



BIRCH CREEK RANCH, LLC, HORSE CREEK HAY & CATTLE, LLC,  
MADISON VALLEY GARDEN RANCH, LLC, GRANGER RANCHES

184 IBLA 307

Decided February 18, 2014



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

BIRCH CREEK RANCH, LLC  
HORSE CREEK HAY & CATTLE, LLC  
MADISON VALLEY GARDEN RANCH, LLC  
GRANGER RANCHES

IBLA 2013-41, *et al.*

Decided February 18, 2014

Appeal from a decision of the Bureau of Land Management approving a long-term holding pasture for wild horses. DOI-BLM-MT-B050-2013-001-EA.

Affirmed; Requests for Stay Denied as Moot; Motion to Amend Notice of Appeal Denied; Motion for Hearing Denied; and Motions to Dismiss Denied as Moot.

1. National Environmental Policy Act of 1969: Generally--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Environmental Assessments

An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information, or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects. Responsible Officials should use existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting them to avoid redundancy and unnecessary paperwork.

2. National Environmental Policy Act of 1969: Generally--  
National Environmental Policy Act of 1969:  
Environmental Statements--National Environmental  
Policy Act of 1969: Environmental Assessments

BLM may elect to prepare another Environmental Assessment to document the continuing validity of a prior environmental analysis and the absence of new circumstances, information or impacts, or subsequent changes in the action or impacts that would require additional analysis. Regardless of whether the interdependence of an earlier Environmental Assessment and a subsequent Environmental Assessment could have been termed “supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses” under 43 C.F.R. § 46.120(d), BLM was entitled to rely on existing environmental documents, provided the rationale and basis for doing so was documented in the supporting record. 43 C.F.R. § 46.120(c). The Board properly looks beyond the nomenclature to consider the substance of the environmental analyses to determine whether BLM has complied with the NEPA.

APPEARANCES: James Guyette, for Birch Creek Ranch, LLC, McAllister, Montana, *pro se*; Stephen Wood, Sheridan, Montana, for Horse Creek Hay & Cattle, LLC; James H. Goetz, Esq., Bozeman, Montana, for Madison Valley Garden Ranch, LLC; Jeffrey A. Laszlo, Ennis, Montana, for Granger Ranches; John E. Bloomquist, Esq., Marc G. Buyske, Esq., and Hollie Lund, Esq., Helena, Montana, for Intervenor Spanish Q, Inc.; and Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE PRICE

Birch Creek Ranch, LLC (Birch Creek), Horse Creek Hay & Cattle, LLC (Horse Creek), Madison Valley Garden Ranch, LLC (Valley Garden), and Granger Ranches (Granger) (collectively, appellants) have appealed from and requested a stay of the November 9, 2012, decision issued by the Deputy Division Chief, National Wild Horse and Burro Program, Bureau of Land Management (BLM), Reno, Nevada, approving the Ennis Long Term Holding Pasture for Excess Wild Horses (Ennis Pasture). The Board consolidated these appeals by order dated January 9, 2013.<sup>1</sup>

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<sup>1</sup> Birch Creek’s appeal was docketed as IBLA 2013-41; Horse Creek’s appeal was  
(continued...)

Valley Garden moved for a hearing, asserting disputed facts. Intervenor Spanish Q, Inc. (Spanish Q) moved to dismiss Birch Creek's appeal for lack of standing because it presented no evidence of grazing permits for lands bordering the Ennis Pasture, and moved to dismiss Valley Garden's appeal on the ground that it neither owns property within the Ennis Pasture area nor can show injury, both of which the Board took under advisement.<sup>2</sup> Valley Garden moved to amend its Notice of Appeal to add the Burkes, which the Board also took under advisement.<sup>3</sup> In addition, Valley renewed its request for a stay of BLM's decision, which BLM opposed.<sup>4</sup>

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<sup>1</sup> (...continued)

docketed as IBLA 2013-54; Valley Garden's appeal was docketed as IBLA 2013-55; and Granger's appeal was docketed as IBLA 2013-63.

<sup>2</sup> Birch Creek did not respond to Spanish Q's allegation. Valley Garden responded by identifying the lands owned by it or Gretchen H. and Stephen B. Burke, the two members comprising Valley Garden, that are operated as Valley Garden Ranch, and by alleging specific harm to its interest as an adjoining landowner. Valley Garden's Amended Notice of Appeal and Petition for Stay at 2-3. The motions to dismiss are denied as moot in light of our view of the merits of the appeals and conclusion that BLM's decision is properly affirmed.

<sup>3</sup> Absent the proffer of evidence or State law requiring a contrary conclusion, a Limited Liability Company (LLC) is a legal person entitled to maintain an appeal in its own name. When it received the Burkes' motion to amend Valley Garden's Notice of Appeal to add them as appellants, the Board took the motion under advisement pending submission of evidence that the Burkes had filed an appeal in their individual capacities, failing which the motion was denied. No such evidence has been received. Accordingly, the motion to amend is now denied, or was denied when the Board issued its Jan. 9, 2013, order. *See* 43 C.F.R. § 4.410; *State of Nevada*, 62 IBLA 153, 154 n.1 (1982); *Conoco, Inc.*, 61 IBLA 23, 25 n.1 (1981).

<sup>4</sup> When the Board did not reach the stay request within 45 calendar days of the expiration of the time for filing an appeal, BLM's decision became effective immediately. 43 C.F.R. § 4.21(a)(3). While the record before us does not include any return mail receipts or other evidence establishing when appellants received the decision they appealed, it is clear that the 45-day period had long since run when Valley Garden renewed the request for a stay and BLM opposed it on Feb. 25, 2013. In its opposition to the renewed motion, BLM acknowledged it planned to proceed with the Ennis Pasture and transport 700 wild horses, but also indicated it would contact appellants so they could accompany BLM representatives when they inspected Spanish Q's fences, giving them the opportunity to identify "any specific areas of fencing they have concerns about, where their lands adjoin those of Spanish

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For the reasons that follow, we affirm BLM's decision and deny the parties' motions.

### *Background*

Planning for this project commenced prior to September 25, 2009, when a public scoping letter sought comments on the Ennis Pasture proposal.<sup>5</sup> Administrative Record (AR) Tab 25 (Request for Scoping Comments) at 1. The proposed action was to stock up to 1,500 wild horses on approximately 16,537 acres of private or State land in a fenced long-term holding pasture operated by the Rice-Spanish Q Ranch (Spanish Q). *Id.* BLM received 28 comments raising a variety of concerns, including comments from Granger. *See generally* AR Tab 24 (BLM Responses to Scoping Comments). Almost every response to the 2009 scoping letter, even those supporting the project, raised concerns about BLM's planned stocking level. *See generally* AR Tab 24.

