

CRAIG M. WEAVER
JUDITH C. SHAW

IBLA 95-227

Decided November 21, 1997

Appeal from a Decision of the Lower Gila Resource Area Manager, Phoenix District, Bureau of Land Management, finding no significant impact and approving construction of a pothole dam development for desert bighorn sheep. EA No. AZ-026-94-019.

Motion to dismiss denied; Decision affirmed.

1. Administrative Procedure: Standing—Rules of Practice: Appeals: Standing to Appeal

A BLM motion to dismiss for lack of standing will be denied where the record sufficiently establishes that the appellants are parties to the case who have legally cognizable interests adversely affected by the appealed decision.

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

A BLM decision based on a finding of no significant impact will be affirmed if the record shows that a careful review of environmental problems has been made, relevant environmental concerns have been identified, reasonable alternatives have been considered, and the final determination is reasonable. A party challenging the decision has the burden of showing that the determination was premised on a clear error of law, a demonstrable error of fact, or an analysis which 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 of BLM's decision if the decision is reasonable and supported by the record on appeal.

APPEARANCES: Craig M. Weaver and Judith C. Shaw, Tonopah, Arizona, pro se; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Craig M. Weaver and Judith C. Shaw have appealed from the December 30, 1994, Decision of the Lower Gila Resource Area Manager, Phoenix District, Bureau of Land Management (BLM or Bureau), finding no significant impact and approving construction of a pothole dam development for desert bighorn sheep as analyzed in Environmental Assessment No. AZ-026-94-019 (EA).

In July 1993, the Foundation for North American Wild Sheep (Foundation) approached the Arizona Game and Fish Department (Department) and BLM about allowing the Foundation and its local affiliate, the Arizona Desert Bighorn Sheep Society (Society), to fund and construct a new desert bighorn sheep water development in conjunction with the Foundation's annual conference to be held in Phoenix in March 1995. The Foundation envisioned the venture as a showcase project benefitting desert bighorn sheep and highlighting the working relationship of the Society, the Department, and BLM and anticipated that participants would include conventioners and dignitaries from the Department of the Interior and the Foundation. In order to meet these goals, the Foundation requested that the project be on BLM land but not in wilderness, that the site be no more than 2 to 3 hours from Phoenix and accessible by two-wheel drive vehicles, that the locale be no more than a 90-minute walk from the vehicle parking areas, and that the undertaking be a traditional pothole/tinaja development large enough to provide work for up to 200 people. See EA at 1.

Since existing cooperative project proposals did not meet the Foundation's criteria, the Department proposed constructing a pothole dam on Saddle Mountain, an isolated mountainous outcrop approximately 60 miles west of downtown Phoenix, inhabited by a small herd of 5-10 bighorn sheep but with no permanent water supply. Id. After various sites on Saddle Mountain were rejected as lacking one or more of the attributes delineated by the Foundation, a shelf in a series of potholes in a bedrock drainage low on the east side of the saddle in sec. 13, T. 1 N., R. 8 W., Gila and Salt River Meridian, Maricopa County, Arizona, was chosen as the location for the development. Id. at 3.

The Bureau prepared an EA for the project. The EA described the proposed action as a

masonry dam 12 feet tall and 25 feet across, constructed of rough-faced, 12 X 4 X 16 inch blocks. The blocks and mortar will be color camouflaged and the top of the dam will be dressed with native rock to break up the straight-line outline. The pothole will be sealed with a sprayed-on concrete sealing agent to prevent leakage. The resultant pothole will retain 25,000 to 30,000 gallons when full of water.

Id. at 3. The project also included a debris-screening gabion and a shade structure to reduce evaporation loss. Id. at 3-4.

The EA stated that the project conformed to applicable land-use plans and to BLM's responsibilities pursuant to its separate memoranda of understanding with the Department, the Foundation, and the Society. Id. at 2-3. The EA also indicated that the proposed action would assist the Foundation, the Society, the Department, and BLM in fulfilling their respective missions and goals relating to bighorn sheep management. According to the EA, the joint endeavor would foster Foundation members' continued concern and support by demonstrating how contributed funds were used and by providing the opportunity for a hands-on experience in bighorn sheep management and would help BLM and the Department assure a permanent bighorn population on Saddle Mountain by providing a constant water source. Id. at 3.

In describing the affected environment, the EA acknowledged that, although the area's ruggedness provided excellent cover for desert bighorn sheep, its potential as bighorn habitat was likely affected by its isolation from other bighorn habitat and by other activities in the area, such as recreation, the impact of which was unknown. The EA observed that the natural potholes did not have sufficient depth to provide permanent water through extended dry periods, but estimated that, with permanent water, the habitat could support as many as 35-40 animals, although the ultimate population size depended on the amount of habitat, the effects of its isolation from other occupied habitat, and the impacts of human activity such as recreation. Id. at 5. The EA further noted that the project area and access trail traversed a major cultural site and that all of Saddle Mountain was designated as Category II Desert Tortoise Habitat. Id.

The EA analyzed the environmental impacts of the proposed action and concluded that, with the identified mitigation measures, the project would have no adverse effects on the environment. The EA specifically found that implementation of the approved data recovery plan would offset any direct or indirect impacts to the cultural resources, adding that the State Historic Preservation Officer concurred with the no adverse effect determination. Id. at 6. The project's effects on desert tortoises and their habitat would likely be minimal and short-term, the EA continued, since vegetation trampling would be minimal and the dam site was located in terrain unusable by tortoises. Id. at 7. The EA also examined the no action alternative, cumulative and residual impacts of the proposed action, and necessary mitigation measures. Id. at 7-8. The cumulative impacts discussion acknowledged once again that the potential for an increase in the bighorn sheep population occasioned by a permanent water supply could be partially offset by other factors affecting the animals and the habitat, including the modest habitat block, the herd's isolation and small size, and the outdoor recreational use of the area. Id. at 8.

After circulating the draft EA for public review in November 1994 and adding Appendix 1 consisting of public comments and BLM responses, BLM finalized the EA in December 1994. In his December 30, 1994, Decision, the Area Manager concluded that, based on the analysis in the EA, the potential environmental impacts of the proposed action were not expected to be significant. He approved the cooperative endeavor, subject to the identified stipulations, explaining that

[t]he proposed action meets the criteria established by the Foundation to build a bighorn sheep water development in conjunction with their meeting, in concert with the Society, the Department and BLM. It fulfills those needs while helping to assure the well-being of the bighorn herd in the area, without causing any significant adverse impacts. Implementation of the project will foster good will on the part of the Foundation and other participants and will thus help assure the future of bighorn sheep in Arizona. A finding of no adverse impact was supported by the State Historic Preservation Officer for the associated archaeological site due to the data recovery program.

One of the identified stipulations specified that the ring road encircling Saddle Mountain would be blocked to vehicular use at one of the four-wheel drive wash crossings east of the project area in order to increase protection for the pothole area and the archaeological resources.

In their Statement of Reasons (SOR), Appellants contend that they will be adversely affected by the project's alteration of the natural attributes of the site and that the permanent nature of the development will create significant impacts to the area. They challenge the Decision's adoption of criteria defined exclusively by the project's proponent, asserting that the EA failed to analyze the effects of such limited criteria in relation to the biological needs of bighorn sheep. Appellants argue that the restrictive nature of the criteria improperly excluded other superior sites on Saddle Mountain from consideration in the EA and that the EA, therefore, failed to satisfy the requirement that it fully evaluate the impacts of a proposed action and offer alternatives which might achieve similar goals while reducing detrimental impacts.

Appellants object to the Foundation's failure to include criteria addressing the biological needs of bighorn sheep. They fault the EA's acceptance of the Foundation's criteria which define the project in terms of access for convention participants and the EA's omission of alternative Saddle Mountain locations biologically superior for bighorns due to reduced human contacts. Appellants complain that the project criteria ignore the needs of higher priority wildlife water development sites identified in land-use plans and accuse the Department of failing to direct cooperative sheep management efforts towards areas of greatest biological benefits. They further criticize the Department for neglecting to provide data demonstrating that the water construction will actually produce the bighorn sheep population increases estimated in the EA.

Appellants posit additional flaws in the EA. They claim that the EA does not establish either that water is not now available year-round at the project site or that limited water is the only factor thwarting an increased bighorn sheep population. They maintain that the EA inadequately analyzed the shortcomings of the proposed locale compared to more remote locations, including the elevated likelihood of negative impacts from human interactions stemming from its low mountain location and the growing isolation of this bighorn range. Appellants also object to BLM's failure to

advise the Tonopah Area Coalition, a recognized community association with a long history of involvement in issues concerning Saddle Mountain, about the proposed action.

In its Answer, BLM moves for dismissal of the appeal for lack of standing, arguing that Appellants have not shown how they would be adversely affected by implementation of the planned project. As to the substantive issues raised by Appellants, BLM asserts that there is no prohibition against implementation of a proposal pursuant to criteria developed exclusively by the project's proponents. The Bureau denies that the criteria overlook the needs of the bighorn sheep, citing references in the EA to the project's purpose of aiding bighorn sheep. The additional parameters, BLM maintains, were essential for the project to fulfill all its needs and purposes.

The Bureau explains that alternative sites on Saddle Mountain with advantages over the selected site were not considered because those sites had defects, such as remoteness, access and terrain difficulties, and unsuitability for pothole/tinaja developments, which would have prevented the project from meeting all its stated goals. As to Appellants' claim that the criteria ignore the needs of higher priority water development sites, BLM avers that the project complies with applicable land-use plans, adding that lack of funding is not a relevant factor here since the Foundation provided funds and labor for the project, resources which were available only for this specific project. The Bureau further insists that the project is aimed where it would do the most good since the retention or restoration of as many existing natural herds as possible, even small ones, is critically important to assuring the continued thriving of desert bighorn sheep in Arizona.

The Bureau notes that, contrary to Appellants' assertion, the EA states only that the natural potholes at the selected locale would not provide permanent water through extended dry periods, not that water is not available throughout the year at the existing site. Similarly, BLM points out that the EA does not identify the current amount of water as the only factor limiting an increased bighorn sheep population, but also acknowledges that isolation from other bighorn habitat and recreational activities might restrict the size of the herd. The EA considers the site's shortcomings, BLM submits, including the herd's isolation and the potential for increased recreational activity in the area, but recognizes that the impact of recreational activity is mitigated by the fact that recreational use would be at its lowest during the hottest part of the year, the period when access to water would be most critical. The Bureau denies that more remote water development opportunities should have been compared to the chosen location because none of those areas would fulfill the stated purposes of the project.

The Department's asserted failure to provide data on other bighorn range has no relevance to the adequacy of the EA, BLM asserts, since the ultimate size of the population is not a factor in the Decision. While the

EA states that, with the provision of permanent water, the habitat might support 35-40 animals, BLM submits that the EA makes no attempt to define the ultimate population size of the herd. In any event, the habitat does not need to support 35-40 animals, BLM avers, since the project's purpose will be fulfilled if the area simply continues to support a bighorn sheep herd. Finally, BLM disputes Appellants' contention that the Tonopah Area Coalition was not advised of the project, asserting that Weaver is the contact for the Coalition, that he was hand-delivered a copy of the EA in November 1994, and that he, Shaw, and other Tonopah residents submitted comments on the EA. Accordingly, BLM asks that the appeal be denied.

[1] We first address BLM's motion to dismiss the appeal for lack of standing. Departmental regulation 43 C.F.R. § 4.410(a) confers the right to appeal upon "[a]ny party to a case who is adversely affected by a decision" of a BLM officer. Thus, to have standing, an appellant must be both a party to the case and also adversely affected by the decision being appealed. Audubon Society of Portland, 128 IBLA 370, 373 (1994), and cases cited. Both Weaver and Shaw participated in the process that led to the BLM Decision by submitting comments on the EA and thus qualify as parties to the case within the meaning of 43 C.F.R. § 4.410(a). See id. at 374.

To be adversely affected, an appellant must have a legally cognizable interest in the land at issue. While that interest is not limited to an economic or property interest and may include use of the land involved or ownership of adjacent land, mere interest in a problem or deep concern about the issues does not suffice. Kendall's Concerned Area Residents, 129 IBLA 130, 136-37 (1994), and cases cited. In any case, there must at least be colorable allegations of adverse effect identifying specific facts giving rise to that conclusion. Southern Utah Wilderness Alliance, 127 IBLA 325, 327 (1993), and cases cited. The Board will not speculate as to why an appellant is concerned about a decision or how an interest has been affected by a decision; rather the appellant must allege or the record must show an interest that has been injured. Mark S. Altman, 93 IBLA 265, 266 (1986); Oregon Natural Resources Council, 78 IBLA 124, 126 (1983), and cases cited. In the absence of such a showing, an appeal must be dismissed for lack of standing. See Save Our Ecosystems, Inc., 85 IBLA 300, 301-02 (1985).

Although BLM contends that Appellants have not shown that they have legally cognizable interests adversely affected by BLM's Decision, we find that Appellants' SOR and their comments on the EA sufficiently show that they use the land in question and provide at least colorable allegations that their use will be adversely affected by the Decision. Accordingly, we deny BLM's motion to dismiss for lack of standing.

[2] We now turn to the merits of the appeal. A BLM decision based on a finding of no significant impact will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant effects will occur is reasonable in light

of the environmental analysis. See, e.g., Bill Armstrong, 131 IBLA 349, 350 (1994); G. Jon & Katherine M. Roush, 112 IBLA 293, 297 (1990); Hoosier Environmental Council, 109 IBLA 160, 172-73 (1989); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Hoosier Environmental Council, *supra*, at 173; United States v. Husman, 81 IBLA 271, 273-74 (1984). The ultimate burden of proof is on the challenging party. G. Jon & Katherine M. Roush, *supra*, at 298; In re Blackeye Timber Sale, 98 IBLA 108, 110 (1987). Mere differences of opinion provide no basis for reversal. *Id.*; Glacier-Two Medicine Alliance, *supra*, at 144. See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975).

Appellants' objections to the EA focus primarily on BLM's acceptance of the project parameters set by the Foundation and BLM's limitation of alternatives based on those criteria. The Foundation, as the source of the funds and labor for the endeavor, not BLM or the Department, proposed the water development project with the multiple purposes of directly benefiting bighorn sheep and providing a hands-on sheep management experience for Foundation members who provide financial support for such projects. The criteria developed by the Foundation served to ensure that all the purposes of the undertaking would be fulfilled. Appellants have not shown that these guidelines were unreasonable, and we find no error in BLM's adoption of those criteria in analyzing the proposed action.

In reviewing a proposed activity, a Federal agency must consider alternatives to the preferred course of actions. See 40 C.F.R. § 1501.2(c); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992). The alternative considered must be feasible and reasonably related to the purpose of the proposed action, in other words, alternatives that can be accomplished and also fulfill the purpose sought to be achieved by the action. See 40 C.F.R. § 1502.14(a); Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978); Howard B. Keck, 124 IBLA 44, 53 (1992), and cases cited. The alternatives Appellants allude to, but do not specifically identify, would not fulfill the project's goal of providing Foundation members the opportunity for actually experiencing bighorn sheep management firsthand because of their remoteness, access and terrain difficulties, and/or unsuitability for pothole/tinaja developments. Appellants, therefore, have not shown that BLM erred by failing to evaluate these alternative project sites.

Contrary to Appellants' assertion, the EA recognized the possible shortcomings of the proposed site, including the location's proximity to human recreational uses, but noted that recreational use would be at its lowest during the hottest part of the year when the water source would be most critical. The EA also adopted the mitigation measure of blocking the

ring road encircling Saddle Mountain to vehicular use at one of the four-wheel drive crossings east of the project area as a means protecting the area. See EA at 6, 8. Several of the other flaws alleged by Appellants stem from their misreading of the EA. The EA does not state that year-round water is not currently available at the site or that water is the only factor limiting an increased bighorn sheep population. Nor does the EA predict that the bighorn sheep population will increase to 35-40 animals after construction of the dam. Instead, the EA recognizes that additional factors including the small habitat block, the herd's isolation and small size, and the recreational use of the area may partially offset the potential for population gains created by a permanent water source sufficient to withstand extended dry spells. See EA at 5, 8.

The record also refutes Appellants' claim that BLM failed to advise the Tonopah Area Coalition of the project. Appellants do not deny that a copy of the EA was hand-delivered to Weaver, the contact person for the Coalition, in November 1994 or that Weaver, Shaw, and David Schwake, another Tonopah resident, submitted comments on the EA. These actions demonstrate that BLM adequately notified the Coalition of the proposed undertaking. Furthermore, while Appellants' concern that scarce public funds be expended only on high priority water-development projects might be relevant if this project were a BLM-initiated and funded proposal, the Foundation, not BLM, suggested and is funding the endeavor. We find that Appellants have failed to show that BLM's environmental analysis was flawed. Accordingly, we conclude that the EA sufficiently analyzed the environmental effects of the water development project and that the Decision approving the project was reasonable and supported by the record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's motion to dismiss is denied, and the Decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge

