



SOUTHERN UTAH WILDERNESS ALLIANCE

182 IBLA 377

Decided September 6, 2012



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

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2011-165

Decided September 6, 2012

Appeal from a Decision Record and Finding of No Significant Impact authorizing the Upper Kanab Creek Watershed Vegetation Management Project. EA UT-040-09-03.

Affirmed.

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

A BLM decision to proceed with a proposed action, based on an EA tiered to an Environmental Impact Statement, will be upheld where BLM has taken a hard look at the potentially significant environmental consequences of doing so, and its decision is supported by an administrative record that establishes that a careful review of environmental impacts has been made, all relevant areas of environmental concern have been identified, and BLM has made a convincing case that no significant impact that was not addressed in the Environmental Impact Statement will result or that any such impact will be eliminated or reduced to insignificance by the adoption of appropriate mitigation measures. A party challenging a BLM decision must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

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

NEPA requires consideration of a reasonable range of alternatives to a proposed action, including a no-action alternative. Appropriate alternatives are those that would accomplish the intended purpose of the proposed action, are technically and economically feasible, and will avoid or minimize adverse effects. A “rule of reason” governs the selection of alternatives, both as to which alternatives an agency must discuss and the extent to which it must discuss them.

3. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability

In approving a watershed vegetation management project to be implemented over a 15-year period, BLM may adopt a phased approach to compliance with section 106 of the National Historic Preservation Act, as long as no surface-disturbing activity will occur until after the section 106 process is completed.

APPEARANCES: Liz Thomas, Esq., Moab, Utah, for Southern Utah Wilderness Alliance; Lawrence J. Jensen, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Southern Utah Wilderness Alliance (SUWA) has appealed from an April 27, 2011, Decision Record (DR) and Finding of No Significant Impact (FONSI) issued by the Color Country District Manager, Cedar City (Utah) Field Office, Bureau of Land Management (BLM), for the Upper Kanab Creek Watershed Vegetation Management Project (project), to be implemented over a 15-year period. In approving the project, the District Manager relied on the April 2011 Environmental Assessment UT-04-09-03 (EA, Upper Kanab EA). The purpose of the project is to rehabilitate vegetation communities by reducing invasive pinyon/juniper woodlands and reseeding land areas in order to restore and improve the sagebrush steppe ecosystem, thereby regenerating a hearty, resilient bionomic balance more closely aligned with the historical baseline. DR/FONSI at unpaginated (unp.) 8; EA at 1-3.

In its appeal, SUWA contends that BLM’s DR/FONSI and its supporting EA violate section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), by failing to sufficiently analyze site-specific

information, by failing to take a hard look at environmental impacts regarding climate change and invasive species, and by failing to analyze an adequate range of reasonable project alternatives. Statement of Reasons (SOR) at 4. SUWA further argues that the DR/FONSI and EA violate the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6 (2006), by failing to conduct meaningful consultation with the Advisory Council for Historic Preservation (ACHP), the Utah State Historic Preservation Officer (SHPO), and Native American Tribes; by failing to make a good faith effort to identify cultural sites in the Project area; and “by failing to adequately assess the potential adverse effects to cultural resources” prior to approving the Project. *Id.*

In this opinion, we affirm the April 27, 2011, DR/FONSI, because we find that SUWA has not met its burden to demonstrate, by a preponderance of the evidence and with objective proof, that BLM’s DR/FONSI and supporting EA fail to comply with the legal requirements of either NEPA or NHPA. We more fully explain below.

I. Background

Kanab Creek is a north-south trending catchment in southwestern Utah that drains part of the Grand Staircase-Escalante landscape and empties into the Colorado River in northern Arizona. Its watershed is divided by the White Cliffs into upper and lower segments. The upper segment, which is at issue here, is located in south-central Utah and is managed by the Grand Staircase-Escalante National Monument (GSENM) and BLM’s Kanab Field Office (KFO). GSENM is responsible for land use planning efforts on approximately 1.9 million acres of public land within the Monument’s boundaries and an additional 200,000 acres within the Glen Canyon National Recreation Area. The KFO management area largely surrounds GSENM’s borders, but the KFO manages only 554,000 acres of the surrounding land, as the general area is home to a number of national parks, monuments, and recreation areas. *See October 2008 Kanab Field Office Record of Decision and Approved Resource Management Plan (2008 KFO RMP)*. The Upper Kanab project area encompasses, in rounded figures, about 89,900 acres of public lands interspersed among approximately 31,400 acres of small private parcels, 6,000 acres managed by the U.S. Forest Service, and 3,400 acres managed by the State of Utah School and Institutional Trust Lands Administration. DR/FONSI at unp. 2.

The Upper Kanab EA is tiered to the 2008 KFO RMP, which approved land treatments within the KFO to be “prioritized and implemented on a case-by-case basis to improve vegetation communities throughout the planning area,” and “to be conducted in areas where the desired vegetation community has been invaded or has

reached an undesirable monoculture.”¹ 2008 KFO RMP at 25. The RMP acknowledges that the land treatments would result in “short term losses of vegetation,” but concludes that “over the long term these actions would help to remove undesirable species, increase species diversity and age class, improve vegetation composition and structure, and increase vegetation cover and ecological condition.” *Id.*

The EA reports that in the project area, pinyon and juniper woodlands have invaded areas once dominated by sagebrush shrubs and other herbaceous vegetation commonly found in a sagebrush-steppe ecosystem, and now comprise 67% of the project area, whereas 27% of the project area is classified as “grass/shrub/scrub types (sagebrush-steppe communities).” EA at 2, 12, 27. According to the EA, resource scientists recognize that “[a]n increase in pinyon/juniper cover affects soil resources, water and nutrient cycles, fire regimes, plant community structure and composition, forage production, and wildlife habitat.” *Id.* at 2. The EA states that pinyon and juniper encroachment in the watershed is negatively altering the ecological balance, producing “a closed canopy with little or no opportunity for future recruitment of sagebrush or other desired understory vegetation.” *Id.* at 14, 43. As a consequence, “[u]pland erosion, resulting in reduced soil moisture and decreased groundwater recharge,” and “[t]he risk of catastrophic wildfire” have increased. *Id.* at 14. The EA reports that “[a]reas where pinyon and juniper have invaded within the watershed (and 93% of the project area) are currently in [Fire Regime Condition Class] 3,” which is defined by “vegetation communities and fire regimes” that have been significantly altered from “their historic range.” *Id.*; *see also* EA, App. 6, “Fire Regime Condition Classes.” As a consequence, the EA states, the risk of losing key ecosystem components is high. EA at 14, 43.

The cumulative consequences of not taking action are potentially ruinous, BLM concludes, because similar processes, which are associated with “a decline in wildlife species dependent on sagebrush ecosystems, increases in invasive plant establishment, increased fire risk and severity, increased erosion and soil loss, and decreases in carbon sequestration potential,” are occurring “throughout the western United States.” EA at 72. In the absence of rehabilitation, the EA concludes, the reasonably foreseeable future scenario for the watershed is grim: “Based on recent large-scale wildland fires throughout southern Utah within similar types of habitats in counties surrounding the project area, *it is not a matter of if a fire will occur, but when.*” *Id.* at 73 (emphasis added). “A large-scale wildland fire would destroy wildlife habitat, increase erosion potential and place communities and firefighters at increased risk.” *Id.* But even if the watershed dodges catastrophic fire, “wildlife habitat would continue to decline under the current conditions. Deer and sage

¹ The 2008 KFO RMP is supported by the July 2008 KFO Proposed RMP and Final Environmental Impact Statement (FEIS) and an October 2007 Draft RMP FEIS.

grouse, which have already experienced decreases in numbers due to lost and degraded habitat and drought, could decline beyond the point at which they could recover,” BLM concludes. *Id.*

To reverse these trends, BLM designed three treatment strategies, or categories, to address vulnerabilities in each of the three dominant vegetation communities in the watershed. Thus, the EA includes a pinyon/juniper treatment, a sagebrush-steppe/sagebrush treatment, and a vegetation retreatment strategy. EA at 12-16. All strategies would incorporate, in common, environmentally sound practices pertaining to fire and fuels, wildlife, vegetation, herbicide use, visual resources, recreation, noxious weeds, soil and hydrology, vegetation, cultural and paleontology resources, fences, and air quality. *See id.* at 16-20.

The EA provides a number of site-specific treatment details.² First, it identifies the location and boundaries of each proposed treatment area, and the projected year the treatment will be completed. EA, Maps 1- 6. Second, it assigns one of three landscape types to each proposed treatment area (depending on the majority of the existing vegetation type in that area³) and it describes the characteristics of each landscape type, including threats to long-term health in the absence of treatment. *Id.* at 12-16. Third, the EA describes the “desired future condition” of each of the landscape types that BLM seeks to achieve through its treatment program. *Id.*⁴

² *See also* BLM Answer at 3-4.

³ These assignments were made based on site-specific information gathered through “extensive individual visits” to each area, as well as “resource and specialist input.” EA at 12.

⁴ For example, in the case of pinyon/juniper treatment areas, the following site-specific desired future conditions are defined:

Limited pinyon and juniper woodlands occur naturally throughout the watershed as open multiple age class stands with a grass and forb understory. Vegetation mosaics of sagebrushsteppe (primary) and woodlands (secondary) contribute to healthy and diverse wildlife communities. Pinyon/Juniper is held in check by periodic low intensity fire (every 15-50 years) and is representative of Fire Regime Condition Classes 1 or 2. Historic stands (generally located in more rocky soils with a tendency toward unique growth form characteristics of rounded, spreading canopies, large basal branches, large irregular trunks and furrowed fibrous bark) experience fire-return intervals every 100+ years. Self sustaining, ponderosa pine located throughout the watershed consist of predominately park like groups, with a grass and

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Fourth, the EA describes in detail the treatment methods that will be used in each landscape type to achieve the “desired future condition.” EA at 12-16. For example, in sagebrushsteppe/sagebrush treatment areas, it specifies that mechanical tools or hand-thinning will be used to remove 100 percent of invading pinyon and juniper trees; rabbit brush in dense stands will be treated with herbicides in accordance with a previously prepared programmatic EIS on herbicide use; in subareas “where understory grasses and forbs are lacking and no seed base is present,” identified seed mixtures will be used to reseed; dense sagebrush sub-areas, which are defined as having “more than 30 percent cover,” will be treated with mechanical, chemical, or grazing management tools; and mechanical tools, hand thinning and chemical treatments will be used “to open corridors for travel to and from sage grouse strutting grounds, nesting areas, brood areas, and water areas.” *Id.* at 13. Similar details are provided for the pinyon/juniper treatment and the vegetation retreatment arrangements.⁵

⁴ (...continued)

forb understory. Stands experience normal levels of mortality and are resilient to low-intensity fire. Ponderosa pine regeneration is present, but generally not abundant.

EA at 14-15.

⁵ For pinyon/juniper woodlands, the EA specifies the following treatment methods: mechanical hand-thinning; approved chemical treatments or prescribed fire, to thin dense stands of pinyon/juniper (*see* EA, Appendix 4 for fuels treatment protocols); removal of up to 90% of standing trees within sagebrush/grassland areas, to restore productive grass, forb, and shrub communities; where rabbit brush occurs in dense stands rather than as isolated plants, the use of herbicides as described in the BLM Vegetation Treatments Using Herbicides Final Programmatic Environmental Impact Statement (EIS) (BLM, 2007) (Final Vegetation Treatment Programmatic EIS) and in accordance with land use plans to avoid further establishment within treatment areas; where appropriate, the use of a stewardship contracting authority to remove forest products; the use of appropriate seed mixtures to reseed areas where understory grasses and forbs are lacking and no seed base is available (*see* Appendix 5 for potential species to be seeded); as appropriate, the use of mechanical tools or hand-thinning to remove ladder fuels and maintain ponderosa pine health (*see* Appendix 4 pertaining to fuels treatment specifications); on a case-by-case basis, the supplementation of declining ponderosa groups with ponderosa seedlings; as a long-term maintenance strategy, the reintroduction of low-intensity ground fire to ponderosa pine groups following treatments to remove ladder fuels; hand-thinning will be scheduled periodically to reduce potential of future pinyon and juniper encroachment into sagebrush-steppe areas and to protect the investment made by

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Fifth, specifications are made for each treatment method that is to be employed. Specifications for treatment by hand cutting and mechanical chippers are found in Appendix 4 of the EA; specifications for herbicide use are found at page 18; and specifications for the use of fire are found at page 16. Specifications for treating the vegetation in such a way as to avoid or deal with impacts to wildlife, desirable vegetation, visual resources, recreation, soil and hydrology, cultural resources, and air quality are also given. EA at 16-20.

Sixth, the EA identifies and discusses the environmental impacts of treating the vegetation with the methods proposed (and the mitigation measures that will be employed) on cultural resources, fire and fuels, greenhouse gas emissions, range/livestock, recreation, soils, visual resources, natural areas, wildlife, and woodland/forestry. EA at 44-64.

Once BLM developed core treatment elements, it then formulated four alternatives. See EA at 12-24. Alternative A would treat both KFO lands and GSENM lands. Alternative C would treat the KFO portion only; Alternative D would treat the GSENM portion only. Alternative B was designated the “No Action Alternative.” EA at 20-22. Additionally, BLM rejected the following choices from consideration: (1) permanent grazing changes, (2) the combined analysis of the upper and lower portions of the Kanab Creek Watershed, and (3) inclusion of riparian treatments and water developments with the proposed action, which, BLM stated, would be handled “on a case-by-case basis, as uplands are improved.” EA at 23. Initially, BLM’s preferred alternative was Alternative A, which would have treated about 52,000 acres on both KFO and GSENM lands. Nov. 17, 2009, Draft DR/FONSI at unpag. 2. But the DR adopted a modified version of Alternative C, which did not include land within GSENM, and also eliminated approximately 430 acres that were determined as part of the 2008 RMP process to be managed for their wilderness characteristics. DR/FONSI at unpag. 7. The final Decision thus designated about 18,530 acres for pinyon/juniper treatment, 7,160 acres for sagebrush-steppe treatment, and 5,065 acres for vegetation retreatment on KFO lands only. *Id.* The DR stated that although inclusion of GSENM lands was preferred for purposes of “landscape level and watershed level treatments,” BLM also recognized “the unique mission of the National Landscape Conservation System,” and thus took into consideration “public comments to not conduct vegetation treatments on GSENM lands at this time.” *Id.*

In the FONSI, the District Manager found that the project is needed to (1) reduce hazardous fuels and risk to life and property from catastrophic wildland fire; (2) restore and improve the sagebrush steppe ecosystem; (3) increase plant species diversity and improve watershed conditions and water quality; (4) improve

⁵ (...continued)

BLM and its partners. EA at 15.

the health of both woodland and sagebrush/grassland by increasing both vegetation diversity and age class structure; (5) enhance important seasonal and year-round habitat for several species of wildlife including sage grouse, mule deer, elk and pronghorn antelope; and (6) decrease the amount of pinyon/juniper expansion into areas historically dominated by sagebrush and grass. FONSI at unp. 2.

The District Manager further noted in the FONSI that the project conforms to the 2008 KFO RMP, as well as the following “local and national directives” that “specifically address or apply to vegetation treatments within the project area”: (1) the Southwest Utah Support Area Fire Management Plan (May 2006); (2) the Healthy Forest Restoration Act of 2003; (3) the National Fire Plan (2000); (4) Final Vegetation Treatment Programmatic EIS; (5) Southwest Utah Regional Wildfire Protection Plan (2007); (6) Color Country Adaptive Resource Management Plan for Sage Grouse (2007); (7) BLM National Sage Grouse Habitat Conservation Strategy (2004); (8) Federal Wildland Fire Management Policy (1995); (9) Utah Wildlife Conservation Strategy (2005); (10) Utah Division of Wildlife Resources Statewide Management Plan for Mule Deer (2008); (11) Paunsaugunt Deer Herd Unit Management Plan (2001); and (10) the Rangeland Health Standards (43 C.F.R. § 4180). FONSI at unp. 3 (quotation marks omitted).

Based upon an analysis of the criteria set forth in 40 C.F.R. § 1508.27, the District Manager determined that the Upper Kanab watershed project “is not a major federal action and will not significantly affect the quality of the human environment, individually or cumulatively with other actions in the general area.” FONSI at unp. 3-6. He therefore concluded that an EIS for the project need not be prepared. *Id.* SUWA timely appealed.

II. Arguments of the Parties

In its SOR, SUWA argues that the Kanab Creek Watershed EA does not meet the requirements of NEPA, 42 U.S.C. § 4332(C)(2) (2006), on three grounds. First, SUWA contends that the EA is in essence a programmatic EA that does not provide site-specific analysis of potential adverse impacts. Second, SUWA claims that BLM did not take a hard look at the site-specific impacts of the proposed project, particularly its impact on climate change and on noxious and invasive species. Third, SUWA maintains that BLM unreasonably failed to analyze the “conservation alternative” proposed by SUWA, which would have excluded vegetation treatments, especially those resulting in surface disturbance, from all lands proposed for wilderness designation in the Red Rock Wilderness Act. SOR at 8-18. SUWA further argues that the EA fails to comply with the NHPA, 16 U.S.C. §§ 470-470x-6 (2006), because BLM failed to (1) timely consult with appropriate historic preservation officers and Tribes in order to identify historic properties early in the process; (2) “review existing

information and identify historic properties”; and (3) “adequately assess the project’s effects on historic properties” prior to approving the project. *Id.* at 20-26.

With respect to SUWA’s NEPA challenges, BLM responds that “SUWA’s claim that BLM failed to ‘analyze sufficient site-specific information’ is based on a mischaracterization or misunderstanding of the EA.” Answer at 10. In fact, BLM argues, the EA sufficiently analyzed site-specific information; it appropriately declined to consider SUWA’s proposed alternative; it “adequately considered the issue of climate change”; and it “adequately considered the issue of invasive and noxious plant species.” *Id.* at 2-10.

With respect to SUWA’s NHPA challenges, BLM replies that SUWA’s arguments pertaining to the NHPA are not properly before the Board because SUWA did not raise them in its comments on the EA, and “has therefore waived any right to have them considered by the Board.” *Id.* at 10-11. In any event, BLM maintains, “SUWA’s NHPA arguments are without merit,” because in this case, BLM adopted a “phased approach” to NHPA compliance, which is practical and reasonable where a 15-year plan for vegetation management over large land areas is involved. *Id.* at 11-15. Further, BLM answers, SUWA is mistaken in its assertion that BLM “failed to properly consult” with proper State and Tribal officials. In point of fact, BLM states, the EA confirms that the SHPO and the Tribes were notified of BLM’s intentions to use a phased approach and to consult at appropriate times. *Id.* at 15.

III. Standard of Review

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), requires consideration of the potential environmental impacts of a proposed action in an EIS if that action is a “major Federal action[] significantly affecting the quality of the human environment.” To determine whether an EIS is necessary, the agency may prepare an EA documenting its consideration of all relevant matters. 40 C.F.R. §§ 1501.3, 1501.4(c); *Oregon Chapter Sierra Club*, 176 IBLA 336, 346 (2009). 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. *Oregon Chapter Sierra Club*, 176 IBLA at 346; *Cf. Utah Shared Access Alliance v. U.S. Forest Service*, 288 F.3d 1205, 1213 (10th Cir. 2002) (quoting *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1554, n.9 (10th Cir. 1993) (“[O]ne of the principal purposes of an EA is to ‘[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].’”). EAs are routinely tiered to EISs, land use plans, and conservation strategies, which have bearing upon the issues presented and the geography involved. *See, e.g., Powder River Basin Resource Council*, 180 IBLA 1, 12 (2010); *Southern Utah Wilderness Alliance*, 127 IBLA 282, 286, 289 (1990).

[1] A BLM decision to proceed with a proposed action, based on an EA tiered to a programmatic EIS, will be upheld as being in accord with section 102(2)(C) of NEPA where BLM has, considering all relevant matters of environmental concern, taken a hard look at the potentially significant environmental consequences of doing so, and its decision is supported by an administrative record that establishes that a careful review of environmental impacts has been made, all relevant areas of environmental concern have been identified, and BLM has made a convincing case that no significant impact that was not addressed in the EIS will result or that any such impact will be eliminated or reduced to insignificance by the adoption of appropriate mitigation measures. *E.g.*, *Powder River Basin Resource Council*, 180 IBLA 32, 47-48 (2010); *The Wilderness Workshop*, 175 IBLA 124, 132-33 (2008); *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007).

In assessing the adequacy of an EA, the Board is guided by the “rule of reason,” such that the EA need only briefly discuss the likely impacts of a proposed action: “By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises.” *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)). An appellant seeking to overcome such a decision carries the burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Bales Ranch, Inc.*, 151 IBLA at 357.

BLM’s decision to issue a FONSI and not prepare an EIS “implicates agency expertise.” *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). Where, in assessing environmental impacts, BLM properly relies upon the professional opinion of its technical experts concerning matters within the realm of their expertise, and that opinion is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. *Powder River Basin Resource Council*, 180 IBLA at 48; *Wyoming Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)). A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the true nature, magnitude, or scope of the likely impacts. *Id.* The fact that an appellant has a differing opinion about likely environmental impacts or prefers that BLM take another course of action does not show that BLM violated the procedural requirements of NEPA. *Biodiversity Conservation Alliance*, 174 IBLA 1, 13 (2008); *Wyoming Audubon*, 151 IBLA 42, 50 (1999); *San Juan Citizens Alliance*, 129 IBLA 1, 14 (1994).

IV. Analysis

A. The Upper Kanab EA meets the requirements of NEPA.

1. *The EA provides sufficient site-specific detail.* SUWA claims that the EA “merely outlines a broad range of possible treatments” within each of the three treatment categories, including the use, “as appropriate,” of “mechanical tools, hand-thinning, chemical treatments, prescribed fire, re-seeding and grazing management.” SOR at 9. SUWA claims that these “as appropriate” recommendations make it “impossible for the BLM or the public to analyze the proposed project’s environmental impacts in any meaningful way.” *Id.* SUWA asserts that “[c]ertainly the environmental impacts of a sagebrush treatment involving hand cutting and spot application of herbicide varies drastically from the impacts of a treatment involving mechanical thinning (e.g., Brush Hog) and liberal application of herbicide over the entire treatment area.” *Id.* at 9-10. SUWA continues: “As the EA currently stands, the BLM has *carte blanche*” to determine the specific treatment protocol to be applied in each in specific area “without any additional analysis of the impacts of the chosen treatments and without additional public input. . . .” *Id.* at 10. SUWA argues that this demonstrates that BLM failed to take a hard look at “site specific impacts in a site specific EA,” and that BLM must therefore supplement this “programmatically EA” with site-specific analysis once it “determines the specific course of treatments within each of these general treatment areas.” *Id.* at 10-11. SUWA thus suggests that there are further or different impacts associated with the selection of the treatment methods to be used in any given case, without expressly identifying any such impact.

However, as BLM points out in its Answer, at 4-5, “[t]he EA identifies the areas where treatment is to take place, the vegetation that is to be treated, the reasons for treating it, the methods that may be used in treating it, how the methods will be employed if they are used, the mitigation measures that will be employed, and the impacts of using those methods on all of the affected resources in the treatment areas.” SUWA has not offered any evidence that BLM failed to consider a substantial environmental question of significance to the proposed action or otherwise failed to comply with section 102(2)(C) of NEPA.⁶ Characterizing the EA as a programmatic EA is not a substitute for the requisite showing and will not alone suffice to establish an obligation to conduct additional environmental analysis.

⁶ The EA requires conformance with BLM’s 2007 Final Vegetation Treatment Programmatic EIS and Record of Decision (ROD), which authorizes the use of herbicides in 17 western states and provides standard operating procedures for their use. SUWA does not argue that the Upper Kanab watershed EA conflicts with that ROD, or with any other technical or legal requirement for the safe use of herbicides.

We find, moreover, that SUWA's assertion does not comport with the "rule of reason" that guides the Board in determining whether an EA is adequate. "So long as an EA contains a 'reasonably thorough discussion of . . . significant aspects of the probable environmental consequences,' NEPA requirements have been satisfied." *Wildearth Guardians*, 182 IBLA 100, 105 (2012) (quoting *Don't Ruin Our Park v. Stone*, 802 F. Supp. at 1247-48, and cases cited therein). Therefore, in the absence of any objective evidence to support the allegation that there are impacts from each treatment method or from combining treatment methods to address conditions on the ground, we find that the EA's analysis is sufficiently site-specific.

2. *BLM took a hard look at potential impacts of the proposed action on climate change, and on the proliferation of noxious and invasive plant species.*

a. *Climate Change.* SUWA asserts that BLM "should have attempted at least some qualitative and/or quantitative analysis" with respect to the proposed project's effects on climate change. SOR at 13. BLM in fact took a qualitative look at climate change. The EA identified greenhouse gas emissions as a "critical element of the human environment," stating that "[o]ngoing scientific research has identified the potential impacts of anthropogenic (man-made) greenhouse gas (GHG) emissions and changes in biological carbon sequestration⁷ due to land management activities on global climate." EA at 9. It discussed what is currently understood about climate change based upon scientific information compiled by the Intergovernmental Panel on Climate Change and other credible sources, stating, among other things, that "[t]hrough complex interactions on a regional and global scale, GHG emissions and net losses of biological carbon sinks cause a net warming effect of the atmosphere, primarily by decreasing the amount of heat energy radiated by the earth back into space."⁸ *Id.* at 28.

⁷ "Carbon sequestration" refers to processes that remove carbon from the atmosphere and deposit it into a reservoir, termed a "carbon sink." United Nations Framework Convention on Climate Change, "Glossary of Climate Change Acronyms." http://unfccc.int/essential_background/glossary/items/3666.php#C (last visited on July 25, 2012).

⁸ In its cumulative impacts analysis of the no action alternative, BLM discussed the qualitative importance of the sagebrush steppe ecosystem in carbon sequestration, stating:

Rangelands, and to a broader extent sagebrush steppe ecosystems, are important for carbon sequestration, primarily because of the significant carbon stored as soil organic matter and the magnitude of the rangelands that occur within the United States (roughly one-third of total

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The EA pointed out that “[s]everal activities contribute to the phenomena of climate change, including emissions of GHGs (especially carbon dioxide and methane) from fossil fuel development, land use management practices, large wildfires, activities using combustion engines, changes to the natural carbon cycle, and “changes to radiative forces and reflectivity (albedo)”]; and that impacts from GHGs are durationally complex: for example, “[r]ecent emissions of carbon dioxide can influence climate for 100 years.” EA at 28, 49. With respect to the quantitative effects that the four alternatives proposed in the EA might have on climate change, BLM stated that there are currently no predictive models sophisticated enough to quantify the effects of any particular project on climate change, nor have “specific levels of significance” for GHGs been identified, and therefore the EA’s discussion was necessarily limited to “accounting and disclosing of factors that contribute to climate change.” EA at 49, 82.

Our review of the record demonstrates that despite the present reality that the assessment of GHG emissions and climate change is in its formative phase, BLM considered the Upper Kanab watershed project in the context of what is known about the subject. BLM’s review was necessarily predicated upon scientific uncertainty, but, in context, uncertainty is the baseline. *See, e.g., North Slope Borough v. MMS*, 343 Fed. App. 272, 275 (9th Cir. 2009); *Conservation Northwest v. Rey*, 674 F. Supp. 2d 1232, 1253 (D. Wash. 2009). BLM has weighed the uncertainties and concluded that land treatments that buttress the sagebrush steppe ecosystem will, over time, provide increased opportunity for carbon sequestration, and that taking no action will increase the risk of a “net loss” of biological carbon sinks. Appellants have not demonstrated error in that conclusion, nor have they demonstrated that BLM failed to take a “hard look” at climate change. *Powder River Basin Resource Council*, 180 IBLA 119, 135-36 n.21 (2010); *Center for Biological Diversity*, 181 IBLA 325, 368 (2012); *Bristlecone Alliance*, 179 IBLA 51, 80-81 (2010).

⁸ (...continued)

lands, excluding Alaska) Conversion of sagebrush steppe to annual vegetation dominance (such as cheatgrass) is associated with 1) volatilization of carbon in woody shrubs during wildfires (carbon source); 2) loss of surface soil organic matter layer due to erosion after a wildfire; 3) reduction in net carbon stored in deeper soils; and 4) reduction in net carbon exchange in annual grasslands compared to sagebrush steppe lands Conversion of sagebrush steppe to annual vegetation dominance would be cumulative with such events occurring throughout much of the western United States.

EA at 67.

b. Noxious and invasive vegetation. Likewise, we find no merit to SUWA's claim that BLM failed to take a hard look at the impacts of the proposed action on encouraging the proliferation of noxious weeds and invasive species by surface-disturbing activities. SOR at 13-14. To the contrary, the focus of BLM's proposed action is on controlling the invasiveness of the noxious juniper/pinyon monoculture, and preventing the spread of cheatgrass and other inferior, high-volume-growth noxious and invasive grasses. The EA makes clear that controlling noxious weeds and grasses will be a priority in the watershed, and that measures to mitigate impact are in place to do so. *See, e.g.*, EA at 2, 19, 27, 54-55, 70. SUWA contends BLM "makes little effort to address, let alone analyze or quantify, the existing baseline conditions of noxious or invasive weeds." SOR at 14. SUWA further argues that "BLM must analyze the increased risk of proliferation" associated with applying treatment methods. *Id.* at 15. These general arguments are properly rejected as unsupported and conclusory in the absence of even an assertion that the EA erred in finding that noxious or invasive species are an environmental concern in the area or that they must be controlled to address the issues enumerated in the EA.

c. BLM considered an adequate range of alternatives. SUWA asserts that BLM failed to consider an adequate range of alternatives because it did not consider the "middle-ground conservation alternative" proposed by SUWA. That alternative, according to SUWA, would have excluded approximately 10 percent of land within the KFO project area because it is proposed for wilderness by "America's Red Rock Wilderness Act." SOR at 16-17. Citing *The Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285, 1311-12 (D. Colo. 2007), SUWA argues that "Federal agencies must consider alternatives with a full spectrum of land protection, not just extreme options on opposing ends of the scale." SOR at 16.

BLM responds that "SUWA's claim that its proposed alternative was reasonable and should have been considered, is grounded in a difference of opinion with BLM over how lands with wilderness characteristics should be managed." Answer at 6. BLM argues, "SUWA believes that all lands that have been identified by the Utah Wilderness Coalition as having wilderness characteristics should be managed to protect those characteristics, and that it was incumbent on BLM to consider an alternative that would achieve SUWA's goal." *Id.* at 6.

[2] BLM is required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2006), to consider "appropriate alternatives" to a proposed action, as well as their environmental consequences. *Center for Biological Diversity*, 181 IBLA at 346; *Oregon Chapter Sierra Club*, 176 IBLA at 351; *Southern Utah Wilderness Alliance*, 166 IBLA 140, 178 n.20 (2005); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466 (10th Cir. 1984); *see* 40 C.F.R. §§ 1501.2(c) and 1508.9(b). A "rule of reason" applies to both the range of alternatives that must be considered and the extent to

which each alternative must be addressed. See 40 C.F.R. § 1508.9(b); 40 C.F.R. § 1500.2(e); 516 DM 3.4(A); *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *Missouri Coalition for the Environment*, 172 IBLA 226, 241 (2007); *Biodiversity Conservation Alliance*, 171 IBLA 218, 235 (2007); *In Re Stratton Hog Timber Sale*, 160 IBLA 329, 337 (2004); *Southern Utah Wilderness Alliance*, 152 IBLA 216, 223-24 (2000). Appropriate alternatives are those that are reasonable alternatives to the proposed action, will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 C.F.R. § 1500.2(e); *WildEarth Guardians*, 182 IBLA at 107; *Oregon Chapter Sierra Club*, 176 IBLA at 351; *Wilderness Workshop*, 175 IBLA at 135; *Biodiversity Conservation Alliance*, 174 IBLA 1, 24-25 (2008). An agency is not required to consider a range of alternatives that extends beyond those reasonably related to the purposes of the project. *Oregon Chapter Sierra Club*, 176 IBLA at 352; see *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974); *Arizona Past and Present Future Foundation, Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983). A difference of opinion as to the proper alternative does not establish error in BLM's choice of alternatives. *Western Exploration Inc. & Doby George LLC*, 169 IBLA 388, 406 (2006); *Southern Utah Wilderness Alliance*, 152 IBLA at 224 ("The fact that a party may favor an alternative other than that adopted by BLM does not render the action taken by BLM erroneous.").

BLM responded to SUWA's comments concerning the "conservation alternative" by noting that the 2008 KFO RMP fully considered the areas proposed for wilderness as part of "America's Red Rock Wilderness Act," stating that some of those lands were determined by BLM to have wilderness characteristics and are now managed for those traits, but other lands that were determined to have wilderness characteristics "are now managed for other resources and activities" because "they were found to have other important resources or resource uses" that would "conflict with protection, preservation, or maintenance of the wilderness characteristics," such as areas identified as needing vegetation treatment under the Healthy Lands Initiative. EA at 96 (internal quotation marks omitted). The EA then noted that the Upper Kanab Creek watershed project was subsequently modified by omitting the 430 acres of land that are to be managed for their wilderness characteristics under the 2008 KFO RMP. *Id.* In addition, BLM added, "the No Action Alternative analyzes no treatments, which would include those areas proposed for wilderness through America's Red Rock Wilderness Act." *Id.*

SUWA cites *The Wilderness Society v. Wisely*, 524 F. Supp. 2d at 1285, in support of its argument that BLM should have considered the "conservation alternative." The issue in that case was whether BLM should have considered a "no surface occupancy" alternative in the permitting of 21 oil and gas wells, when there was evidence, in that record, that the alternative would accomplish the intended

purpose, be technically and economically feasible, and have a lesser or no impact. *Id.* at 1312. We agree with BLM that the facts before us here do not fall in the same way. *See* Answer at 7-8. But we find the court’s statement of the law pertaining to the NEPA requirement for analysis of reasonable alternatives instructive. The District Court stated:

Under NEPA, an agency’s consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative. . . . An agency need not . . . discuss alternatives similar to alternatives actually considered, or alternatives which are “infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.” . . . NEPA does not require BLM to explicitly consider every possible alternative to a proposed action. . . . An agency must, however, explain its reasoning for eliminating an alternative. [Quotation marks and citations omitted.]

524 F. Supp. 2d at 1309.

Under all of the aforementioned legal standards, the EA comports with the NEPA requirement to consider an appropriate range of alternatives, and SUWA has failed to satisfy its burden of proof to show otherwise. We agree with BLM that

“the need to rehabilitate vegetation communities,” which is the purpose of the Project, applies to lands [in the KFO] with wilderness characteristics . . . , and the purpose of the project cannot be achieved by simply excluding all of the lands with wilderness characteristics from treatment. SUWA has simply proposed a “No Action” alternative for all lands with wilderness characteristics; it has not proposed an alternative that would achieve the project’s purpose on those lands at a lesser environmental cost.

Answer at 7. The fact that SUWA favors an alternative other than that adopted by BLM does not render the range of alternatives considered by BLM inadequate or erroneous. *Southern Utah Wilderness Alliance*, 152 IBLA at 224.

B. The Upper Kanab EA meets the requirements of the NHPA.

SUWA alleges that BLM violated NHPA “by failing to conduct meaningful consultation with the ACHP, the SHPO, and Native American Tribes, and by failing to make a good faith effort to identify cultural sites and adequately assess the potential adverse effects to cultural resources” prior to approving the project. SOR at 7. BLM

responds that SUWA cannot raise this challenge for the first time on appeal, since it had the opportunity but “did not suggest, as it does now, that BLM’s compliance with NHPA in the context of the EA was deficient. Answer at 10. BLM argues that SUWA waived its arguments with respect to the NHPA because, in its comments to the DR/FONSI and EA, it essentially conceded that as long as BLM conducts appropriate consultations and inventories “prior to all treatments,” and “avoids all cultural resources,” it will have satisfied the requirements of the NHPA. In any event, BLM asserts, BLM complied with all NHPA requirements. *Id.* (quoting EA, Public Comments, Dec. 18, 2009, Letter from SUWA (Comments) at 16-17, VII).

With regard to project compliance with the NHPA, the EA specifically states that “[g]iven the scope and schedule of this project, a phased approach as defined in 36 C.F.R. § 800.4(b)(2) is necessary.” EA at 45. The EA confirms that the SHPO “was notified of our intentions to approach the identification and evaluation of cultural resources for this project in phases, to which they concurred with on August 17, 2010,” and that “[p]rior [to] any ground disturbing activities and/or with each phase of the project, an intensive (Class III) cultural resource inventory would be conducted to identify and evaluate cultural resources.” *Id.* at 45-46. The EA warrants that “[a] determination of eligibility and finding of effect would be made for each identified historic property by the agency and in consultation with the SHPO in accordance with Section 106 of the NHPA.” *Id.* at 46. The EA avers that “[o]nce the project area is defined and funds made available, a 100% pedestrian (Class III) inventory would be conducted to identify and evaluate cultural resources for eligibility to the National Register of Historic Places (NRHP).” *Id.* at 20.

[3] The NHPA is essentially a procedural statute designed to ensure that an agency identifies and considers significant cultural resources in its decision-making process. *Deborah Reichman*, 173 IBLA 149, 161 (2007); *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 347 (2005), and cases cited. Section 106 of the NHPA, 16 U.S.C. § 470(f) (2006), requires the head of any Federal agency having authority to license any undertaking to take into account the effects of the undertaking on any property eligible for inclusion in the NRHP. 164 IBLA at 348. The agency must engage in such efforts in consultation with the SHPO or, in the case of Indian tribal lands, the Trust Historic Preservation Officer, and the ACHP. *See, e.g.*, 36 C.F.R. §§ 800.2(a)(4), (b), and (c), 800.3(c), 800.4, 800.5, and 800.6. Where, as here, the proposed undertaking involves a complex project involving corridors or large land areas, an agency may, under 36 C.F.R. §§ 800.4(b)(2), 800.5(a)(3), and 800.6(b) and (c), use a phased approach for complying with its NHPA duties, in accordance with a Programmatic Agreement executed pursuant to 36 C.F.R. § 800.14(b), “where no surface-disturbing activity is to occur until the section 106 process is completed.” *Southern Utah Wilderness Alliance*, 177 IBLA 89, 98 (2009); *Deborah Reichman*,

173 IBLA at 161; *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA at 347 (citing *Southern Utah Wilderness Alliance v. Norton*, 277 F. Supp. 2d 1169, 1193 (D. Utah 2003)).

It is well settled that BLM may adopt a phased approach to compliance with section 106 of the NHPA, as long as no surface disturbing activity will occur until after the section 106 process is complete. *Backcountry Against Dumps*, 179 IBLA 148, 181-82 (2010), and the cases just cited. SUWA's argument that the "phased approach" means that BLM will "*carte blanche*" disregard the requirements of the NHPA is speculative and without merit.

Contrary to SUWA's assertions, the EA demonstrates that BLM has adequately addressed the procedures it will use to comply with the NHPA, including consultation with the SHPO and affected Tribes. See EA at 9 (noting that "[a] high concentration of archaeological resources can be expected in some [project] areas," and "[t]here may be sites that are eligible for the NRHP"); 20 (listing the procedures BLM will follow once sites eligible for the NRHP are identified); EA at 76, Table 15 ("Agencies Consulted . . ."); 80-81 (BLM Comment Analysis with respect to how BLM will achieve NHPA compliance in implementing the project).

V. Conclusion

SUWA has failed to meet its burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or has otherwise failed to abide by section 102(2)(C) of NEPA. Likewise, SUWA has failed to demonstrate that the DR/FONSI and EA do not comply with section 106 of the NHPA.

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/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge