



WESTERN WATERSHEDS PROJECT

186 IBLA 51

Decided July 21, 2015



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

703-235-3750

703-235-8349 (fax)

WESTERN WATERSHEDS PROJECT

IBLA 2015-152

Decided July 21, 2015

Appeal from the March 31, 2015, Decision Record of the Bishop Field Office, California, Bureau of Land Management, approving the Bodie Hills Upland Vegetation Restoration Project in Mono County, California.

Appeal dismissed; Petition for Stay denied as moot.

1. Appeals: Jurisdiction -- Appeals: Standing to Appeal

An appeal from a BLM decision approving vegetation treatments over a 10-year period is properly dismissed where the decision is programmatic in nature and does not decide whether, when, how, or where to authorize vegetation treatments, and where any future decision to authorize treatment will be subject to environmental review and will be administratively and judicially reviewable.

APPEARANCES: Michael J. Connor, Director, Western Watersheds Project, Reseda, California, for appellant; Kevin Tanaka, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

On May 1, 2015, Western Watersheds Project (WWP) filed a notice of appeal from the March 31, 2015, Decision Record (DR) of the Bishop Field Office (California), Bureau of Land Management (BLM). The DR approved the Bodie Hills Upland Vegetation Restoration Project (Project) in Mono County, California. The DR and a March 6, 2015, Finding of No Significant Impact (FONSI) were based on an Environmental Assessment (EA) (DOI-BLM-CAC-070-2011-0032-EA)¹ that analyzed the potential impacts of the Project.

¹ BLM prepared the EA in accordance with the Council on Environmental Quality's and the Department of the Interior's regulations implementing the National

(...continued)

WWP has also filed a Petition for Stay of the DR. As explained below, because WWP has failed to establish that it is adversely affected by BLM's decision, it has no standing to file either a petition for stay of, or appeal, the DR. We therefore dismiss WWP's appeal and deny its Petition for Stay as moot.

Background

The Bodie Hills are a distinct mountain range located at the western edge of the Great Basin that provide important habitat for wildlife and native plants. EA at 1, 7. As explained in the EA, BLM conducted an expansive study on the area's ecological conditions, in cooperation with The Nature Conservancy, and held public workshops to obtain stakeholder input on the area's needs and potential vegetation management approaches. *Id.* at 5. The analysis demonstrated that due largely to reduced fire frequencies, "multiple upland vegetation systems are highly ecologically departed from their natural range of variability" and others are "at risk of future conversion to undesirable states outside the natural range of variability." *Id.* at 7. The purpose of the Project, therefore, is to "make at risk systems more resistant to conversion to non-native species, increase the potential for a natural disturbance regime to be reintroduced, benefit wildlife such as greater sage-grouse, and reduce the risk of damage to adjacent communities, historic and cultural resources, and other ecosystem dependent values (wilderness characteristics, watershed, visual quality, recreation, etc.)." *Id.* at 7.

BLM prepared its EA at the landscape scale to consider multiple-year approaches to vegetation management for the area, encompassing 167,100 acres of BLM-administered public land, rather than addressing issues on a "piecemeal" or treatment-by-treatment basis. EA at 2, 7-8. Thus, instead of considering individual treatment units, the EA described and analyzed criteria for identifying future locations and treatment methods that could be undertaken. *Id.* at 8. As explained in the EA, under the proposed action,² treatment units would include areas at the greatest risk of conversion to uncharacteristic classes, including areas invaded by invasive plant species such as cheatgrass and pinyon/juniper-encroached shrublands, *id.* at 24, and

(...continued)

Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321- 4347 (2012).
See 40 C.F.R. §§ 1500.1-1518.4 and 43 C.F.R. Part 46. The DR, FONSI, and EA are all available online. See
http://www.blm.gov/ca/st/en/fo/bishop/bodie_hills_dr_update.html

² In addition to the Project (the proposed action), the EA analyzed a no action alternative and four action alternatives. *Id.* at 15-17. The EA also identified three alternatives that BLM considered, but did not analyze in detail. *Id.* at 17-21.

treatment sites would be prioritized based on whether multiple objectives could be accomplished at the site and where there would be “the lowest possible conflict with other resource concerns.” *Id.* at 25. Treatment methods would be chosen based on the current vegetation state and the treatment’s potential impacts to other resources, and could include hand cutting, piling, chipping, mowing, and broadcast prescribed burning. *Id.* at 31-33.³

The EA disclosed that the treatments, if and when they are implemented, would, among other things, result in a reduced risk of wildfire and associated impacts on vegetation and wildlife; create habitat for and benefit species such as sage-grouse, pygmy rabbit, and mule deer; and improve the wilderness quality of Wilderness Study Areas and wilderness characteristics of lands outside of WSAs. *Id.* at 69-75. The EA recognized that the Project would result in short-term adverse impacts, including impacts to sage-grouse during treatment (e.g., sage-grouse being flushed from or avoiding areas being treated and the loss of habitat and connectivity), *id.* at 158; increases in non-native invasive plant species within treatment areas due to localized disturbance, *id.* at 139; and limited short-term adverse effects on air quality, visual quality, and wilderness values. *Id.* at 191, 213, 228. The EA also disclosed that project design features would be required to minimize these and other negative treatment effects. *Id.* at 35-43.

In its DR, BLM explained that the Project would directly affect a maximum of 21,330 acres of land within the 167,100 acre project area over a 10-year period and that on average approximately 2,133 acres would be treated annually. DR at 2. BLM further explained that “site-specific treatments proposed for implementation pursuant to this decision shall be subject to a subsequent environmental review,” e.g., a Determination of NEPA Adequacy (DNA) or an EA, and that all future treatment decisions “shall be subject to appeal pursuant to 43 CFR Part 4.” *Id.* at 3.

³ For additional details on treatment units and site selection criteria, see DR App. 1 (Objectives, Strategies, and Classes to be Treated with Approved Maximum Treatable Acreages and Allowable Treatment Methods by Ecological System for the Bodie Hills Upland Vegetation Restoration Project in Mono County, California) and DR App. 2 (Site Selection Criteria, Allowable Treatment Methods, Method Selection Criteria, Design Features and Monitoring for the Bodie Hills Upland Vegetation Restoration Project in Mono County, California).

On May 1, 2015, WWP timely filed a notice of appeal. On June 18, 2015, WWP filed its Statement of Reasons,⁴ as well as a Petition for Stay of the DR (SOR/Petition).⁵ In its SOR/Petition, WWP complains that the Project “will increase the risk of catastrophic degradation of the most important Bi-state sage-grouse habitat, habitat for sensitive plants and animals, multiple wilderness study areas, and a cultural [Area of Critical Environmental Concern.]” SOR/Petition at 5. WWP asserts that in approving the Project, BLM violated NEPA for failing to prepare an environmental impact statement (EIS). *Id.* at 12. In particular, WWP claims that the Project is highly controversial and should have been evaluated in an EIS because “BLM admits that the leading adverse effects would be the potential for increases in abundance of non-native invasive plant species within treatment areas,” which “will set the stage for future catastrophic fires that could spread throughout sage-grouse and pygmy rabbit habitat across the area.” *Id.* at 14. WWP also claims that BLM violated NEPA based on the agency’s failure to consider a reasonable alternative proposed by WWP (a Reduced Grazing/Habitat Restoration Alternative) and take a “hard look” at the Project’s impacts. *Id.* at 14-16. WWP further claims that BLM violated the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787 (2012), because the Project will result in degradation of sensitive species habitat and is inconsistent with the agency’s Special Status Species policy.⁶ *Id.* at 17-19.

Discussion

A petition for stay may be filed only by a party who may properly maintain, i.e., has standing to bring, an appeal. 43 C.F.R. § 4.21(a)(2). Standing is governed by 43 C.F.R. § 4.410, which requires that an appellant demonstrate that it is both a “party to a case” and “adversely affected” by the decision, within the meaning of 43 C.F.R. § 4.410(b) and (d). *Western Watersheds Project*, 185 IBLA 293, 298

⁴ In an Order dated June 1, 2015, the Board granted WWP an extension of time to file its Statement of Reasons.

⁵ We note that WWP filed its Petition for Stay pursuant to 43 C.F.R. §§ 4.471(c) and 4160.3. *See* SOR/Petition at 19. Those regulations, however, apply to grazing decisions, and the DR on appeal in this case is not a grazing decision. *See* DR at 1 (“The purpose of the project is to maintain and improve the ecological condition and resiliency of the most ecologically departed and at risk upland vegetation systems in the Bodie Hills at a landscape scale.”). The regulation at 43 C.F.R. § 4.21 governs WWP’s filing of its Petition for Stay.

⁶ BLM’s policies on special status species are set forth in Manual 6840--Special Status Species Management (2008).

(2015), and cases cited. If either element is lacking, we must dismiss the appeal and deny the Petition for Stay as moot.⁷ *Id.*

We find that WWP has satisfied the first element of standing. It is a party to this case based on its participation in the scoping process for the Project and the public review process for the EA. See SOR/Petition at 1-2. The issue, then, is whether WWP has demonstrated that it is “adversely affected” by BLM’s approval of the Project. A party to an appeal is adversely affected “when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” 43 C.F.R. § 4.410(d). A threat of injury and its effect on the appellant must be more than hypothetical; standing will only be recognized where the threat of injury is real and immediate. See *Western Watersheds Project*, 182 IBLA 1, 8-9 (2012). “[M]ere speculation that an injury might occur in the future will not suffice.” *Western Watersheds Project*, 185 IBLA at 299 (citation omitted).

[1] Here, BLM’s decision approved future action. As articulated in the EA and DR, the Project provides generally that vegetation treatment will occur on 21,330 acres of public lands over a 10-year period, and establishes criteria for how BLM will select sites for vegetation treatment and select treatment methods. BLM, however, has not yet decided whether, when, how, or where to authorize any actual treatment. Such decisions will be made in the future, will be subject to environmental review, and will be administratively and judicially reviewable. Because BLM’s decision is programmatic in nature and does not authorize any ground-disturbing activity, it cannot be the cause of any actual or threatened injury; WWP can only speculate about any harm that might arise from an as yet unknown treatment proposal.

This Board has found that appellants cannot establish standing to appeal similar programmatic decisions. In *Salmon River Concerned Citizens*, for example, we held that the appellants lacked standing to appeal a BLM California State Office Record of Decision (ROD) that generally approved the use of herbicides under specified management constraints, as a means of controlling undesirable vegetation on public lands in California and Nevada. The ROD, however, did not authorize whether, when, or where to implement any actual herbicide spraying:

⁷ We note that WWP filed its Petition for Stay after the expiration of the 30-day appeal period, making the Petition untimely under 43 C.F.R. § 4.21(a)(2). See *Robert E. Oriskovich*, 128 IBLA 69, 70 n.1 (1993) (stay petition must be filed with a notice of appeal, or “at any time during the time period for filing the notice of appeal.”). Although BLM urges the Board not to consider WWP’s Petition because of its untimeliness, see Opposition at 10, we have determined that WWP lacks standing to bring its appeal and will not address WWP’s Petition for Stay on that ground.

By itself, the ROD does not have any consequences, actual or threatened, so far as the environment and any members of the public are concerned. [BLM's] . . . ROD only authorizes use of herbicides in the control of undesirable vegetation as an option which may be employed. . . . [T]here is nothing in the record indicating where or whether herbicides will actually be used. Indeed, no activity . . . can take place until after preparation of site-specific EA's. Any adverse consequences will occur, if at all, only if BLM decides to engage in herbicide spraying at particular sites in California and northwestern Nevada, and only after preparation of site-specific EA's.

114 IBLA 344, 348 (1990). Thus, while it was likely that BLM would approve spraying at some future time somewhere on public lands, in accordance with the ROD, BLM had yet to approve any particular spraying, and therefore there was no "specific Federal action which was subject to imminent authorization." *Id.* at 349. Consequently, the Board held that the appellants were not adversely affected by BLM's ROD: "The mere possibility that BLM may at some future time authorize the spraying of herbicides, pursuant to the authorization contained in the . . . ROD, in such a way as to potentially affect appellants is not sufficient to confer standing." *Id.* at 350 (citations omitted). We further noted that once BLM approves any specific spraying in the future, the appellants could challenge it on any and all bases, including the acceptability of spraying versus other methods of vegetation control, even though the ROD already authorized the use of spraying. *Id.* at 350-51. As we explained, the Board is "constrained to consider these matters only in the context of an appeal from a party adversely affected by a BLM decision, which is not the situation here." *Id.* at 351. Since the appellants in *Salmon River Concerned Citizens* could not demonstrate they were adversely affected by BLM's decision, we dismissed the appeal for lack of standing.

The decision at issue in this case is identical in effect to the decision in *Salmon River Concerned Citizens*. While BLM's DR generally provides that vegetation treatments of public lands can occur, the agency has not yet decided whether, when, how, or where to authorize any actual treatment, and any future decision to approve a specific treatment will be subject to environmental review and administrative challenge. WWP claims that, consistent with the DR, BLM may at any time authorize future vegetation treatments, and such treatments "may initiate long term, irreparable harms such as increased invasive species and fire risks." SOR/Petition at 20. Through the declaration of Michael J. Connor, WWP also claims that the Project will increase the risk of wildfire and cause harm "by potentially pushing sensitive species like the Bi-state sage-grouse and pygmy rabbit closer to listing under the Endangered Species Act, and by further degrading upland and riparian habitat." *Id.* at Ex. 1 (Declaration at 2-3 ¶ 7).

As we stated in *Salmon River Concerned Citizens*, “[i]n cases where standing is asserted on the basis of a threatened injury . . . standing turns on the likelihood of the occurrence of that injury.” 114 IBLA at 350. Here, WWP’s general assertions of adverse effects are inadequate to establish any causal relationship between BLM’s decision and the likelihood of any injury. Any adverse effects will occur in the future, as a result of BLM’s approval of specific treatment projects. We therefore conclude that WWP has failed to establish that it is “adversely affected” by BLM’s DR, and thus the organization has no standing to appeal.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, WWP’s appeal is properly dismissed and its Petition for Stay is denied as moot.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge