



HARRIET NATTER

181 IBLA 72

Decided April 27, 2011



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

HARRIET NATTER

IBLA 2010-184

Decided April 27, 2011

Appeal from a decision of the Kemmerer, Wyoming, Field Office, Bureau of Land Management, denying a right-of-way application to construct a gravity-fed waterline from an existing spring located on public land. WYW-171223.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rules of Practice: Appeals: Burden of Proof

Under section 501(a)(1) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(1) (2000), BLM has the discretion to reject or approve the grant of a right-of-way across the public lands for pipelines or other facilities for the storage, transportation, or distribution of water. A BLM decision rejecting an application for a right-of-way because the proposed right-of-way could adversely affect fragile wetlands and cause unnecessary or undue degradation to the wetlands will be affirmed when the record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. The appellant has the burden of demonstrating by a preponderance of the evidence that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

2. Administrative Procedure: Burden of Proof--Appeals:  
 Generally--Environmental Quality: Environmental  
 Statements--National Environmental Policy of 1969:  
 Environmental Statements--National Environmental Policy of  
 1969: Finding of No Significant Impact--Rules of Practice:  
 Burden of Proof

A BLM decision based on an EA and FONSI will be affirmed on appeal if the decision considered all relevant factors and is supported by a record that 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 a BLM decision has the burden of demonstrating, with objective proof, that the decision was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial question of material significance to the proposed action. Mere differences of opinion or disagreement with BLM's conclusions do not suffice to show error in BLM's decision.

APPEARANCES: Harriet Natter, Park City, Utah, *pro se*; Danielle DiMauro, Esq., Office of the Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE GREENBERG

Harriet Natter has appealed the May 28, 2010, decision of the Field Manager, Kemmerer, Wyoming, Field Office, Bureau of Land Management (BLM), denying her right-of-way (ROW) application (WYW-171223) for construction of a gravity-fed waterline from an existing spring located on public land. The Field Manager based his denial on the analysis contained in the environmental assessment (EA) (DOI-BLM-WY-D090-2010-0074-EA) prepared for the proposed project pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).

On appeal, Natter asserts that BLM did not comply with NEPA's environmental analysis requirements and that the EA contains numerous errors and omissions which undermine the Field Manager's denial decision. She also avers that BLM denied her due process because it did not adequately consult with her and provide her with staff comments and other findings necessary for her to respond to and address BLM's concerns before the Field Manager issued his decision. Because BLM's decision

represents a reasoned analysis of the factors involved, made with due regard for the public interest, considered all relevant factors, and is supported by a record that establishes that a careful review of environmental problems has been made, that all relevant areas of environmental concern have been identified, and that the final determination is reasonable in light of the environmental analysis, and because Natter has not shown error in the decision, we affirm BLM's decision.

#### *BACKGROUND*

Natter owns private property adjacent to public land in sec. 23, T. 24 N., R. 116 W., 6th Principal Meridian (PM), Lincoln County, Wyoming. On December 5, 2008, Natter filed an ROW application pursuant to section 501(a)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(1) (2006), and its implementing regulations 43 C.F.R. Part 2800, seeking approval for the construction of a 600-foot long gravity-fed water pipeline to divert water from an existing spring located on public land for use on her private land. She stated that the purpose of the project was to deliver water to a previously disturbed area “contributing to revegetation. The primary benefits of revegetation will reduce soil erosion and ultimately improve wildlife habitat,” and that “[t]he long-term purpose of the ROW is for domestic use and livestock watering” on the private parcels down gradient from the water source.<sup>1</sup> ROW Application at 2, ¶15.

Natter described the project as a low flow seasonal water delivery and storage system, requiring the installation of a 2" diameter pipe or hose for conveyance of water from the lower end of the water source on public land to a discharge point on private land approximately 600 feet down gradient. She indicated that the system would be a closed system conveying water only when the supply was in use and the outlet was open, and that the flow would be by gravity feed only and would be under 10 gallons per minute when the system was in use. She proposed screening the inlet and/or perforated pipe, connecting the outlet to a maximum 2000-gallon storage tank, laying the 600 feet of pipe or hose on the ground surface or burying it shallowly by hand to minimize vegetation disturbance. She further noted that the system would be used seasonally when the temperature was above freezing. ROW Application at 1, ¶7.

Natter explained that no other alternatives were technically or financially feasible. She stated that the spring on public land was the closest known water source upgradient from the point of use or in any direction within a reasonable distance, that any other nearby upgradient source would also be on BLM land and

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<sup>1</sup> The water source consists of a spring feeding two ponds connected by a stream. The lower pond is also identified in the record as the sedge filled pond and the lower beaver pond.

would require the installation of more pipeline and create a greater disturbance, and that installation and operation of a well for non-drinking and domestic use would be cost prohibitive and require more resources for installation and power generation for water delivery. She also indicated that she had chosen the proposed route for the pipeline because it minimized the crossing of BLM land. ROW Application at 2, ¶13(a), (b), (c).

On January 31, 2009, Natter filed an application with the Wyoming State Engineer seeking a permit to appropriate 2 acre-feet (650,000 gallons) per year of ground water from the spring for domestic and stock watering uses. The Wyoming State Engineer approved the permit for “Domestic - - Ground Water, Stock Watering” on February 26, 2009.<sup>2</sup>

BLM personnel visited the proposed ROW site on July 1 and September 24, 2009, and prepared technical reports addressing riparian, wildlife, and hydrology concerns, as well as engineering issues and recommendations. By email dated February 24, 2010, BLM advised Natter that, because of its impacts to the wetland area, the project could not be constructed as designed and that it was sending her a letter outlining problems and suggesting alternative ideas for a closed system that might not have the same impacts to those areas.

As promised, BLM sent Natter the referenced letter on that same day, February 24, 2010. In the letter, BLM notified Natter that the project as currently described would create significant impacts to the wetland at the lower pond area, thus precluding BLM from authorizing the project as proposed. BLM recommended that the spring development follow guidelines as a closed system to ensure that all excess water would be kept at the spring source and prevent any drying up of the wetland area. BLM suggested (1) that a collection box be installed at the exit channel of the lower beaver pond, (2) that a main transport line and overflow line be installed in the collection box with gate valves to control the flow and winterize the system if needed, (3) that the collection box have a locked lid to prevent contamination and vandalism to the spring source and valves, (4) that the waterlines be buried following the walking path from the spring source to the private land boundary, which would make the line easier to bury and obviate the need to remove trees to bury the line, (5) that the holding tank have a float control to shut off water when the tank is full and keep the excess water in the overflow line at the spring source, and (6) that the entire riparian area be fenced to protect the spring source from future degradation and contamination by livestock. BLM also indicated that, based on the nature of the geology of the area, a shallow well on Natter’s private property might provide sufficient water for her purposes. BLM further noted that, if

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<sup>2</sup> Natter provided BLM with additional waterline design information, including specifics about the permit, on July 13, 2009.

Natter chose to pursue the project, the project would have to be re-designed by a licensed professional engineer and include plans to fence the riparian area, that consultation with the U.S. Fish and Wildlife Service (FWS) for impacts to the Canada Lynx would be required, and that, if approved, the system would have to be monitored every year and removed if there were any impacts to the wetland area.

Natter responded to BLM's letter on March 12, 2010. She informed BLM that she had decided to modify the proposed system by installing a buried, frost-free hydrant, with a padlocked handle and a shut-off valve, at the bottom end of the lower pond, instead of the originally proposed storage tank. She indicated that this modification would better protect the system from vandalism and freezing, especially since she planned on using freeze-proof polyethylene pipe and installing a manual disconnect at the upper end so the pipe could be drained for the winter or for maintenance, leaving all the flow at the spring.

Natter also addressed the key issues raised in BLM's February 24, 2010, letter, essentially disputing BLM's conclusions on those issues. Specifically, she asserted that her system was a closed system and would ensure all unused excess water remained at the spring source thus preventing the drying up of the wetland area. She also claimed that using a collection point at the bottom of the lower pond as recommended by BLM would be unsuitable due to low outflow and potentially no flow during the driest time of the year. She estimated that the flow at the proposed collection point was at least 4 gallons per minute (gpm) or 5,760 gallons per day (4gpm x 60min/hr x 24hr/day), and that, even if she used 80-100 gallons of water per day for domestic water and another 10-20 gallons per day for livestock (horses) use, the flow would only be reduced to 5,640 gallons per day. She added that even if she doubled the estimated use, the reduction would still be less than 5%, which she considered to be statistically insignificant. She suggested that BLM's alternate inflow location below the lower pond be the contingency plan in the event 5 years of monitoring indicated that there was more than a minimal impact to the wetland, which she defined as a reduction of more than 20% in the vegetative cover or a 20% change in species composition from wetland to upland vegetation, and offered to provide BLM with annual monitoring reports of vegetation change through visual estimation and photo documentation.

Natter rejected BLM's suggestion that she install a collection box with transport line, overflow, and gate valves for flow control and winterization, averring that the box would be unnecessary and create additional disturbance. She also disputed the benefits of burying the waterline along the walking path from the spring source to the private land boundary, asserting that, not only would this route be longer and require going through trees, but since freezing would not be an issue with the use of polyethylene pipe, burying the pipeline would not be necessary. She also contended that her planned use of a frost-free hydrant obviated the need to

utilize a float control shut off valve; that fencing the riparian area was unnecessary because she was not going to graze livestock on that land, no livestock currently degraded the spring, and installation of a fence would negatively impact wildlife and bring unwarranted attention to the spring; that the attached diagrams of her proposed modifications satisfied BLM's request that the project be re-designed by a licensed professional engineer; and that the area appeared to be outside the critical habitat for the Canada Lynx and no lynx would be impacted by the project.

By email dated March 19, 2010, Natter asked that she be allowed to meet with BLM staff to discuss and resolve the details and any questions concerning her proposed system before BLM issued its ruling and that she be given the opportunity to review the conditions to be set forth in the ROW grant while it was still in draft form. She also requested clarification of various issues and reiterated her objections to the vent line and fencing unless warranted by monitoring or a future change in conditions.

BLM personnel reviewed Natter's revised ROW proposal and prepared additional hydrology and engineering reports, both of which concluded that the revised proposal, which did not contain the certification of a licensed engineer, would not protect wetlands and would create additional hazards on both private and public land by increasing the instability of the geologically unstable slump blocks on which the wetlands and a partly cleared cabin site on Natter's private land were located. Additionally, the BLM hydrologist disagreed that the polyethylene pipe would have sufficient flexibility to withstand freezing and questioned whether Natter's opinions about her fencing obligations complied with both Wyoming and Federal regulations. Both the BLM hydrologist and civil engineer recommended that the revised ROW application be denied.

BLM prepared an EA, dated May 13, 2010, for the revised ROW proposal. The EA identified the purpose and need for the proposed action as the installation of 600 linear feet of waterline from a spring located on public land to Natter's private property for use as domestic and livestock water, and the key issues as water quality, riparian management, soils, and vegetation. The EA described the proposed action and two alternatives: (1) a closed buried system consisting of installation of a collection box at the exit channel of the lower pond, with a main transport line and an overflow line placed in the collection box and gate valves to control the flow and winterize the system if needed and a locked lid to prevent contamination and vandalism to the spring source and valves, as well as burial of the waterline along the walking path from the spring to Natter's private land boundary, placement of a float control in the holding tank to shut off water when the tank is full and keep all excess water at the spring source, and fencing of the entire riparian area to protect the source from future degradation and contamination by livestock; and (2) the no action alternative, *i.e.*, denying the application and continuing current management

practices and activities on the public lands. BLM also identified a third alternative, the drilling of a well on Natter's private land, but did not analyze that alternative in detail because it would not occur on public lands.

The EA described the affected environment, noting that the project area consisted of a steep hillside made up of a series of slightly rotated slump blocks, that the proposed pipeline would be placed below a spring source at the top of one slump block, that historical beaver use had created two ponds with a stream connecting the upper and lower ponds, and that abundant and vigorous riparian vegetation grew along the streams and within the pond. The EA also discussed water quality, soils, vegetation and riparian/wetlands, cultural resources, and wildlife.

The EA then analyzed the environmental effects of the various alternatives on the affected environment. Turning first to Natter's proposed action, the EA indicated that, under the proposed action, the riparian area would need to be fenced to protect the spring from future degradation and contamination and that the erosive potential created by soil disturbance and placement of the pipe on the surface could increase sediment transport and decrease water quality. As to soils, the EA stated that the construction and reclamation of the pipeline as proposed would disturb and further destabilize the geologically and structurally unstable soils on which the wetlands and private land cabin site were located. Addressing vegetation and invasive and noninvasive plants, the EA noted that the direct effects of the proposed action would include the loss of vegetation, the modification of structure and species composition, and the diminution in the extent of cover types in the areas of construction, and that the indirect impacts of the proposed action would include short-term and long-term increased potential for weed invasion, establishment, and expansion.

As to riparian and wetland management, the EA stated:

With no excess surface flow from the site, it may be assumed that the size of the riparian/wetland area is closely related to the volume of the available water. A reduction in water volumes could result in a loss of riparian/wetland area. Placing the inlet above the sedge filled pond would reduce the volume of water and the flat topography of the wetlands located on the benches make the system sensitive to even small reductions in water volumes. This would be in violation of the policy of no net loss of riparian area.

With the pipe buried near the surface, or placed on the surface, there would be a high likelihood of the pipe freezing and breaking. If a break in the pipeline was not discovered and fixed quickly, water could be drained from the riparian area. These factors could contribute to a decrease in riparian species vigor, and an eventual reduction in riparian

habitat. The increased potential for accelerated erosion that could result from such an event could further reduce the capacitance of the wetland system on public lands and increase the potential for sediment deposits on private lands below.

EA at unnumbered 8. Finally, the EA indicated that, although BLM would have to consult with the FWS regarding impacts to the Lynx Analysis Unit and wildlife would be displaced during pipeline installation, wildlife would then only be affected if there was an impact to the riparian/wetland area as a result of a decrease in the available water supply.

The EA found that the impacts of the closed buried system alternative would be similar although somewhat less than those of the proposed action and would also result in increased soil instability and loss of riparian/wetland areas. Addressing the impacts of the no action alternative, the EA concluded that this alternative would have no effect on sensitive resources because it would maintain the fragile stability of the slope by preserving existing vegetation without changing its composition through water diversion, and, by keeping the water at the present location, would assure the continued success of the riparian/wetland area.

In its cumulative and residual effects analysis, the EA anticipated that both the proposed action and the closed buried alternative would have an adverse impact on the environment by contravening the mandate to protect riparian and wetland areas set out in Executive Order No. (EO) 11990, Protection of Wetlands, 42 Fed. Reg. 26961 (May 24, 1977). Specifically, the EA found that both those action alternatives could cause the loss of riparian habitat, create additional impacts to already unstable soils, and increase the amount of invasive, non-native species, although the closed buried system would have slightly reduced effects on vegetation. The EA also concluded that the proposed action was not designed with the protection of resources in mind and would cause unnecessary and undue degradation of vegetation resources. Conversely, the EA considered the no action alternative to be a potential practical alternative to directly impacting the public wetlands and riparian areas. The EA also suggested that the drilling of a well on private land would avoid unnecessary and undue degradation of vegetation and soils and possible adverse impacts to the wetland/riparian areas, and should be seriously considered.

By email dated May 27, 2010, BLM provided Natter with the requested pre-decision notice that BLM planned on denying her application. BLM stated that both its hydrologist and civil engineer considered the system as proposed to be insufficient to meet BLM design standards as a closed system and the placement of the pipeline on the surface to be unacceptable because their experience had shown that lines not buried below the 4' to 5' frost line would freeze and break, rendering her frost-free hydrant ineffective. BLM further noted that, given the geology of the

area, even if she installed a closed system, the soils were so unstable that the erosion would be unmitigable. BLM also explained that its lack of authority to allow any action that would cause a net loss to a riparian area rendered approval of any proposal to divert water from the riparian water source highly unlikely, especially since the long-term impacts to the riparian area would not be evident during the 5-year monitoring period she proposed and would be uncorrectable when they did appear. BLM added that, considering the relatively small volume of water and the flat topography of the wetlands, the wetland system would be sensitive to even a small decrease in water volumes and that, therefore, even a small diminution would have significant impacts on those wetlands. Additionally, BLM observed that the wetlands and cabin site were located on geologically and structurally unstable slump blocks and that the increased disturbance created by installing and maintaining the proposed pipeline would further increase the instability of the hillside and threaten both the wetlands and the private cabin site. Finally, BLM listed the potential advantages of drilling a well on Natter's private land, as compared to the disadvantages of the requested ROW, and advised her that its formal decision would recommend that she drill the well on her private land rather than allow her to install a pipeline to divert water from the riparian area. BLM offered to meet with Natter to discuss the decision, which it expected to issue in a couple of weeks.

Upon receipt of BLM's email, Natter immediately responded by email, requesting a meeting with the hydrologist, engineer, and others to discuss their conclusions before BLM issued a formal decision. After agreeing with BLM to meet on June 16, 2010, to discuss the ROW, Natter sent BLM a subsequent email, also on May 27, asking BLM to provide her with copies of the EA, the hydrologist's and civil engineer's comments on the ROW, and other information related to system design standards.

Relying on a policy that precluded it from providing Natter with the EA before the EA had been finalized and a decision record (DR) signed and issued, BLM immediately signed a DR and Finding of No Significant Impact (FONSI), both dated May 27, 2010. In the FONSI, BLM determined that the no action alternative would have no significant impacts on the human environment, while the proposed action had a high potential to cause a significant impact to the riparian/wetland area, which would contravene the protection of riparian/wetland area mandates set out in both Kemmerer Resource Management Plan (RMP) and EO 11990 and the current policy requiring no net loss of habitat. In the DR based on the EA, BLM selected the no action alternative, *i.e.*, the denial of Natter's proposed ROW, because that alternative would have the least impact on the existing environment. BLM found that selecting the no action alternative conformed to the Kemmerer RMP's directive to manage riparian areas and wetlands to preserve, protect, and, if necessary, restore natural functions, and to minimize degradation of stream banks and loss of riparian habitat, while the proposed action had no measures to reduce impacts that might occur to the

riparian/wetland area. The DR further concluded that BLM had complied with all statutory requirements; that BLM had considered all relevant resource and economic considerations, including the unmitigated significant environmental impact to the wetland/riparian area identified in the EA; that the proposed action contravened the no net loss mandate of EO 11990 and EO 11988 (42 Fed. Reg. 26951 (May 24, 1977) (relating to floodplains)); and that, since her 5-year monitoring plan would be ineffective to detect immediate or short-term changes to the riparian area, Natter had not committed to any mitigation measures that could protect the riparian/wetland areas.

The Field Manager issued his decision denying Natter's ROW application on May 28, 2010, concluding that authorization of the ROW for the construction of the gravity-fed waterline from an existing spring on public lands for use for domestic and livestock water would violate section 102(a)(8) of FLPMA, 43 U.S.C. § 1701(a)(8) (2006), which states that public lands should be managed in a manner to protect the quality of, *inter alia*, environmental and water resources, to preserve and protect certain public lands in their natural condition, and to provide food and habitat for wildlife, as well as section 302 of FLPMA, 43 U.S.C. § 1732(b) (2006), which directs BLM to take any action necessary to prevent unnecessary or undue degradation of the public lands. He also cited the requirement in EO 11990 that Federal agencies take action to minimize the destruction, loss, or degradation of wetlands and to preserve and enhance the natural and beneficial values of wetlands in managing those lands. Given these directives, the Field Manager determined that there was insufficient excess water to divert water for another use and still maintain the integrity of the riparian/wetland, explaining that placing the inlet above the sedge filled pond would reduce the volume of water being supplied to the wetland and that the relatively small volume of water and the flat topography of the wetlands located on the benches made the system sensitive to even small reductions in water volumes.

The Field Manager also pointed out that the series of slump blocks on which the wetlands and private cabin site were located were geologically unstable from both a slope and structural standpoint and that the cabin construction site below and roughly in line with the springs had increased the instability of the soil. He further stated that the disturbance created by the proposed pipeline and its required maintenance would create additional instability and threaten both the cabin site and the wetlands. He added that, in light of the location of the water source in relation to the cabin, the concerns over the proposed ROW's design and materials, and the geologic history of the area, a failure of the proposed system could create a point of accelerated erosion that would not immediately be discovered, causing a drop in the water table and accelerated surface water flow, which would threaten the wetlands and produce safety hazards for the private land. The Field Manager reiterated BLM's opinion that drilling a private well would provide access to excess water without causing unnecessary or undue degradation to the public lands.

The appeal followed.<sup>3</sup>

### *DISCUSSION*

On appeal, Natter contends that BLM failed to fulfill its obligations under NEPA and produced an EA that contains numerous errors and omissions, which undermine the Field Manager's decision. She also avers that BLM denied her due process by failing to adequately consult with her and provide her with staff comments and other critical findings before the Field Manager issued the decision denying her ROW application. Because BLM's decision represents a reasoned analysis of the factors involved, made with due regard for the public interest; considered all relevant factors; and is supported by a record that 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, and because Natter has not shown error in the decision, we affirm BLM's decision.

#### *Legal Framework*

[1] Section 501(a)(1) of FLPMA authorizes the Secretary to grant ROWs for "reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." 43 U.S.C. § 1761(a)(1) (2006); *see* 43 C.F.R. § 2801.9(a)(1); *Michael & Edith Lederhause*, 174 IBLA 188, 191 (2008); *see also Clifford Bryden*, 139 IBLA 387, 389 (1997); *Stewart Hayduk*, 133 IBLA 346, 354 (1995); *see also Southern Utah Wilderness Alliance*, 166 IBLA 140, 142 (2005). Approval of an application for an ROW is a matter committed to the Department's discretion. *Michael & Edith Lederhause*, 174 IBLA at 191; *Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008); *Wiley F. & L'Marie Beaux*, 171 IBLA 58, 66 (2007); *D.J. Laughlin*, 154 IBLA 159, 163 (2001); *Cypress Community Church*, 148 IBLA 161, 164 (1999). A BLM decision approving or rejecting an application for an ROW ordinarily will be affirmed when the record shows that the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. *Michael & Edith Lederhause*, 174 IBLA at 191; *Union Telephone Company, Inc.*, 173 IBLA at 327; *Kirk Brown*, 151 IBLA 221, 225 (1999),

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<sup>3</sup> Natter initially attempted to resolve the issues raised in the Field Manager's decision informally with BLM, providing BLM with her own alternatives analysis and additional information about her system design. She also appears to have agreed to modifications of her current proposal. These discussions ultimately proved unsuccessful, due in part, apparently, because BLM considered the modified proposal to be a new ROW application subject to a new processing fee, while she wanted it to be processed as part of the original ROW application, without a new fee.

and cases cited; *Clifford Bryden*, 139 IBLA at 390. An ROW application may be denied if, *inter alia*, the authorized officer determines that the proposed use would be inconsistent with the purpose for which the public lands are managed, that the proposed ROW would not be in the public interest, or that issuing the grant would be inconsistent with applicable laws. 43 C.F.R. § 2804.26(a)(1), (2), and (4); *Michael & Edith Lederhause*, 174 IBLA at 191.

To successfully challenge a discretionary decision, the appellant bears the burden to

demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

*Wiley F. & L'Marie Beaux*, 171 IBLA at 66 (quoting *International Sand & Gravel Corp.*, 153 IBLA 295, 299 (2000)); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999). Natter must therefore show, by a preponderance of the evidence, that BLM erred in denying her ROW application. *Michael & Edith Lederhause*, 174 IBLA at 192; *D.J. Laughlin*, 154 IBLA at 163-64, and cases cited; *Stuart Krebs*, 147 IBLA 167, 172 (1999). She has failed to meet that burden here.

[2] Natter essentially relies on various alleged NEPA violations as the basis for her contention that BLM erred in denying her ROW application. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), requires Federal agencies to prepare an environmental impact statement (EIS) for a major Federal action significantly affecting the quality of the human environment. In making the threshold determination of whether an EIS is necessary, the agency may prepare an EA documenting its consideration of all relevant matters, and the agency may go forward with the project if the analysis in the EA establishes that the project will not have a significant impact on the human environment. A BLM decision based on an EA and FONSI will be affirmed on appeal if the decision considered all relevant factors and is supported by a record that 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. See *Oregon Chapter Sierra Club*, 176 IBLA 336, 346 (2009); *Gerald H. Scheid*, 173 IBLA 387, 396 (2008); *Bark*, 167 IBLA 48, 76 (2005); see also *Johnson County Weed and Pest Control Board*, 155 IBLA 98, 103 (2001) (affirming a BLM decision selecting the no action alternative when that determination was reasonable in light of the environmental analysis).

A party challenging a BLM decision has the burden of demonstrating, with objective proof, that the decision was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Oregon Chapter Sierra Club*, 176 IBLA at 347; *The Wilderness Workshop*, 175 IBLA 124, 132-33 (2008); *Santa Fe Northwest Information Council*, 174 IBLA 93, 107-108 (2008); *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993). Unsupported differences of opinion or disagreement with BLM's conclusions do not suffice to show error in BLM's decision. *Oregon Chapter Sierra Club*, 176 IBLA at 347; *Bark*, 167 IBLA at 76; *Las Vegas Valley Action Committee*, 156 IBLA 110, 117-19 (2001); *Rocky Mountain Trials Ass'n*, 156 IBLA 64, 71 (2001). Nor is it sufficient for an appellant to simply speculate and request more information or "pick apart a record with alleged errors and disagreements without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance." *Bark*, 167 IBLA at 76 (quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004)); see also *Oregon Chapter Sierra Club*, 176 IBLA at 347; *Edward C. Faulkner*, 164 IBLA 204, 209 (2004). It is with these principles in mind that we review Natter's arguments.

### *Analysis*

BLM denied Natter's ROW application because it concluded that the project as proposed would violate FLPMA and would be inconsistent with the directive contained in EO 11990. Section 102(a)(8) of FLPMA requires that

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8) (2006). In addition, section 302(b) of FLPMA mandates that, when managing the public lands,<sup>4</sup> BLM must "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) (2006). Federal policy for management of wetland resources is set out in EO 11990, 42 Fed. Reg. 26961. That EO directs Federal agencies to "take action to minimize the

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<sup>4</sup> Although Natter complains about BLM's distinguishing between public and private lands, that distinction is important because BLM's authority extends only to public lands and not private lands.

destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for . . . managing . . . Federal lands and facilities." EO 11990, § 1(a). It also instructs agencies to "avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands that may result from such use." *Id.*, § 2(a). The Board has not hesitated to uphold a BLM decision rejecting an ROW application when the ROW would be inconsistent with BLM's wetland protection obligations. See *Clifford Bryden*, 139 IBLA at 390.

In his decision, the Field Manager cited the lack of sufficient excess water to support both Natter's proposed diversion of the water through an inlet placed above the wetlands and the integrity of the wetland/riparian area, noting that the relatively small volume of water and the flat topography of the wetlands rendered the area sensitive to even a small reduction in water volume. He further concluded that the instability of the soils at the site would be exacerbated by the construction and maintenance of the pipeline and increase the threat to the wetlands. According to the Field Manager, permitting these impacts to the wetland area would not only contravene EO 11990, but would also result in unnecessary or undue degradation of the public lands. The Field Manager also opined that unnecessary or undue degradation of the public land wetland area could be avoided by the drilling of a well on Natter's private land. See *Michael & Edith Lederhause*, 174 IBLA at 194 (upholding BLM's conclusion that a proposed water diversion system that would adversely affect public lands because the project was unnecessary because viable alternatives existed).

Natter challenges the Field Manager's decision by attacking the analysis in the EA underlying the decision. She questions BLM's reliance on the general opinions and narratives of its resource experts and its rejection of her calculation that the amount of water to be diverted above the wetland would be statistically insignificant considering the small size of the wetland area, in determining that the proposed project had a high potential for creating significant impacts to the riparian/wetland areas. She further objects to BLM's alternatives analysis, arguing that BLM mischaracterized her proposed system and ignored both the project's purpose of restoring and revegetating disturbed areas on her private land and the mitigation measures afforded by her mitigation plan; failed to analyze fully the consequences of the no action alternative; and neglected to analyze the well-drilling alternative at all. We find none of these arguments persuasive.

Natter generally disputes BLM's reliance on its resource experts' opinions that her proposed system would have significant impacts to the wetlands. BLM, however, is entitled to rely on the opinions of its experts within their realm of expertise, particularly when an appellant merely expresses a difference of opinion with the

experts' opinions. *Michael & Edith Lederhause*, 174 IBLA at 193; *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 400 (2007); *Stuart Krebs*, 147 IBLA at 172. In this case, BLM's hydrologist, range engineer, and civil engineer all agreed that her proposed system design was inadequate for the location and would jeopardize the wetland area. Natter's proffered calculations of projected water usage and her opinion that this usage would be insignificant do not undermine the experts' opinions. Her calculations, which considered only the volumes needed for domestic and livestock use and not for the revegetation she now claims is the primary purpose of the project, *see* discussion, *infra*, and were based on a one-time crudely measured flow test that did not include information about flow in other seasons and from other diversion points, do not support her claim that the estimated 5% reduction in flow would be statistically insignificant. Additionally, although Natter complains about BLM's use of a qualitative, rather than a quantitative, analysis in reaching its decision, BLM's qualitative analysis was appropriate here because little quantitative data was available. *See Friends of the Nestucca Coast Range Ass'n*, 144 IBLA 341, 359 (1998). "Qualitative descriptions of effects or categorization of impacts as high, medium, or low, as in this case, are acceptable analysis of environmental consequences if not much quantitative information is available." *Id.* Accordingly, we reject Natter's general challenge to the sufficiency of the BLM NEPA analysis underlying the determination that the proposed action would have significant impacts to the wetland area.

Natter's specific objections to BLM's alternatives analysis are similarly unpersuasive. She first disputes BLM's analysis of the impacts of her proposed system, contending that BLM mischaracterized several aspects of her system, failed to consider the proposed use of the system to restore and revegetate the previously disturbed areas on her private land, and improperly discounted the mitigating effects of her monitoring plan.

Natter asserts that BLM mischaracterizes her proposed system as an open system. BLM does not dispute that Natter's system would be a closed system if it remained intact; it contends, however, that the system would not remain intact because the proposed frost-free hydrant would not serve its purpose if it was connected to a pipe not buried below the frost line. Although Natter claims that the plastic pipe industry documents provided to BLM after she received the denial decision demonstrate that the polyethylene pipe she intends to use will not freeze, BLM maintains that, in its experts' experience, even polyethylene pipe will rupture in the winter if not fully drained, citing the engineering and hydrologic analyses prepared by its civil engineer and hydrologist. As we noted above, the Board has consistently held that BLM is entitled to rely on the opinions of its experts within their areas of expertise. *See, e.g., Michael & Edith Lederhause*, 174 IBLA at 193. Additionally, despite being repeatedly advised on the need to do so, Natter failed to comply with the standard requirement that applicants provide certified drawings,

including survey and engineering details, prepared and stamped by a professional licensed engineer, a failure that made it impossible for BLM to evaluate whether the system as proposed incorporated features enabling it to function in the proposed location without a high probability of failure. Natter thus has not shown that BLM mischaracterized her proposed system.

Natter's contention that BLM erroneously ignored the restoration purpose of the proposed ROW similarly fails. Natter's ROW application did mention the revegetation along with domestic and livestock use when addressing the need for the project. Natter's subsequent, pre-decisional communications with BLM, however, did not mention the restoration function of the ROW. She also failed to provide any details of the work involved in her planned restoration activities and did not include any estimation of the amount of water needed for revegetation in her calculations of the amount of water she would need to divert from the spring. Absent this information, BLM would have been unable to meaningfully assess the potential positive and negative impacts of use of the water for restoration purposes. Additionally, both Natter's application for the water permit and the issued permit identify only stock watering and domestic use as the uses for the permitted water; neither one mentions restoration or revegetation as an additional use. Considering all these factors, we find that Natter has not shown that BLM improperly ignored the purported restoration purpose of the ROW.

Nor has Natter shown that BLM failed to consider the mitigation components of her 5-year monitoring plan. To the contrary, BLM carefully considered Natter's plan, including her offer to move the diversion point to below the lower pond if monitoring indicated that there were adverse impacts to the wetlands,<sup>5</sup> which she defined as changes of 20% or more in vegetative cover or species composition,<sup>6</sup> and determined that the proposed monitoring plan would not detect immediate changes that could result in long-term effects to wetland areas. Natter has not shown error in BLM's conclusion that the proposed monitoring plan is insufficient to mitigate any impacts to the wetland areas. We therefore conclude that Natter has not demonstrated that BLM's analysis of her proposed system was inadequate.

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<sup>5</sup> In her statement of reasons (SOR), Natter now agrees to modify her proposal to move the diversion point to below the lower pond. See SOR at 7.

<sup>6</sup> Natter contends that, since wetlands are defined as areas having greater than 50% species or cover composed of wetland vegetation, reducing wetland vegetation or cover from 100% to 80% would not change the nature of the area as a wetland, and would not result in a net loss of wetland. That the area might still qualify as a wetland even with a 20% reduction in vegetative species or cover does not demonstrate that her proposed project would not have adverse impacts to the wetland area.

Natter also challenges BLM's assessment of the impacts of the no action alternative. This challenge rests on her claim that BLM ignored the restoration purpose of the project and the positive impacts of the restoration activities on her private land, which would be lost if the no action alternative were selected. She asserts that adopting the no action alternative would allow continued erosion of the disturbed area adjacent to BLM land, degradation of water quality, and proliferation of invasive non-native weeds, all of which could extend onto BLM land. As discussed above, Natter made only passing reference to the restoration purpose of the project and provided no details on how the restoration on her private land would be implemented, which hampered any efforts by BLM to evaluate if and how the project, which would primarily benefit her private land, might also affect public land, including whether the project might actually exacerbate existing erosive conditions and weed proliferation.<sup>7</sup> Under the facts presented here, we cannot fault BLM's discussion of the impacts of the no action alternative.

Natter's final alternatives objection centers on BLM's decision not to consider the well drilling alternative in detail. Natter does not deny that the impacts of this alternative would affect only her private land and that activities solely on private land fall outside BLM's management authority. This fact alone obviates any need for BLM to analyze in detail the impacts of drilling the well on her land. Natter nevertheless contends that BLM provided no justification for its conclusion that drilling a well on her private land would fulfill the purposes of the proposed ROW while avoiding unnecessary or undue degradation of vegetation, soils, and wetland area on the public lands. She further maintains that BLM's conclusion ignores the information in her application stating that drilling such a well would not be economically feasible and would not meet the restoration purposes of the project. Not only, as previously noted, has Natter provided no details about her restoration plans, but she also has not shown why water from a well drilled on her private land could not be used to implement those plans. In any event, the fact that an alternative might be more difficult or more expensive provides insufficient reason for overturning a BLM decision rejecting an ROW application. *See, e.g., Union Telephone Company, Inc.*, 173 IBLA at 330; *D.J. Laughlin*, 154 IBLA at 164; *Kirk Brown*, 151 IBLA 221, 226 (1999). This is especially so when the proposed ROW conflicts with other land

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<sup>7</sup> Natter has attached her own analysis of the impacts of the no action alternative, which focus on her financial costs and losses should the project be abandoned and her private land be allowed to deteriorate, including the loss of value of the land and the costs of installing a driveway, pad, septic system, well, and power source on another lot, and the increased disturbance required by those activities. These impacts, all of which would occur on private land, do not undermine the adequacy of BLM's analysis of the impacts of the no action alternative, which evaluated the impacts on public, not private, land.

management objectives, as it would here. *Id.* In sum, we find that Natter has failed to meet her burden of showing error in BLM's alternatives analysis.

Natter raises other arguments concerning the DR's basis and findings, generally challenging the DR's conclusion that the decision to select the no action alternative conformed to the Kemmerer RMP and agency statutory requirements, addressed relevant resource and economic considerations, followed national wetlands policy established in EO 11990, assessed measures to minimize environmental harm, would have no significant impact on the wetland area, and was in the public interest. We find none of these arguments meritorious; rather, they simply represent an attempt by Natter to "pick apart a record with alleged errors and disagreements without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance." *Bark*, 167 IBLA at 76 (quoting *In re Stratton Hog Timber Sale*, 160 IBLA at 332). See discussion *supra*. Accordingly, we conclude that Natter has failed to meet her burden of demonstrating, with objective proof, that the Field Manager's decision, based on the EA, FONSI, and DR, was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.

Finally, Natter maintains that the decision must be reversed because BLM failed to properly consult and cooperate with her before making its decision. We disagree. The record demonstrates that BLM provided Natter with numerous opportunities to respond to BLM's concerns about her proposed design; her responses, however, demonstrated her apparent unwillingness to relocate the diversion point, to bury the pipeline, to follow the walking path, or to fence the wetland area, which were the key issues raised by BLM's experts. BLM also complied with her requests for advance notice of any BLM decision on the ROW application. Natter has cited no specific rule, regulation, or precedent establishing a requirement that BLM provide an applicant with all its pre-decisional documents and afford the applicant unlimited opportunities to submit additional information before issuing a decision. Additionally, none of BLM's communications to Natter suggests that the decision on this particular proposal remained open for negotiations. The record before us clearly demonstrates that BLM far exceeded the minimum necessary to meet whatever obligation it had to consult, confer, and cooperate with her. Accordingly, we reject Natter's argument that BLM failed to afford her due process.

To the extent not specifically addressed herein, Natter's other arguments have been considered and rejected.

In sum, we conclude that BLM's decision represents a reasoned analysis of the factors involved, made with due regard for the public interest; considers all relevant

factors and is supported by a record that 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; and that Natter has not shown error in the decision. Accordingly, we affirm BLM's decision.<sup>8</sup>

Therefore, 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.

\_\_\_\_\_/s/\_\_\_\_\_  
Sara B. Greenberg  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge

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<sup>8</sup> Neither the Field Manager's decision nor our affirmance of that decision precludes Natter from submitting a revised ROW application for a water diversion system.