

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 99-346

Decided January 21, 2000

Appeal from a decision of the District Manager, Cedar City (Utah) Field Office, Bureau of Land Management, authorizing the installation of water catchment guzzlers for small mammals and birds.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness Act

Where BLM prepares an environmental assessment regarding the environmental impact of the installation of water guzzlers in an area previously inventoried but not designated as a Wilderness Study Area, it is not required to include in such assessment consideration of a subsequent inventory by a citizens' group concluding that the area possesses wilderness characteristics.

APPEARANCES: Liz Thomas, Esq., Cedar City, Utah, for Appellant; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Southern Utah Wilderness Alliance (SUWA or Appellant) has appealed the June 10, 1999, decision of the District Manager, Cedar City (Utah) Field Office, Bureau of Land Management (BLM), authorizing the installation of 2 big game and 30 small mammal and bird water catchments (guzzlers) on public lands located in Iron and Beaver Counties. ^{1/} The complaint pertains to seven guzzlers to be located in Beaver County, designated by BLM as the "Wah Wah Complex." (EA at 1.) These guzzlers will be located in a portion of the North Wah Wah Mountains that Appellants contend has high potential for wilderness designation.

^{1/} By Order dated Oct. 21, 1999, we denied Appellant's motion for stay of the decision pending appeal and granted the Milford Wildlife Association status as an amicus curiae.

Based on a June 1999 Environmental Assessment (UT-044-99-25) (EA), BLM found that installation of the guzzlers would have no significant impact on the environment. BLM also found that its decision conformed to the Pinyon Management Framework Plan, approved June 1983, and the Cedar Beaver Garfield Antimony Resource Management Plan, approved on October 1, 1986. With regard for wilderness potential, BLM's decision record noted: "The BLM wilderness inventory in 1979 and 1980 determined that none of the proposed guzzler locations have wilderness characteristics. The 1999 BLM wilderness reinventory did not analyze any of these locations and they were not included in the former wilderness bill HR 1500."

The record indicates that the two big game guzzlers will be built according to a modified Lesicka design and will have no surface apron and only a small visible drinker. They will use three to four 1,500-gallon buried storage tanks, each equipped with a float valve and a 3- by 3-foot drinker. The disturbed area is estimated at less than 1/8 acre, and BLM has agreed to revegetate it with a native grass/forb/shrub seed mixture. BLM indicated that, if the Lesicka design cannot be installed at these locations for unforeseeable reasons, traditional big game water catchments with an above ground collection apron would be installed. (EA at 6.)

Each small animal guzzler will be built in accordance with the Nevada Game and Fish catchment design and will consist of a 300-gallon storage tank located under a collection apron comprised of steel panels and measuring 12 by 8 feet. Each collection apron will be painted a beige color to blend in with the environment and will be screened with natural vegetation. Appropriate fencing will be used to prevent damage by livestock or wild horses. The maximum amount of disturbance anticipated at each small animal water catchment site is 30 by 30 feet. According to the EA, "total maximum disturbance for the entire proposed action should not exceed 0.9 acre," and "[a]ctual disturbance is anticipated to be much less, based upon previous projects." Id.

In its statement of reasons (SOR) on appeal, Appellant argues that BLM's EA failed to adequately consider the wilderness characteristics of the North Wah Wah Mountains. Appellant acknowledges that the proposed project is not located in a designated wilderness area, but argues that a citizens' inventory of Utah public lands (which resulted in a document entitled "Citizens' Wilderness Proposal" (citizens' proposal), which was in turn subsequently used in drafting pending Senate Bill 861 and pending House of Representatives Bill 1732) concluded that the North Wah Wah Mountains possesses wilderness characteristics. Appellant notes that the inventory was overseen by the Utah Wilderness Coalition (UWC) and asserts that the inventory was carried out by competent staff, interns, and volunteers. Appellant further asserts that UWC used the same standards that BLM used in its 1996 reinventory and concludes that BLM's reliance on its 1980 inventory was in error. (SOR at 12-13.)

Citing 40 C.F.R. § 1502.15, Appellant argues that the National Environmental Policy Act of 1969 (NEPA) requires "that the most current information be used and that the environmental review contain an accurate description of the existing environment affected by the proposed action." (SOR at 16.) Appellant also argues that 40 C.F.R. § 1502.1 requires the full and fair examination of all important issues, including whether an area has wilderness value.

Appellant argues that BLM violated NEPA by failing to consider an adequate range of alternatives in its decision and failed to explain why the guzzlers could not be located on lands outside of the North Wah Wah Mountains. (SOR at 17-19.) Appellant argues that BLM had a duty, pursuant to 40 C.F.R. §§ 1508.7 and 1508.8 to consider the reasonably foreseeable consequences of the impact and effect of putting the guzzlers on land that had been identified by the citizens' group as having wilderness characteristics. (SOR at 20-21.) Moreover, Appellant charges that BLM failed to consider both indirect and cumulative impacts to the ecosystem of introducing a large-scale water distribution system on naturally occurring desert lands. (SOR at 21-22.)

In its answer, BLM asserts that, since the North Wah Wah Mountains have not been identified as possessing wilderness characteristics, it was not obliged to consider in its EA whether installation of the proposed guzzlers violated wilderness study area (WSA) management criteria. BLM asserts that the North Wah Wah Mountains were evaluated in the late 1970's pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1994), and were found not to have wilderness characteristics. (Answer at 3.)

BLM reports that Appellant filed maps with the Cedar City Field Office, BLM, which depict certain areas of the range as possessing wilderness characteristics. However, BLM asserts that Appellant has "presented no evidence of the standards or procedures [it] used in making determinations or who made these determinations and what their qualifications might be or how otherwise these determinations were made." (Answer at 4.) BLM further argues that it complied with section 603 of FLPMA when it completed its inventory (including the North Wah Wah Mountains) by 1980 and that "Appellant, in effect, is trying to appeal a BLM decision made 19 years ago, which it cannot do," citing Southern Utah Wilderness Alliance, 128 IBLA 52, 66 (1993), and cases cited therein. Id. BLM contends that, although it has authority to reinventory lands for wilderness characteristics (as it did in the case of lands identified in two bills introduced before Congress in 1996, H.R. 1500 and H.R. 1745) that authority is discretionary. (Answer at 5-6.)

Citing Wyoming Outdoor Council, 147 IBLA 105 (1998), BLM asserts that it has complied with NEPA because it has taken a hard look at the environmental consequences of installing the guzzlers, and that Appellant

has failed to demonstrate that BLM failed to act when considering a substantial environmental problem of material significance. It states that it complied with NEPA by considering an adequate range of alternatives, noting that the seven guzzlers to be located within the North Wah Wah are part of a larger system "modeled on that recommended by the Nevada Division of Wildlife for this type of desert habitat." (Answer at 7.) BLM contends that, to place them outside the North Wah Wah, as suggested by Appellant, would frustrate the purpose of the system and render it ineffectual for achieving the land use objectives for which it was designed. Id.

BLM disputes Appellant's allegation that it has not adequately considered the cumulative impacts and indirect effects of the action. BLM indicates that the seven guzzlers in the North Wah Wah will be spread across a large area so they are not visible from each other; moreover, "[the] guzzlers are designed to blend with the environment and be substantially unnoticeable." Id.

[1] The time for challenging BLM's 1980 inventory that did not include the area in question as a WSA has long since passed. Accordingly, the sole issues before the Board are (1) whether BLM was required to consider the citizens' proposal in its June 1999 EA, and (2) whether the EA was adequate in other respects. In a recent case, the Board addressed the exact issues presented by this appeal:

As to the first issue, SUWA has presented no authority which requires that before BLM authorizes any use of lands previously inventoried and excluded as a WSA, it must consider in its EA findings by a citizens' group contradicting such exclusion.

Moreover, we held in Southern Utah Wilderness Alliance, [128 IBLA 52, 66 (1993),] that BLM may administer for other purposes lands excluded from wilderness consideration. In that case, SUWA challenged a BLM Decision Record and Finding of No Significant Impact approving an application for permit to drill (APD) a natural gas well on a Federal lease along the north canyon rim of the White River, approximately 30 miles south of Vernal, Utah. Therein we stated at pages 65-66:

Appellants also argue that the EA violated NEPA in failing to consider any potential adverse impacts APD approval might have on the area's eligibility for designation as a wilderness area within the National Wilderness System. Specifically, Appellants argue that approval of the APD allows development within a potential wilderness area, as proposed by Utah Congressman Wayne Owens,

and that under such circumstances, NEPA requires preparation of an [environmental impact statement]. 13/

First, NEPA does not contain directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation was conducted pursuant to relevant provisions of [FLPMA] and the Wilderness Act. The Wilderness Society, 119 IBLA 168 (1991).

Second, as we have stated on a number of occasions, final administrative decisions relating to the designation of lands as WSA's in Utah were completed in the 1980's. Southern Utah Wilderness Alliance, 123 IBLA 13, 18 (1992); Southern Utah Wilderness Alliance, 122 IBLA 17, 21 n.4 (1992). The lands in question were not included in a WSA. Therefore, BLM may administer them for other purposes, including the approval of drilling for oil and gas. Id.

13/ The Owens bill, H.R. 1500, was introduced in the House of Representatives on Mar. 16, 1989, and proposes approximately 12,000 acres in the Book Cliffs Resource Area for inclusion within the national Wilderness Preservation System, to be designated as the White River Wilderness.

Southern Utah Wilderness Alliance, 150 IBLA 263, 266-67 (1999). Thus, in this case, BLM may administer the lands in question by authorizing the creation of water catchments on the lands. In any event, there is no evidence that construction of the catchments would impair the wilderness characteristics of the land.

We next turn to the question of whether the EA is adequate. The EA describes the "purpose and need" for the water catchments as follows:

Water is a rare and valuable resource in the Great Basin. It is a major limiting factor to the survival and distribution of many wildlife species. The addition of dependable water sources not only increases wildlife populations, but also helps more evenly distribute wildlife use of other resources.

* * * * *

Except for 1998, a year of high rainfall and after the [Utah Division of Wildlife Resources (UDWR)] had established

70 of these water devices in the West Desert, UDWR has noted a decline in chukar partridge, cottontail rabbit, and other small birds and mammals throughout the West Desert. The proposed developments would allow small mammal and bird populations an opportunity to recover to previous population levels, and perhaps to be enhanced. These species in turn provide prey for raptors and other predators. One of these, the ferruginous hawk, is listed as a state threatened species in Utah.

Recent recommendations from the Nevada Division of Wildlife indicate that multiple, small water developments spaced approximately one mile apart—a complex, are much more beneficial to small and nongame wildlife than a single large development. The results of the past two years of these waters in the West Desert tend to support this observation. Units are placed in a mosaic pattern in topography where a natural water source might occur.

(EA at 2.)

The EA describes access to and installation of the proposed guzzlers:

Access would be by four wheel drive pickup trucks. Existing roads and wash bottoms would be used to the extent possible. There would be limited cross country driving. Rubber tired backhoes and hand tools, at the applicant's discretion, would be utilized to install the tanks. Soil disturbance would be kept to the minimum amount needed to accomplish the task. Where no existing road or trail exists, parts would be carried in by hand or 4-wheeler and construction would be done using hand tools. Access for maintenance in these areas would be by foot. All disturbed areas at these sites would be reseeded with a native grass/forb/shrub mixture.

(EA at 6.)

The EA contains an analysis of a No Action Alternative to the proposed project and lists other alternatives considered but not analyzed in detail. The EA team rejected in-depth consideration of an alternative to relocate the seven catchments within the citizens' proposal outside the North Wah Wah area because location in areas outside the citizens' proposal boundary did not meet the Nevada Division of Wildlife habitat guidelines for the chukar, which require that catchments be placed in a mosaic pattern a specified distance from each other in areas where water is the only habitat component missing. In order to avoid choosing habitat already within a wilderness study area or reinventory unit, BLM chose areas within the citizens' proposal. (EA at 5.)

The EA addressed concerns that the chukar would be benefitted to the detriment of other species:

The chukar is native to the Middle East and Southern Asia. Intensive efforts to establish this species in Utah began in 1951. Like many other species (such as the ring-necked pheasant, European starling, brown trout, dandelion, and cheatgrass) chukar are now considered by many to be a naturalized species in the United States. Naturalized species are those species not naturally occurring in any ecosystem of the United States, which now occur within defined areas in a self-sustaining wild state.

* * * * *

Concern has been expressed over the impact of increased chukar populations on vegetation and native wildlife species in the area. Many studies (Christensen 1970, Ferrel 1969, Grenfell et al 1980, Knight et al 1979, * * *) have documented the importance of cheatgrass (Bromus tectorum) in the chukar's diet and the bird's utilization of this forage species during every month of the year. This is a situation where one naturalized species is preying on another. Cheatgrass expansion throughout the West, and its impact on native vegetation, is a much greater concern to BLM than an increase in chukar populations. This office is unaware of any documented, negative impacts or relationship between chukars and other native species, plant or animal.

(EA at 8.) The EA emphasizes that water catchments benefitting the chukar will also benefit other small animal and bird species, including coyote, bobcat, kit fox, cottontail rabbit, reptiles, mourning dove and other "passerine" birds. (EA at 2.) The EA concludes that, without the additional water sources, wildlife populations may decline, especially during drought years, necessitating, in the future, supplemental transplants, a State action. (EA at 9.) With the additional water sources, small mammals and birds will directly benefit; indirectly benefitting species which prey on these animals. (EA at 8.)

In order to successfully challenge BLM's decision and finding of no significant impact based on the EA, Appellant must demonstrate that the decision was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared; mere differences of opinion are insufficient to cause a reversal of BLM's action if it is reasonable and supported by the record on appeal. See Committee for Idaho's High Desert, 139 IBLA 251, 256-57 (1997), and cases cited. We conclude that Appellant has failed to satisfy its burden of proof and that BLM's decision was reasonable and supported by the record. To the extent Appellant has raised arguments which we have not specifically addressed, they have been considered and rejected.

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.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

