



WESTERN WATERSHEDS PROJECT

IBLA 2014-186

Decided September 13, 2016



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Appeal from a decision of the Owyhee Field Office, Bureau of Land Management, to use prescribed fire and cutting to control juniper on the Trout Springs Allotment. DOI-BLM-ID-B030-2009-0030-EA.

Appeal Dismissed in Part; Decision Affirmed.

1. Administrative Procedure: Adjudication;
Administrative Procedure: Burden of Proof;
Rules of Practice: Appeals: Burden of Proof

A party challenging a BLM decision to approve an action that was analyzed in an EA and for which BLM issued a FONSI has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Conclusory allegations, unsupported by evidence showing error, do not suffice, nor do mere differences of opinion.

2. Administrative Procedure: Adjudication;
Administrative Procedure: Burden of Proof;
Rules of Practice: Appeals: Burden of Proof

Where BLM regulations do not define the meaning of “unnecessary or undue degradation” for purposes of a particular activity, a BLM decision will not be found to constitute unnecessary or undue degradation of the public lands if its conclusions have a rational basis in the record.

3. Administrative Procedure: Adjudication;
Administrative Procedure: Administrative Review;
Rule of Practice: Appeals

When BLM provided an opportunity for participation in its decision-making process, a party to the case may raise on appeal only those issues it raised in its prior participation or issues that arose after the close of the opportunity for such participation.

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

OPINION BY ADMINISTRATIVE JUDGE RIECHEL

Western Watersheds Project (WWP) appeals a decision of the Owyhee Field Office, Bureau of Land Management (BLM), authorizing vegetation treatments to manage the expansion of western juniper in the Trout Springs Allotment.

On appeal, a party may only raise issues it raised during its prior participation in a matter or issues that arose after the opportunity for such participation ended. In this appeal, WWP attempts to raise two statutory violations it did not raise in its comments on the environmental assessment (EA) BLM prepared in support of its decision. Because WWP did not assert these violations earlier, we dismiss that portion of WWP's appeal.

The remainder of WWP's appeal is properly before us. WWP challenges BLM's vegetation treatment decision based on alleged defects in BLM's compliance with the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA). A party alleging violations of NEPA, where a BLM decision to approve an action was analyzed in an EA, has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. If the party challenges the BLM decision for failure to comply with FLPMA's mandate to prevent unnecessary or undue degradation, the party must show that BLM's conclusions lack a rational basis in the record. In this case, WWP did not show that BLM violated NEPA or FLPMA: WWP did not demonstrate that BLM's decision is premised on error, that BLM's analysis omitted a substantial environmental question of material significance, or that BLM's decision lacks a rational basis in the record. We therefore affirm BLM's decision.

BLM's Decision to Manage Western Juniper

The Trout Springs Allotment encompasses more than 29,000 acres of mostly public lands in southwestern Owyhee County Idaho.¹ In a 2012 Rangeland Health Evaluation, BLM determined that the Trout Springs Allotment does not meet any of the applicable Idaho Standards for Rangeland Health due to livestock grazing and the expansion of western juniper.² To analyze the effects of different alternatives for managing livestock and treating juniper on the Trout Springs Allotment, BLM prepared an EA.³ The EA was designed to inform BLM decisions about renewing permitted grazing, constructing range improvement projects, and implementing vegetation treatments on the Allotment.⁴

BLM issued a scoping document for the EA in August 2009.⁵ WWP provided most of the comments BLM received, disputing the need for range improvement projects and proposed juniper treatments and advocating for reductions in livestock use.⁶ In July 2012, BLM issued the Draft EA for review and comment.⁷ WWP was among five entities that commented.⁸ BLM considered each comment and either incorporated it into the Final EA or addressed it individually in an appendix to the Final EA.⁹

BLM completed the Final EA in August 2013 and signed a Finding of No Significant Impact (FONSI) on May 1, 2014.¹⁰ On May 2, 2014, the Field Manager for the Owyhee Field Office issued the decision to implement western juniper treatments—specifically, hand cutting or girdling and prescribed fires—on approximately 19,500 acres of public land over the next 10 years.¹¹

¹ Term Permit Renewals for Livestock Grazing in Trout Springs and Hanley FFR Allotments Environmental Assessment (EA) DOI-BLM-ID-B030-2009-0030-EA at 1, 160 (Aug. 2013) (Administrative Record (AR) 000006, 000165); EA Appendix (App.) A at 2 (AR 000263) (2012 Trout Springs Allotment Evaluation and Determination).

² EA App. A at 18.

³ EA.

⁴ *Id.* at 5.

⁵ *Id.* at 6.

⁶ *Id.* at 6; *id.* App. C (AR 000309-320) (Responses to Scoping Comments).

⁷ *Id.* at 7.

⁸ *Id.*

⁹ *Id.*; *id.* App. N (AR 000462-000494) (Response to Draft EA Comments).

¹⁰ FONSI (AR 000495-000498).

¹¹ Notice of Field Manager's Final Decision (AR 000910, 000913).

WWP's Appeal

WWP appealed BLM's decision to implement western juniper treatments. After revising its arguments to meet the Board's 30-page limit for statements of reasons (SORs), WWP submitted an SOR organized into 21 sections, each section containing reasons why BLM's decision cannot be upheld based on perceived violations of NEPA¹² and FLPMA.¹³ It is not entirely clear how many separate claims WWP actually asserts, and some of the allegations appear focused on BLM's grazing decisions as opposed to the particular juniper treatments that are the subject of this appeal.¹⁴ WWP's relevant arguments can be divided into NEPA, FLPMA, and other claims and summarized, much like BLM addressed them in its answer, as follows:

NEPA claims:

- BLM did not take a "hard look" at the impacts of juniper control treatments.
- BLM did not consider an adequate range of alternatives.
- BLM should have prepared an environmental impact statement (EIS) instead of an EA.
- BLM ignored WWP's comments and data.

FLPMA claims:

- BLM's decision violates the governing Resource Management Plan (RMP) and FLPMA by causing undue degradation.

Other claims:

- BLM's decision violates the Migratory Bird Treaty Act (MBTA)¹⁵ and Clean Water Act (CWA)¹⁶.

¹² 42 U.S.C. §§ 4321-4370h (2012).

¹³ 43 U.S.C. §§ 1701-1787 (2012).

¹⁴ See Answer at 22, 44; see, e.g., SOR at 16-19 (arguing that BLM failed to take a "hard look" at the impacts of livestock facilities, trampling, and concentrating livestock in smaller pasture areas).

¹⁵ 16 U.S.C. §§ 703-712 (2012).

¹⁶ 33 U.S.C. §§ 1251-1388 (2012).

Standard of Review for NEPA Challenges

NEPA requires Federal agencies to prepare an EIS evaluating the potential environmental impacts of major Federal actions significantly affecting the quality of the human environment.¹⁷ Agencies may prepare an EA instead of an EIS to determine whether an EIS is required or to aid the agency's compliance with NEPA when an EIS is not necessary.¹⁸ An EA is defined as "a concise public document" that includes a brief discussion of the need for the proposed action, alternatives to the action, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted during the preparation of the EA.¹⁹ The level of detail and depth of an EA may be limited to the minimum level needed to determine whether there would be significant environmental impacts from the proposed action.²⁰ An EA may lead to the preparation of an EIS or conclude with a FONSI.²¹

The Board will uphold a BLM decision to proceed with a proposed action after completion of an EA and FONSI when the record demonstrates that BLM has considered 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.²² Taking a "hard look" means that the agency conducted "a thorough environmental analysis before concluding that no significant environmental impact exists"²³ and prepared a document that shows "the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project."²⁴

¹⁷ 42 U.S.C. § 4332(2)(C) (2012).

¹⁸ 40 C.F.R. § 1508.9(a); 43 C.F.R. § 46.300.

¹⁹ 40 C.F.R. § 1508.9(a), (b); 43 C.F.R. § 46.310(a).

²⁰ 43 C.F.R. § 46.310(e).

²¹ 40 C.F.R. § 1508.13; 43 C.F.R. § 46.325.

²² *Center for Native Ecosystems*, 182 IBLA 37, 50 (2012).

²³ *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1239 (9th Cir. 2005) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998)).

²⁴ *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 781 (10th Cir. 2006) (quoting *Comm. to Preserve Boomer Lake Park v. U.S. Dep't of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993)).

[1] The Board is guided by a “rule of reason” in assessing an EA’s adequacy.²⁵ A party challenging a BLM decision to approve an action that was analyzed in an EA and for which BLM issued a FONSI has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.²⁶ Conclusory allegations, unsupported by evidence showing error, do not suffice.²⁷ Furthermore, mere differences of opinion between the appellant and BLM do not provide a basis for reversal.²⁸ “It is not sufficient for an appellant to simply speculate and request more information or ‘pick apart a record with alleged errors and disagreements[,] without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance.’”²⁹

BLM Took a Hard Look at the Impacts of Juniper Control Treatments

WWP argues that BLM failed to take a hard look at the impacts of juniper control treatments on impaired watersheds;³⁰ soil and vegetation;³¹ wildlife and sensitive species;³² water quality and quantity;³³ old growth and habitat;³⁴ and wilderness values.³⁵ WWP also claims that BLM’s analysis of the cumulative effects of vegetation treatment, grazing, climate change, trespass, herbicide use, and wildfires on these resources was inadequate.³⁶

Although WWP’s vehement objection to BLM’s decision is clear, WWP’s allegations are vague and conclusory and do not identify legal or factual errors with

²⁵ *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000).

²⁶ *Wildlands Defense*, 188 IBLA 68, 70-71 (2016); *Bales Ranch, Inc.*, 151 IBLA at 357.

²⁷ *Wildlands Defense*, 188 IBLA at 76; *Wyoming Outdoor Council*, 159 IBLA 388, 399 (2003).

²⁸ *Bark (In Re Rusty Saw Timber Sale)*, 167 IBLA 48, 76 (2005).

²⁹ *Id.* (quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004)).

³⁰ *See, e.g.*, SOR at 9-10 (faulting the EA for, among other things, failing to sample an adequate number of springs and gather data on riparian systems), 15.

³¹ *See, e.g., id.* at 11-12.

³² *See, e.g., id.* at 13-14.

³³ *See, e.g., id.* at 14-15.

³⁴ *See, e.g., id.* at 15-16.

³⁵ *See, e.g., id.* at 19.

³⁶ *See, e.g., id.* at 20-23.

any specificity that would enable us to evaluate the substance of WWP's arguments. The following are examples of WWP's assertions:

The EA's radical treatment disturbance plus recent fires and now . . . authorized grazing will greatly increase vulnerability to weeds across uplands and watersheds EA estimates of soils, veg, crusts, habitat and watershed recovery are off-base.^[37]

. . .

BLM points to sage habitat in the larger landscape – but never studies the quality and quantity of that habitat, either. In reality, it is very limited, being rapidly invaded by weeds, and severely impacted by cattle.^[38]

. . .

BLM absurdly claims that a single year is needed for recovery from treatment. It greatly fails to address the large-scale adverse effects of planned deforestation and fire risk.^[39]

. . .

The [cumulative effects] area is often too small. Unless BLM identifies where suitable habitat actually is present, and describes the quality and quantity of that habitat and threats it faces, it cannot understand cumulative impacts of massive inter-twined EA schemes. No valid analysis is provided for any juniper species.^[40]

WWP's SOR largely consists of unsubstantiated opinions and predictions like these. As we stated in another case brought by WWP:

At most, WWP has shown that it profoundly disagrees with BLM's conclusions and management decisions, but a mere difference of opinion will not suffice to show that BLM failed to fully comprehend

³⁷ SOR at 11.

³⁸ *Id.* at 13.

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 22.

the true nature, magnitude, or scope of the likely impacts. 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.⁴¹

The same applies here. We find that WWP has not carried its burden to demonstrate with objective proof that BLM failed to take a hard look at the impacts of its decision.

BLM Considered an Adequate Range of Alternatives

WWP faults BLM for failing to consider an adequate range of alternatives, including alternatives that would eliminate grazing in sensitive areas, impose significant rest periods from grazing, and designate Juniper Mountain as an Area of Critical Environmental Concern (ACEC).⁴²

NEPA requires that an EA include a brief discussion of appropriate alternatives.⁴³ Appropriate alternatives that BLM must consider are those that “will accomplish the project’s intended purpose, are technically and economically feasible, and will avoid or minimize adverse environmental impacts.”⁴⁴ NEPA does not require that an agency consider a minimum number of alternatives, and it generally suffices for an agency to consider a no action and proposed action alternative in an EA, particularly if the proposed action will achieve environmental benefits.⁴⁵ “[T]he fact that a party may favor an alternative other than that adopted by BLM does not render the action taken by BLM erroneous.”⁴⁶

⁴¹ WWP, 184 IBLA 106, 121 (2013) (citations omitted).

⁴² 43 U.S.C. § 1702(a) (ACECs are “areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.”).

⁴³ See 40 C.F.R. § 1508.9(b); 43 C.F.R. § 46.310(a).

⁴⁴ *Roseburg Resources Company*, 186 IBLA 325, 336 (2015) (quoting *Cascadia Wildlands*, 184 IBLA 385, 409 (2014)); *Biodiversity Conservation Alliance*, 183 IBLA 97, 124 (2013); *WildEarth Guardians*, 182 IBLA 100, 107 (2012).

⁴⁵ *Randy L. Witham*, 187 IBLA 298, 303 (2016); *Roseburg Resources Company*, 186 IBLA at 336 (citing *Earth Island Inst. v. United States Forest Serv.*, 697 F.3d 1010, 1022 (9th Cir. 2012)).

⁴⁶ *Southern Utah Wilderness Alliance*, 152 IBLA 216, 224 (2000).

BLM stated that the purpose of its action is to improve resource conditions through changes to livestock grazing management (which is the subject of a separate decision that is not part of this appeal) and vegetation treatments.⁴⁷ In the EA, BLM explained that it initially considered 13 alternatives for management of the Trout Springs and Hanley Fenced Federal Range Allotments and analyzed eight of these alternatives in detail to the point where it was evident that they did not meet the purpose of and need for action.⁴⁸ The final EA included a detailed analysis of five alternatives that BLM brought forward for its grazing and vegetation management decisions, including a no action alternative (current grazing management with no vegetation treatment), grazing with a rest rotation system, no grazing, and seasonal grazing restrictions.⁴⁹ In all but the no-action alternative, the same juniper treatments would occur.⁵⁰

BLM's EA also discussed the alternatives considered but not carried forward for detailed analysis, including three alternatives proposed by WWP.⁵¹ Specifically, BLM explained that WWP advocated for hand cutting the entire area without broadcast or slash or jackpot burning;⁵² designating Juniper Mountain as an ACEC;⁵³ and an "ecological recovery" alternative, under which livestock would be removed from the most sensitive areas.⁵⁴ In each instance, BLM explained its rationale for not considering the alternative in detail. For example, with respect to the only juniper-related alternative WWP proposed, BLM cited studies documenting adverse impacts of hand cutting without broadcast burning and noted that hand cutting alone "would not maintain vegetative covertype mosaics that provide diverse habitat for mule deer and other wildlife, and would not restore desired fire regimes."⁵⁵

The record shows that BLM evaluated the alternatives WWP proposed and determined that they would not meet its purpose. We conclude that BLM considered an adequate range of alternatives.

⁴⁷ EA at 4.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 7-8.

⁵⁰ *Id.* at 7, 18.

⁵¹ *Id.* at 26-31.

⁵² *Id.* at 26.

⁵³ *Id.* at 29-30.

⁵⁴ *Id.* at 30-31.

⁵⁵ *Id.* at 26.

BLM Was Not Required to Prepare an EIS

WWP argues that BLM should have prepared an EIS instead of an EA because the models BLM used are the subject of “scientific controversy.”⁵⁶ WWP also broadly alleges that all of its other arguments about the EA (specifically failure to take a hard look at impacts, address opposing points of view, and use high-quality, site-specific information) demonstrate the need for an EIS.⁵⁷

As noted earlier, the Board will uphold a BLM decision to proceed with a proposed action after completion of an EA and FONSI when the record demonstrates, among other things, that the project will not have a significant impact on the human environment or that any significant impact will be reduced to insignificance by the adoption of appropriate mitigation measures.⁵⁸ Under the regulations implementing NEPA, significance is determined by considering both context (for example, the effects on the locale) and intensity (the severity of impacts).⁵⁹ The regulations list several considerations important to the evaluation of intensity, including “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”⁶⁰

We first note that WWP’s argument about the necessity for an EIS does not expressly allege that the effects of BLM’s decision are likely to be highly controversial. Instead, WWP asserts that the models and data BLM used are controversial. WWP states that BLM’s models are “flawed” and “at odds with plant ecology.”⁶¹ In support of its position, WWP cites the entirety of several documents or categories of documents, including the Owyhee Woodland Harvest Management Plan, the 1991 Idaho Wilderness Report, “BLM’s own [General Land Office (GLO)] records,” and WWP GLO mapping.⁶² But WWP does not point to any specific portion of these documents to show that BLM erred in relying on its models and data. These broad assertions are not sufficient to establish controversy about BLM’s models and data, much less controversy about the impacts of BLM’s decision.

⁵⁶ SOR at 24-25.

⁵⁷ *Id.* at 25.

⁵⁸ WWP, 183 IBLA 297, 318-19 (2013); *Center for Native Ecosystems*, 182 IBLA at 50.

⁵⁹ 40 C.F.R. § 1508.27 (definition of “significantly”).

⁶⁰ 40 C.F.R. § 1508.27(b)(4).

⁶¹ SOR at 24; *see also id.* at 4-5 (arguing that a “serious controversy exists” about BLM’s models and assumptions).

⁶² SOR at 24-25; *see also* Answer at 23-24 (noting that the sources WWP references are consistent with the EA).

To the extent WWP alleges that the effects of the decision are highly controversial, we believe that BLM adequately addressed this issue in its FONSI:

Although the treatment of juniper with the use of prescribed fire is considered to be controversial by some groups and individuals, the effects on the quality of the human environment from this proposal are not considered highly controversial based on: 1) the number and content of the comments received from the public regarding the treatment, and 2) our review of the scientific literature conducted when completing the effects analysis (Appendix C and Section 7 of the EA).⁶³

WWP has not met its burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action requiring an EIS.

BLM Considered WWP's Comments and Data

The Department of the Interior's regulations implementing NEPA require BLM to provide for public involvement, to the extent practicable, when an EA is being prepared and to consider comments that are timely received.⁶⁴

Throughout its SOR, WWP asserts that BLM ignored data and information WWP brought to BLM's attention in comments on the EA. For example, WWP states that BLM "never explains how it will avoid destroying old growth" juniper⁶⁵ and "ignored the prevalence of invasive exotic grasses in understories—that will only thrive and increase with the rampant treatment disturbance."⁶⁶ Yet BLM responded to the issues WWP raised in its comments on the EA.⁶⁷ BLM also addressed these issues in the text of the EA.⁶⁸ WWP has not specifically identified any comments it made that BLM failed to respond to.

⁶³ FONSI at 2; *see also* Answer at 27-28.

⁶⁴ 43 C.F.R. § 46.305(a)(1).

⁶⁵ SOR at 7-8.

⁶⁶ *Id.* at 5.

⁶⁷ *See, e.g.*, EA App. N at 19 (protecting old growth trees) and 21-22 (invasive weeds).

⁶⁸ EA at 18, 68-69 (old growth junipers) and 57-58, 70-71 (invasive weeds).

As WWP admits, it has participated in public meetings, field trips, and public review and comment opportunities related to Trout Springs, illustrating the extent of public involvement BLM provided.⁶⁹ The record shows that BLM fully considered WWP's comments, data, and suggested alternatives and fulfilled its public involvement responsibilities under Departmental NEPA regulations.

BLM Complied with FLPMA

WWP contends that the juniper treatments violate the Owyhee RMP⁷⁰—and therefore FLPMA—in two ways. First, WWP argues that the juniper treatments impair watersheds, threaten sensitive species populations, and fail to address climate change.⁷¹ Second, WWP argues that BLM's decision violates the Owyhee RMP by failing to impose measurable standards of grazing use.⁷² Because the second argument addresses grazing, which is not the subject of the decision on appeal and instead is the subject of a separate BLM decision, we will not consider it.⁷³ WWP also contends that the juniper treatments violate FLPMA because they will cause undue degradation by “inflicting multiple severe disturbances across severely depleted watersheds, low sensitive species populations, and weed-vulnerable wild lands”⁷⁴ and destroying wilderness characteristics.⁷⁵

FLPMA requires BLM to “manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans” BLM develops.⁷⁶ FLPMA further requires BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands.”⁷⁷ We will first examine WWP's claim that the decision violates the Owyhee RMP by impairing watersheds, threatening sensitive species populations, and failing to address climate change, and then we will examine whether WWP demonstrated that BLM's decision violates FLPMA's mandate to prevent unnecessary or undue degradation.

⁶⁹ See, e.g., AR 000650-651 (WWP scoping comments, referencing recent field trip).

⁷⁰ Owyhee RMP (Dec. 30, 1999).

⁷¹ SOR at 26-28.

⁷² *Id.* at 25-26 (WWP's arguments about measurable standards)

⁷³ Answer at 44 (explaining that BLM issued a separate grazing decision).

⁷⁴ SOR at 8; see also *id.* at 13.

⁷⁵ *Id.* at 29.

⁷⁶ 43 U.S.C. § 1732(a) (2012).

⁷⁷ 43 U.S.C. § 1732(b).

WWP has not shown that BLM's decision is inconsistent with the Owyhee RMP. WWP's allegations are broad and premised on its disagreement with BLM's conclusions and management decisions. WWP asserts that juniper treatments will impair watersheds and threaten sensitive species, but WWP has not supported this assertion. For example, WWP states that the Owyhee RMP requires BLM to manage species to maintain or increase populations and declares that the vegetation treatments will degrade habitats for migratory birds, elk, goshawk, and other species.⁷⁸ But WWP does not provide support for its argument, nor does it attempt to explain why the explanations and conclusions to the contrary in the EA are incorrect.⁷⁹ Similarly, WWP claims that BLM failed to address climate change, which WWP asserts is required by the Owyhee RMP,⁸⁰ but this assertion is also vague and unsubstantiated and undermined by the record.⁸¹

Based on our review of the record, we conclude that BLM's juniper treatment decision is consistent with the Owyhee RMP. For example, the RMP calls for managing fire activity to counter the "increased density of western juniper [that has] eliminate[d] desirable understory vegetation" and can, "under the right conditions, . . . result in large catastrophic fires resulting in significant loss of wildlife and watershed values."⁸² Consistent with this direction, BLM's decision includes prescribed fires as a tool to "restore and maintain the native shrub steppe, aspen, and riparian communities of this area, and to restore the natural role of fire on the landscape for the long-term maintenance of these communities."⁸³ We conclude that WWP has not demonstrated that BLM's decision is inconsistent with the Owyhee RMP.

[2] Furthermore, WWP has not demonstrated that BLM's decision will cause unnecessary or undue degradation. The record shows that BLM was mindful of its responsibility to prevent unnecessary or undue degradation and chose an alternative

⁷⁸ SOR at 28.

⁷⁹ See, e.g., EA at 100 ("generally, as juniper densities increase, species diversity decreases"), 120 ("In general, restoration of grasslands, sagebrush, shrub steppe, riparian, and aspen habitats would increase the potential productivity of the area treated and could lead to increased prey for all raptors.").

⁸⁰ SOR at 28.

⁸¹ See, e.g., EA at 172 (discussing the effect of high-intensity fires—specifically those caused by the build-up of woody fuels—on carbon emissions).

⁸² Owyhee RMP at 27.

⁸³ Notice of Field Manager's Final Decision at 14 (AR 000923); see also EA at 8-9 (Conformance with Applicable Land Use Plan).

it believed would do so.⁸⁴ BLM also identified management practices it will follow before and during vegetation treatments to minimize any impacts and possible degradation to natural resources. For example, the EA explains that BLM will conduct pre-treatment inventories for proposed treatment areas, including wildlife surveys, and will mitigate any impacts on raptor nesting sites and Columbia spotted frog habitat through avoidance and adjustment of cutting specifications.⁸⁵ BLM will also conduct surveys and monitoring for special status plants, cultural sites, and noxious weeds.⁸⁶

In other cases where appellants have alleged that a BLM decision failed to prevent unnecessary or undue degradation, we have required appellants to demonstrate that BLM's decision lacked a rational basis. In those cases, we noted that BLM only defines "unnecessary or undue degradation" for certain types of activities, principally surface management of mining claims.⁸⁷ In all other cases, where BLM's governing regulations do not define the meaning of "unnecessary or undue degradation," we will not find that a BLM decision causes unnecessary or undue degradation if it has a rational basis.⁸⁸ Because we find that the EA demonstrates that BLM had a rational basis for approving the juniper treatments, and WWP does not demonstrate otherwise, we conclude that WWP does not show BLM's decision will cause unnecessary or undue degradation.

As BLM notes in its Answer, many of WWP's arguments are based on the premise that juniper must be protected.⁸⁹ But as BLM explains, in managing this area, BLM has long considered it beneficial to treat encroaching juniper in order to

⁸⁴ See, e.g., EA at 85 ("The proposed juniper projects would reduce some streambank-binding riparian vegetation that could lead to increased sediment from high intensity storm events . . . and degrade the water quality."), 105 (noting that the no-action alternative would result in long-term habitat degradation with little opportunity for recovery), 118-119 (describing the "chronic nature of habitat degradation resulting from juniper expansion" and the positive effects of juniper treatments).

⁸⁵ EA at 14-15.

⁸⁶ *Id.* at 15.

⁸⁷ See 43 C.F.R. § 3809.5 (defining unnecessary or undue degradation).

⁸⁸ See *Intrepid Potash-New Mexico, LLC*, 176 IBLA 110, 122-23 (2008); *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008).

⁸⁹ See, e.g., SOR at 29 ("Deforestation, girdling and other actions will create vast ugly, weedy, artificially manipulated areas, with unnatural features.")

restore the land to its natural condition.⁹⁰ WWP's disagreement with BLM's management decision does not demonstrate that BLM violated FLPMA.

The Board Will Not Consider Arguments WWP Did Not Raise to BLM

WWP makes two arguments on appeal that it did not articulate in its comments on the EA. First, WWP alleges in one of the headers in its SOR that "Serious Sensitive Species, Raptor and Migratory Bird Data and Analysis Defects Violate ... [the Migratory Bird Treaty Act]."⁹¹ Second, WWP alleges in another header that "EA Actions Pose High Risk of ... Rampant [Clean Water Act] Violations."⁹² While some of WWP's comments on the Draft EA discuss migratory birds and water quality,⁹³ WWP did not allege violations of the MBTA or CWA until its SOR, and nowhere does WWP specify relevant provisions of either statute or their implementing regulations.

[3] When BLM provides an opportunity for participation in its decision-making process, a party to the case may raise on appeal only those issues it raised in its prior participation or issues that arose after the close of the opportunity for such participation.⁹⁴ In this case, this means that WWP may only raise on appeal issues it raised in its comments on the EA or issues that arose after the close of the EA comment period. The rationale for this rule is that it maintains a logical framework for decision-making within the Department by allowing the initial decision-maker to confront objections to proposed actions before the Board reviews those objections on appeal.⁹⁵ In NEPA challenges, this rule is particularly appropriate because it requires parties challenging an agency's compliance with NEPA to "structure their

⁹⁰ Answer at 38, 45-46; *see also* EA at 156 ("Overall, the proposed projects would control the encroachment of juniper and improve riparian and vegetative health conditions throughout the area, restoring existing shrub steppe, aspen and riparian communities. This in turn would enhance [lands with wilderness characteristics] by restoring the area to its more natural state.").

⁹¹ SOR at 13.

⁹² SOR at 14-15.

⁹³ *See, e.g.*, EA App. N at 16, 17, 29 (migratory birds); and 18, 28, 32 (water quality).

⁹⁴ 43 C.F.R. § 4.410(c).

⁹⁵ *Great Basin Resource Watch*, 185 IBLA 1, 16 (2014) (quoting *Southern Utah Wilderness Alliance*, 128 IBLA 52, 59 (1993)).

participation so that it . . . alerts the agency to the [parties'] position and contentions” and enables the agency to give those issues meaningful consideration.⁹⁶

Accordingly, we summarily dismiss those arguments WWP raised in its SOR that it did not raise in its comments to BLM—violations of the MBTA and CWA.⁹⁷

Conclusion

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁹⁸ we dismiss those parts of WWP’s appeal that it did not raise in its comments on the EA. For the remainder of its appeal, we conclude that WWP has not carried its burden to demonstrate that BLM’s decision is premised on a clear error of law or demonstrable error of fact, that the analysis failed to consider a substantial environmental question of material significance to the proposed action, or that the decision lacks a rational basis. Accordingly, we affirm BLM’s decision.

/s/
Silvia M. Riechel
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge

⁹⁶ *Id.* (quoting *Dep’t of Transportation v. Public Citizen*, 541 U.S. 752, 764 (2008) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978))).

⁹⁷ *See WWP*, 184 IBLA at 118 (dismissing claim “[w]here 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, . . . particularly when WWP repeatedly availed itself of the opportunity to submit and supplement its comments in the decisionmaking below.”).

⁹⁸ 43 C.F.R. § 4.1.