

SOUTHERN UTAH WILDERNESS ALLIANCE  
THE WILDERNESS SOCIETY  
UTAH CHAPTER SIERRA CLUB

IBLA 89-73

Decided June 25, 1992

Appeals of a decision by the Richfield District Office to implement rangeland improvement projects and finding that implementation will have no significant impact on the quality of the human environment not previously noted in the Henry Mountain Grazing Environmental Impact Statement.

Set aside and remanded.

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

An EA may be tiered to an EIS. The purpose of tiering is to eliminate repetitive discussions of issues and allow focus on the issues ripe for decision. The similarity of environmental issues determines whether tiering is appropriate, not the nature of the decision made based upon the review. When an EA is tiered to an EIS, the question is whether the EIS adequately addresses the environmental effects of the proposed actions or whether, because the analysis is broad and does not address specific impacts, a supplemental statement is required.

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

When a programmatic EIS is sufficiently detailed, and there is no change in circumstances or departure from the policy in the programmatic EIS, no useful purpose would be served by requiring a site-specific EIS. Major variations between the actions considered in a broad EIS and a site-specific EA may vitiate compliance with NEPA. Conversely, the fact specific actions were anticipated in an EIS or matters addressed in the EIS were later carefully reviewed in regard to undertaking specific actions supports a finding of compliance with NEPA.

3. Environmental Quality: Environmental Statements--Grazing and Grazing Lands--National Environmental Policy Act of 1969: Environmental Statements

Absent an analysis of the possible consequences should proposed rangeland improvement projects not be fully successful and lacking an analysis of the immediate consequences of undertaking the projects, the Board cannot conclude that BLM has identified the relevant areas of environmental concern and has taken a hard look at the environmental consequences of the projects.

APPEARANCES: Rodney Greeno, Issues Coordinator, Southern Utah Wilderness Alliance, Salt Lake City, Utah; Mike Medberry, Utah Representative, The Wilderness Society, Salt Lake City, Utah; James Catlin, Public Lands Coordinator, Utah Chapter of the Sierra Club, Salt Lake City, Utah; David K. Grayson, Office of the Regional Solicitor, Salt Lake City, Utah.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Southern Utah Wilderness Alliance (Wilderness Alliance) and The Wilderness Society, jointly, and the Utah Chapter of the Sierra Club (Sierra Club), separately, have appealed a decision by the Acting District Manager of the Richfield District Office, Bureau of Land Management (BLM), dated September 14, 1988, to implement the "MFP [Management Framework Plan] Alternative" and his finding, based on the Henry Mountain Coordinated Resource Management Proposals Environmental Assessment (Henry Mountain EA), that the action will have no significant impact on the quality of the human environment not previously noted in the Henry Mountain Grazing Environmental Impact Statement (Henry Mountain EIS). 1/

At issue are 21 rangeland improvement projects affecting 10,055 acres of BLM land and 1,920 acres of State land within the Crescent Creek, Nasty Flat, Pennell, and Steele Butte grazing allotments in the Henry Mountains of southern Utah (Henry Mountain EA at 15-16). The proposed land treatment projects include controlled burning or chaining 2/ of 4,930 acres to remove

1/ The Sierra Club also filed a protest of the decision with the Utah State Director. In its statement of reasons (SOR) the Sierra Club reports that by letter dated Oct. 11, 1988, the State Director declined to rule on the protest because the appeal had removed BLM's jurisdiction over the matter (SOR at 5). A copy of the protest is part of the record.

2/ "The chaining process involves pulling a heavy, anchor chain between two crawler tractors. The tractors crawl about 150 feet apart parallel to each other. This causes the chain to form a large 'U' shape between the tractors. This breaks up and uproots most tall wooden vegetation. Immediately following the first chaining of the project area seed would be broadcast aerielly into the disturbed sites. After the seed is broadcast the entire area would be rechained by pulling the anchor chain in exactly the opposite direction from the first chaining." (Henry Mountain EA at 7-8.)

juniper and pinion trees and sagebrush, and seeding the areas with grasses, forbes, and shrubs. Maintenance chaining or burning would occur on an additional 2,219 acres and another 2,576 previously treated acres would

be roller chopped <sup>3/</sup> to destroy regrowth. An area of 1,150 acres would be interseeded, and 1,100 acres previously treated would be reseeded by air. The intended effect of these projects is to increase the forage available for grazing by cattle, sheep, bison, and mule deer. The projects also include constructing three sections of fence totalling 8.5 miles and laying 5 miles of new pipeline on Tarantula Mesa. Except for aerial seeding, none of the projects are to occur in wilderness study areas.

In opposition to the decision, appellants present a variety of arguments raising both broad legal issues and specific factual controversies. The Wilderness Alliance and the Wilderness Society argue that the Acting District Manager's decision requires preparation of a site-specific EIS. They contend that the destruction of pinyon and juniper and the other actions implemented by the decision constitute a major Federal action significantly affecting the quality of the human environment and that "tiering" the EA to the Henry Mountain EIS does not obviate preparation of an EIS. The Sierra Club argues that the Henry Mountain EIS did not adequately analyze the environmental effects of the proposed projects. It finds that the EIS identified only 7 of the 21 projects and contends that the 7 were not adequately reviewed. The Sierra Club also raises arguments that BLM's proposals fail to adequately protect cultural and visual resources and require amendment of management plans before they can be implemented.

In answer, BLM argues that an EA may properly be tiered to an EIS and that "insofar as the proposed rangeland improvements were considered in the original EIS," their significant impacts were analyzed in the EIS (Answer at 3). BLM relies on Texas v. U.S. Forest Service, 654 F. Supp. 296 (S.D. Tex. 1987), which found that the U.S. Forest Service did not need to prepare an EIS prior to removing and replanting trees on 2,600 acres of a 5,600-acre tract within the Sam Houston National Forest when an EIS and management plan had been prepared. The court concluded that the National Environmental Policy Act (NEPA) does not require a further EIS unless application of the management plan "serves an intermediate end or policy that was not part of the original review process." Id. at 298.

In their reply briefs appellants contend that BLM has misconstrued their arguments about the EA, stating that the question is not whether the site-specific EA may be tiered to the EIS, but the adequacy of BLM's review of environmental impacts. As in its SOR, the Sierra Club argues that neither the EIS nor EA adequately address a number of impacts the proposed action will have. Similarly, the Wilderness Alliance and Wilderness Society repeat their contention that, because the proposed action will have

<sup>3/</sup> "A large, rolling, water filled drum approximately 6' in diameter and 16' long is pulled behind a crawler tractor. Parallel 4" blades, spaced about 18" apart, welded to the drum would cut and crush woody vegetation into 18" lengths." (Henry Mountain EA at 8.)

significant impacts, an EIS is necessary. They further argue that BLM has admitted there will be significant impacts and that, for this reason, State of Texas does not apply because the court in that case found the proposed action not to have a significant impact.

We begin our analysis with the point the parties appear to concede--the rangeland improvement projects adopted by the Acting District Manager's decision will significantly affect the quality of the human environment.

As noted by the Wilderness Alliance and Wilderness Society, the Acting District Manager's statement that he had "found no significant impact not already noted in the EIS" implies there will be significant impact. While it is possible that his wording was inadvertent or inartful, BLM has not rejected the implication. To the contrary, it has responded: "Because there would be significant impacts, BLM prepared the 1983 EIS. However, insofar as the proposed rangeland improvements were considered in the original EIS, the site-specific proposals do not raise new significant impacts not already analyzed in the 1983 document." (Answer at 2-3.)

[1] NEPA requires that an EIS be prepared for any proposed "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (1988). The Wilderness Alliance and the Wilderness Society, however, are mistaken in suggesting that the fact the proposed actions may have a significant impact is sufficient to require preparation of an additional or supplemental EIS. As indicated by the following NEPA regulations, "tiering" may be used to obviate preparing an additional or supplemental EIS.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

40 CFR 1508.28.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the

subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussion from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available.

40 CFR 1502.20.

The above regulations allow an EA to be tiered to a previously completed EIS. The provision at 40 CFR 1502.20 explicitly discusses moving from a broad EIS to a subsequent EA. Similarly, the definition of tiering at 40 CFR 1508.28 states that tiering is appropriate when moving from an EIS to a "site-specific statement or analysis." See In re Humphy Mountain Timber Sale, 88 IBLA 7, 8 (1985). We see no reason why differences between the State Director's MFP III decision and the Acting District Manager's decision should preclude tiering. While the two are administratively different, in that the former adopts a general plan for each of 22 grazing allotments and the latter is a decision to implement 21 specific actions within 4 of them, it is clear that to some extent they both consider rangeland improvement projects in the same geographical area. To the extent they do, disallowing tiering would defeat the stated purpose of the regulations--eliminating repetitive discussions of the same issues to allow focus on the issues ripe for decision. 40 CFR 1502.20. In other words, it is the similarity of environmental issues reviewed which determines whether tiering is appropriate, not the nature of the decision made based upon the review. See 48 FR 34263, 34267 (July 28, 1983).

On the other hand, to say the Henry Mountain EA may be tiered to the Henry Mountain EIS does not resolve the issue before us. If, as in this case, implementation of a decision based on a site-specific EA will significantly affect the quality of the human environment, the effect must be analyzed and considered in an EIS. 42 U.S.C. § 4332(2)(C) (1988); see Upper Mohawk Community Council, 104 IBLA 382, 385 (1988). Tiering an EA to a previously completed EIS simply raises the question whether the EIS adequately addresses the environmental effects of the proposed actions, or a supplemental EIS is required because the EIS' analysis is broad and does not address specific impacts. See Ventling v. Bergland, 479 F. Supp. 174, 179-80 (D.S.D.), aff'd mem., 615 F.2d 1365 (8th Cir. 1979); NRDC v. Administrator, ERDA, 451 F. Supp. 1245, 1258-59 (D.D.C. 1978), modified sub nom. NRDC v. U.S. NRC, 606 F.2d 1261 (D.C. Cir. 1979); NRDC v. Morton, 388 F. Supp. 829, 838-41 (D.D.C. 1974), aff'd, 527 F.2d 1386 (D.C. Cir.) (per curiam); cert. denied, 427 U.S. 913 (1976); see also Manatee County v. Gorsuch, 554 F. Supp. 778, 788 (M.D. Fla. 1982). It has also been said that the benefit of tiering an EA to an EIS is that the sufficiency of the environmental analysis is considered as a whole to determine whether it complies with the requirements of NEPA. Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983).

[2] Courts have not established precise criteria for determining the adequacy of a tiered environmental analysis. See generally Mandelker, NEPA Law and Litigation § 9:09 (1984). One rule which has developed is that

when a "programmatic EIS is sufficiently detailed, and there is no change in circumstances or departure from the policy in the programmatic EIS, no useful purpose would be served by requiring a site-specific EIS." Ventling v. Bergland, *supra* at 180. Major variations between the actions considered in a broad EIS and a site-specific EA, however, have been found to vitiate compliance with NEPA. See Oregon Environmental Council v. Kunzman, 714 F.2d 901, 904-05 (9th Cir. 1983). Conversely, the fact specific actions were anticipated in an EIS or matters addressed in the EIS were later carefully reviewed in regard to undertaking specific actions have been relied on to support a finding of compliance with NEPA. EDF v. Andrus, 619 F.2d 1368, 1379-82 (10th Cir. 1980); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1305-06 (8th Cir. 1976).

The documents in the present case present two difficulties in determining the adequacy of the environmental analysis. First, although the Henry Mountain EIS identifies and discusses a number of environmental impacts, both adverse and beneficial, it rarely uses the term "significant." Consequently, it is difficult to ascertain the significant impacts which the Acting District Manager referred to as having been "noted" in the EIS. Second, although the Henry Mountain EA states that it "tiers to the existing grazing EIS" and "discusses and analyzes techniques and procedures for site specific implementation and maintenance treatments in line with concepts of the tiered EIS" (Henry Mountain EA at 3), it does not present any summary of the issues discussed in the EIS or explicitly incorporate the EIS' analysis of any particular issue. See 40 CFR 1502.20. Consequently, it is difficult to identify any specific portion of the EIS on which the EA relies.

Reviewing the EIS, we find that, for the most part, its analysis does not consider the possible environmental consequences of undertaking the proposed rangeland improvement projects. Rather, the analysis is primarily concerned with the effects of the alternative allocations of animal unit months for grazing (EIS at 82, 83).

[3] In preparing the EA, BLM compiled additional information bearing on conditions at the proposed project sites. Tables present the current status and range condition and trend for each area (EA at 19, 23). Appendix I presents data as to soils, precipitation, slope, effective root depth, erodibility, and probability of reseeding success (EA at 125). Although this is the type of information necessary for a site-specific review of proposed actions, the role it played in BLM's decision making is not clear. As appellants point out, despite the EIS' limitation of possible sites to those having a 50 to 70 percent probability of success, the projects adopted by the Acting District Manager's decision include many which the EA identifies as containing areas having only a 30 to 50 percent probability of success (Sierra Club SOR at 9; Joint SOR at 6).

The low probabilities generally occur in areas with particular types of soils, steep slopes, or relatively low amounts of precipitation and, consequently, moderate rather than slight erodibility (EA at 125-30). The portions of the EA discussing environmental impacts on soils and watershed

do not mention specific areas or their features but, as in the EIS, concentrate on the benefits of the projects (EA at 33-35). The sole reference to the factors is that:

There is enough precipitation that the probability of success is generally estimated as 50 to 70 percent for the soil types involved \* \* \*. However, other seedings in the project area have all been fully successful. In one or two growing seasons, ground cover would increase, stabilizing the soil and further reducing erosion levels.

(EA at 34; see EA at 17). Consistent with this analysis, the EA presents tables giving the projected erosion condition of each area and the calculated annual rate and total annual loss of soil (EA at 36, 48). They show that the projects will improve conditions at most sites and that others will remain the same (compare EA at 19).

Although the tables show that BLM considered the long term effect of the proposed projects, the calculations appear to assume that all projects will be successful. The EA does not indicate that the factors were reviewed to consider possible consequences should the projects not be fully successful. Nor is there any indication that BLM considered the immediate consequences of undertaking the projects, particularly in areas of low probability of success. The EA does not discuss the information about current conditions, soils, precipitation, slopes, erodibility, and probability of reseeded success in relation to possible environmental effects occurring during implementation of the projects and the 2 to 5 years it would take seeded areas to stabilize. While the long term benefits might ultimately outweigh short term adverse effects, the EA does not present any analysis of the factors to support such a conclusion.

An EA must (1) take a hard look at the environmental consequences as opposed to reaching bald conclusions unaided by preliminary investigation, (2) identify relevant areas of environmental concern, and (3) make a convincing case that environmental impact is insignificant. Rex Kipp, Jr., 115 IBLA 1, 2 (1990); accord Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987); Citizens' Committee to Save Our Public Lands, 29 IBLA 48, 54 (1977). When "a salient aspect of a program 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." Idaho Natural Resources Legal Foundation, Inc., supra at 24, 94 I.D. at 38. Lacking any detailed analysis in the EIS to which the EA might tier and absent an adequate site-specific analysis in the EA, we are unable to conclude that BLM has identified the relevant areas of environmental concern and has taken a hard look at the environmental consequences of the proposed projects.

Despite some similarities, Texas v. U.S. Forest Service, supra, relied upon by BLM does not require a contrary conclusion. The question is not

whether BLM's review process paralleled the Forest Service's, but whether BLM has, at some level, adequately considered the environmental effects of its proposed actions. The Federal court in Texas clearly was persuaded

that the Forest Service had adequately done so. In addition to preparing an EIS prior to adopting a 10-year management plan for the forest, see Texas Committee on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir. 1978), the Forest Service had prepared, and twice amended, an EA reviewing methods to control the southern pine beetle in recommended wilderness areas. Sierra Club v. Block, 614 F. Supp. 134, 136 n.3 (E.D. Tex. 1985). Pine beetle control in the Four Notch area was addressed in either that EA or an additional EA. See Texas v. U.S. Forest Service, 654 F. Supp. 289, 291, 293 (S.D. Tex. 1986). After Four Notch was eliminated as a potential wilderness area, the Forest Service prepared another EA to address the burning and reforestation of 2,600 acres which had been destroyed by the beetle. Id. at 291. The court was satisfied that the "assessments by the Forest Service particular to the Four Notch infestation and reforestation programs were based upon cogent evidence and were in themselves reasonable in their conclusions." Texas v. U.S. Forest Service, 654 F. Supp. at 298. We cannot say the same about the documents in this case.

We find the EIS and EA before us inadequate to support the conclusion of the Acting District Manager that the projects BLM proposes to undertake will have "no significant impact not already noted in the EIS." Although we find that BLM has not conducted the environmental review NEPA requires, we do not hold that BLM must prepare a site-specific EIS. Neither the condition of the lands at issue nor BLM's management programs are static. BLM may decide that some of the projects are no longer appropriate or require modification. It would therefore be premature to mandate a site-specific EIS for actions we cannot identify. Whatever course of action BLM chooses, an adequate environmental review is required.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting District Manager of the Richfield District Office is set aside and the case is remanded.

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John H. Kelly  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge