

NATIONAL WILDLIFE FEDERATION, AL.
ERIK AND TINA BARNES

IBLA 96-526, 96-536

Decided November 24, 1999

Appeals from a decision by the Arizona State Director, Bureau of Land Management, adopting the Arrastra Mountain Wilderness Range Improvement Maintenance Plan and Environmental Assessment. AZ-26-92-011.

Affirmed.

1. Environmental Quality: Environmental Statements--
Federal Land Policy and Management Act of 1976:
Land-Use Planning--National Environmental Policy
Act of 1969: Environmental Statements

A BLM decision to adopt a range improvement maintenance plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, including an environmental assessment which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the BLM decision must show that it was premised on an error of law or fact or that the analysis failed to consider a material environmental question. Unsupported differences of opinion provide no basis for reversal.

2. Administrative Procedure: Administrative Review--
Federal Land Policy and Management Act of 1976:
Land-Use Planning--Federal Land Policy and
Management Act of 1976: Wilderness

A BLM decision to allow limited and reasonable vehicle use consistent with the prewilderness grazing use in a recently designated wilderness area will be upheld on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration

of whether to continue the motorized vehicle authorization include the availability of other alternatives and the reasonableness of the authorized use.

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

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, identify alternatives, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are insignificant.

4. Administrative Practice--Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Delegation of Authority-- Endangered Species Act of 1973: Generally-- Endangered Species Act of 1973: Section 7: Consultation--Fish and Wildlife Service--Office of Hearings and Appeals--Rules of Practice: Appeals: Jurisdiction

The Office of Hearings and Appeals does not have authority to review the merits of biological opinions issued by the FWS under section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1994). BLM properly limits activity on a private inholding in a wilderness area where the limitations imposed are directed by an FWS biological opinion in order to prevent adverse impacts on wildlife.

APPEARANCES: Thomas D. Lustig, Esq., for the National Wildlife Federation; Thomas D. Kelly, Esq., Prescott, Arizona, for Erik and Tina Barnes; 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 TERRY

These are consolidated appeals from the July 17, 1996, Finding of No Significant Impact/Decision Record (FONSI/DR) adopting the Arrastra Mountain Wilderness Range Improvement Maintenance Plan and Environmental Assessment (EA), AZ-026-92-011 (RIM plan), as modified, issued by the Arizona State Director (SD), Bureau of Land Management (BLM).

The National Wildlife Federation, The Wilderness Society, Yuma Audubon Society, and Sierra Club Palo Verde Group (NWF), appealed, and Erik and Tina Barnes also appealed, the SD's July 17, 1996, FONSI/DR RIM plan (IBLA 96-526 and 96-536, respectively). NWF filed motions to intervene

in the Barnes' appeal and the Barnes filed a request for a hearing. On December 24, 1998, the Board issued an order consolidating the appeals, allowing NWF to intervene in the Barnes' appeal and denying the Barnes' request for a hearing.

On November 28, 1990, the Arizona Desert Wilderness Act of 1990 (Pub. L. No. 101-628) was enacted. This Act designated certain public lands in Arizona as wilderness, including lands historically used for grazing under BLM authorization. Livestock grazing, where authorized prior to passage of the law, is permitted to continue within the wilderness. BLM's July 17, 1996, FONSI/DR adopts the RIM plan which provides direction for the management of ongoing livestock operations and maintenance of the range improvements, including fences, springs, water tanks, and pipelines. Under the RIM plan, the use of mechanized equipment and/or motorized transport is authorized for responding to emergencies - threats to human life or property (RIM plan at 11) - and to repair and maintain 17 of the 24 rangeland developments addressed in the RIM plan. (RIM plan at 5.)

The RIM plan adopted by the SD's July 17, 1996, FONSI/DR authorizes the limited use of motorized and mechanized equipment for repair/maintenance of rangeland facilities along 15.5 miles of access routes. It permits, on a limited basis, the use of pickups, all-terrain vehicles, chainsaws, etc., by grazing permittees/lessees for maintaining fences, corrals, and water facilities and access routes addressed in the RIM plan. (RIM plan at 12-21.)

The RIM plan contains a discussion of the affected environment, including wilderness, recreation and riparian zones, endangered and special status species (Gila topminnow and desert pupfish), as well as a discussion of environmental consequences by area. Among endangered or special status species, an active peregrine falcon eyrie was discovered on the Barnes' private inholding within the wilderness area. (RIM plan at 33-34.)