BLM subsequently issued Environmental Assessment (EA) DOI-BLM-MT-BO50-2010-001-EA<sup>6</sup> (2009 EA) pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), analyzing the proposed action, a no action alternative, and Alternative A. Alternative A proposed to initially stock 805 geldings on 16,367 acres of private and State land, up to a maximum of 1,000 wild horses, if on-the-ground monitoring confirmed the availability of additional forage. If the State subsequently determined not to issue a special use permit to authorize the inclusion of its lands,<sup>7</sup> the initial stocking rate would be reduced proportionately, to 785 horses, representing a decrease of

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<sup>4</sup> (...continued)

Q, so that BLM is fully informed of those concerns and can appropriately address those." Opposition to Renewed Motion at 4. The parties have not submitted any further information or evidence regarding the status of the inspection, the stocking of the Spanish Q facility, or events since initial stocking that might bear on the merits of appellants' arguments on appeal, and we have not been advised that any party went to Federal court to enjoin the operation. We therefore assume the transfer of horses occurred as planned.

<sup>5</sup> The environmental analysis was managed by the Dillon (Montana) Field Office. The record shows that notice of the proposal was published in local newspapers.

<sup>6</sup> It may be that the 2009 EA serial number properly should be DOI-BLM-MT-BO50-2010-001-EA, with the number "zero," but documents of record show the serial number as DOI-BLM-MT-BO50-2010-001-EA, with the letter "O." We used the latter citation in this opinion.

<sup>7</sup> Sec. 36, T. 5 S., R. 2 W., Montana Principal Meridian, Madison County, Montana.

20 Animal Unit Months (AUMs).<sup>8</sup> AR Tab 21 (2010 EA) at 10. The alternatives of exchanging use of public lands to eliminate 13 miles of new fence construction and modifying the new fence specifications to lower them from the proposed 48" height to 42" were considered and rejected. BLM dismissed the former because under the Wild Free-Roaming Horses and Burros Act (WFHBA), 16 U.S.C. §§ 1331-1340 (2006), BLM has authority to manage wild horses only on those public lands where they were found when the WFHBA was enacted, and dismissed the latter because the lower fence height would not reliably contain the horses, posing a health and safety hazard to both people and horses. AR Tab 21 (2009 EA) at 8.

The EA identified and analyzed impacts relative to invasive non-native plant species, soils and vegetation resources, carrying capacity, wetlands and riparian zones, and wildlife. *Id.* at 15-23. Cumulative impacts were assessed. *Id.* at 23-27. The EA presented a suite of monitoring and mitigation measures including, among others, fencing to exclude public and State lands; requiring the fencing to be installed or modified before the horses are allowed to use the areas; use of gates and/or cattle guards; setting the maximum use of key forage grasses on allowable upland range sites at 50 percent by weight; setting a maximum stubble height on sedge at 4" to protect wetland and riparian zone conditions; providing for site-specific monitoring; at least quarterly monitoring in the first year; employing adaptive management techniques; employing a deferred rotation grazing strategy (west to east one year, east to west the next year); substituting wild horse use for cattle use; and requiring Spanish Q to provide additional supplemental feed in the event of fire, drought, or other unforeseen circumstance. *Id.* at 27-29. Public comment was elicited, and BLM contacted a number of State agencies and the Forest Service, U.S. Department of Agriculture. AR Tab 21 (2009 EA) at 29, Tab 23 (Interested Party Letter). A total of 20 comments was received, to which BLM responded in Appendix 6 to the 2009 EA.<sup>9</sup> AR Tab 22 (EA Comments Received). A Decision Record (DR) approving Alternative A to implement the Ennis Pasture, accompanied by a Finding of No Significant Impact (FONSI) that dispensed with the need to prepare an Environmental Impact Statement (EIS), was issued on December 28, 2009. AR Tab 21. The 2009 EA fully complied with section 102(2)(C) of NEPA: it adequately described the proposed and alternative actions; the range of alternatives was appropriate; it thoroughly discussed the relevant environmental concerns, and direct, indirect, and cumulative impacts; it

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<sup>8</sup> An AUM is the amount of forage necessary to sustain one cow or its equivalent for 1 month. 40 C.F.R. § 4100.0-5.

<sup>9</sup> Appendix 6 was inadvertently omitted from the copies of the AR provided to the Board. However, the complete 2009 EA, with Appendix 6, is available online at: [http://www.blm.gov/pgdata/etc/medialib/blm/mt/field\\_offices/dillon.Par.27782.File.dat/EnnisLTHdr.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/mt/field_offices/dillon.Par.27782.File.dat/EnnisLTHdr.pdf) (last visited Nov. 20, 2013).

provided ample opportunity for public participation; and relevant agencies were consulted.

Several appeals followed issuance of the 2009 DR. Eventually, when it became clear that Spanish Q could not at that time perform a contract with BLM because of a private dispute over 1,600 acres included as part of the Ennis Pasture acreage,<sup>10</sup> BLM requested that the Board vacate and remand the decision. AR Tab 15. The Board did so in an order dated May 24, 2011.

On February 15, 2012, BLM requested proposals to provide private long term holding pastures. AR Tab 13. BLM eventually awarded a competitive contract to Spanish Q on June 6, 2012 (finalized July 1, 2012). AR Tabs 10-12 (Contract, Award Letter, and Solicitation Form).

On November 9, 2012, BLM issued the DR involved in this appeal, supported by EA No. DOI-BLM-MTB050-2013-001-EA (2012 EA), tiered to the 2009 EA. AR Tab 7 (2012 EA) at 4. The 2012 EA identified no new or changed environmental impact or concern, and initiated no new analysis. Instead, the 2012 EA in more summary form presented the substance of the environmental analysis contained in the 2009 EA with four minor changes, expressly noting that the comments on the 2009 EA were considered as part of BLM's decisionmaking. AR Tab 9 (Letter Transmitting 2012 EA, DR, and FONSI) at 1. First, the action originally offered as the proposed action was deleted for the reasons that appear in the 2009 EA, and Alternative A was designated the Proposed Action. Second, the Mitchell lease acreage was eliminated from the Project acreage, reducing the Ennis Pasture acreage from 16,367 to 15,456 acres of private and State land. AR Tab 21 (DR) at 1. Third, BLM slightly adjusted the numbers of wild horses to be held at the facility. Instead of a maximum initial stocking rate of 805 geldings, the maximum would be 800 geldings. The stocking number could be increased over the life of the contract up to 1,150 wild horses, instead of the maximum 1000 geldings identified in Alternative A of the 2009 EA, or could be decreased as forage levels or other circumstances dictated. *Id.* at 2. Fourth, instead of a maximum contract term of 5 years, the contract term would be for a maximum of 10 years. *Id.* BLM issued a FONSI, again concluding that an EIS was not required. Relying on the analysis and conclusions contained in the 2009 EA and reviewed in the 2012 EA, BLM again selected Alternative A from the 2009 EA and issued its DR determining to move forward with the Ennis Pasture competitive contract.

Pursuant to that contract, Spanish Q will provide, among other things, appropriate fencing and structures, and supplemental feed and salt and mineral

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<sup>10</sup> Paulette Mitchell, the widow of a private landowner who had previously agreed to lease his land to Spanish Q, disputes that agreement.

supplements as needed to ensure the health of the horses. Further, Spanish Q will employ a deferred rotation grazing strategy to moderate grazing pressures on the land, which is expected to “maintain moderate grazing utilization by wild horses (not to exceed 50% by weight of key forage species) and to maintain the amount of forage and the quality of habitat available for use by wildlife.” AR Tab 7 (2012 EA) at 14.

### *Analysis*

#### *I. NEPA Procedural Arguments*

Valley Garden challenges the NEPA process in this case on the following grounds: the EA constitutes a *post hoc* rationalization of a decision made in advance of the environmental analysis, Valley Garden Statement of Reasons (SOR) at 6-8; the EA failed to clearly describe the proposed action, *id.* at 8-11; EA was improperly tiered to the 2009 EA, *id.* at 11-15; the EA failed to recognize changed circumstances, *id.* at 15-18; there was no public participation, *id.* at 18-21; and BLM failed to consult relevant agencies, *id.* at 22-23. BLM responds that the EA fully complies with NEPA.

We begin with Valley Garden’s argument that BLM improperly tiered to the 2009 EA, because resolving that contention disposes of its other assertions regarding the propriety of the NEPA process in this case. Citing Council on Environmental Quality (CEQ) regulation 40 C.F.R. § 1502.20 and the Board’s decision in *Nat’l Wildlife Fed’n v. BLM*, 140 IBLA 85, 97 (1997), Valley Garden argues that tiering is appropriate only “when a broad [EIS] has been prepared (such as a ‘programmatic’ EIS), and a related site-specific or action-specific proposal is subsequently considered.” Valley Garden SOR at 12.

We agree that the CEQ defines *tiering* in terms of a progression from a general analysis set forth in an EIS to the more specific in subsequent analyses.<sup>11</sup> However,

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<sup>11</sup> The CEQ regulation at 40 C.F.R. § 1508.28 defines *tiering* as follows:

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early

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nothing in the CEQ regulations states that NEPA documents can be tiered only to an EIS, and nothing therein prevents an agency from adopting a broader view of tiering, so long as the NEPA documents involved “help public officials make decisions that are based on understanding environmental consequences.” 40 C.F.R. § 1500.1(c). The Department has implemented NEPA as follows:

A NEPA document that tiers to *another broader NEPA document* in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects *described in the broader NEPA document* are still valid or address any exceptions.

(a) Where the impacts of *the narrower action are identified and analyzed in the broader NEPA document*, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

(b) To the extent that any relevant analysis in the *broader NEPA document* is not sufficiently comprehensive or adequate to support further decisions, *the tiered NEPA document* must explain this and provide any necessary analysis.

(c) An environmental assessment prepared in support of an individual proposed action *can be tiered to a programmatic or other broader-scope environmental impact statement*. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no *new* significant impact.”

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<sup>11</sup> (...continued)

stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

43 C.F.R. § 46.140 (emphasis added in part).<sup>12</sup> Paragraphs (a) and (b) thus recognize tiering to a broader NEPA analysis that is not an EIS, because tiering to an EIS is specifically provided for in paragraph (c) of the regulation.

[1] That distinction is consistent with the Departmental regulation that provides guidance on the use of “existing environmental analyses prepared pursuant to NEPA and [CEQ] regulations” as follows:

(a) When available, the Responsible Official *should use existing NEPA analyses* for assessing the impacts of a proposed action or any alternatives. Procedures for adoption or incorporation by reference of such analyses must be followed where applicable.

(b) If *existing NEPA analyses* include data and assumptions appropriate for the analysis at hand, the Responsible Official *should use these existing NEPA analyses and/or their underlying data and assumptions where feasible*.

(c) *An existing environmental analysis prepared pursuant to NEPA and the [CEQ] regulations may be used in its entirety* if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.

(d) Responsible Officials should make the best use of *existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses* to avoid redundancy and unnecessary paperwork.

43 C.F.R. § 46.120 (emphasis added).

The Department’s explanation of the proper uses of EAs is likewise consistent with a broader view of tiering than Valley Garden urges:

The purpose of an environmental assessment is to allow the Responsible Official to determine whether to prepare an environmental impact statement or a finding of no significant impact.

(a) A bureau must ensure that an environmental assessment is prepared for all proposed Federal actions, except those:

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<sup>12</sup> As stated therein, 43 C.F.R. Part 46 “supplements, and is to used in conjunction with, the CEQ regulations except where it is inconsistent with other statutory requirements.” 43 C.F.R. § 46.20.

- (1) That are covered by a categorical exclusion;
- (2) *That are covered sufficiently by an earlier environmental document as determined and documented by the Responsible Official*; or
- (3) For which the bureau has already decided to prepare an environmental impact statement.

(b) A bureau may prepare an environmental assessment for any proposed action at any time to:

- (1) Assist in planning and decision-making;
- (2) Further the purposes of NEPA when no environmental impact statement is necessary; or
- (3) Facilitate environmental impact statement preparation.

43 C.F.R. § 46.300 (emphasis added).

[2] Valley Garden has cited no decision of this Board or a court declaring that an EA can be tiered only to an EIS, and we are aware of none.<sup>13</sup> We need not delve further into the question, because, as stated above, the 2009 EA complied with NEPA. In such circumstances, BLM might have appropriately used its Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) to implement the 2009 DR and FONSI, without the formality of issuing the 2012 EA. *See Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997) (agency properly applied its regulation providing for reevaluation of environmental documents to determine whether the impacts of a proposed project change required supplemental NEPA documentation). However, BLM chose to prepare another EA to document its evaluation of the continuing validity of the 2009 analysis and the absence of new circumstances, information or impacts, or subsequent changes in the action or impacts, that would have required additional analysis. In response to the concerns raised by commenters, the 2012 EA eliminated the originally proposed action in favor of Alternative A, which considerably reduced both the scope of the action and its environmental impacts. The 2009 EA to that extent reflected a broader action and analysis to which the subsequent narrower action and analysis might be tiered. Whether the interdependence of the 2009 EA and the 2012 EA could or

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<sup>13</sup> The Board's decision in *Nat'l Wildlife Fed'n v. BLM*, 140 IBLA 85, does not stand for or assert that an EA can be tiered only to an EIS. The decision focused on the analytical progression from the general to the more specific, holding that "tiering requires a minimum of two NEPA documents, a general environmental document and a later-developed site-specific environmental document which is tiered back to the earlier general document." 140 IBLA at 97. Because *no* site-specific environmental analysis addressing the particular grazing allotment had been prepared, there could be no tiering to the EIS that analyzed the general decisions contained in the Resource Management Plan in that case. In the absence of a second NEPA analysis, tiering at that juncture was simply "impossible." *Id.*

should have been termed “supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses” under 43 C.F.R. § 46.120(d) may perhaps be arguable, but the result is the same in this case: BLM was entitled to rely on existing environmental documents, provided the rationale and basis for doing so was documented in the supporting record. 43 C.F.R. § 46.120(c).<sup>14</sup> The 2012 EA obviously constitutes BLM’s determination that the 2009 analysis adequately assessed the environmental effects of the Proposed Action and reasonable alternatives, and documents its conclusion that no new circumstances, information or impacts, or changes in the action or impacts had ensued, that would require additional analysis. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989); *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1154 (9th Cir. 2008); *Biodiversity Conservation Alliance*, 183 IBLA 97, 116-17 (2013). The Board properly looks beyond a perceived fault in the nomenclature BLM employed to consider the substance of the environmental analyses to determine whether BLM has complied with NEPA. Accordingly, we turn to whether appellants have identified any new circumstances, information or changes in the action or its impacts, or shown that any such changes or impacts may result in significantly different environmental effects that would mandate additional analysis.

## II. *Appellants’ Other NEPA Arguments*

A BLM decision to proceed with a proposed action based on an EA will be upheld as being in accord with section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Powder River Basin Resource Council*, 180 IBLA 1, 12 (2010), and cases cited. The Board is guided by a “rule of reason” in assessing an EA’s adequacy, and an appellant seeking to overcome a decision based on an EA carries the ultimate burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to comply with section 102(2)(C) of NEPA. *Bales Ranch, Inc.*, 151 IBLA 353, 357 (2000). We consider each of appellants’ arguments in turn.

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<sup>14</sup> The supporting record of the 2009 EA therefore fully informed BLM’s subsequent decision to competitively procure a contract to implement Alternative A. Valley Garden’s argument that the 2012 EA constitutes a *post hoc* rationalization of a decision made in advance of completing a NEPA analysis is properly rejected. *See* Valley Garden SOR at 6-8.

### Changed Circumstances

Valley Garden contends BLM's failure to recognize changed circumstances vitiates reliance on the 2009 EA to fulfill BLM's NEPA obligations. Valley Garden SOR at 15-18. It argues that the "drought letter" BLM issued to grazing permittees in southwest Montana constitutes a changed circumstance that BLM did not even mention in the 2012 EA, and that the omission warrants the preparation of yet another EA. The referenced letter warned permittees that authorized AUMs could be reduced by as much as 50 to 60 percent if dry conditions persisted or worsened. Valley Garden SOR, Ex. E.

BLM responds that the drought letter is merely an alert, and whether dry conditions will continue or worsen to the point of requiring reduced AUMs remains to be seen. BLM Answer at 12. BLM notes that Spanish Q's obligation to provide any supplemental feed that may become necessary in such conditions and the mitigation measures holding forage utilization at 50 percent by weight and requiring a 4" minimum stubble height, coupled with use of adaptive management and monitoring, negate Valley Garden's claim that the possibility of drought is a changed circumstance that requires a new EA.

We agree. The 2009 EA clearly anticipated changes in available forage on the ranch due to "wildfire, drought, early or late snowfall, or other unforeseen circumstance," and further stipulated that if monitoring ultimately indicated that the forage was not adequate, BLM would reduce the horse population by gathering and relocating those excess horses. AR Tab 21 (2009 EA) at 10, 11.

In its Reply, Valley Garden offers another circumstance to support its claim, *i.e.*, the loss of the Mitchell lease acreage requires a lower stocking rate that, in turn, requires the preparation of a new EA. Valley Garden Reply at 9-10. This fact does not necessitate supplemental or new analysis. The 2012 EA explicitly acknowledged the decreased project acreage in reiterating the key points of analysis from the 2009 EA. 2012 EA at 4. While the 2009 EA analyzed the carrying capacity of 15,456 acres in determining that the Spanish Q Ranch could be initially stocked with 805 geldings, the EA also was conservative in calculating the carrying capacity of the ranch's lands. The 2009 EA generously assumed 800 pounds of forage per month per wild horse, without regard to actual variations in weight among the horses, provided for "1 to 1.5 months of unused forage (about 1200-1250 AUMs)" for emergency or unforeseen circumstances, required Spanish Q to provide 4 months of supplemental feed, limited forage utilization to 50 percent by weight on key forage species on the majority of the ranch lands, and required a 4" stubble height on sedge in the majority of the riparian areas. The EA further provided for adaptive management and monitoring to ensure the horses and the private and State lands comprising the Ennis

Pasture remain healthy, and expressly provided that, if necessary, the number of horses maintained on the Spanish Q Ranch would be reduced. These elements were carried forward to the 2012 EA. Given the foregoing, we are not persuaded that BLM failed to consider the impact of less acreage than originally planned.

### *Carrying Capacity*

Birch Creek and Granger assert that the planned population of the Ennis Pasture is too high. Birch Creek Notice of Appeal (NOA) at 1 (independent range analysts have concluded that BLM erred in setting the Ennis Pasture's capacity); Granger NOA at 1 ("1 horse per 5 acres at its highest stocking rate" is too dense a population); Valley Garden SOR at 35-40. Valley Garden challenges the quality and substance of the analysis by which the carrying capacity was determined, arguing that BLM "exaggerated" the capacity, and that Ranch Advisory Partners LLC has more rigorously considered available information to conclude that the maximum capacity is 488.<sup>15</sup> Valley Garden SOR at 35-40, Ex. 1.

The maximum stocking level under the Proposed Action in the 2009 EA was 1,500 horses, a substantially higher number than that selected in the 2009 DR and again selected and approved in the 2012 DR. 2009 EA at 9. As set forth above, instead of a maximum initial stocking rate of 805 geldings under Alternative A, the maximum set in the 2012 EA would be 800 geldings. The stocking number could be increased over the life of the contract up to 1,150 wild horses, instead of the maximum 1,000 identified in Alternative A of the 2009 EA. The number of horses could be decreased as forage levels or other circumstances dictated, based on site-specific monitoring to ensure that utilization levels remain moderate or lower, the frequency of which will be increased in the first year of operations in response to public comments. 2009 EA at 40; 2012 EA at 9. BLM calculated that each horse would consume 800 pounds of forage per month, utilizing 50% of the forage by weight, a measure designed to ensure the health of both horses and rangeland. 2012 EA at 11. BLM's stocking capacity analysis considered four data sets: the contractor's initial estimate based on average animal weight, a BLM estimate based on the soil survey by the National Resources Conservation Service, a site-specific ecological inventory, and data from actual livestock use over the previous 11 years. 2009 EA at 16-18. BLM's initial stocking rate of 800 horses falls below the maximum estimated stocking capacity under all four analyses. *Id.* at 18.

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<sup>15</sup> Although its relationship to this case is not explained, the record suggests that Ranch Advisory Partners LLC is a consulting entity retained by Valley Garden to review Spanish Q's plan to operate the Ennis Pasture and BLM's supporting documentation approving the DR. Valley Garden SOR Ex. 1.

Moreover, on appeal BLM represents that it planned to stock only 700 horses in the first year, and half of these will be yearlings weighing 500-600 pounds, compared to adult geldings weighing 800-1,000 pounds. BLM argues that this assures monitoring in the first year will reveal whether and to what extent additional capacity is available. BLM Answer at 21. BLM further states that so long as the Mitchell acreage is excluded, the maximum number of horses that will be pastured at the Ennis facility is 800 wild horses. *Id.* at 22; *see also* n.2 *ante*.

While appellants are skeptical, and Valley Garden maintains that Ranch Advisory Partners' conclusions should be accepted over those contained in the EAs, this Board has frequently held that BLM is entitled to rely on its experts' analyses and conclusions. *Harriet Natter*, 181 IBLA 72, 85-86 (2011). Differences of opinion among experts do not alone provide a basis for reversing a BLM determination. *Powder River Basin Res. Council*, 180 IBLA at 13; *Southern Utah Wilderness Alliance*, 163 IBLA 14, 28-29 (2004). Here, we find no reason to disturb the conclusions BLM drew from the data it examined.

#### *Adequacy of Fencing Specifications*

Appellants generally assert that cattle grazed by Spanish Q have trespassed on their lands in past years. Birch Creek NOA at 1; Birch Creek SOR at 2; Horse Creek NOA at 1; Valley Garden Reply at 16-17. Birch Creek asserts that in 2012 more than 125 cattle trespassed from Spanish Q lands on its land. Birch Creek NOA at 1. These allegations relate to the claim that fencing on the Spanish Q Ranch is inadequate. Valley Garden SOR at 40-44.

Valley Garden provides photographs taken on December 7, 2012, purportedly showing damaged border fences between Valley Garden and Spanish Q lands. These show twisted and sagging wires and top wires at or below 40" in height. Valley Garden SOR Exs. 14a-14d, 18. In the opinion of Valley Garden's Ranch Manager, these fences are minimally adequate to contain cattle and "not even marginally effective in containing wild mustangs." *Id.*, Ex. 18 at 3. He admits, however, that the photographs "do not depict fencing that is on the BLM's proposed horse facility," and that they are intended to provide only a sample of "general disrepair and lack of maintenance" of fences for which Spanish Q is responsible. *Id.* Valley Garden has since filed its Ranch Manager's declaration in which he states he determined, after looking from a distance using binoculars, that border fences between Valley Garden and Spanish Q lands remain inadequate as of February 21, 2013. Supplement to Renewed Petition for Stay, Ex. 2 at 2.

BLM responds by pointing out that Spanish Q is contractually responsible for ensuring that the top wire "on all perimeter and interior fencing is 48 inches high" and that appellants' conviction that horses will trespass on their lands is only

conjecture. BLM Answer at 24. The 2012 EA not only concludes the stated fence specifications are sufficient to contain wild horses, it also specifies that Spanish Q must ensure that all perimeter and interior fences meet those standards. In addition, BLM will re-evaluate them if they prove insufficient. *Id.* BLM notes, moreover, that at 46", existing fencing on the Spanish Q Ranch already exceeds 42", and even if the Project was to be abandoned, those fences would not be shortened to 42". BLM Answer at 24 (citing 2012 EA at 13).

Spanish Q points out that it is required to maintain liability insurance throughout the term of the contract. Spanish Q Answer at 7. Spanish Q also refutes at length appellants' claims that its fences are inadequate and that it was responsible for substantial cattle trespasses in past years. *Id.* at 7-10; *Id.* Ex. B at 2-4. We note that, in response to the original 2009 scoping letter, Robert D. Brannon, Wildlife Biologist for the Montana Department of Fish, Wildlife and Parks, encouraged BLM to consider using a 42" top wire instead of 48", because in his experience, 42" fences confine bison without risk of trespass, and, accordingly, a 42" top wire in this case would contain wild horses. AR Tab 24 at unpaginated (unp.) 14-15.

We decline to presume that Spanish Q will breach its contractual obligations. We agree with BLM and Spanish Q that appellants' challenge to the 2012 EA regarding the inevitability of future trespasses is speculative, and that their disagreement regarding the adequacy of the fence height does not establish error. Spanish Q Answer at 7; AR Tab 24 at unp. 14-15. To the contrary, the record shows BLM considered conflicting opinions about the size and height of fencing that should be prescribed for the facility and made a reasoned judgment to require a height of 48".

#### *Adequacy of Public and Agency Involvement*

Valley Garden maintains BLM erred when it did not conduct another round of public scoping prior to issuing the 2012 EA and further erred when it did not consult other agencies. In addition, Valley Garden contends NEPA requires an opportunity for public comment on the draft 2012 EA. Valley Garden SOR at 18, 22. Valley Garden argues that "[t]here has never been a decision by any federal agency to import wild horses to the state of Montana" and that "the [2009] project was aborted before any decision was made." *Id.* at 19-20. Birch Creek also questions the lack of public scoping. Birch Creek NOA at 1.

Valley Garden's assertion that an opportunity for public comment for every draft EA must be provided to comply with NEPA is without merit. Neither NEPA nor CEQ regulations explicitly require a Federal agency to allow public comment on every EA. Instead, "the question of whether the public was adequately involved in BLM's NEPA process depends on a fact-intensive inquiry made on a case-by-case basis."

*Lynn Canal Conservation, Inc.*, 169 IBLA 1, 4 (2006). NEPA requires public involvement as appropriate in the circumstances presented. *Id.* at 4-7, and cases cited. The Department’s NEPA rules thus state that BLM “must, to the extent practicable, provide for public notification and public involvement when an [EA] is being prepared.” 43 C.F.R. § 46.305(a). However, the “methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.” *Id.* Although BLM must consider any comments it receives, whether solicited or not, scoping is not required, nor is publication of a draft EA. 43 C.F.R. § 46.305(a)(1), (2), (b). The rules therefore vest considerable discretion in the Responsible Officer. As this Board has held many times, a BLM decision made in the exercise of its discretionary authority will be overturned only when it is arbitrary and capricious, and thus not supported on any rational basis. The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision is not supported by a record showing that BLM gave due consideration to all relevant factors, and acted on the basis of a rational connection between the facts found and the choice made. *Graham Pass, LLC*, 182 IBLA 79, 87 (2012), and cases cited; *see UOS Energy, LLC*, 177 IBLA 341, 349 (2009) and cases cited; *Rocky Mountain Helium, LLC*, 148 IBLA 317, 319 (1999) (the Board will affirm discretionary decisions when the record demonstrates that the relevant factors were considered and the decision is in accord with statutory directives). This burden is not satisfied by expressions of disagreement with BLM’s analysis or conclusion. *Id.* (citing *Tom Cox*, 142 IBLA at 258; *Larry Griffin*, 126 IBLA 304, 308 (1993)).

Here, when the 2009 EA was prepared, the public was duly notified and afforded ample opportunity to participate in the NEPA process. AR Tabs 21a, 22, 24. Appropriate agencies were consulted and identified in the 2009 EA. As discussed above, the 2012 EA rested on the procedure and analysis that culminated in the 2009 EA, regardless of whether such reliance is or should be styled *tiering*, *adoption*, *supplementation*, or *incorporation by reference*. Two rounds of public participation were provided, and BLM considered the views expressed during the preparation of the 2009 EA and when the 2012 EA was prepared. The 2012 EA and DR selected implementation of virtually the same Alternative A as analyzed and selected in 2009. The community was well aware of BLM’s intention to establish a private long-term holding pasture for wild horses in Montana, the material details of the plans for the facility, and BLM’s position on the concerns raised in public comments. In these circumstances, we find that there was a rational connection between the facts attending completion of the 2009 EA and the conclusion that BLM need not provide for further public involvement in completing the 2012 EA.<sup>16</sup>

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<sup>16</sup> BLM’s issuance of the 2012 EA instead of a DNA is not an “explicit acknowledgment by the BLM that a new environmental analysis was required for the  
(continued...) ”

*Adequacy of the Range of Alternatives*

Valley Garden contends BLM failed to look at reasonable alternatives to the proposed action. Valley Garden SOR at 23. An EA is a “concise public document” that “briefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]” including “brief discussions . . . of alternatives.” 40 C.F.R. § 1508.9. Even in a more detailed EIS, the analysis of alternatives is guided by the agency’s statement of the “purpose and need” for a proposed action, and special circumstances surrounding a particular project necessarily may narrow consideration of alternatives. *League of Wilderness Defenders-Blue Mountains Diversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069-72 (9th Cir. 2012).

In the 2009 EA, BLM considered no action, the proposed action and Alternative A using different stocking rates – a maximum of 1,500 horses under the proposed action and a maximum of 1,000 under Alternative A – using different grazing strategies. 2009 EA at 9-11. BLM also considered and rejected other alternatives, including an alternative fencing scheme and a land exchange. *Id.* at 8-9, 11. The 2012 EA eliminated the original proposed action, designated a slightly revised version of Alternative A as the Proposed Action, a no action alternative, and briefly rejected other alternatives. 2012 EA at 4-7.

Although couched as a failure to “rigorously explore” a “range of reasonable alternatives,” Valley Garden’s true complaint is that BLM should have considered even smaller maximum numbers of horses, and should have considered placing horses in other long-term pasture facilities outside of Montana. Valley Garden SOR at 25-26. The first argument is a different expression of Valley Garden’s assertions with respect to BLM’s calculation of carrying capacity, which we have upheld and will address no further. The second argument is refuted by the EAs, both of which succinctly explained the growing number of unadopted wild horses, the difficulty of controlling population growth and the need for additional long-term capacity. 2009 EA at 3-4; 2012 EA at 2-3. “When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.” *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986). We

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<sup>16</sup> (...continued)

2012 EA” as asserted by Valley Garden. Valley Garden SOR at 22. While the record as a whole shows that BLM appropriately could have issued a DNA, it chose to prepare the 2012 EA to document the continuing vitality of the 2009 analysis as the prerequisite to issuing a new DR. As we have stated, whether additional environmental analysis is necessary before an action can be implemented turns not on the label applied to BLM’s NEPA documentation, but on whether appellants have shown an impact that was not considered.

conclude BLM considered an adequate range of alternatives appropriate to the stated purpose and need for the proposed action.

*Adequacy of the Cumulative Impacts Analysis*

Citing *Te-Moak Tribe of Western Shoshone of Nevada v. Dep't of the Interior*, 608 F.3d 592, 602-03 (9th Cir. 2010) and *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002), Valley Garden maintains the 2012 EA's "cumulative impacts analysis lacks quantified or detailed information or analysis." Valley Garden SOR at 27. Granger claims the introduction of wild horses from outside Montana will upset the Montana ecosystem and will alter elk migration by causing them to concentrate on lands outside the Ennis Pasture. Granger NOA at 2. Birch Creek also questions the effect wild horses will have on Montana's native wildlife. Birch Creek NOA at 1.

The 2009 EA discussed cumulative impacts at a length generally appropriate to EAs. 2009 EA at 23-27. It also separately discussed the impacts of the alternatives on elk and other wildlife. *Id.* at 22-23. The substance of that analysis was reiterated in more summary form in the 2012 EA at 13-17. Valley Garden alleges general deficiencies, but without identifying the specific information or analysis it believes BLM was required to address. For example, Valley Garden acknowledges the measures that are designed to minimize or eliminate hazards to wildlife posed by the fence specifications, but nonetheless complains that there is no "quantifiable or detailed information as to *how* these measures will actually reduce entanglement or facilitate wildlife migrations." Valley Garden SOR at 28. Valley Garden further criticizes the 2012 EA for its failure "to even discuss the proposed action's impact on . . . the Spanish Q Ranch." *Id.* We think the record leads to a different conclusion.

The 2009 EA stated that "all existing exterior and interior fences would be modified or reconstructed and any new fences would be constructed to specifications," and this includes use of smooth wire in suspension fences; raising the bottom wire to 18" above the ground to facilitate passage by antelope, fawns, and calves; setting the distance between the top and second wires at 14" to reduce the potential for entanglement; attaching 8" of flagging to the top wire at 20' intervals to increase visibility of that wire; and should monitoring indicate the need, additional modifications would be made, such as placing PVC pipe on the top wire or using let-down fencing. 2009 EA at 11. The 2012 EA essentially incorporated the 2009 analysis. *See* 2012 EA at 15-17.

As to the argument that the 2012 EA failed to discuss the cumulative impacts of implementing Alternative A on the Spanish Q Ranch, we are unpersuaded. Even assuming *arguendo* that the environmental impacts on the Ranch can meaningfully be separated from those examined in the EAs, Valley Garden has not identified any such cumulative impact that was not considered, and we perceive none.

BLM is required to analyze past, present and reasonably foreseeable future actions, and to provide a “discussion and an analysis in sufficient depth and detail to assist the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.” *Oregon Natural Desert Ass’n*, 174 IBLA 341, 351 (2008) (quoting *Northwest Env’tl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 989, 994 (9th Cir. 2006)). An agency is obligated to consider only those cumulative impacts that “might be expected.” *Annunziata Gould*, 176 IBLA 48, 66 (2008) (quoting *In re Long Missouri Timber Sale*, 106 IBLA 83, 86 n.2 (1988)). In this case, BLM proposed an action, examined the direct, indirect, and cumulative impacts of the alternatives considered, and ultimately chose Alternative A, precisely because it diminished the potential for, or the extent of, such impacts. NEPA is a procedural statute only; it does not direct BLM to take a particular action, nor does it prohibit action even when environmental degradation will result. The statute only mandates that an agency consider environmental impacts of an action before it takes the action. *Oregon Nat’l Res. Council*, 116 IBLA 355, 361 n.6 (1990). Provided the “adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs” and going forward with the action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).<sup>17</sup>

#### *Need to Prepare an Environmental Impact Statement*

Valley Garden and Birch Creek, and Granger indirectly, assert that an EIS is required under NEPA because Alternative A entails the permanent removal of 800 wild horses from public lands, an action that is “unprecedented,” and with which BLM has “little experience.” Valley Garden SOR at 31-32, 33; see Granger SOR at 1. Valley Garden further contends that the action is *controversial* within the meaning of 40 C.F.R. § 1508.27(b)(4), and argues that the 2012 EA failed to explain why issuance of the FONSI was warranted in light of appellants’ claims discussed above. Valley Garden SOR at 32.

BLM disputes appellants’ conclusion that an EIS is required in this situation, correctly noting that a wild horse gather and removal from public lands is a separate action that is subject to its own NEPA analysis, while the Proposed Action entails only

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<sup>17</sup> See also 40 C.F.R. § 1500.1(b) and (c); *Vermont Yankee Nuclear Power Corp. v. Nat’l Res. Defense Council*, 435 U.S. 519, 558 (1978); *Nat’l Res. Defense Council v. Hodel*, 819 F.2d 927, 929 (9th Cir. 1987); *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1212 (D. Idaho 1993), *aff’d*, 42 F.3d 1399 (9th Cir. 1994).

the operation of a long-term holding pasture. BLM Answer at 18. BLM dismisses Valley Garden’s characterization of the action as *controversial* within the meaning of CEQ regulations, stating that it has contracted with 22 such facilities on private lands that “BLM has been able to monitor and observe over many years, and this experience, combined with BLM’s knowledge of wild horses on public lands in the West, provide a good understanding of what the potential environmental impacts of the Ennis LTH Pasture will be.” *Id.*

We agree that the gather of wild horses to stock the Ennis Pasture is beyond the scope of the subject EAs and DRs. We also agree that the subject action is not *highly controversial* within the meaning of CEQ regulations. The CEQ states that *significantly* as used in NEPA embraces the elements of *context* and *intensity*. The latter “[r]efers to the severity of impact.” 40 C.F.R. § 1508.27(b). The severity of impact in turn is considered under 10 criteria, one of which is the “degree to which the *possible effects* on the quality of the human environment are *likely* to be highly controversial.” 40 C.F.R. § 1508.27(b)(4) (emphasis added).

A proposed action may be considered “highly controversial” when “a substantial dispute exists as to the size, nature or effect of the . . . [F]ederal action.” *Rucker v. Wills*, 484 F. 2d 158, 162 (4th Cir. 1973). This determination has little to do with the extent of public opposition to the project itself. *Oregon Natural Resources Council*, 116 IBLA at 362; *Tulkisarmute Native Community Council*, 88 IBLA 210, 219 (1985), *aff’d in part*, Civ. No. A85-604 (D. Alaska 1988).

*Arizona Zoological Soc’y*, 167 IBLA 347, 356-57 (2006); *see also Coalition for Canyon Pres., Inc. v. Hazen*, 788 F. Supp. 1522, 1528 (D. Mont. 1990) (citing *Found. for N. Am. Wild Sheep v. U.S.*, 681 F.2d 1172, 1182 (9th Cir. 1982)); *Mary Lee Dereske*, 162 IBLA 303, 322 (2004); *The Sierra Club, Inc.*, 107 IBLA 96, 107 (1989). Here, while appellants clearly disagree and object to implementation, we are unable to conclude that there is a substantial dispute as to the size (place and acreage are certain), nature (long-term private pasture for excess wild horses) or effect (all were specifically identified in the EA).

#### *Water Quality and Riparian Conditions*

Valley Garden argues BLM “hardly looked at the important riparian and water quality issues.” Valley Garden SOR at 44. According to appellant, a Total Maximum Daily Load (TMDL) must be established for Moore Creek because the Montana Department of Environmental Quality has classified it as an impaired stream under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006). *Id.* The State has not established a TMDL, and Moore Creek remains an impaired stream. *Id.* at 45. Referencing pages 18 and 20 in the 2009 EA and page 12 in the 2012 EA, appellant

alleges an inconsistency in BLM's estimate of adverse environmental impacts on land health conditions and water quality. Specifically, Valley Garden suggests that the 2009 EA identified water-related problems that "[m]agically . . . evaporated in 2012 even though we have drought conditions." *Id.* at 46. Lastly, Valley Garden also faults the 2012 EA for not referring to and incorporating the Dillon Field Office's January 2007 South Tobacco Roots Watershed Assessment Report.<sup>18</sup> *Id.* at 14-15, 47-48.

Spanish Q avers the impaired portion of Moore Creek is not within its property or within the proposed holding pasture acreage. Spanish Q Answer at 13 (citing Karen Rice Declaration, Ex. B ¶ 15). In addition, Spanish Q acknowledges that the impaired section is not suitable for drinking water, which, it states, is due to naturally-occurring arsenic levels, but asserts that the impaired section is classified for agricultural use. Spanish Q further maintains that its water rights (which can support up to 1820 AUMS) cannot lawfully be divested, impaired, or diminished by establishing TMDLs and that, in any event, "non-point source issues such as grazing are addressed through best management practices," such as BLM's mitigation strategies. *Id.* at 13-14. Spanish Q and BLM both correctly point out that Valley Garden erroneously compares the effects of the action originally proposed in the 2009 EA to those resulting from the modified Alternative A that is the Proposed Action in the 2012 EA. *Id.* at 13; BLM Answer at 12-13.

The Watershed EA considered riparian conditions on approximately 33,600 acres of public land administered by BLM in Madison County and 30 grazing allotments. The STR Report accompanying that EA identified impacts on segments of riparian habitat by allotment, noting when they were in part attributable to livestock grazing or primarily attributable to cattle grazing. The 2009 EA provided site-specific information regarding the riparian health of the Ennis Pasture acreage, and acknowledged that 2½ miles of Granite Creek and the upper portion of the Moore Creek tributary are impaired. AR Tab 21 (2009 EA) at 18. Thus, to the extent Valley Garden means to assert that these are environmental impacts that were neglected in the 2009 EA, we again disagree.

Spanish Q will pasture horses in lieu of grazing cattle. AR Tab 13, 21 (2009 EA), App. 6 at 41 (response to comment #19, item 2). The 2009 and 2012 EAs state that, unlike cattle, horses tend not to loaf at water sources after watering. AR Tab 21 (2009 EA) at 13, 21; AR Tab 7 (2012 EA) at 12. The Watershed EA at 85 made the same point. BLM's observations at other BLM long-term pastures in other states confirm this difference in species behavior. AR Tab 21 (2009 EA), App. 6 at 40

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<sup>18</sup> Available at: [http://www.blm.gov/st/en/fo/mt/fo/dillon\\_field\\_office/STR.html](http://www.blm.gov/st/en/fo/mt/fo/dillon_field_office/STR.html) (last viewed Dec. 24, 2013). The Executive Summary and Authorized Officer's Report (STR Report) precedes the South Tobacco Roots Watershed Assessment EA (Watershed EA) on the website.

(response to comment #14). The Spanish Q lands contain several water sources, so there is additional reason to expect that the horses will not linger long enough to further degrade riparian conditions at the two sections of Moore and Granite Creeks. Moreover, the riparian impacts of the initial stocking rate under Alternative A are very nearly the same as those that resulted from grazing cattle on the Spanish Q acreage in past years, so that BLM reasonably could anticipate that its strategies for managing forage utilization would likely maintain or slightly improve wetland/riparian conditions. 2009 EA at 13, 21. Additionally, BLM observes that Valley Garden relies on a “very general” passage in the Watershed EA that “applies to public lands managed by BLM” on which it does not propose to graze livestock. BLM Answer at 13.

Valley Garden did not pursue its arguments regarding water quality and riparian conditions in its Reply. Our review of the record shows that appellant has not demonstrated that the 2009 EA is fatally flawed because it was not tiered to the Watershed EA, or shown that the 2009 EA overlooked an impact on water quality and riparian conditions that should have been considered.

#### *Impacts on Wildlife*

Apart from assertions relating to the impact of the fence specifications, which were addressed above and will not be repeated here, Valley Garden argues that the EA ignored effects on sage-grouse. In particular, Valley Garden contends the EAs failed to research and evaluate the impact of wild horses on sage-grouse habitat, and that the 2012 EA should have been tiered to the BLM National Technical Team’s (NTT’s) *Report on National Greater Sage-Grouse Conservation Measures* dated December 21, 2011 (NTT Report).<sup>19</sup> Valley Garden SOR at 14-15, 49. Noting that the STR Report states that the only occupied sage-grouse habitat in the South Tobacco Roots Watershed is on public lands located “east of Granite Creek in the Virginia City Hill vicinity and southwest of Axolotl Lakes,” Valley Garden further argues that the Spanish Q Ranch is near enough to the Virginia City Hill “vicinity” that we can reasonably infer that the Ennis Pasture acreage also contains sage-grouse. *Id.* at 51 (quoting Ex. 5 at 28 (footnote omitted)).<sup>20</sup>

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<sup>19</sup> Available at:

<http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/wildlife.Par.73607.File.dat/GrSG%20Tech%20Team%20Report.pdf> (last viewed Dec. 23, 2013).

<sup>20</sup> Valley Garden’s Ex. 5 is several pages from the Watershed EA that do not include p. 28. We reviewed BLM’s online copy of that EA and found the quote on p. 66 (last viewed Dec. 23, 2013).

BLM disputes Valley Garden's statements, arguing the 2009 and 2012 EAs addressed predation and determined there are no active sage-grouse leks on the private lands in the Ennis Pasture. BLM notes that reliance on the NTT Report and its objectives with respect to restoring sage-grouse habitat is misplaced, because the language quoted by Valley Garden in its SOR at 50 (to the effect that wild horses have the potential to impact habitat used by sage-grouse, and because they have different grazing patterns from cattle, the magnitude of such impacts could affect the entire landscape) pertains to habitat on lands administered by BLM. BLM Answer at 14.

Spanish Q notes that the 2012 EA accurately stated that there are no active leks in the Tobacco Root Mountains, and avers there are "no sage-grouse on Spanish Q's property." Spanish Q Answer at 14. Citing the NTT Report at 12, Spanish Q further states that "private lands are not subject to mitigation measures aimed at sage-grouse conservation." *Id.*

First, the NTT Report is not a NEPA document to which the 2009 and 2012 EAs might have been tiered. As we stated in *National Wildlife Federation v. BLM*, 140 IBLA at 97, "tiering requires a minimum of two NEPA documents," absent which tiering is impossible.

Second, it is true that nothing prevented BLM from referencing or incorporating information contained in the NTT Report. While that Report identifies numerous objectives and strategies to be pursued by collaborating Federal and State government and private landowners, it also clearly states that the NTT's focus was "primarily on *priority sage-grouse habitat areas*. General habitat conservation areas were not thoroughly discussed or vetted through the NTT, and the concept of connectivity between priority sage-grouse habitat areas will need more development through the BLM planning process." NTT Report at 5. However, the stated objective of the NTT Report and the reason "for chartering this planning strategy effort was to develop new or revised *regulatory mechanisms, through Resource Management Plans (RMPs)*, to conserve and restore the greater sage-grouse and its habitat on *BLM-administered lands on a range-wide basis over the long term*," and to "serve as a scientific and technical forum" providing expertise in several capacities. *Id.* at 6 (emphasis added).

BLM concluded that "there are no documented sage grouse leks and [there] have been no documented sightings of sage grouse on the Ennis side of the Tobacco Root range for many years," though it acknowledged that blue grouse have been sighted in the "Granite Creek timber sale area." 2009 EA at 18; 2012 EA at 13. Valley Garden's attempt to persuade us to presume the presence of sage-grouse or priority habitat within Ennis Pasture must fail where there is no evidence that sage-grouse, leks, or their priority habitat are found on Spanish Q lands. The fact that

public land somewhere in the vicinity of Spanish Q's perimeter contains known occupied sage-grouse habitat does not demonstrate the existence of impacts on sage-grouse or their habitat that "should have been addressed more professionally in the 2012 EA." Valley Garden SOR at 52.

### *Conclusion*

BLM properly relied upon the 2009 EA in its entirety, and properly used the 2012 EA to document the basis for doing so. Where there has been no showing that there are new circumstances, information, or changes in the action or its impacts that were not analyzed or that may result in significantly different environmental effects, neither an EIS nor further environmental analysis is required by NEPA. 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). There are no material factual issues that could not be resolved on the basis of the record before us, and accordingly, Valley Garden's motion for a hearing is denied. Its motion to amend its notice of appeal is denied. Spanish Q's motions to dismiss are denied as moot, and the appellants' petitions for stay are denied as moot.

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 is affirmed, the petitions for stay are denied as moot, Valley Garden's motions for a hearing and to amend its notice of appeal are denied, and Spanish Q's motions to dismiss are denied as moot.

\_\_\_\_\_/s/  
T. Britt Price  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
James F. Roberts  
Acting Chief Administrative Judge