

IDAHO NATURAL RESOURCES LEGAL FOUNDATION, INC.

IBLA 86-1391

Decided February 26, 1987

Appeal from the February 19, 1986, decision of the Jarbidge Resource Area Manager, Boise (Idaho) District Office, Bureau of Land Management, allowing construction of the Echo II (Amendment) Project, and finding no significant effects on the quality of the human environment. EA ID-01-86-47.

Affirmed.

1. Administrative Procedure: Administrative Review -- Appeals -- Board of Land Appeals -- Federal Land Policy and Management Act of 1976: Land Use Planning -- Rules of Practice: Appeals: Generally

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

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

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

3. Rules of Practice: Appeals: Dismissal

Where a notice of appeal is not filed within 30 days after the person filing the notice has been served with a

decision, the Board does not have jurisdiction to review that decision.

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

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of the officer's study of such a record.

APPEARANCES: Edwin W. Stockly, Esq., Boise, Idaho, for appellants; Robert S. Burr, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Bureau of Land Management (BLM) has filed a motion under 43 CFR 4.21(a) to put into immediate effect its decision of February 19, 1986, allowing the construction of a pumping station and a sump pond near the East Fork of the Bruneau River in Owyee County, Idaho, and the installation of 1-1/2 miles of water pipeline from the pond to a reservoir. The effect of the decision was suspended by an appeal filed February 26, 1986, by the Idaho Natural Resources Legal Foundation. ^{1/} Under the circumstances of this

^{1/} See 43 CFR 4.21(a). The statement of reasons lists as additional appellants Idaho Bird Hunters, Inc., Idaho Sportsmen's Coalition, Inc., Idaho Conservation League, Ada County Fish and Game League, and Idaho Wildlife Federation.

case it is appropriate to treat the motion as one to expedite a decision on the merits, and we have done so.

2/

The system originally developed in 1970 for stock watering in this part of Owyhee County proved expensive to operate and maintain. When, in 1982, BLM announced the policy that responsibility for maintenance of such systems would be assigned to those deriving the primary benefit from them, 3/ the grazing permittees in the area proposed redesigning the system so that costs would be reduced. They formed the Echo Water Users Association to cooperate with BLM in planning and executing the redesigned system and to bear its operation and maintenance costs. In June 1985, BLM approved the construction of a well, a 2-1/2-million-gallon reservoir, and 12 miles of pipeline to correct the deficiencies of the existing system. 4/ The construction was completed, but because the well did not produce enough water, BLM decided to allow construction of a pumping station, an L-shaped sump pond 150 feet long, 15 feet wide, and 6 to 10 feet deep, and 1-1/2 miles of pipeline from the sump pond to the reservoir constructed in 1985. 5/ It is this decision that has been appealed.

2/ BLM's State of Idaho permit to appropriate public waters provides that BLM shall commence construction within a year of issuance of the permit on Feb. 27, 1986.

3/ See Instruction Memorandum (IM) No. 83-27, "Final Rangeland Improvement Policy," dated Oct. 15, 1982, and IM No. ID-84-369, "Assignment of Range Improvement Maintenance Responsibility," dated July 30, 1984.

4/ See Environmental Assessment EA #ID-01-85-89, dated June 6, 1985, for the Echo II project. "A secondary objective of the proposal is to develop the potential to distribute water outside of the current systems service area." Id. at 1. "Increasing distribution capabilities" is listed as one of the objectives in the discussion of alternatives. Id. at 6. Construction costs were divided equally between BLM and grazing permittees. Id. App. 7, at 1.

5/ See Environmental Assessment EA No. ID-01-86-47 for the Echo II (Amendment) project, dated Feb. 19, 1986. "Water for the pump station will be delivered directly from Clover Creek through an existing headgate and irrigation ditch." Id. at 1. (The East Fork of the Bruneau River is also known as Clover Creek.)

At the outset, we must define the scope of the appeal. Appellants complain that BLM decided as early as January 1984 to partially fund reconstruction of the Echo pipeline; 6/ that neither the August 1984 draft Resource Management Plan/Environmental Impact Statement outlining proposed management of more than 1,690,000 acres of public land in the Jarbidge Resource Area nor the September 1985 Proposed Jarbidge Resource Management Plan and Final Environmental Impact Statement discussed or evaluated the Echo pipeline project, as they should have; and that both the June 1985 Environmental Assessment (EA) for the well, reservoir, and 11 miles of pipeline and the February 1986 EA for the amendment of the project involving the pumping station, sump pond, and 1-1/2 miles of pipeline were after-the-fact rationales for decisions already made (and, in the latter case, partially implemented 7/) that did not explore the environmental impacts in a timely or adequate manner, as required by the National Environmental Policy Act and implementing regulations.

BLM responds that the Jarbidge Resource Management Plan was begun in 1981, when the Echo pipeline reconstruction project could not have been anticipated, and in any event is suited to consider broad land use allocations, not site-specific range improvement projects; that it is too late to appeal

6/ See Exhibit B, appellants' statement of reasons, which is a draft BLM IM dated Jan. 19, 1984, concerning the FY 1985 Annual Work Plan Directives and Operating Budget approval. It reads in part, under the heading 4322-Grazing Management: "II. Specific Directives. Your AWP [Annual Work Plan] cost target is increased by \$ 432,000 * * * of which * * * \$ 106,000 [is] for the Echo pipeline reconstruction * * *. [T]he \$ 106,000 is provided for the Bureau to make a good faith effort to assist in this as a cooperative project."

7/ The 1-1/2 miles of pipeline from the site of the proposed sump pond and pump to the new reservoir were constructed in October 1985, soon after it was apparent the well would not produce enough water.

any aspect of the June 1985 decision; and that the February 1986 EA contains an adequate discussion of the environmental impacts of the diversion of water from the river, and the construction of the sump pond, pumping station, and pipeline to the new reservoir.

[1] We agree that the resource management plan is not the proper basis for us to review BLM's decision concerning the Echo pipeline project. Such a plan is "not a final implementation decision on actions." 43 CFR 1601.0-5(k). Rather, it is "designed to guide and control future management actions." 43 CFR 1601.0-2. In any event, the Board does not have jurisdiction over appeals from the approval or amendment of a resource management plan, but only over actions implementing such a plan. Wilderness Society, 90 IBLA 221, 224-25 (1986). Appellants may pursue their concerns about the Jarbidge Resource Management Plan via the protest they filed concerning it on November 1, 1985. 43 CFR 1610.5-2.

[2] BLM is required to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (1982), in carrying out range management projects such as the Echo pipeline reconstruction, however. Unless a project is categorically exempt, which this one is not claimed to be, 8/ an EA must be prepared. 40 CFR 1501.4(b). Such an assessment must take a hard look at the issues, as opposed to setting forth bald conclusions, identify the relevant areas of environmental concern, and make a convincing case that environmental impact is insignificant if its conclusion that an environmental impact statement (EIS) is not required is to be upheld. Glacier-Two Medicine

8/ See 516 DM 2.3A, 45 FR 27544 (Apr. 23, 1980), 516 DM 2, Appendix 1.

Alliance, 88 IBLA 133, 141 (1985); Sierra Club, 57 IBLA 79, 83 (1981). If a salient aspect of a program or project has not been assessed, and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared. SOCATS (On Reconsideration), 72 IBLA 9 (1983). In this case, even though developing "the potential to distribute water outside of the current systems [sic] service area" is acknowledged as an objective in the June 1985 EA, see supra note 4, and the EA evaluates the cost-benefit ratio on the basis of adding lateral pipelines within specified later periods (see EA App. 7 and Map I), the text of the EA spends only two sentences evaluating the impacts of this increased distribution. ^{9/} The consultant's discussion of the recommendation that was modified somewhat in the June 1985 decision names as one of its benefits "the ability to open up the entire range between the two reservoirs for stock usage with adequate water," ^{10/} but, like the EA, does not discuss the effects of this consequence at all.

[3] If the June 1985 decision were subject to our jurisdiction, we would be constrained to suspend it until an adequate environmental analysis was prepared. SOCATS, supra at 12. No timely appeal of this decision brought it within our jurisdiction, however. See State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (1985). Further, the construction it authorized is complete, so requiring compliance with NEPA at this stage would substantially prejudice both BLM and the private parties who jointly financed the project. Cf. Peshlakai v. Duncan, 476 F. Supp. 1247, 1256-57 (D.D.C. 1979);

^{9/} "Increased distribution of water will have a long term effect of improved distribution of livestock. This should have a beneficial impact to the riparian zone, in that it will decrease the number of cattle which currently drink directly out of the creek." 1985 EA, supra note 4, at 10.

^{10/} Id., App. 1, at 5.

Mandelker, NEPA Law and Litigation, § 4.27 (1984). Under the circumstances, we cannot provide appellants any relief from BLM's June 1985 decision. 11/

[4] There remains the question whether the 1986 EA properly concluded an EIS was unnecessary for the amendment of the Echo pipeline project. The answer to this question is clouded by the fact that BLM proceeded with the construction of part of the project -- 1-1/2 miles of pipeline from the proposed diversion site to the new reservoir -- in October 1985, 4 months before it prepared the 1986 EA. The only apparent explanation provided for doing so are the statements in the February 1986 EA that "[t]he existing environment is basically the same as the described in EA #ID-01-85-89" and that "[t]he 1-1/2 miles of pipeline required under this proposal will result in the same environmental impacts previously identified in EA #ID-01-85-89. Therefore, the same mitigating measures previously identified for the pipeline/roadway will be carried forward." It is not clear from the record that the environment surrounding the mile of the originally proposed pipeline from the well in section 15 east to the new reservoir in section 14 is "basically the same" as the 1-1/2 miles from the proposed new diversion site in

11/ BLM's answer states at page 2:

"Neither the Echo II Decision of June 6, 1985, or the Echo II Amend-ment Decision of February 1986 were [sic] concerned with the enlargement of the water distribution system located on the plateau. Both decisions were oriented towards upgrading the existing water system by constructing a more efficient pumping station and increasing water storage capacity."

Its motion states at page 2:

"The watering areas for livestock are not being increased by this decision so the amount of water used to supply the needs of the domestic livestock and wildlife within this portion of the Salier Creek Unit are not being increased. Neither are grazing areas for livestock being enlarged by the decision."

We assume these statements mean BLM plans to prepare an EA on the effects of increasing water distribution before it proceeds with this aspect of the project.

section 23 north to the reservoir. In any event, for an analysis to apply to the same construction in a different location the environment would have to be the same, not just "basically" the same. Even if the new location were the same, however, an environmental analysis is to be prepared before construction of the project it analyzes; it cannot serve its function of assisting in determining whether to prepare an EIS if the project has already been completed. See 40 CFR 1501.4(c), 1508.9(a)(1).

We stated above the criteria for an EA: it must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impact is not significant. Sierra Club, supra. A decision that a proposed action does not require an EIS will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of his study of such a record. Id. at 84; Southwest Resource Council, 73 IBLA 39, 48 (1983). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and is supported by the record on appeal. Glacier-Two Medicine Alliance, supra at 141; Sierra Club, Inc., 92 IBLA 290, 303 (1986).

Appellants contend the "1986 EA contained only a superficial discussion of the effects of taking water directly from the East Fork of the Bruneau

River" (Statement of Reasons at 8, 12). They argue that if the effects of removing water from the stream on riparian zones and fisheries habitat are unknown, as the EA states, then a worst case analysis should be performed. Id. at 17. This criticism is based on the following statement from the 1986 EA at page 3:

In addition to surface disturbance, which is mitigated by the above measures, concern has been expressed over potential impacts to Clover Creek which may result from removing water directly from the stream. Reduced water flows would have a negative effect on riparian zones and fisheries habitat. The significance of this effect is unknown at this time as there is not enough data available to make a quantifiable assessment. Under the existing Echo System approximately .23 cfs is being pumped out of Clover Creek on a continual basis. The proposed pumping system will have the capability to double this rate (to .43 cfs), but pumping on a continual basis should no longer be required. The new pump system will however, affect an additional 10 miles of stream.

The EA and BLM's answer explain that the increased pumping capacity and increased storage capacity will enable BLM to fill the reservoirs when the stream is not at low flow and to extend the periods when no pumping is needed at all to 5 to 7 weeks if the reservoirs were full beforehand. This would result in less impact on fisheries and riparian habitats than the present system, BLM argues, even though the amount of water diverted would be greater and the diversion site is 10 miles upstream. In its motion, BLM offers supporting data (stating it was analyzed during the EA process) that the .46 cubic feet/second to be diverted would have exceeded 10 percent of the mean flow of the stream during lowflow summer months in only 2 of 13 years of record during July, 3 of 13 years in August, and 5 of 13 years in September (Affidavit Accompanying Motion at 5-6). In such months, BLM

states, "the Echo II system would have had to operate strictly with water stored in the reservoirs"; correspondingly, livestock could be watered away from the stream, thus reducing their direct impacts on riparian habitats by drinking from it. Id. In other months diverting up to 10 percent of mean flow "is not considered to be a significant effect on the water flow." Id. In times of low flow it is holders of water rights senior to BLM's whose uses "can and do dry up the river in certain stretches," BLM observes (Motion at 3; EA at 3).

The EA concludes:

From this information, preferred mitigation would be to develop a watershed management plan for Clover Creek which would improve the entire riparian zone of the stream and ultimately reduce its wide fluctuations in flow rates. The entire drainage would have a stable water discharge rate rather than the wide extremes of no flow or flood which currently exist. Improvement of the riparian condition would be accomplished by developing specific livestock grazing systems, gap fencing to restrict livestock access to stream banks or structural improvements to regulate waterflow.

The Resource Area Manager's rationale for his February 19, 1986, decision allowing construction of the amendment to the project and finding no significant effects on the quality of the human environment stated: "It will also be required that the storage systems be kept as full as possible during those periods when excess water is flowing through Clover Creek. A watershed management plan will be developed for Clover Creek in an attempt to lessen the wide fluctuations in stream flows which currently exist."

It is thus apparent that the BLM decision was based on an examination of relevant areas of environmental concern and incorporated appropriate

provisions in response to those concerns. It is based on a sufficient (if not fulsome) environmental analysis record and is a reasonable result of a review of that record. Appellants have not identified any clear error of law or fact or shown that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision of February 19, 1986, is affirmed.

Will A. Irwin
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

The instant case evidences a less than complete recognition by the Boise District Office of the obligations imposed by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982).

Admittedly, this Board has had occasion to note in numerous prior decisions that the thrust of NEPA is primarily procedural rather than substantive. Thus, in In re Otter Slide Timber Sale, 75 IBLA 380 (1983), we quoted the decision of the United States Supreme Court in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978), that: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision." Id. at 383 n.3.

The fact that NEPA is primarily informational rather than action-forcing, however, does not lessen its import. Rather, the Board has held that the opposite is true. In State of Wyoming Game & Fish Commission, 91 IBLA 364, 367 (1986), we noted that: "Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA." Under such a standard, the actions taken by the Boise District Office in the instant matter must be deemed clearly inadequate.

It is true, of course, that two environmental assessments (EA's) were prepared in this case. Each, however, suffers from infirmities. The 1985 EA (EA ID-01-85-89) involved consideration of the proposal to drill a water well, pump the water to a new 2-1/2 million gallon reservoir and, from there, connect the new reservoir to an existing reservoir by means of 11 miles of buried pipeline. This proposal was derived from a private study commissioned by the Echo Water Users Association undertaken to ascertain how the irrigation system could be improved so that costs of operating and maintaining the system could be lowered. Five alternatives were examined. Preferred alternative number 5 involved the drilling of the well and creation of the new reservoir. The resultant costs of this alternative were not inconsiderable. Indeed, of the four alternatives for which cost estimates were provided, alternative number 5 involved the highest expenditures. This alternative was preferred, however, because it contemplated "development of new storage and new lands for stock usage" in addition to overall lowered operation and maintenance costs.

But, despite the fact that economic viability of this alternative was directly related to the fact that increased lands would be made available for grazing (see Appendix 7 to the EA), the 1985 EA is totally silent as to any environmental analysis of the effect of opening up new lands to grazing use. On appeal, counsel for BLM advises us that the EA was not concerned "with the enlargement of the water distribution system located on the plateau" (Answer at 2). Certainly, it does not analyze this aspect of the proposal. The EA, however, clearly states that "a secondary objective of the proposal is to develop the potential to distribute water outside of the current systems service area" (1985 EA at 2). It must be assumed, therefore, that it was the

intention of the District Office to issue another EA prior to construction of the new laterals which would examine the impacts of increasing the lands open to grazing.

Had a proper appeal been filed at that time, I think it is clear that the Board would have set aside the EA as an improper bifurcation and piecemeal analysis of a project whose effects should be considered as a whole. Thus, courts have refused to allow segmentation of projects into discrete units for purposes of analysis since not only may synergistic effects be ignored under such an approach, but also the partial completion of a project may so prejudice the decisionmaker that subsequent recognition of adverse environmental impacts which might have convinced the agency not to proceed as an original matter may be overwhelmed by consideration of the time, efforts, and expenditures already made. Inasmuch as the economic viability of the Echo II pipeline system was dependent upon increased grazing capacity, it was clear error for BLM not to directly address this question in the 1985 EA.

Be that as it may, the majority correctly points out that no one appealed from the initial EA. Rather, action proceeded to implement the plan until September 1985, when it was determined that the well would not have sufficient flow for the system. This determination was made after construction of the new Clover Crossing Reservoir had already been completed. In October 1985, approximately 1-1/2 miles of pipeline was laid from the Clover Crossing Reservoir to a site on Clover Creek where a pumping station was now proposed. In February 1986, BLM issued the 1986 EA (EA ID-01-86-47),

purportedly examining the impacts of both the pipeline and the pumping station, even though the pipeline had been constructed 4 months earlier.

One need not be steeped in the arcana of NEPA to recognize that the essential utility of an EA is vitiated where it is completed after the "proposed" action being analyzed has already been accomplished. The whole purpose of an EA is to develop a document which assesses the impact of a proposed action and allows the decisionmaker to consider environmental consequences and direct the adoption of measures which might mitigate any negative impacts prior to authorizing a project. An EA prepared after the fact can only be either an exercise in damage control or an ex post facto rationalization. This is simply not the way the process is supposed to work.

It is, therefore, with extreme reluctance that I concur in the disposition of this appeal. Two separate considerations impel me to this result. First, appeals do not arise in a vacuum. The pipeline to Clover Creek has already been constructed. Admittedly, the EA was prepared after the fact. But, at this point in time, there is nothing that the Board can do, no matter how strongly it may deplore the procedures followed in this case, which can erase this reality. Thus, I think we must limit ourselves to a review of the adequacy of the 1986 EA, ignoring the belated nature of its preparation. I must agree that the 1986 EA, which the majority charitably describes as "not fulsome," at least minimally analyzed the impact of the pumping station. On this limited question, appellants have failed to establish that BLM did not consider the environmental impacts of increased diversion from the river. Nor can I say that the decision to proceed with the project is not a reasonable result from a review of the record. Thus, insofar as the pumping

station and pipeline are concerned, I agree that appellants have not carried their burden on appeal.

The second and more critical consideration in my decision to concur is my understanding that no action with respect to the construction of new lateral lines (as opposed to the maintenance of existing ones) will be permitted until after an EA is prepared which fully analyzes the environmental impacts of increasing the areas open to grazing. Indeed, were this not the case, I would not hesitate to vote to reverse the decision of BLM and direct suspension of all activities under the 1986 EA until it was supplemented by such an analysis.

I realize that this still results in a piecemeal analysis of the Echo II pipeline's effects. However, both the pipeline and the Clover Crossing Reservoir have already been constructed. Appellants have failed to establish that the pumping facilities, with its attendant impacts on Clover Creek, have not been adequately considered by BLM. It would therefore appear to serve no useful purpose to require a halt in construction of those facilities or the impoundment of the spring run-off, pending an examination of the effect of increasing the areas open to grazing provided that these effects are examined before any resources are committed to expanding the system. With this understanding, I concur in the denial of the appeal.

James L. Burski
Administrative Judge