The essential issue presented by NWF's appeal (IBLA 95-526) is whether the BLM actions comport with the Wilderness Act, 16 U.S.C. § 1131 (1994), as well as other statutes, regulations, and other authorities.

In IBLA 96-526, NWF contends that BLM's RIM plan would destroy the wilderness character of the Arrastra Mountain Wilderness and violate the prohibition, in the Wilderness Act, 16 U.S.C. § 1133(c) (1994), of roads in a wilderness area. That provision states that "there shall be no temporary road, no use of motor vehicles" within any wilderness area. NWF asserts that bulldozers and chainsaws, authorized in the RIM plan as tools for route maintenance, are inconsistent with the wilderness designation. NWF is concerned that the wilderness setting and the wilderness experience of hikers and seekers of solitude will be unacceptably compromised by the presence of 4-wheel drive vehicles, maintenance vehicles, and by the impacts caused by vehicle traffic.

NWF admits that livestock grazing and attendant maintenance and reconstruction of deteriorated supporting facilities are not precluded under the Wilderness Act or the 1990 Arizona Desert Wilderness Act. NWF charges that the RIM plan sanctions road construction and the reconstruction of deteriorated roads, partially reclaimed by nature. NWF argues that neither temporary nor permanent roads are permitted in wilderness areas. NWF asserts that insofar as the RIM plan envisions routes passable for pickup trucks, it "crosses the line from motor vehicle use * * * to road construction, which is forbidden by the Wilderness Act." (Statement of Reasons (SOR) at 21.) NWF asserts that BLM incorrectly concluded that road reconstruction will not have significant environmental impacts. (SOR at 31-33.)

NWF contends that the conversion of desert springs into livestock watering facilities is inconsistent with wilderness character. NWF objects to the RIM plan provisions which allow the repair and development of various water sources for livestock purposes. NWF asserts that congregating cattle will destroy riparian areas, denude sparse vegetation and degrade the fragile desert wildlife habitat.

NWF asserts that BLM failed to determine if it was necessary to reconstruct watering facilities, and argues that even if such action was necessary, BLM failed to consider whether there were practical alternatives to using motorized equipment to achieve this objective. (SOR at 25-31, 34-36.)

NWF contends that the RIM plan violates the National Environmental Policy Act of 1969 (NEPA), amended 42 U.S.C. § 4332(2)(C) (1994), in that it "segments" various actions, none of which has an individually significant environmental impact, but which collectively have a substantial impact. (SOR at 38-39.) NWF Thomas v. Peters, 753 F.2d 754 (9th Cir. 1985) as a "directly analogous" case. BLM further violated NEPA, NWF contends, in failing to consider obvious alternatives to the adopted action. NWF suggests, for example, that BLM should have considered eliminating grazing on portions of the Santa Maria Ranch allotment and the Santa Maria Community allotment to reduce the need for road and vehicle use. (SOR at 38-41.)

NWF contends that the RIM plan is contrary to BLM's Lower Gila Resource Habitat Management Plan (HMP) in that livestock will create conflicts with wildlife, specifically the desert tortoise. (SOR at 42.)

BLM points out that the 1990 Arizona Desert Wilderness Act specifically provides authorization for limited motorized equipment and/or vehicle use, including the use of backhoes and pickup trucks to maintain stock ponds and fences, and that the access routes over which NWF expresses concern existed at the time of wilderness designation. BLM contends that the periodic spot maintenance work authorized does not involve new construction or a substantial change in the present character of these routes.

With pertinent citations to the RIM plan and EA, BLM notes that alternatives to motorized access were considered, and that the need for development of stock watering facilities was also considered.

BLM denies that NEPA was violated, asserts that all reasonable alternatives were considered, and denies that the RIM plan conflicts with its HMP for the Desert Tortoise.

[1] A BLM decision to adopt a range improvement maintenance plan and EA, and subsequent FONSI will be affirmed on appeal if the decision is based on consideration of all relevant factors and is supported by the record which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A challenge to that determination must show that it was premised on an error of law or fact, or that the environmental analysis failed to consider a substantial environmental issue of material significance to the proposed action. See, e.g., Owen Severance 41 IBLA 48, 51 (1997); Southern Utah Wilderness Alliance 128 IBLA 382, 390 (1994); Southern Utah Wilderness Alliance 122 IBLA 334, 338 (1992), and cases cited therein. Differences of opinion, unsupported by any real objective proof, are insufficient to overcome a BLM decision for which there is abundant support in the record. We conclude from our review that the RIM plan was based on a thorough consideration of all relevant factors and comports with the Wilderness Act, and other applicable authorities.

[2] A BLM decision to allow limited and reasonable vehicle use consistent with the prewilderness grazing use authorized within a wilderness area will be upheld on appeal where there has been no showing of compelling reasons for modification or reversal. Relevant factors for consideration of whether to continue the motorized vehicle authorization include the availability of other alternatives and the reasonableness of the authorized use. Southern Utah Wilderness Alliance 140 IBLA 341, 348-49 (1997).

We turn first to NWF's contentions concerning road construction in wilderness areas. The first applicable authority is the Arizona Desert Wilderness Act of 1990, 104 Stat. 4469. Section 101(f) of that Act (104 Stat. 4473) provides that the grazing of livestock, where established prior to the Act, "shall be administered in accordance with section 4(d)(4) of the Wilderness Act and the guidelines set forth in Appendix A of the Report of the Committee on Interior and Insular Affairs to accompany H.R. 2570 of the One Hundred First Congress (H. Rept. 101-405)." Section 101(f) directs the Secretary to review BLM "policies, practices and regulations" regarding grazing in wilderness areas in Arizona to insure that they fully conform to congressional intent as expressed in the Act.

Section 4(d)(4) of the Wilderness Act, 16 U.S.C. § 1133(d)(4)(2) (1994), referred to in the Arizona Act, provides that "the grazing of livestock, where established prior to September 3, 1964, shall be permitted to

continue subject to such reasonable regulations as are deemed necessary" by an agency administering an area designated as wilderness.

The applicable regulations provide at 43 C.F.R. § 8560.4-1(a) that the grazing of livestock, where established before wilderness designation "shall be permitted to continue under the regulations on the grazing of livestock on public lands in part 4100 of this chapter and in accordance with any special provisions covering grazing in wilderness areas that the Director may prescribe." Under 43 C.F.R. § 8560.4-1(b), "Grazing activities may include the construction, use and maintenance of livestock management improvements and facilities associated with grazing that are in compliance with wilderness area management plans."

The Congressional Grazing Guidelines (Excerpt from House Report 96-1126 (Ex. E to BLM Reply to NWF's Petition for Stay)) states at Point 2, that "[t]he maintenance of supporting facilities, existing in an area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.) is permissible in wilderness," and such maintenance may "be accomplished through the occasional use of motorized equipment" including "for example, backhoes * * * [and] pickup trucks."

BLM's RIM plan proposes the "limited use of motor vehicles or mechanized equipment" for three purposes: (1) the repair and periodic maintenance of 17 range developments; (2) to respond to emergencies within five grazing allotments; and (3) to periodically "repair and maintain" the "five distinct former vehicle ways (totaling approximately 15.5 miles), referred to as 'access routes'" in the RIM plan. (RIM plan at 11.)

Table 2 in the RIM plan is a summary of the motorized use permitted for maintenance of range facilities and access routes. One of the prescribed variables is the "expected duration/frequency of motorized/mechanized activity" for performing these tasks. Another variable is the "equipment" required. For example, chainsaws and pickup trucks or ATV's are the equipment necessary for the maintenance of allotment boundary fences and may be used, depending on the range development, 1 to 5 days every 3 to 5 years. Similar and closely circumscribed frequency of use restrictions apply for backhoes and bulldozers.

The RIM plan contains a detailed history and evaluation of "current accessibility" of the access routes, a description of maintenance needs tailored to each individual route, and provides that these routes will routinely be inspected by nonmotorized means such as "horseback, packtrain or on foot." (RIM plan at 25.) The Rim plan provides for "spot maintenance" only of specific segments of the access route, and only to the extent needed to allow pickup trucks and ATVs to traverse these routes as necessary to maintain range facilities. (RIM plan at 25-27.)

Contrary to NWF's assertion, the RIM plan, beginning at page 37, contains a succinct discussion of the impacts associated with motorized/mechanized access. Compaction of vehicle tracks, short-term changes

in the visual landscape due to backhoe or bulldozer action, and some damage to vegetation, are anticipated. Such impacts will be mitigated by scheduling major maintenance activities concurrently, to minimize the number of trips and duration of the activities. BLM also evaluated the impact on riparian zones of various access routes, as well as the impacts to threatened, endangered and special status species. See RIM plan at 38-41, 43.

Those portions of the RIM plan summarized above do not permit the conclusion that "road construction," as NWF alleges, is contemplated. It is equally unreasonable to conclude, as NWF has suggested, that those mechanized intrusions which are foreseen in the RIM plan would compromise wilderness characteristics or spoil the wilderness experience of hikers and seekers of solitude. We draw attention again to the relatively minuscule measure of time during which motorized/mechanized activity is permitted. With reference to Table 2, where, for example, 3 days of bulldozer activity is foreseen during a 3- to 5-year period, one possible ratio is 1 : 365 (days of intrusive activity to days of nonactivity) or less than ½ of 1 percent. This cannot be considered adverse to wilderness or preemptive of the interests of wilderness seekers.

We note further that the Arrastra Wilderness is not a homogenous area "where the earth and its community of life are untrammelled by man," 16 U.S.C. § 1131(c) (1994), but an area interlaced with the imprint of man. Where such an area is designated as a wilderness, the lawmakers have recognized the need for the coexistence of man's works and activities in harmony with, and deference to, the wilderness elements. Although NWF appears to admit as much, it fails to recognize that this reality requires the striking of a balance of competing interests. This is what BLM has attempted to achieve in its RIM plan. NWF points out that various of the access routes have deteriorated and are being partially reclaimed by nature. NWF suggests that that process should not be disturbed by making an access route passable for a pickup truck. (SOR at 21.) NWF's position ignores the balance of interests intended by the statutes and regulations which do not prohibit the limited reasonable use of motor vehicles in wilderness areas. See Southern Utah Wilderness Alliance v. IBLA, 341, 348-49 (1997).

NWF also challenges the RIM plan's provisions with respect to springs and water developments for livestock. Again, grazing in wilderness areas is "subject to such reasonable regulations as are deemed necessary" by an agency administering an area designated as wilderness. 16 U.S.C. § 1133(d) (4) (2) (1994). The construction, use, and maintenance of livestock management improvements and facilities associated with grazing are permissible under 43 C.F.R. § 8560.4-1(b). This includes the construction, use, and maintenance of water sources, without which there could be no grazing. Accordingly, the development of watering facilities, vital adjuncts to grazing, is permitted by the statutes and the Secretary's regulations.

The Congressional Grazing Guidelines (Ex. E, BLM Reply to NWF's Petition for Stay) permits the "replacement or reconstruction of deteriorated facilities or improvements" as well as the "construction of new

improvements or replacement of deteriorated facilities" for resource protection and in accordance with agency management plans which keep constant, and do not increase livestock over prewilderness designation levels.

Water facility maintenance is discussed at pages 17-21 of the RIM plan. This discussion indicates that the various springs involved were developed in the 1940's, 1950's, and 1960's, but that such facilities as water troughs, pipes, spring boxes, and storage tanks are in disrepair. In the RIM plan, BLM authorizes the grazers to perform the necessary work to make the water sources usable for livestock. Such maintenance and development work is limited by specifications of estimated number of days and frequency of motorized/mechanized trips anticipated as necessary to complete such work. The "purpose and need" of such maintenance work is discussed at pages 5-6 of the RIM plan, where repair and maintenance of enumerated rangeland facilities is listed as "necessary" to implement the "grazing system authorized in a 1991 grazing decision," and to assure that livestock remain on their respective management units.

Therefore, the improvement of watering facilities contemplated in the RIM plan fully comports with applicable authorities. Moreover, contrary to NWF's charges, BLM considered and justified the necessity of developing and maintaining livestock facilities. In its discussion of the No Action Alternative (RIM plan at 41-42), BLM also evaluated the "elimination of motor vehicles and/or mechanized equipment," on the basis of information received from ranchers. BLM noted that "pack strings in lieu of pickup trucks * * * to haul personnel and equipment on a fence repair project, for example, could triple both the time and cost of the job." Manpower, in lieu of a bulldozer or backhoe, could turn a 1-day job into a 25- or 50-day job. Id. at 42.

NWF has generally charged that livestock congregation at watering facilities will destroy riparian areas, denude sparse vegetation, and degrade desert habitat. The RIM plan reflects that riparian impacts were considered individually for each spring area. BLM noted that riparian vegetation would be grazed at Fork, Sam's and Tina Springs until funding became available to fence the riparian zones from livestock. Some seedlings would probably not survive due to grazing. BLM anticipated very little impacts to riparian vegetation at McGrew Spring because "very little of it exists," and no impact at three other springs for the same reason. (RIM plan at 39.) BLM noted that "[s]ome streambank shearing and loss of soil could occur at Sam's Spring if protective fencing is not procured and installed prior to cattle watering there. BLM further noted that since there were no streams at six of the springs, "[s]treambank stability would not be impacted" at those springs. (RIM plan at 40.) As to the South Peoples Canyon Spring, BLM observed that stipulations in its 1991 Santa Maria Ranch Lease grazing decision, concerning the construction and maintenance of a drift fence, will protect the riparian zone of that spring. (RIM plan at 39-40.)

[3] When BLM has taken a hard look at all of the likely environmental impacts of a proposed action, it will be deemed to have complied with NEPA, regardless of whether a different substantive decision would have been reached by this Board or a court (in the event of judicial review). See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 F.2d 223, 22-28 (1980); Great Basin Mine Watch, 48 IBLA 1, 3 (1999). An environmental impact statement (EIS) need not be prepared where a convincing case is made that no significant environmental impacts are anticipated. NEPA does not direct BLM to take any particular action, or refrain from taking an action which will result in environmental degradation. It merely mandates that whatever action BLM takes be initiated only upon a full consideration of all environmental impacts. See Oregon Natural Resources Council, 41 IBLA 355, 361 n.6 (1990).

Council on Environmental Quality regulations provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). A "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed. See Natural Resources Defense Council, Inc. v. Felt, 458 F.2d 827, 834 (D.C. Cir. 1972); Allen D. Miller, 43 IBLA 270, 274 (1995). Thus, the fact that a party may favor an alternative other than that adopted by BLM does not render the action taken by BLM erroneous. This Board must give considerable deference to the ultimate policy selections of the resource managers. See In re Bryant Eagle Timber, 43 IBLA 25, 29 (1995); Oregon Natural Desert Association, 45 IBLA 52, 60 (1993).

We conclude that the above guidelines have been complied with. Responding to NWF's NEPA arguments, we observe first that BLM did consider alternatives other than the adopted action, and that those alternatives are discussed at pages 27-29 of the RIM plan and in the FONSI/DR. Thus, the "No Action" alternative considered access to range developments by nonmotorized, nonmechanized means only. Repair, maintenance, and inspection would be by horseback, packtrain, or on foot. Further, BLM considered maintenance of "only those improvements that are currently operative and/or that were operative at the time of wilderness designation." (FONSI/DR at 2.) BLM rejected further study of this alternative because the purpose of the RIM plan "is to determine how historically maintained range developments within wilderness will be maintained." (RIM plan at 28.) BLM also considered allowing motor vehicle access via only those routes passable at the time of wilderness designation. BLM rejected this alternative because it would be unreasonable, impractical, not cost effective, and far too time-consuming. (RIM plan at 28-29.)

The wilderness designation in this case did not require BLM to consider eliminating grazing on any of the allotments affected by the designation. As noted earlier, preexisting grazing use is allowed to continue in wilderness areas and the task of BLM is to ensure that the impacts are kept to a minimum and mitigated as reasonably possible. Our review of the RIM plan persuades us that BLM properly performed this task.

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) is not, as NWF asserts, analogous to this case. ~~Peterson~~ involved timber road construction in the Nez Perce National Forest in Idaho. The Forest Service had considered, in separate EA's and FONSI's, the impacts of road construction and the impacts of timber sales facilitated thereby, respectively. The court found, partially based on evidence showing timber sales in an advanced stage of planning, that road construction and subsequent timber sales were actions having cumulatively significant impacts which required comprehensive consideration as a whole in an EIS. Id. at 761.

In the case now before us, BLM's management initiative, as expressed in the RIM plan, is not a newly independent action, but is based on land-use planning antedating the wilderness designation. As BLM points out, the decision to graze these lands was made in 1991 and BLM's 1991 grazing EA specified incidental and limited use of motorized vehicles on access routes. (BLM Answer at 48, 46, respectively.) The singular concrete task addressed by the post-wilderness designation RIM plan is the repair and maintenance ~~of preexisting~~ ~~angeland~~ developments. It is not a case where redeveloped watering sources will facilitate ~~recreation~~ activity, the grazing of livestock, as the timber road ~~Peterson~~ facilitated various timber sales. Accordingly, we find that NWF's arguments on improper segmentation of BLM's environmental evaluation are without merit.

Finally, BLM's RIM plan is not in conflict with its wildlife habitat management plans. As BLM points out, none of the water developments discussed in the RIM plan are located in the area addressed in its Lower Gila HMP. Further, BLM's Rangewide Plan for Desert Tortoise Habitat Management specifically limits range improvements in habitat areas to those which will not create conflicts with tortoise populations. (BLM Answer at 48-50.)

In IBLA 96-536, Erik and Tina Barnes appealed from a BLM decision that approved restrictions on their activity on their inholding and determined that reasonable mechanized or vehicular access by the Barnes to their inholding is not likely to adversely affect environmental interests BLM is obligated to protect. Among the BLM administered grazing allotments in the Arrastra Mountain Wilderness is the Santa Maria Ranch allotment No. 5046. It comprises 27,574 acres of which 17,280 are within the wilderness area. (RIM plan at 8.) The Barnes, d.b.a. the Santa Maria Ranch, are permittees of this grazing allotment. In 1990, the Barnes bought the Santa Maria Ranch and a 40-acre inholding parcel. The inholding parcel is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 14, T. 12 N., R. 10 W., in a portion of the Santa Maria Ranch allotment within the Arrastra Mountain Wilderness Area. Access

to the inholding parcel is by a partially overgrown and eroded jeep trail which crosses 2.4 miles of the wilderness between the wilderness boundary and the private property.

On April 26, 1996, the U.S. Fish and Wildlife Service (FWS), having reviewed BLM's plans for the wilderness inholding access EA, issued a biological opinion addressed to reasonable mechanized or vehicular access by the Barnes to their inholding. In its opinion, FWS concurred with BLM's determination that regulation of the inholding access, permission for circumscribed motorized traffic, is not likely to adversely affect the Gila topminnow and desert pupfish, and that BLM's action "is not likely to jeopardize the continued existence of the American peregrine falcon." (FWS Op. at 1, 2.) The FWS opinion further states:

An active peregrine falcon eyrie was discovered in Peoples Canyon in the spring of 1994. Arizona Game and Fish Department biologists observed a pair of breeding peregrine falcons on May 18, 1994. The presence of two nestlings of approximately two weeks of age was confirmed on June 15, 1994 (Ward and Siemens (1995)). It is not known if the nestlings fledged. The eyrie is located in a pothole within 50 feet of the top of a 300 foot cliff face overlooking South Peoples Spring. The nest site is approximately 300 feet vertically above the spring. Use of the site in 1995 was not confirmed. The eyrie is located on the privately owned 40-acre inholding which is with the action area.

Id. at 6.

While FWS determined that use of the access road would not adversely affect the peregrine falcon, it did conclude that "use of a pump at South Peoples Spring, and any other disturbing activities the landowners may conduct on the inholding due to availability of vehicular access, may adversely affect the peregrine falcon." (FWS Op. at 9.) For this reason, FWS prescribed a number of mitigating measures BLM was to implement "to minimize incidental take that might otherwise result from the proposed action." (FWS Op. at 11.) Among these was an instruction to the landowners to conduct no disturbing activities on the inholding between March 1 and July 31, when the peregrine eyrie is active, unless inspection by biologists show that the eyrie is not in use. Among "disturbing activities" FWS listed bulldozing, backhoeing, chainsawing, blasting or the running of a gasoline pump at South Peoples spring. (FWS Op. at 10-11.)

The RIM plan states that the Gila topminnow, desert pupfish and peregrine falcon were listed as endangered under the Endangered Species Act of 1973 (ESA) as amended 16 U.S.C. § 1501 (1994). During the 1980's, the Arizona Game and Fish Department and FWS, in cooperation with BLM, transplanted the Gila topminnow and desert pupfish into Peoples Canyon Creek and Yerba Mansa Spring, which is outside the Arrastra Mountain Wilderness. In

a policy change of the late 1980's, FWS no longer transplanted these species into areas outside their natural range. According to the RIM plan, no topminnows or desert pupfish have been observed in South Peoples Canyon or Peoples Canyon Spring since 1989. (RIM plan at 33.)

The RIM plan also summarizes the discussion in the FWS opinion on the peregrine falcon eyrie discovered on the Barnes' inholding. (RIM plan at 34.)

The RIM plan does not authorize mechanized access to the Barnes' inholding, but states that a final decision on the private land access would subsequently be issued. The RIM plan notes, however, that the Barnes hold "a valid Arizona Department of Water Resources right for livestock use of water from South Peoples Spring." (RIM plan at 21.) In limiting the Barnes' activity on their inholding, the RIM plan relies on the evaluation and instructions expressed in the FWS opinion. Thus, the RIM plan allows the Barnes to install a pump and pipeline segment on their inholding "without BLM authorization so long as it is done without the use of mechanized transportid. The RIM plan specifies that the work of refurbishing the Red Tank and pipeline "will be scheduled when the peregrine falcon eyrie is not in use." The RIM plan envisions several days of disturbance on the Barnes' 40-acre parcel "below the peregrine eyrie when the pump is re-installed and the pipeline is laid across the private parcel," which could have some "impact on the peregrine falcons and/or their use of the area." (RIM plan at 40.) The RIM plan further states that "BLM cannot control the lessee/owner's activities on his own land when accessed by nonmechanized methods."

On November 13, 1996, BLM issued its decision (announced in the RIM plan) adopting the Wilderness Inholding Access Arrastra Mountain Wilderness Environmental Assessment (EA-AZ-026-94-23). In that decision, BLM authorized access by motorized and mechanized equipment when such use is needed to reach the privately owned land for the grazing, recreational, and other private purposes. The Barnes' and NWF's appeals of this BLM decision were docketed as IBLA 97-150 and 97-151, respectively. Those appeals, challenging BLM's management of access to the Barnes' inholding, are addressed in a separate Board decision. In the remainder of this decision, we will address the Barnes' appeal of the RIM plan to the extent that appeal raises issues other than access. Those issues relate to wildlife and to the strictures placed by the RIM plan on the Barnes' activities on their inholding because of impacts to the peregrine falcon.

The Barnes assert that the RIM plan and EA erroneously identify the Gila topminnow and desert pupfish as endangered or special status species. They also contend that the RIM plan erroneously identifies a peregrine falcon nesting site on their private land, and that it arbitrarily prohibits activity on their private land.

BLM points out that identification of endangered species is the province of FWS and that the presence of the peregrine falcon eyrie was

documented under applicable FWS regulations and guidance. BLM contends, therefore, that its action of limiting repair and maintenance of the Upper Red Tank and pipeline is validly based. (Answer at 28.)

The Barnes do not explain how the identification of the Gila topminnow and desert pupfish in the RIM plan adversely affects their interests. There is, in fact, no nexus between the identification of these species and the RIM plan specifications affecting activity on the Barnes' inholding. Moreover, the Barnes present no evidence to contradict the FWS determination that a peregrine falcon eyrie exists as described in the FWS opinion.

Subsection 7(a)(2) of the ~~ESA~~ amended 16 U.S.C. § 1536(a)(2) (1994), provides in pertinent part:

Each Federal agency shall * * * insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

The Office of Hearings and Appeals does not have authority to review the merits of biological opinions issued by FWS under section 7 of the ESA. Southern Utah Wilderness Alliance, 28 IBLA 52, 60-61 (1993) Indoren v. Bureau of Land Management, 26 IBLA 238, 248 (1993) Edward R. Woodside 125 IBLA 317, 322-24 (1993).

Though the Board has no jurisdiction to set aside or "second-guess" FWS' biological opinion determinations, we may review a party's objections as they relate to compliance or consistency with policy determinations. BLM's policy, as expressed in the RIM plan, fully tracks the FWS opinion as to what is required to forestall adverse impacts to the peregrine falcon. The precautions recommended clearly do not "prohibit" activity on the Barnes' inholding. The Barnes, no less than Federal agencies, are charged with preventing harm to endangered species.

1/ Under section 9 of the ESA, 16 U.S.C. § 1538(1)(B) (1994), "it is unlawful for any person * * * to take any [endangered] species within the United States or the territorial sea of the United States." "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1994).

To the extent not expressly addressed in this Decision, other arguments advanced by the parties have been considered and are rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 645 F.2d 645, 652 (6th Cir. 1980) and Clacier-Two Medicine Alliance, supra at 156.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge