BLM responded to NEC’s protest in its Final Decision on livestock management and also solicited public comment on a final DR, after which it rescinded that DR and amended its EA.\textsuperscript{14} The EA Amendment addressed sage-grouse management under the September 2015 Idaho and Southwestern Montana Greater Sage-Grouse Approved Resource Management Plan Amendment (ARMPA) that had amended the applicable land use plan, the 2006 Dillon Resource Management Plan (RMP).\textsuperscript{15} BLM then issued a FONSI and the DR that is here appealed.

In the DR, the Field Manager selected EA Alternative B for livestock management, including its Forest and Woodland Treatments, Riparian Vegetation Treatments, and Travel Management, and also EA Alternative C for its Non-Commercial Mechanical/Prescribed Fire Treatments.\textsuperscript{16} She there approved: (1) Forest and Woodland Treatments, including commercial timber harvesting on up to 1,188 acres in the Clark County Grazing allotment (i.e., thinning of high density conifer stands, harvesting conifers in and around aspen stands, and salvage harvesting of dead/dying timber), planting of whitebark and/or limber pine seeds/seedlings on a case-by-case basis, plus planting mountain mahogany seedlings in the Bell Canyon and Row West allotments; (2) Riparian Vegetation Treatments to reduce/remove Rocky Mountain juniper and other conifers from an undeveloped spring and up to eight miles of riparian areas in the Gallagher, Gallagher Mountain AMP, Cedar Creek, Little Sheep, and Clark Canyon Grazing allotments; (3) Non-Commercial Mechanical/Prescribed Fire Treatments to reduce conifer expansion into sage-grouse habitat and to maintain and enhance vegetative structure and function of 1,913 acres in the Clark Canyon, Roe West, and Bell Canyon/Roe West Grazing allotments; (4) Willow Regeneration in wetlands along the Beaverhead River (up to 330 acres); (5) using biological controls and herbicides to

\textsuperscript{12} See AR 3-8 at 1.

\textsuperscript{13} AR 2-5; AR 2-6; see DR at 1.

\textsuperscript{14} See October 2018 Decision at 1-2, B-1 to B-19 (Response to NEC protest); BLM Field Manager Letter to Interested Parties, dated Nov. 15, 2018 (AR 3-5); EA Amendment.

\textsuperscript{15} See EA at 52-69.

\textsuperscript{16} See DR at 2-12.
eradicate new noxious weed infestations and mapping of all invasive species to prioritize areas for future treatment (Noxious and Invasive Species); and (6) updating travel routes as open, closed, limited (Travel Management). She also specified project design features, plus monitoring and mitigation measures to avoid or minimize adverse impacts to special status plant and animal species and habitat, visual resources, recreation, and other resources.17

The Field Manager determined that all approved actions conformed to the applicable RMP, as amended by the 2015 Sage-Grouse ARMPA.18 In her accompanying FONSI, she considered context and intensity under 40 C.F.R. § 1508.27, found the approved actions were not likely to result in any significant impacts to the human environment, and concluded that BLM was not required by NEPA to prepare an environmental impact statement (EIS).

NEC timely appealed from the DR and petitioned to stay the effect of BLM's approval of slashing conifers, burning sagebrush, removing juniper trees, building fences, and developing water projects during the pendency of this appeal.19 It asserts these actions will directly impact animals, promote the spread of cheatgrass by eliminating sagebrush, and destroy valuable wildlife habitat used by Greater sage-grouse and other wildlife. NEC also objects to BLM's failure to take affirmative steps to comply with the Sage-Grouse ARMPA for managing sage-grouse on public lands, ensure that mitigation measures adopted in the DR are designed and implemented to avoid sage-grouse collisions with fences, and control cheatgrass invasions that threaten wildlife habitat.20

NEC contends that BLM violated NEPA by failing to (1) make wildlife surveys and other requested information available for public review; (2) adequately consider the likely effect of new fencing and water projects on sage-grouse and other wildlife in the RRLW; (3) adequately consider direct, indirect, and cumulative impacts on sage-grouse, birds, big game species, and other aspects of the human environment of timber harvesting up to 1,188 acres, prescribed burning up to 1,913 acres, and removing conifers along approximately eight miles of streams and around an undeveloped spring; (4) prepare an EIS to address potentially significant environmental impacts; and (5)

17 See DR at 2 (“All features common to all action alternative will be implemented.”); EA at 20-24 (Features Common to All Alternatives), 34-52 (Features Common to All Action Alternatives).
18 See DR at 17-18; EA at 8-9; EA Amendment at unp. 2.
19 See NEC Letter at unp. 1; Petition for Stay (Petition) at unp. 1.
20 See NEC Letter at unp. 1; Notice of Appeal/Statement of Reasons (NA/SOR) at 2, 20-21.
consider the adequacy of measures for mitigating adverse impacts to sage-grouse.\textsuperscript{21} NEC also contends BLM's approval of cutting, mastication, and prescribed fire as vegetation treatments is contrary to the recommendations of the Sage-Grouse ARMPA and violates section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA).\textsuperscript{22}

BLM moves to dismiss, claiming NEC lacks standing to pursue its appeal. We here address that motion.

**DISCUSSION**

In order to appeal from and petition to stay the effect of a BLM decision, an appellant must have standing under 43 C.F.R. § 4.410. 43 C.F.R. § 4.410(a) requires an appellant to be a “party to a case” that is “adversely affected” by the decision being appealed.\textsuperscript{23} It is the responsibility of the appellant to demonstrate both elements for standing.\textsuperscript{24} If either is lacking, the appeal must be dismissed.\textsuperscript{25}

The rule at 43 C.F.R. § 4.410(b) states that a “party to a case” is one who “participated in the process leading to the decision under appeal” such as by commenting on an environmental document or filing a protest to a proposed action.\textsuperscript{26} As NEC did both, it is clearly a party to this case. The rule at 43 C.F.R. § 4.410(d) provides that a party to a case is “adversely affected” when the decision on appeal causes or is substantially likely to cause injury to an appellant’s “legally cognizable interest.”\textsuperscript{27} When an organization appeals from a BLM decision, it must demonstrate that the organization itself has a legally cognizable interest or that one or more of its members or staff has a legally cognizable interest that is substantially likely to be injured by the decision.\textsuperscript{28} Such a legally cognizable interest must be held by the appellant, its members, or staff at the time of the decision being appealed.\textsuperscript{29} To demonstrate an adverse effect, an

\textsuperscript{21} See NA/SOR at 1-14, 17-21, 23-27; NEC Letter at unp. 2.
\textsuperscript{22} 43 U.S.C. § 1732(a) (2012); see NA/SOR at 2, 3, 14-17, 21-23, 24.
\textsuperscript{23} See 43 C.F.R. § 4.410(b) (party to a case) and (d) (party to a case adversely affected); Western Watersheds Project, 185 IBLA 293, 298 (2015).
\textsuperscript{25} WildEarth Guardians, 183 IBLA 165, 170 (2013).
\textsuperscript{26} See WildEarth Guardians, 183 IBLA at 171; NA/SOR at 2, 5.
\textsuperscript{27} See Western Watersheds Project, 185 IBLA at 298.
\textsuperscript{28} See Board of County Commissioners of Pitkin County, Colorado, 186 IBLA 288, 308-10 (2015).
\textsuperscript{29} See Western Watersheds Project, 185 IBLA at 298.
appellant must make colorable allegations of adverse effect that are supported by specific facts set forth in an affidavit, declaration, or other statement of an affected individual that are sufficient to establish a causal relationship between the approved action and the injury alleged. An appellant need not prove an adverse effect will, in fact, occur as a result of the BLM action, but we have long held the threat of injury and its effect must be more than hypothetical.

NEC Failed Adequately to Demonstrate it is Substantially Likely to be Adversely Affected by BLM’s Decision

NEC filed a one-page Declaration of Standing that was signed by its Director, Sara Johnson. BLM responded by moving to dismiss this appeal and opposing NEC’s stay petition. Although the Board chose to hold NEC’s stay petition in abeyance pending our resolution of BLM’s motion, NEC filed nothing further, electing instead to rely solely on the Johnson Declaration to demonstrate that it has standing to pursue this appeal.

Johnson attests to having spent part of July 20, 2018, “looking at sage grouse habitat” on the 9,445-acre Snowline AMP Grazing allotment. BLM asserts in its Answer that none of the challenged management actions will take place in this allotment, and Johnson makes no claim that any of the actions challenged by NEC are likely to take place in the only area she visited in the 10,000-acre allotment. But even if she had, Johnson visited the allotment only once and for only part of a day. She identifies no other visits to the RRLW or any of its allotments, only a November 2016 visit to two watersheds “in the vicinity of the RRLW.” Johnson “intends to spend time looking at

32 Johnson Declaration (AR 2-4); see id. (“Sagebrush habitats in the Snowline AMP were easily accessed from Interstate 15, and Appendix A of NEC’s appeal includes several photos of habitat in this allotment.”).
33 Answer at 8-9.
34 See Johnson Declaration.
35 Id.
sagebrush habitats and impacts of past fires and vegetation treatments in the RRLW during the summer of 2019,” but she does not state whether she will be visiting any area where BLM’s challenged treatments are likely to take place.\(^\text{36}\)

Recreational and other legitimate uses of the public lands have long been recognized as legally cognizable interests sufficient to support standing by an individual or an organization.\(^\text{37}\) But such use must be demonstrated, and the user must specify when and where that prior use occurred, as well as his or her intentions regarding future use, in order to demonstrate an actual connection to the lands or resources impacted by a BLM decision approving the challenged actions.\(^\text{38}\)

At best, NEC demonstrated that Johnson visited the general area likely to be affected by the approved actions on only one occasion for part of one day. She attests to having been somewhere in the 9,445-acre Snowline AMP Grazing allotment that is part of the 69,730-acre RRLW Assessment Area administered by BLM. We have long held that an organization may demonstrate standing by establishing that “a member ‘has used or in the future will use’ the lands impacted by the decision on appeal.”\(^\text{39}\) While Johnson visited one of 28 allotments managed by BLM in the RRLW, the Snowline AMP Grazing allotment, she fails to allege ever visiting any area likely to be adversely affected by any of the activities challenged on appeal, as described in the EA.\(^\text{40}\) Thus, NEC fails to

\(^{36}\) Id.; see Western Watersheds Project, 185 IBLA at 300 (“[Cole] does not set forth the date(s) of his visits, where he was, what he did, or otherwise place himself in, adjacent to, or near any of the identified treatment areas”).

\(^{37}\) See, e.g., Klamath-Siskiyou Wildlands Center, 190 IBLA 295, 300 (2017); Cascadia Wildlands, 188 IBLA 7, 9-10 (2016).

\(^{38}\) See Western Watersheds Project, 185 IBLA at 300 (“We do not believe Cole’s allegations of limited use in 2011 and indefinite prior and future use are sufficient to demonstrate that WWP held a legally cognizable interest at the time of [BLM’s] . . . 2015 [decision].”); Western Watersheds Project v. BLM, 182 IBLA 1, 9 (2012) (a member’s single visit in 2005 did not demonstrate that an organization has standing); Coalition of Concerned National Park [Service] Retirees, 165 IBLA 79, 88 (2005) (“As this appeal demonstrates, it is helpful for an appellant to provide as much evidence as possible about what interests are allegedly injured and what the connections are between those interests and the decision it seeks to appeal.”).


\(^{40}\) See EA at 63 (Table 2.6 (Riparian Reaches Proposed for Conifer Expansion Treatment (Alternative B))), 70 (Table 2.9 (Non-Commercial Mechanical/Prescribed Fire Units...
establish that Johnson or any NEC member has a legally cognizable interest that is substantially likely to be injured by BLM’s decision, and NEC has not asserted that it has legally cognizable interests apart from its members’ interests in the resources impacted by BLM’s decision.\textsuperscript{41} It has demonstrated nothing more than a general interest in vegetation management on the public lands, which is insufficient for standing purposes.\textsuperscript{42} We therefore find no basis for recognizing that NEC has standing to pursue this appeal.

CONCLUSION

NEC has not carried its burden to demonstrate it is “adversely affected” by the DR on appeal, as required by 43 C.F.R. § 4.410. We therefore grant BLM’s motion to dismiss and deny NEC’s stay petition as moot.

\textsuperscript{41} See Board of County Commissioners of Pitkin County, Colorado, 186 IBLA at 308-09 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)) (standing as an organization requires a showing of a “concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources”).

\textsuperscript{42} See, e.g., American Motorcyclist Association, 188 IBLA 177, 190 (2016) (“general interest in OHV use” and “general concern with the related issues” insufficient to demonstrate standing); Front Range Equine Rescue, 187 IBLA 269, 277 (2016) (“general interest cannot serve as a proper basis for standing to appeal”); Defenders of Wildlife, 152 IBLA 1, 4 (2000) (“general interest in a problem, absent colorable allegations of adverse effect, is insufficient to confer standing”).
Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, BLM's motion to dismiss is granted, NEC's appeal is dismissed for lack of standing, and its petition for a stay is denied as moot.

/s/

James K. Jackson
Administrative Judge

I concur:

/s/

K. Jack Haugrud
Administrative Judge

\[43\] 43 C.F.R. § 4.1.