



WESTERN WATERSHEDS PROJECT

184 IBLA 106

Decided August 2, 2013



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

WESTERN WATERSHEDS PROJECT

IBLA 2012-150

Decided August 2, 2013

Appeal from a Decision Record and Finding of No Significant Impact authorizing juniper vegetation management treatments. Environmental Assessment No. DOI-BLM-ID-B030-2009-0004-EA.

Motions to Strike Granted; Claim Dismissed; Decision Affirmed.

1. Administrative Review: Generally--Evidence: Official Notice--Rules of Practice: Appeals

A notice of supplemental authority is a procedural device by which a party formally advises the Board and parties of authorities or developments that are material to, or that could be dispositive of, a pending appeal or issues presented therein. These are matters that have come to a party's attention after that party's brief or pleading has been filed, but before a decision has issued, and typically convey notice of a recent judicial decision, enactment of a statute or regulation, or matters of which the Board may take official or administrative notice. Although some argument may be appropriate or permissible, it is to be confined to the significance and legal effect of the decision, statute, or matter to be officially noticed to the issues in the pending appeal.

2. Administrative Procedure: Adjudication--Rules of Practice: Generally--Rules of Practice: Board of Land Appeals--Rules of Practice: Motions--Rules of Practice: Timely Filing

Reply briefs are discouraged, but are to be filed within 15 days after an answer is filed. 43 C.F.R. § 4.412(d). Where appellant has previously filed a reply brief, material thereafter submitted in the guise of four notices of supplemental authority are more properly deemed surreplies. As such, they also are due within 15 days of the

answer and, under 43 C.F.R. § 4.412(d)(1), are limited to the issues raised in the answer. Because the regulation contemplates “a reply brief,” appellant was in each case required to file a motion seeking the Board’s leave to file additional evidence and argument and to demonstrate good cause for its failure to comply with the Board’s rules of practice.

3. Administrative Procedure: Adjudication--Administrative Review: Generally--Evidence: Admissibility--Evidence: Credibility--Rules of Practice: Motions--Rules of Practice: Board of Land Appeals

The Board ordinarily will not reject any evidence as inadmissible, but will weigh its credibility. Where the evidence and argument that appellant attempts to insert in the record as notices of supplemental information are untimely and are also of doubtful evidentiary value, or are plainly irrelevant or immaterial, BLM’s motions to strike are properly granted.

4. Administrative Procedure: Generally--Administrative Procedure: Adjudication--Administrative Procedure: Standing--Administrative Review: Generally--Rules of Practice: Board of Land Appeals

A party to the case may appeal a decision, but may raise on appeal only those issues the party raised in its earlier participation or which arose after the close of the comment period. 43 C.F.R. § 4.410(c). That regulation codified existing Board precedent under which the Board declined to adjudicate issues raised for the first time on appeal, except in extraordinary circumstances. Where the record confirms that appellant did not raise the issue of improper project segmentation below, did not offer any explanation for its failure to do so, and none appears from the record, no extraordinary circumstance has been shown that would justify a departure from the rule.

5. Administrative Procedure: Adjudication--Administrative Procedure: Burden of Proof--Administrative Review: Generally--Evidence: Burden of Proof--Rules of Practice: Burden of Proof--Rules of Practice: Evidence

A recitation of perceived errors and omissions in an Environmental Assessment does not discharge the burden of affirmatively demonstrating error in the decision on appeal. Conclusory allegations, unsupported by evidence showing error, do not suffice. Nor is the requirement to affirmatively demonstrate error in the decision on appeal satisfied when an appellant has merely reiterated the arguments considered by the decisionmaker below, as if there were no decision addressing those points. In such cases, BLM's decision may be affirmed in summary fashion, because a failure to affirmatively demonstrate error is the same as not filing a statement of reasons at all.

APPEARANCES: Katie Fite, Boise, Idaho, for Western Watersheds Project; Robert B. Firpo, Esq., U.S. Department of the Interior, Office of the Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Western Watersheds Project (WWP), through Katie Fite, its Biodiversity Director, has appealed the March 2, 2012, Decision Record (DR) and Finding of No Significant Impact (FONSI) authorizing, among other things, juniper vegetation management treatments in the Pole Creek Allotment #00635 (Allotment) in southwestern Owyhee County, Idaho, issued by the Field Manager, Owyhee (Idaho) Field Office, Boise District. The DR and FONSI were issued following the preparation of Environmental Assessment No. DOI-BLM-ID-B030-2009-0004-EA, the Pole Creek Allotment Grazing Permit Renewal (EA), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). WWP requested an unopposed stay, which the Board granted by order dated May 24, 2012.

Background

The allotment is in the Owyhee Mountains on the west slope of Juniper Mountain, in Owyhee County, Idaho, 30 miles south of Jordan Valley, Oregon.¹ Relying on the work of an Interdisciplinary Team, the members of which relied on

¹ The Allotment is composed of the Berry Gulch, Horse Flat/Scott Spring, Pole Creek Breaks, and Dutcher pastures, containing 24,486 acres, the vast majority of which (23,395 acres) is Federally owned.

numerous authorities and literature cited in the Administrative Record (AR)² at Vol. II, Comp. 2, Tab 1, an extensive EA was prepared in response to an application to renew an expiring grazing permit, change grazing management to improve resource conditions, and implement vegetation treatments. Vol. II, Comp. 2, Tab 1, EA 1.2. Action was needed because:

Livestock use in riparian areas, unauthorized livestock drift between Oregon/Idaho, upland vegetation and watershed conditions, and management of sage-grouse habitat have been identified as issues on the Pole Creek Allotment. In addition, due to juniper expansion into upland sagebrush communities, this document will consider vegetative treatments. The BLM determined that land health standards cannot be met unless vegetative treatments are implemented.

Id. Livestock grazing is authorized on the Allotment under the Owyhee Resource Management Plan (RMP), and where consistent with the 1997 Idaho Standards and Guidelines for Grazing Management (S&Gs), BLM has authorized grazing permits. BLM concluded that none of the S&Gs were being met and that grazing management and juniper encroachment are “significant causal factors.” *Id.*³

BLM held scoping meetings on March 11, April 1, and April 22, 2009. On July 30, 2009, a Scoping Document was issued to grazing permittees, the interested public (including WWP), and State and local governments, with a 30-day comment period. It was presented to the Shoshone-Paiute Tribes and the Owyhee County Commissioners on July 16, 2009. A field tour with the permittee, WWP, and BLM was conducted on November 10, 2009. Meetings with the permittee occurred on November 10 and December 15, 2010. Only WWP and the Idaho Department of Fish and Game (IDFG) submitted comments. *Id.*, 1.3; Vol. II, Comp. 2, Tab 2, EA App. C (copies of comments). The record shows WWP submitted scoping comments on

² The AR consists of two bound volumes with indices. Volume I contains six Compartments, most of which in turn include separately tabbed documents. Volume II contains five Compartments. In this opinion, we will cite the Volume (Vol.), Compartment (Comp.), and Tab. According to its table of contents, the unpaginated EA comprises more than 200 pages. We therefore will cite only the internal section numbering of the EA.

³ Specifically, BLM determined that Standard 1 (Watersheds) is not being met; Standards 2 (Riparian Areas and Wetlands), 7 (Water Quality), and 8 (Threatened and Endangered Plants and Animals) are not being met on 19.89 miles of stream, but are being met on 11.01 miles of stream, depending on whether those reaches are accessible by livestock; and Standard 4 (Native Plant Communities) is not being met in higher elevations because juniper is encroaching and degrading species diversity.

August 25, August 26, August 31, September 1, September 21, September 22, November 13, and November 14, 2009. Vol. II, Comp. 3, Tabs 1-7, Comp. 4, Tabs 2-7. It submitted comments on the proposed decision on March 27, 28, and 29, 2012. Vol. I, Comp. 4, Tabs 1, 2, Comp. 3, Tabs 2, 3.⁴ On March 30, 2012, WWP filed a protest. Vol. I, Comp. 3, Tab 1 (compact disk).

Briefly, the Proposed Action included changing the grazing season of use from July 1 through September 30, to April 16 through June 30; reducing the number of permitted cattle from 500 to 401 and an additional 38 cattle every other year; reducing Total Active Use from 1,468 to 1,029 Animal Unit Months (AUMs)⁵ for a 30 percent reduction; resting the two largest pastures from grazing in alternating years; and cutting with prescribed burn treatments over the next 10 years to restore native plant communities and diversity. Vol. II, Comp. 2, Tab 1, EA 1.4. Six Alternatives were analyzed in the EA: current grazing management in accordance with a 2008 Stipulated Settlement Agreement (Settlement Agreement)⁶ (Alternative A1); grazing management as it was before the 2008 Settlement Agreement – *i.e.*, under the terms and conditions of the 1997 permits (Alternative A2); adaptive management (Alternative B); the Proposed Action (Alternative C1); Spring use and rest with a 40 percent reduction in AUMs of Active Use (Alternative C2); and no grazing (Alternative D). Seven alternatives were considered but not analyzed in detail:

⁴ The comments in Vol. I, Comp. 3, Tabs 2 and 3 are duplicates of each other, as are those in Vol. I, Comp. 4, Tabs 1 and 2.

⁵ An AUM is the amount of forage necessary to sustain one cow or its equivalent for one month. 43 C.F.R. § 4100.0-5.

⁶ In *Western Watersheds Project v. Hahn*, No. 97-0519-S-BLW, slip opinion (D. Idaho Mar. 31, 1999), the District Court determined that BLM had violated section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), but declined to enjoin grazing under any of 68 grazing permits that were renewed in 1997. On Feb. 29, 2000, the District Court ordered BLM to complete its review of the allotments associated with the 68 permits. Grazing was to be allowed on the Allotment under the 1997 permit terms and conditions until a new EA was completed and a final decision issued. From 1997 through 2007, 500 cattle were authorized to graze on the Allotment from July 1 to Sept. 30 (1,468 AUMs) with no specified pasture rotations. In 2003, BLM completed an EA and issued a decision in September 2003. That decision was administratively appealed and ultimately remanded to BLM. BLM and WWP executed the Settlement Agreement on May 15, 2008, under which AUMs were capped at 1,467 AUMs and it was agreed that livestock would be removed if interim monitoring criteria were exceeded, with appropriate changes for the following year. EA 1.6.2.

- Hand cutting the entire area without burning (rejected because unburned debris smothers desired forbs and grasses and reduces available light; perennial grass density and cover increases more rapidly under burned debris; unburned debris could create a fuel load issue; and this alternative would not maintain desired vegetative mosaic and fire regimes);
- Designating Juniper Mountain an Area of Critical Environmental Concern (ACEC) (rejected because ACEC designations are appropriate at the land use planning level; the ACEC alternative was analyzed in the Environmental Impact Statement prepared for the Owyhee RMP and was not selected, and reconsidering it is beyond the scope of the present EA and objectives);
- Grazing different pastures at different times from those specified in the 2003 EA and DR (not analyzed in detail because it is similar to alternatives that were analyzed in detail);
- Additional fencing to split the Pole Creek Breaks pasture into two pastures, also adding several spring developments and pipelines (these improvements were determined to be unnecessary to achieving compliance with the S&Gs, and comments on the scoping document indicated possible issues or obstacles);
- Use of a Key Area Utilization/Actual Use formula to estimate carrying capacity (rejected because this alternative would have caused a 31 percent increase in AUMs, from 1,468 to 1,917);
- Grazing in accordance with the 2008 Settlement Agreement with reduced AUMs, livestock numbers, and season of use (rejected because even with those reductions, riparian S&Gs would still be exceeded, causing a more severe reduction in livestock use).
- Allowing grazing in the Fall only (rejected because this alternative was analyzed in detail as part of Alternative B).

Id. 2.3.

Implementation of a Water Quality Restoration Plan, monitoring studies, pretreatment inventories (wildlife, plantlife, and cultural surveys), and site-specific and landscape-level noxious weed control are common to all the Alternatives that were studied. *Id.* 2.2. BLM articulated nine management objectives for grazing practices, including maintaining consumption of upland herbaceous forage species, browse species, and riparian willows at specified levels; minimizing hoof impacts on stream banks; and achieving seral juniper mortality rate of 50-70 percent after treatment. *Id.* 2.2.2.

For Alternatives B, C1, C2, and D in part, the EA identified range improvements designed to achieve the S&Gs. These include installing fencing on public land that conforms to the specifications applicable to fences in deer, elk, and pronghorn habitat; minimizing disturbances; installing, expanding, or rehabilitating designated exclosures; removing fences; installing a cattleguard; and rehabilitating Horsehead Spring. *Id.* 2.2.3.

For Alternatives B, C1, C2, and D, the juniper treatments are identical, and none are proposed for Alternatives A1 and A2. Hand cutting and girdling/broadcast burn⁷ is planned for 5,500-7,700 acres within an 11,000-acre perimeter, with a target of 50-70 percent mortality of seral juniper; and hand cutting and girdling/jackpot burn⁸ is planned for 4,950-6,930 acres within a 9,900-acre perimeter, for a total treatment area of 21,000 acres, of which only portions would actually be treated. *Id.* 2.2.4. Pole Creek Breaks in the Pole Creek pasture and old-growth juniper and mahogany are not targeted for treatment. *Id.* BLM acknowledged the possibility that fire could inadvertently be carried into a non-treatment area because, in a given case, fire control lines may not be constructed around them. Given that there will be no pre-burn cutting and the weather conditions specified in the prescriptions, however, BLM concluded that it is unlikely that fire would spread far into these areas. *Id.*

The EA requires compliance with numerous Standard Operating Procedures (SOPs) for the juniper treatments. These include, for example, using bulldozers or graders to remove vegetation that could compromise the use of existing roads as firelines; using fire engines, support vehicles, and all-terrain vehicles to contain fires within control lines; establishing a fire contingency area outside the burn perimeters; cleaning the undercarriage of all vehicles to prevent the spread of noxious weeds; conducting the burn in accordance with applicable guidelines to ensure local air

⁷ A *broadcast* burn allows fire to naturally carry within a prescribed burn perimeter, in a manner similar to a natural wildfire. Vol. II, Comp. 2, Tab 1, EA 2.24.

⁸ *Jackpot* burning (or slash burning) consists of burning downed trees or their parts to consume the slash that remains after hand cutting. It typically is scheduled for late fall or winter when weather conditions prevent the spread of fire beyond the slash. Vol. II, Comp. 2, Tab 1, EA 2.2.4.

quality standards are met; prohibiting broadcast burning in Squaw Creek Canyon, identified sage-grouse habitat, and in buffer zones around raptor nests; and allowing pastures to rest for specified periods following the broadcast burn. *Id.* Numerous SOPs likewise govern the hand cutting and girdling treatments, such as requiring the cutting and removal of seral juniper near old-growth juniper; requiring necessary vehicles to use established roads and trails; cutting trees to a specified stump height; timing limitations in sage-grouse habitat; and prohibiting cutting activities with specified distances of raptor breeding areas. *Id.* The EA similarly imposes certain livestock trailing and crossing restrictions for Alternatives A1, A2, C1, and C2. *Id.* 2.2.5; *see* Comparison of Alternatives, EA 2.5.

The Field Manager considered the context and intensity of the potential effects of the grazing alternative selected (C1), under which juniper treatments would be required and grazing on the Allotment would be authorized. She issued her FONSI on March 1, 2012, and issued the DR the following day. Vol. I, Comp. 5, Tab 1; Comp. 6, Tab 1. WWP timely appealed.

BLM's Motions to Strike

On August 20, 2012, WWP filed a Notice of Supplemental Information (First Notice), followed on August 29, 2012, by another Notice of Additional Supplemental Information (Second Notice). With these Notices, WWP submitted a compact disk copy of EA No. DOI-BLM-ID-B030-2009-0003-EA for the Term Grazing Permit Renewals for the Trout Springs and Hanley Federal Fenced Range Allotments issued in July 2012 (Trout Springs EA), arguing that EA is evidence in this appeal of improper project segmentation under NEPA and shows BLM failed to “conduct adequate assessment of the indirect and cumulative effects of the massive Pole Creek deforestation scheme.” First Notice at 1. The Second Notice transmitted photographs and e-mail messages pertaining to a cattle trespass in the Trout Springs Allotment and the environmental damage that allegedly resulted from the trespass. WWP argues the severe impacts and absence of fencing “show[] that any proposed treatments, grazing rest following treatments, and fencing schemes are highly uncertain,” confirm a “very great risk that they will never be followed,” and they “elevate[] [WWP’s] alarm over the irreversible harm that will be caused by the highly risky fire, fencing and other EA actions here.” Second Notice at 2. WWP also informed the Board of an August 2012 (the Grasshopper/Cottonhopper fire) wildfire in the North Fork Owyhee watershed that affected a portion of the Trout Springs Allotment containing sage-grouse habitat, questioning the circumstances of the fire, and claiming that the fire is “further demonstration that . . . the trees actually reduce the rate and speed of fire spread.” *Id.*

On October 19, 2012,⁹ BLM filed a Motion to Strike WWP's August 2012 submissions (First Motion) as untimely and irrelevant. BLM argued that the two Notices had been filed after WWP filed its appeal and almost 3 months after BLM filed its Answer, and that the Board's regulations do not allow such submissions. BLM further argued that the material was, in any event, irrelevant because it concerns events that post-date the decision on appeal, and the existence of a trespass or BLM actions on different lands does not affect the decision to go forward with juniper treatments on the Pole Creek Allotment. First Motion at 2.

As noted, on October 3, 2012, WWP not only responded to BLM's First Motion (Response), it filed a third Notice of Supplemental Information (Third Notice) as part of its Response. Citing its Notice of Appeal at 7-8, WWP maintains that, contrary to BLM's assertion, it has repeatedly and squarely raised improper segmentation of a project that otherwise requires an Environmental Impact Statement (EIS), arguing that

to understand all the stresses on watersheds that will be significantly impacted by the massive treatment disturbance and continued large-scale grazing disturbance (intensified in many areas under the cow rotation and project expansion scheme) in Pole Creek, one must also understand and thoughtfully factor in the stresses occurring to the headwaters in Trout Springs allotment (Middle Fork Owyhee watershed, portions of North Fork Owyhee including Squaw Creek and other watersheds), Pleasant Valley, and others.

....

The massive juniper and sagebrush killing treatment can occur in Pole Creek at the same time that portions of these same watersheds are being grazed in Pole Creek. Meanwhile, massive treatment and its aftermath effects will be occurring in Pole Creek headwaters in Trout Springs. At the same time, grazing can be imposed in these severely degraded allotments (including Bull Basin too).

Now, the current chronic trespass and the abject inability of BLM to control livestock whereabouts on Juniper Mountain interjects even more uncertainty and likely adverse impacts.

⁹ BLM counsel signed the First Motion on Sept. 25, 2012, but inexplicably, it was not filed with the Board until Oct. 19, 2012. The Board has no record of receiving the First Motion at an earlier date, but WWP acknowledges that it was served in September 2012, as evidenced by the caption of its response to the First Motion. *See* WWP's Notice of Additional Supplemental Authority Late September 2012 and Response to BLM Motion to Strike of September 25, 2012, filed on Oct. 3, 2012.

Response at 2. WWP's Third Notice proffers photographs and e-mail traffic on compact disks purporting to show how the trespass has changed conditions "across much of Juniper Mountain, as well as documenting impacts of grazing and the environmental harms and uncertainties in Trout Springs, Bull Basin and Pole Creek." *Id.* at 4.

On October 22, 2012, BLM filed a Motion to Strike (Second Motion) the Third Notice, again arguing that WWP's submission was untimely because it was filed well after the appeal was filed and 4 months after BLM's Answer, and irrelevant because the trespass also occurred long after the decision WWP here appealed was issued. BLM further argues that the events addressed in the Third Notice are unrelated to the juniper treatment decision, "the filing is ambiguous, unlabeled, and in many cases completely unresponsive to any issue in this case," in what to BLM appears to be "an attempt to skew the administrative record and/or obscure and hide its legitimate claims," causing a "massive waste of time for the BLM and Office of the Solicitor who have been forced to wade through the documents." Second Motion at 2. BLM supports its allegations with specific examples. *Id.* at 3. BLM nonetheless responds to the merits of WWP's segmentation claim, noting that WWP failed to address the factors that guide consideration of whether an action has been improperly segmented, and that its argument is not supported by the record. *Id.* at 4-6.

On February 14, 2013, WWP filed yet another Notice of Supplemental Information (Fourth Notice), in which WWP sets forth the results of its review of the survey records of the original cadastral land surveyors to show that juniper was "ubiquitous and abundant in Pole Creek and adjacent Trout Springs at the time those surveys were executed." Fourth Notice at 3. WWP submitted a compact disk and copies of U.S. Geological Survey topographical maps bearing handwritten notations, some of which have been manually deleted or corrected, that purport to show the locations of juniper, aspen, and mahogany, and the recorded diameters of bearing trees, as noted in the survey records created during the original surveys.

In response, on June 7, 2013, BLM moved to strike the February 14 submission (Third Motion), restating its argument that WWP's submission was untimely because it was filed well after the appeal was filed and almost 1 year since BLM's Answer, and irrelevant because it includes information that had not been submitted to BLM previously and is not a part of the AR, and therefore cannot be considered by the Board. BLM complains that WWP could have provided the information contained in the several supplemental submissions before it issued its decision, yet chose not to do so. Third Motion at 2.

[1] BLM's Motions are well-founded. As an initial matter, a notice of supplemental authority is the procedural device by which a party formally advises the Board and parties of authorities or developments that are material to, and that could be dispositive of, a pending appeal or issues presented therein. These are matters

that have come to a party's attention after that party's brief or pleading has been filed, but before a decision has issued. As an administrative appeals forum, the Board does not strictly follow judicial rules of evidence and it adopts its own rules of procedure; nevertheless, we properly may look to the Federal rules for guidance. See *David Q. Tognoni*, 138 IBLA 308, 319 n.8 (1997); *Russell Prater Land Co., Inc.*, 3 IBSMA 124, 127 n.4, 88 I.D. 498, 499 n.4 (1981). The Federal Rules of Appellate Procedure (FRAP), Rule 28(j), provides as follows:

Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit court by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Thus under Rule 28(j), a notice of supplemental authority typically advises of recent judicial decisions, enactment of a statute or regulation, or matters of which the Board may take official or administrative notice. Although some argument may be appropriate or permissible, it is to be confined to the significance and legal effect of the decision, statute, or matter to be officially noticed on the issues in the pending appeal. The Board's practice generally accords with Rule 28(j) of the FRAP. See, e.g., *Consolidated Golden Quail Res., Ltd. (On Judicial Remand)*, 183 IBLA 250, 254 (2013) (notice of a BLM Instruction Memorandum); *Powder River Basin Res. Council*, 183 IBLA 83, 89 (2012) (notice of a judicial decision); *Town of Crestone*, 178 IBLA 79, 85-86 (2009) (notice of a judicial decision); *Western Watersheds Project*, 175 IBLA 237, 250-51 (2008) (notice of a judicial decision); *Wilderness Watch*, 168 IBLA 16, 33 (2006) (notice of judicial decisions).

WWP has ventured far beyond the legitimate purpose of a notice of supplemental authority, instead wielding it as a means of continuing to raise new issues, offer new evidence and pursue new or further argument, as if no decision had been made and appealed. Thus, a good portion of WWP's supplemental material and arguments – *i.e.*, the results of WWP's review of cadastral survey records to find references to juniper trees – should have been presented during the decisionmaking process in the frequent and extensive comments WWP submitted to BLM. The Trout Springs EA and WWP's challenge to its adequacy are offered as evidence that the Pole Creek EA is also inadequate and together presumably confirm improper project segmentation and show that an EIS is required. The Pole Creek trespass is proffered as evidence of wide-spread conditions on Juniper Mountain and proof that the Pole Creek EA FONSI is not sustainable. We cannot agree that WWP's supplemental

information and argument fairly or plausibly confirm the sweeping propositions and conclusions WWP ascribes to them.

[2] More fundamentally, WWP ignored this Board's rules. Even assuming *arguendo* some marginal relevance to the issues, reply briefs are discouraged, but are to be filed within 15 days after an answer is filed. 43 C.F.R. § 4.412(d). In this case, WWP had previously filed a reply to BLM's Answer on June 27, 2012. The material since submitted in the guise of four notices of supplemental authority are more properly deemed sur-replies. As such, they also were due within 15 days of the filing of BLM's Answer and, under 43 C.F.R. § 4.412(d)(1), are limited to the issues raised in the Answer. Because the regulation contemplates "a reply brief," in each case WWP was required to file a motion seeking the Board's leave to file the evidence and argument contained in the four Notices and to demonstrate good cause for its failure to comply with the rules. The matters raised in WWP's several Notices are manifestly beyond the proper scope of a notice of supplemental authority, do not comply with the Board's rules of practice, and are immaterial to determining the adequacy of the DR and FONSI or showing error in the EA upon which they are founded.

[3] The Board ordinarily will not reject any evidence as inadmissible, and instead will weigh its credibility. *See, e.g., U.S. v. Lyle T. Thompson*, 168 IBLA 64, 94 n.21 (2006); *Elizabeth Box*, 166 IBLA 50, 62 n.16 (2005); *Ramona & Boyd Lawson*, 159 IBLA 184, 191 n.8 (2005); *David Q. Tognoni*, 138 IBLA at 319 n.8. In *R.C.T. Engineering, Inc., v. OSMRE*, 121 IBLA 142, 149 n.7 (1991), the Board declined to strike a pleading, explaining that "[t]he Board is capable of discerning the arguments that have merit and those that do not, and our analysis must ultimately be based on the relevant facts and pertinent law rather than arguments advanced by counsel." Nonetheless, where, as in this instance, the evidence and argument that WWP wishes to insert in the record are submitted without complying with the Board's rules of practice and are therefore untimely, in part could have been submitted to BLM before it reached a decision, and are otherwise of doubtful evidentiary value (the results of WWP's review of cadastral survey records), or plainly irrelevant and immaterial (the trespass), BLM's Motions to Strike are properly granted.

WWP's Project Segmentation Claim Under NEPA

[4] While we are willing to give WWP the benefit of the doubt and agree that it adequately raised the argument that BLM violated NEPA because it improperly segmented an action in its Notice of Appeal at 7-8, we have scrutinized WWP's comments and protest and cannot agree that it raised any such claim prior to raising it for the first time in this appeal. We found nothing that even suggests an intent to raise such a claim. To the extent WWP might contend otherwise, it has failed to cite any other document or supporting page in the record.

In cases such as *Thomas S. Budlong*, 165 IBLA 193, 197 (2005), we have recognized that under 43 C.F.R. § 4.410(c), a party to the case may appeal a decision, but may raise on appeal only those issues the party raised in its earlier participation or which arose after the close of the comment period. See also *Forest Guardians*, 170 IBLA 253, 259 (2006); *Colorado Env'tl. Coalition*, 169 IBLA 137, 140 (2006). The regulation codifies a practice evident from earlier decisions of this Board under which “IBLA will not adjudicate issues raised for the first time on appeal, except in extraordinary circumstances.” 68 Fed. Reg. 33795 (June 5, 2003) (citing *Henry A. Alker*, 62 IBLA 211 (1982)); see also *Grynberg Petroleum Co.*, 137 IBLA 76, 79 (1996). Although the Board may consider an issue raised for the first time on appeal in extraordinary circumstances, the Board’s authority to decide appeals for the Department, “as fully and finally as might the Secretary,” 43 C.F.R. § 4.1, includes the authority to correct or reverse an erroneous decision by the Secretary’s subordinates or predecessors in interest and to decide cases on the basis of issues other than those advanced by parties. *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976); see also *Schade v. Andrus*, 638 F.2d 122, 124-25 (9th Cir. 1981); *Ben Cohen (On Judicial Remand)*, 103 IBLA 316, 328-29 (1988), *aff’d in a partial decision, briefing ordered on other issue, sub nom., Sahni v. Watt*, No. S-83-96-HDM (D. Nev. Jan. 17, 1990), *aff’d* (Jan. 14, 1991), *aff’d*, No. 91-15398 (9th Cir. Apr. 27, 1992) (disposition of a land selection application on a basis other than that for which the case was remanded by the court).

Where our review of WWP’s comments and protest confirm that it raised no such claim prior to raising it for the first time in this appeal, and WWP has not offered any explanation for failing to do so and none appears in the record, no extraordinary circumstance has been presented that would justify a departure from the rule, particularly when WWP repeatedly availed itself of the opportunity to submit and supplement its comments in the decisionmaking below. The reason for the rule is plain. As we explained in *Southern Utah Wilderness Alliance*, 128 IBLA 52, 59 (1993):

The rationale for the approach taken in these cases is that generally it is best to allow the initial decisionmaker to confront objections to proposed actions and to limit the Board’s review to appeals of decisions addressing those objections because such a process follows the logical framework for decisionmaking within the Department, as it relates to BLM actions. See *California Association of Four Wheel Drive Clubs*, 30 IBLA 383, 385 (1977).

Although the foregoing rationale applies to IBLA appeals generally, courts have recognized the principle is particularly applicable to NEPA challenges: “Persons challenging an agency’s compliance with NEPA must ‘structure their participation so that it . . . alerts the agency to the [parties’] position and

contentions,' in order to allow the agency to give the issue meaningful consideration." *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2008) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council*, 435 U.S. 519, 553 (1978)). In *Public Citizen*, the Court held that "[b]ecause respondents did not raise these particular objections to the EA, [the agency] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." *Id.* at 764-65. The same is true here. See *Powder River Basin Res. Council*, 180 IBLA 119, 136-37 n.23 (2010); see also *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) ("Appellants had ample opportunity to submit the evidence of the environmental impact of wind energy development to the Bureau as it crafted the Atlantic Rim Project EIS, but they did not."); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (finding that when the tribe's views were solicited during the comment process and the tribe failed to raise groundwater issues, it could not raise the issue as "a basis for reversal of an agency decision" later); *Wildearth Guardians v. Salazar*, 880 F. Supp. 2d 77, 90 (D.D.C. 2012) (recognizing that plaintiff had waived an issue that was first raised in their administrative appeal after BLM's record of decision had been signed). As the Court stated in *Vermont Yankee*, "[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" 435 U.S. at 553. Having failed to raise the issue below, the NEPA segmentation claim is not properly before us. *Oregon Chapter Sierra Club*, 176 IBLA 336, 357 (2009).

The Merits of WWP's Appeal

In essence, 43 C.F.R. § 4.410(c) requires an appellant to explain how the decision below erred in its treatment of the issues that the appellant previously raised. Such a requirement avoids needlessly repetitive consideration of issues where there have been multiple comments and opportunity for public involvement. In this case, WWP's Statement of Reasons (SOR) is only the latest iteration of the issues, allegations, commentary, and criticism it presented in its many prior comments and protest in this case.¹⁰ BLM responded in detail to WWP's comments, with appropriate

¹⁰ WWP's advocacy in this appeal is considerably weakened by its haranguing tone and frequently immoderate statements. WWP is cautioned that intemperate characterizations often tend to diminish the credibility of the party making them rather than the party against whom they are directed. *Archaeological Serv. by Laura* (continued...)

citations and references to the record. *See* Vol. II, Comp. 2, Tab 2, App. C. WWP's SOR merely repeats conclusory statements and general allegations, without acknowledging BLM's responses and without citation to the record to support its opposing assertions and conclusions. For example, WWP argues BLM violated NEPA because it relied upon "limited data as it has not conducted baseline surveys for native animal species, included TES [threatened or endangered species], occurrence and populations, old growth or mature juniper and forest stand characteristics, and many other factors." SOR at 20. This broad contention ignores the data sources BLM identified when it responded to WWP's August 26, 2009, comments (AR Vol. II, Comp. 2, Tab 2, App. C at 1-2), and it ignores the details set forth in describing the affected environment (AR Vol. II, Tab 1, EA at 44 to 140).

WWP contends BLM "failed to consider significant ecological concerns of fire or heavy equipment disturbance increasing risk of weed invasion." SOR at 16. The record is to the contrary. *See* AR Vol. II, Tab 1, EA at 44-55, 141-45. Rather than identifying any error in the EA analysis of this topic, WWP offers only opinion and a commentary:

cheatgrass thrives in zones of fire disturbance, or any intensive disturbance of big sagebrush and low sagebrush. Thus, use of fuelbreaks and reduced grazing to improve understory conditions would have been a viable alternative with much less ecological risk. BLM needed to carefully scrutinize vegetation and soils, and past disturbance history to specifically define the conditions when treatment would be considered.

SOR at 16. To the extent WWP believes any of the scientific material it previously submitted to BLM demonstrates error, it behooved WWP to specifically identify which among its submissions did so and to relate it by appropriate, specific citation to particular analyses, data, and conclusions contained in the EA. The SOR did not do so.

As yet another example, WWP maintains BLM has failed to "protect forestry resources, and adequately examine, survey, and act to protect mature and old growth native trees (juniper, mountain mahogany, aspen)." SOR at 10. However, BLM responded to WWP's comments repeatedly raising this concern. *Id.*, Comp. 2, Tab 2, Response number 24, App. C at 9. Moreover, the EA expressly provides that old-

¹⁰ (...continued)

Michalik, 169 IBLA 90, 97 (2006) (citing *R.T.C. Engineering, Inc. v. OSM*, 121 IBLA 142, 149 n.7 (1991)).

growth juniper is not targeted for treatment, and that seral juniper will be hand cut only. AR Vol. II, Comp. 1, Tab 1, EA 2.2.4. WWP's several general claims to the effect that BLM failed to consider the impacts of grazing and grazing facilities are likewise unsupported by objective evidence and contrary to the record. We decline the burden of attempting to discern what specifically in the materials WWP provided to BLM identifies a significant issue that was overlooked or objectively shows a flaw in the data, analyses, or reasoning of the DR, FONSI, or EA. *Cf. Powder River Basin Res. Council*, 183 IBLA 83, 90-92 (2012), and cases cited.

The Board's statement in *Southern Utah Wilderness Alliance*, 182 IBLA 377, 386 (2012), is fully applicable here:

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 32, 48 (2010); *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007) (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)).

At most, WWP has shown that it profoundly disagrees with BLM's conclusions and management decisions, but a mere difference of opinion, even 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).

[5] WWP's litany of perceived shortcomings and omissions in the EA do not discharge the burden of affirmatively demonstrating error in the decision on appeal. *Powder River Basin Res. Council*, 183 IBLA at 89-90; *Great Basin Mine Watch*, 159 IBLA 325, 353 (2003); *Southern Utah Wilderness Alliance*, 158 IBLA 212, 219-20 (2003); *The Ecology Center*, 140 IBLA 269, 271 (1997); *U.S. v. De Fisher*, 92 IBLA 226, 227 (1986). Conclusory allegations, unsupported by evidence showing error, do not suffice. *See, e.g., Powder River Basin Res. Council*, 183 IBLA at 89-90; *J. W. Weaver*, 124 IBLA 29, 31 (1992); *Glanville Farms, Inc. v. BLM*, 122 IBLA 77, 85 (1992); *Shama Minerals*, 119 IBLA 152, 155 (1991), and cases cited. Nor is the requirement to affirmatively demonstrate error in the decision on appeal satisfied when an appellant "has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision . . . addressing those points."

In Re Mill Creek Salvage Timber Sale, 121 IBLA 360, 361-62 (1991) (quoting *Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990)). An appellant cannot prevail simply by repeating the arguments made in comments or in a protest. *In Re Mill Creek*, 121 IBLA at 362; see *Wyoming Outdoor Council*, 172 IBLA 289, 294 (2007). In the absence of a sufficiently specific allegation of error, this Board will not infer one. *U.S. v. Freeman*, 179 IBLA 341, 362 (2010). In such cases, BLM's decision may be affirmed in summary fashion. *Western Watersheds Project*, 183 IBLA 297, 316 (2013); *Powder River Basin Res. Council*, 183 IBLA at 89-90; *In Re North Trail Timber Sale*, 169 IBLA 258, 261-62 (2006). Such an outcome is justified here, because a failure to affirmatively demonstrate error is the same as not filing a statement of reasons at all. *Wyoming Outdoor Council*, 159 IBLA 388, 399 (2003). BLM's decision is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's Motions to Strike are granted, the project segmentation NEPA claim is dismissed, and the decision appealed from is affirmed.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge