WALLACE FOREST CONSERVATION AREA ADVISORY COMMITTEE

192 IBLA 108             Decided December 21, 2017
WALLACE FOREST CONSERVATION AREA ADVISORY COMMITTEE

IBLA 2017-300

Appeal from a decision of the Bureau of Land Management denying a protest of a forest fuels treatment decision. DOI-BLM-ID-C010-2015-0013-EA.

Affirmed.

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

   When a party appeals BLM's denial of a protest, the party must establish error in BLM's decision to deny the protest.

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

   When a party only reiterates the arguments already considered by the decisionmaker below, as if there were no decision addressing those arguments, this repetition constitutes mere disagreement with the decisionmaker and cannot establish error in a protest decision.

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.
OPINION BY ADMINISTRATIVE JUDGE RIECHEL

Wallace Forest Conservation Area Advisory Committee (Committee) appeals a July 24, 2017, decision of the Bureau of Land Management (BLM) Coeur d'Alene Field Office in Idaho, denying the Committee's protest of a forest fuels treatment decision.

SUMMARY

When an appellant challenges a decision denying its protest of a proposed action, the appellant's burden on appeal is to show error in that decision. An appellant cannot satisfy this burden by simply repeating the arguments it made in its protest as if there were no decision by the bureau addressing those arguments, because mere repetition shows only disagreement with the decisionmaker and does not show error in the decision. Conversely, an appellant may only argue on appeal issues it raised in its protest or issues that arose after the protest period, because the bureau must have an opportunity to confront objections before the Board reviews them on appeal. In this appeal, the majority of the Committee's arguments either repeat the language from its protest or raise new issues that it did not include in its protest. To the extent the Committee alleges error in BLM's decision denying its protest, it has not stated how or why BLM's decision was in error and instead expresses only disagreement with BLM's conclusions. Because the Committee has not shown error in BLM's decision, we affirm.

BACKGROUND

The Wallace L. Forest Conservation Area and the Need for Forest Fuels Treatment

The Wallace L. Forest Conservation Area (WFCA) encompasses 751 acres of BLM-managed lands about six miles east of the city of Couer d'Alene, Idaho.\(^1\) The

\(^1\) WFCA at Blue Creek Bay Vegetation Treatment and Trails, DOI-BLM-ID-C010-2015-0013-EA at 2 (May 2017) (Administrative Record (AR) Attachment 2) (Revised EA).
WFCA is surrounded by privately owned land and borders the Blue Creek Bay on Lake Coeur d'Alene.\(^2\)

Over the years, drought, insect infestations, disease agents, and climate changes altered the composition of vegetation in the WFCA, which created wildfire fuel loads and posed safety hazards to recreational users.\(^3\) In 2015, BLM contemplated development of forest management projects to address these conditions and enhance recreation opportunities.\(^4\) BLM prepared an EA to disclose and analyze the environmental consequences of three alternative projects: the proposed action, which included a forestry component to address forest health and hazardous fuel issues and a recreation component involving development of trails and parking areas; an alternative that excluded forest treatment on the western portion of the WFCA and one of the parking areas; and a no-action alternative under which BLM would not implement forest treatments or recreation developments.\(^5\)

BLM released the EA to the public for review and comment in August 2016.\(^6\) BLM received 257 sets of comments, including many from interested neighbors of the WFCA.\(^7\) BLM considered the comments and revised the EA, mostly to address new issues associated with recreation options.\(^8\) BLM also added a new alternative action that offered different recreation options, but kept the forestry treatments the same as its original proposed action.\(^9\) Based on the analysis in the revised EA, BLM issued a Finding of No Significant Impact (FONSI), finding that the forest vegetation treatments and recreation improvements described in the proposed action in the Revised EA will not have a significant effect on the quality of the

\(^2\) Id. at 28, 38.
\(^3\) Id. at 2; Notice of Final Decision Regarding Vegetation Treatments in the WFCA at 3 (July 24, 2017) (Protest Decision) (AR Attachment 6).
\(^4\) Protest Decision at 3.
\(^6\) Decision Record, Forest Management Decision (DR) at 5 (AR Attachment 4).
\(^7\) Revised EA at 8; Protest Decision at 4.
\(^9\) Revised EA at 24.
human environment, so BLM did not need to prepare an environmental impact statement (EIS).

**BLM's Forest Fuels Treatment Decision**

On June 12, 2017, based on the Revised EA and the FONSI, BLM's Couer d'Alene Field Office issued two decision records: one to implement forest fuels management actions on 616 acres in the WFCA, and the other to implement non-motorized recreation improvements in the WFCA. Only the forest management decision is at issue in this appeal. That decision approved a combination of vegetative treatment methods, including selective harvest, pre-commercial thinning, and hazardous fuels reduction work. BLM incorporated project design features to minimize impacts to sensitive wildlife, soils, hydrologic conditions, and vegetation. BLM stated that its decision conforms to the Coeur d'Alene Resource Management Plan (RMP) and indicated that treatments would begin in late 2017 and continue for up to six years through multiple phases.

**Appellant's Protest and Appeal**

The Committee protested BLM's decision. The Committee alleged violations of the National Environmental Policy Act (NEPA) and its implementing regulations, the Federal Land Policy and Management Act and the conditions under which the lands in the WFCA were deeded to the United States.

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10 FONSI, DOI-BLM-ID-C010-2015-00013-EA (Revised) at 1 (June 12, 2017) (AR Attachment 3).
11 DR at 1-2.
13 See Answer at 5 n.1 (noting that the recreation decision is subject to a separate appeal, IBLA 2017-235).
14 DR at 1-2.
15 Id. at 4-7.
16 Id. at 1, 7 (citing Record of Decision and Approved Coeur d'Alene RMP (Coeur d'Alene RMP) (June 2007) (AR Attachment 1).
17 Protest (June 22, 2017) (AR Attachment 5a).
On July 24, 2017, BLM issued a Notice of Final Decision denying the Committee’s protest. BLM attached a nine-page response to specific points the Committee raised in its protest and stated that its denial of the protest was based on its consideration of the issues the Committee raised and the applicable laws and BLM policies.\(^{20}\)

Appellant appealed the denial of its protest to this Board and petitioned for a stay of the effect of that decision, which we denied.\(^{21}\)

**DISCUSSION**

*The Committee Must Show Error in BLM’s Decision to Deny its Protest*

To succeed on the merits of its appeal, the Committee must show error in BLM’s decision to deny its protest.\(^{22}\) An appellant cannot establish error in a protest decision by asserting mere disagreement with the decisionmaker.\(^{23}\) Instead, an appellant must state how or why BLM’s denial of its protest was in error.\(^{24}\)

When an appellant repeats arguments already considered by the decisionmaker below, as if there were no decision addressing those arguments, this repetition constitutes mere disagreement with the decisionmaker and cannot establish error in the protest decision.\(^{25}\) For example, we have explained that “when appellants have filed a protest based on alleged NEPA violations, but BLM thoroughly discussed and answered the protest, and the appeal to the Board does not analyze how BLM erred in its response to the protest, the Board will summarily affirm the decision being appealed.”\(^{26}\)

Conversely, a party appealing the denial of a protest “may only raise on appeal issues it raised in its protest or issues that arose after the close of the protest

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\(^{20}\) Protest Decision at 4; Response to Specific Protest Points (AR Attachment 7).

\(^{21}\) *Wallace Forest Conservation Area Advisory Committee*, 191 IBLA 338 (2017).


\(^{23}\) *In re North Trail Timber Sale*, 169 IBLA at 261.

\(^{24}\) See *Klamath-Siskiyou Wildlands Center*, 190 IBLA at 304.


\(^{26}\) *Klamath-Siskiyou Wildlands Center*, 187 IBLA at 288-89.
27 The rationale for this rule is that it maintains a logical framework for
decisionmaking within the Department by allowing the initial decisionmaker to
confront objections to proposed actions before the Board reviews those objections on
appeal. Accordingly, when the appellant did not raise an argument in its protest,
and that issue did not arise after the protest period, we will dismiss that argument.

The Committee Has Not Shown Error in BLM’s Protest Decision

The Committee alleges error in BLM’s compliance with NEPA, FLPMA, and
the deeds by which the United States acquired the land in the WFCA, which we
address below. In addressing their arguments under NEPA and FLPMA, we first
identify the Committee’s arguments that are either simply repetitions of arguments
it made in its protest without showing error in BLM’s protest denial, or are based
on issues the Committee did not argue in its protest. We then affirm BLM with
respect to the arguments the Committee merely repeats and dismiss the arguments
that the Committee did not raise in its protest. We then examine the merits of any
arguments the Committee has raised specifically alleging error in BLM’s protest
denial, including the Committee’s argument that BLM has not complied with the
deeds to the land in the WFCA.

1. NEPA Arguments

a. NEPA Arguments Repeated from the Protest

The following are arguments the Committee repeats from its protest,
sometimes verbatim, without stating how or why BLM’s denial of its protest was in
error: BLM designed the purpose and need for the project “in such a wayD as to
constrain alternatives, and in so doing, pre-determined the decision prior to NEPA
analysis:” BLM did not analyze in the EA a reasonable range of alternatives “that

27 Colorado Wild Public Lands Inc. (Colorado Wild), 189 IBLA 392, 410 (2017),
petition for review filed, Case No. 1:17-cv-01564-WYD (D. Colo. June 26, 2017); see
43 C.F.R. § 4.410(c) (“Where the Bureau or Office provided an opportunity for
participation in its decisionmaking process, a party to the case . . . may raise on
appeal only those issues: (1) Raised by the party in its prior participation; or
(2) That arose after the close of the opportunity for such participation.”).
28 Colorado Wild, 189 IBLA at 410; Great Basin Resource Watch, 185 IBLA 1, 16
(2014) (quoting Southern Utah Wilderness Alliance, 128 IBLA 52, 59 (1993)).
29 See Colorado Wild, 189 IBLA at 410.
30 Revised Statement of Reasons (SOR) at 3. Compare SOR at 3-4 with Protest at
unpaginated (unp.) 1-2; SOR at 12-15 with Protest at unp. 2-4.
includes scientifically and ecologically sound management proposals”; BLM did not take a hard look at the impacts of BLM’s forest management decision on forest health, taking into account natural fire behavior, fire severity, and what conditions drive wildfires; BLM did not take a hard look at the impacts on the community, particularly from noise pollution caused by the forest management actions; and BLM did not take a hard look at the impacts on wildlife habitat, including elk trails.

BLM responded to each of these arguments in its protest denial. For example, BLM responded to the Committee’s arguments about the identified purpose and need for the project and the range of alternatives, explaining that the purpose of the project conforms to the governing land use plan, and “[n]one of the public comments identified options for fuels treatments that are not captured by one of the analyzed alternatives.” BLM also responded to the Committee’s arguments about taking a hard look at impacts on the local community, wildlife, forestry and fuels.

Because the Committee does not allege specific error in BLM’s response to these issues in the Protest Decision and instead merely repeats them, we do not consider these arguments on appeal and affirm BLM’s decision with respect to these arguments.

b. NEPA Arguments Not Raised in Protest

The Committee raises numerous NEPA arguments on appeal that it did not raise in its protest; nor did these issues arise after the protest period. These arguments are that BLM erred by issuing its decision based on a revised EA that BLM did not make available for public comment; BLM failed to adequately address public comments; BLM failed, despite its representations to the contrary, to consult with certain groups in the community revealing a “pre-determined

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31 SOR at 3. Compare SOR at 3-4 with Protest at unp. 1; SOR 12-15 with Protest at unp. 2-4; SOR at 18 with Protest at unp. 1.
32 Compare SOR at 15-16, 16-17 with Protest at unp. 4, 5-6.
33 Compare SOR at 5 with Protest at unp. 16, and SOR at 17 with Protest at unp. 6.
34 Compare SOR at 17 with Protest at unp. 6.
35 Response to Specific Protest Points at 1-2.
36 Id. at 5-10.
37 Klamath-Siskiyou Wildlands Center, 190 IBLA at 252.
38 SOR at 1, 3, 6.
39 Id. at 2.
decision bias”; BLM violated the Federal Advisory Committee Act (FACA) because BLM was “heavily involved with special interest bicycle shop owners” during its decisionmaking process; BLM did not take a hard look at the impact to the community with respect to property values and public access during the logging operations; the FONSI was based on the initial EA, not the Revised EA; BLM chose to separate the forest management actions and the recreation actions into two separate projects to avoid a finding of cumulatively significant impacts requiring an EIS; the FONSI and the revised EA did not address many endangered and special status species; BLM inaccurately concluded in the FONSI that possible effects on the human environment are not highly uncertain and do not involve unique or unknown risks because BLM received hundreds of letters about the effects of the decision; BLM inappropriately found that the action will not establish a precedent for future actions with significant effects and tried to minimize the overall impacts on the neighboring community; and finally, that the project may violate Federal agreements with the Coeur d’Alene Tribe, as well as Idaho’s plans for expansion of the Blue Creek Wetlands.

Because the Committee did not raise these arguments in its protest, and these issues did not arise after the protest period, we dismiss these arguments and will not consider them further.

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40 Id. at 7; see id. at 6 (arguing BLM failed to consult Birds of Prey Northwest, Back Country Horsemen, Idaho Conservation League, Kootenai County Commissioners), 8 (arguing BLM failed to consult Idaho Department of Fish and Game), and 18 (citing “evidence that BLM was already committed to the course of action for the entire EA and the NEPA analysis was a pro-forma exercise.”).
42 SOR at 8, 18.
43 Id. at 20.
44 Id. at 19.
45 Id. at 21 (referencing 40 C.F.R. § 1508.27(b)(7) (individually insignificant but cumulatively significant impacts)).
46 Id. at 19, 21.
47 Id. at 20 (referencing 40 C.F.R. § 1508.27(b)(5) (effects that are highly uncertain or involve unique or unknown risks)).
48 Id. (referencing 40 C.F.R. § 1508.27(b)(6) (precedent for future actions with significant effects or a decision in principle about a future consideration)).
49 Id. at 23.
50 Colorado Wild, 189 IBLA at 410.
c. NEPA Arguments We Address on the Merits

The Committee’s remaining NEPA arguments are those where it alleges that BLM’s protest denial is in error or where BLM did not respond to arguments made in the Committee’s protest, and we therefore address these arguments on the merits. Specifically, the Committee argues that BLM erred by failing to take a hard look at certain environmental impacts, including damage to local roads from logging equipment and the effect of BLM’s action on fire severity, and failing to complete an EIS when environmental impacts will be significant.

In evaluating the adequacy of an EA, we are guided by a “rule of reason.” 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. Furthermore, mere differences of opinion between the appellant and BLM do not provide a basis for reversal. “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.”

(1) BLM Took a Hard Look at Environmental Impacts

In its protest and on appeal, the Committee argues that BLM failed to take a hard look at the potential environmental impacts of its forest management decision. 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

51 Western Watersheds Project (WWP), 191 IBLA 351, 356 (2017) (citing Klamath-Siskiyou Wildlands Center, 190 IBLA at 304; Bales Ranch, Inc., 151 IBLA 353, 358 (2000)).
52 Id. (citing Klamath-Siskiyou Wildlands Center, 190 IBLA at 304-05; Wildlands Defense, 188 IBLA 68, 70-71 (2016); Bales Ranch, Inc., 151 IBLA at 357).
53 WWP, 191 IBLA at 356 (citing Klamath-Siskiyou Wildlands Center, 190 IBLA at 305; Wildlands Defense, 188 IBLA at 76; Wyoming Outdoor Council, 159 IBLA 388, 399 (2003)).
54 Id. (citing Klamath-Siskiyou Wildlands Center, 190 IBLA at 305; Bark, 167 IBLA at 76).
55 Klamath-Siskiyou Wildlands Center, 190 IBLA at 305 (quoting Bark, 167 IBLA at 76 (quoting In re Stratton Hog Timber Sale, 160 IBLA 329, 332 (2004))).
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.\textsuperscript{56} Taking a "hard look" means the agency conducted "a thorough environmental analysis before concluding that no significant environmental impact exists"\textsuperscript{57} and prepared a document that shows "the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project."\textsuperscript{58}

(i) Northern Rockies Ecosystem Protection Act

In its protest, the Committee argued that the Revised EA ignored the fact that "much of this area is included within the Northern Rockies Ecosystem Protection Act," which is "[a] bill to designate certain . . . public lands under the jurisdiction of the Secretary of the Interior . . . as wilderness, wild and scenic rivers, wildland recovery areas, and biological connecting corridors."\textsuperscript{59} The Northern Rockies Ecosystem Protection Act was introduced in the House of Representatives in 2007 and has not been acted upon since.\textsuperscript{60} BLM did not respond to this argument in the Protest Decision. The Committee repeats this claim on appeal to the Board, without elaboration.\textsuperscript{61}

Because the bill never became law, we see no error in BLM's failure to consider the bill in its EA. The existence of the bill, which was introduced 10 years ago and was never acted upon by Congress, is not a relevant matter of environmental concern that undermines BLM's analysis of the impacts of its decision. We find that the Committee's assertion about this proposed legislation does not show that BLM failed to take a hard look at environmental impacts.

\textsuperscript{56} Klamath-Siskiyou Wildlands Center, 190 IBLA at 310; Center for Native Ecosystems, 182 IBLA 37, 50 (2012).
\textsuperscript{57} Klamath-Siskiyou Wildlands Center, 190 IBLA at 310 (quoting 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))).
\textsuperscript{58} Id. (quoting Silverton Snowmobile Club v. U.S. Forest Service, 433 F.3d 772, 781 (10th Cir. 2006) (quoting Commission to Preserve Boomer Lake Park v. U.S. Department of Transportation, 4 F.3d 1543, 1553 (10th Cir. 1993))).
\textsuperscript{59} Protest at unp. 6; Northern Rockies Ecosystem Protection Act, 110 H.R. 1975 (Apr. 20, 2007).
\textsuperscript{60} 110 Bill Tracking H.R. 1975 (indicating a "last action date" of Oct. 18, 2007).
\textsuperscript{61} SOR at 17.
(ii) Damage to Roadways from Heavy Logging Equipment

In its protest, the Committee argued that BLM failed to disclose in its EA damage that logging equipment will cause on the roads of the Eastside Highway District.62 BLM's Protest Decision did not respond to this argument. On appeal, the Committee again argues that BLM did not disclose damage to these roads from their use by "heavy industrial logging equipment" over six years.63

BLM's Revised EA demonstrates that BLM took a "hard look" at the impacts of the proposed forest management activities on the roadways. BLM disclosed that it would use existing roads and old logging trails to facilitate vegetative treatments.64 BLM then analyzed the effect of this use on several resources, including air quality, public health and safety, socioeconomics, and weed invasion and expansion.65 This analysis included an evaluation of the impacts of dust generation, the increased risk of traffic accidents, and noise, all of which may result from the forest fuels treatment activities.66 We conclude that the record shows that BLM took a hard look at the impacts of its decision on local roadways by conducting a thorough and thoughtful analysis, and the Committee has not shown otherwise.

(iii) Logging Roads and Trails

In the Protest Decision, in response to one of the Committee’s arguments about natural fire behavior, BLM stated that the lands in the WFCA are "criss-crossed by a multitude of old logging roads and trails" created when the lands were in private ownership.67 BLM used this fact to explain the current condition of the lands.

On appeal to the Board, the Committee asserts there are no logging roads, old or new, in the WFCA.68 But the Committee has not provided any support for this disagreement. The Committee has also not explained why, even if BLM is incorrect, this error would amount to a substantial environmental question of material significance. In light of these deficiencies, we find the Appellant has not satisfied its burden to show error in BLM's Protest Decision.

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62 Protest at unp. 5.
63 SOR at 21.
64 Revised EA at 3, 13.
65 Id. at 35, 57-61, 65-67, 80-81.
66 Id.
67 Response to Specific Protest Points at 8; see Revised EA at 1, 54 (referencing old logging roads).
68 SOR at 11.
(iv) Fire Severity

On appeal, the Committee asserts that BLM “inadequately address[ed] the fire severity issue” in its denial of the Committee’s protest.69 The Committee then cites the existence of information in a 2010 article “regarding a study on logging making forests more flammable.”70 But the Committee does not indicate what BLM wrote in the Protest Decision that is inadequate. The Committee’s mere reference to this 2010 article, which primarily focuses on forest management in Australia, does not explain how BLM erred in its protest denial or how the cited information shows that BLM failed to take a hard look at the impacts of its forest fuels treatment decision on fire severity. Furthermore, the Committee did not cite this article in its protest, and, regardless, it is not clear to us that this article recommends any actions that are contrary to BLM’s chosen forest fuels management decision.71 We conclude that the Committee has not shown error in BLM’s Protest Decision with respect to the analysis of the impacts of its decision on wildfire severity.

(v) Water Quality and Quantity from Erosion

In its protest, the Committee argued that BLM did not adequately address runoff from the project area that will occur during rains and snowmelt, causing sediment and debris to flow into the Blue Creek Wetland and Blue Creek Bay, which will harm bull trout that live there.72 On appeal, the Committee states again that BLM’s EA did not address the “heavy erosion that will occur from the heavy logging operations and tree removal along with complete ground cover vegetation removal,” which will result in sediments flowing into the Blue Creek and Blue Creek Bay, contributing to degradation of Blue Creek Bay and Lake Coeur d’Alene.73 But BLM did address impacts of erosion on nearby waters, both in the EA74 and in its protest denial. In the protest denial, BLM cited the discussion in

69 SOR at 11.
70 Id. (citing article dated Feb. 11, 2010, Attachment 8 to the Committee’s original SOR).
71 See Answer at 14-15 n.4 (arguing that the studies the Committee references “tend to support, rather than undermine, the BLM’s conclusion that active management of forested lands within the wildland urban interface is an effective approach to reduce fire threats.”).
72 Protest at unp. 6.
73 SOR at 22.
74 See Revised EA at 40-42 (effects of erosion from timber and fuels management activities on fish, including bull trout), 42 (effects of the no-action alternative on
the EA about effects on bull trout and the determinations by BLM and Fish and Wildlife Service biologists that the forestry management actions will have no effect on bull trout and its critical habitat. The Committee’s disagreement with BLM’s analysis does not demonstrate error in BLM’s decision.

The Committee has not shown error in BLM’s Protest Decision or demonstrated that BLM overlooked potential impacts of the forest fuels treatment decision or failed to consider all relevant matters of environmental concern.

(2) BLM Was Not Required to Prepare an EIS

In its protest and on appeal, the Committee argues that BLM erred by not preparing an EIS because its forest fuels management decision will have significant impacts on the environment.

BLM must prepare an EIS for major Federal actions significantly affecting the quality of the environment. 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). 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.”

The Committee makes two arguments alleging error in the Protest Decision with regard to BLM’s obligation to prepare an EIS: first, the Committee challenges BLM’s overall finding that the forest management action will not have a significant impact on the environment; and second, the Committee asserts that BLM did not appropriately evaluate one of the intensity considerations, specifically, the degree to which the effects on the quality of the human environment are likely to be highly controversial.

erosion), 70-71 (effects of logging on erosion rates), 71 (effect of logging on water quality), 74 (cumulative effects on water quality and soils).

Response to Specific Protest Points at 6.

Protest at unp. 4-5, 6; SOR at 4-5, 6, 13, 19, 20-21.


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

Id. § 1508.27(b)(4).
(i) Significance Generally

In its protest, the Committee broadly asserted that "BLM attempts to bypass the requirement for an EIS by stating no environmental effects meet the definition of significance as defined by [the regulations implementing NEPA]." The Committee then stated that BLM’s FONSI is based on one individual’s opinion and not on the actual impacts to the environment.

In the Protest Decision, BLM responded to this assertion, explaining that its analysis was performed by various BLM subject matter specialists in consultation with the U.S. Fish and Wildlife Service and the Coeur d’Alene Tribe. On appeal, the Committee alleges that BLM erred in its Protest Decision. But the Committee simply restates, word for word, what it argued in its protest, without addressing BLM’s response or attempting to show error. Because the Committee only repeats the arguments it made to BLM without saying how or why BLM’s response to its protest was in error, we conclude that the Committee has not shown error with respect to the significance of impacts generally.

(ii) Controversial Effects on the Quality of the Human Environment

In its protest and on appeal, the Committee argues that BLM’s conclusion that the effects on the quality of the human environment are not likely to be highly controversial is a "complete fabrication and false statement in an attempt to avoid the necessity of an EIS." The Committee asserts that "hundreds of citizens" protested at hearings and voiced concerns about the project, which demonstrates the existence of controversy about the potential effects.

But under NEPA, controversy does not exist because people have concerns about a project. Rather, controversy exists when there is a scientific dispute about the size, nature, or effect of a proposed action. And in its decision denying the

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80 Protest at unp. 2.
81 Id.
82 Protest Decision, Response to Specific Protest Points at 3.
83 Klamath-Siskiyou Wildlands Center, 190 IBLA at 252.
84 SOR at 20; see Protest at unp. 5 (stating that BLM’s conclusion about this intensity factor “is untrue”).
85 SOR at 20.
86 See, e.g., Birch Creek Ranch, LLC, 184 IBLA 307, 326 (2014) (explaining that an action may be considered highly controversial where there is dispute about the size,
Committee’s protest, BLM explained that, under NEPA, “controversy warranting a more in-depth analysis in an [EIS] refers to scientific controversy, where the impacts of an alternative are uncertain, and not when a project . . . is unpopular with some members of the public.” The Committee does not address BLM’s response on appeal and instead repeats its argument about opposition to the project, expressing its disagreement with BLM’s decision. But disagreement alone does not show error. Because the Committee does not state how or why BLM’s response to this argument was incorrect, it has not shown error in BLM’s decision on this point.

The Committee also disputes BLM’s statements in the Protest Decision and Revised EA about the declining health of the forest in the WFCA, arguing that BLM’s conclusions lack “adequate evidence” and are contrary to a May 2017 scientific study published in the Proceedings of the National Academy of Sciences. The gist of the Committee’s argument seems to be that there are scientists who would recommend different ways to manage forest fuels than the method BLM has chosen. The Committee asserts that this issue cannot be resolved unless BLM prepares an EIS.

But disagreement about the best way to manage forest fuels does not show the existence of scientific controversy over the effects of BLM’s selected forest fuel management activities. The Committee does not identify any specific error in BLM’s analysis or methodologies or any dispute over the size, nature, or effect of the activities. Further, we note that the Committee did not cite the May 2017 article in its June 2017 protest, but BLM nevertheless responded to the Committee’s

nature, or effect of the action; the extent of public opposition to the project is not relevant to this determination).

87 Response to Specific Protest Points at 3-4 (citing Federal case law).
88 In re North Trail Timber Sale, 169 IBLA at 261.
89 SOR at 4-5 (citing Responses to Specific Protest Points at 1; Tania Schoennagel et al., Adapt to more wildfire in western North American forests as climate changes, 114 PROC. NAT’L ACAD. SCI. 4582 (2017)); see Protest at unp. 6 (“BLM’s analysis of the forest health and measures to clear it contradicts scientific research”).
90 See SOR at 4-5 (citing “the need to shift fire and . . . fuels management policy to one that is relevant to the conditions that forests in the west are now facing due to warming climate.”)
91 SOR at 4.
92 See Arizona Zoological Society, 167 IBLA 347, 356-57 (2006) (distinguishing a controversy over the efficacy of a project from “a controversy over the potential effects of the project upon the human environment”).
93 Birch Creek Ranch, LLC, 184 IBLA at 326.
contentions that fuels management was not necessary by discussing the basis for the forest management decision and a different article the Committee cited. The Committee does not allege or show error in BLM's response.

The Committee has not carried its burden to demonstrate 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. The Committee therefore has not shown error in BLM's denial of its protest with respect to NEPA compliance.

2. **FLPMA Arguments**

In its protest and on appeal, the Committee argues that BLM’s forest management decision violated the Coeur d’Alene RMP. 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. In this case, BLM’s decision must be in accordance with the Coeur d’Alene RMP, which is the land use plan that governs BLM’s management of the public lands and resources in the WFCA.

a. **FLPMA Arguments Repeated from Protest**

The only argument the Committee makes on appeal about RMP compliance that it also raised in its protest is that BLM’s forest fuels treatment decision is contrary to the RMP’s designation of Blue Creek Bay as a Watchable Wildlife Viewing Area. In the Protest Decision, BLM explained that this designation does not preclude the area from being managed for other uses and, moreover, that vegetation management to reduce hazardous fuels and restore forest health is an authorized action in Watchable Wildlife Viewing Areas. The Committee does not allege specific error in BLM’s Protest Decision response on this issue and therefore has not fulfilled its burden to show error in the Protest Decision regarding compliance with the governing RMP.

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94 Protest Decision, Response to Specific Protest Points at 8-9; see also id. at 1-2 (explaining the purpose and need for the action).
95 Protest at unp. 2, 5; SOR at 2, 9, 11-12, 19, 22.
97 SOR at 9, 22; Protest at unp. 5.
98 Protest Decision at 4-5 (citing the Coeur d’Alene RMP); see Coeur d’Alene RMP at 15-16 (vegetation goals in forests and woodlands), 41-42 (wildland fire management goals), 45 (forestry and woodland products goals), 63 (goals for Watchable Wildlife Viewing Areas).
b. FLPMA Arguments Not Raised in Protest

The Committee did not raise the following arguments about BLM’s compliance with the Coeur d’Alene RMP in its protest before BLM: BLM violated FLPMA’s multiple-use mandate; BLM violated provisions of the RMP protecting bald eagles; BLM violated RMP provisions about protecting big game, including elk, and its habitat; BLM violated RMP provisions applicable to endangered and special status species; and BLM violated an RMP provision about soil resources. Because the Committee did not raise these issues in its protest, we will not address them on appeal.

We conclude that the Committee has not demonstrated error in BLM’s compliance with the Coeur d’Alene RMP.

3. Deed Restriction Arguments

In its protest and on appeal, the Committee asserts that BLM’s forest management decision is inconsistent with the deeds through which BLM acquired the land in the WFCA and “the intent of the acquisition.” The Committee faults BLM for identifying the WFCA as “multiple use public land” when the deeds indicate that the land was transferred for the purpose of preservation, not development. The Committee argues that the deeds, the Congressional declaration of policy in FLPMA, and the purpose of the Conservation Fund, which is the organization that transferred the land to BLM, dictate that BLM manage the land “lightly . . . , closed to motorized vehicles, a sanctuary for wildlife with unaltered natural landscapes.”

BLM explains that the Federal government re-acquired the lands in the WFCA through a series of conveyances between 1992 and 2003. Some of those conveyances were brokered by The Conservation Fund, which received the property

99 SOR at 9.
100 Id. at 11-12.
101 Id. at 12 and 22.
102 Id. at 19.
103 Id. at 22.
104 Colorado Wild, 189 IBLA at 410.
105 SOR at 9; see id. at 8-10, 16; Protest at unp. 5.
106 SOR at 9.
107 Id. at 16; see id. at 10 (citing 43 U.S.C. § 1701 (2012) and the purpose of the Conservation Fund, including forest conservation and wildlife preservation).
108 Answer at 18.
from the grantors and then re-conveyed it to the United States. In its decision denying the Committee’s protest, BLM further explained that the primary grantor was Jack Forest, who asked “that the property be named the Wallace L. Forest Conservation Area in honor of his father, and that the lands be managed for conservation typical of North Idaho.” BLM clarified that this means the land would be “managed as a working forest, with opportunities for non-motorized public recreation.” BLM stated that it honored Mr. Forest’s request by giving the land the name Mr. Forest proposed and by adopting rules limiting motorized use. BLM explained that it manages the public land in the WFCA for multiple use and sustained yield under FLPMA and the RMP, and that its vegetation treatments are needed to actively manage these multiple-use public lands for the long-term health of the forest and to reduce hazardous fuels.

We have reviewed the deeds that conveyed the land in the WFCA to the United States and found no restrictions that would preclude BLM’s forest fuels treatment decision. The Committee has not identified any specific provision of the deeds or any other authority that prohibits BLM’s decision. We find that BLM’s decision is not inconsistent with the deeds conveying the lands in the WFCA, and the Committee has not shown error in BLM’s decision.

4. The Committee Was Not Prejudiced by BLM’s Identification of an Incorrect Address for the Boise Office of the Field Solicitor

Finally, the Committee asserts that, in the part of its decision describing the appeals process, BLM provided an inaccurate address for the Boise Office of the Field Solicitor. The Committee states that because of this error, “the appeal could be denied simply because the Office of the Field Solicitor was never notified of the appeal.”

Although BLM made a typographical error in its decision and inverted the numbers in the Field Solicitor’s address, the Committee’s certificate of service for

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109 Id.
110 Protest Decision at 2.
111 Id.
112 Id.: see Notice of Final Supplementary Rules for Public Lands in Idaho: Blue Creek Bay Recreation Management Area, 75 Fed. Reg. 76483, 76485 (Dec. 8, 2010).
113 Response to Specific Protest Points at 8.
114 AR Attachment 7 (Deeds).
115 SOR at 22-23.
116 Id. at 23.
117 Protest Decision at 4.
its notice of appeal and statement of reasons indicates that it sent the document to
the correct address.\textsuperscript{118} BLM’s error was therefore harmless and does not provide a
basis for reversal.

RESPONSE TO DISSENT

In his dissent, Judge Jackson opines that the Board should refrain from
ruling on the merits of the Committee’s appeal until BLM “submit[s] its entire case
file and ‘complete administrative record.’”\textsuperscript{119} Judge Jackson believes that the
administrative record BLM submitted is incomplete because it contains “only five
documents . . . from its case file”\textsuperscript{120} and does not include, for example, the original
draft EA, comments received on the draft EA, internal or external correspondence,
and data supporting the findings in the EA.

The Board’s regulations do not require a bureau to submit its “case file” or
any original documents. The regulations require “the office of the officer who made
the decision” to send the Board “[t]he complete administrative record compiled
during the officer’s consideration of the matter leading to the decision being
appealed.”\textsuperscript{121} The cases Judge Jackson cites for the notion that the Board requires
an original case file all pre-date the Board’s regulatory requirement to submit the
administrative record.\textsuperscript{122} The regulation recognizes the reality that an
administrative record is often a subset of an agency’s case file or project file,
because not all documents generated in the course of a project are considered by the
decisionmaker.

We disagree with Judge Jackson’s assumption that the record BLM
submitted for this appeal is not its complete administrative record. The number of
documents in an administrative record does not determine the completeness of the
record. Nor does the absence of a particular document that we know to exist, like
the draft EA, indicate an incomplete administrative record. Rather, the office of the
decisionmaker determines what documents constitute the complete record that was

\textsuperscript{118} SOR at 24 (certificate of service).
\textsuperscript{119} 192 IBLA at 132.
\textsuperscript{120} Id. at 129.
\textsuperscript{121} 43 C.F.R. § 4.411(d)(3).
\textsuperscript{122} See Interior Board of Land Appeals and Other Appeals Procedures, 75 Fed. Reg. 64655, 64659 (Oct. 20, 2010) (final rule) (“The final rule also adds a new § 4.411(d),
specifying what the office of the officer who made the decision must do after
receiving a notice of appeal. The office must forward to the Board the notice of
appeal and any accompanying documents, as well as the complete administrative
record.”).
before the decisionmaker when he or she made the decision on appeal. It is not appropriate or necessary for us to speculate about what other documents might exist and could have been included.

While certainly other documents related to the WFCA forest fuels treatment decision may exist, their absence from the administrative record indicates that the decisionmaker did not consider them. As the United States District Court for the District of Columbia has held, "absent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record."\(^{123}\) In this case, the record included all of the documents the decisionmaker stated that he considered.\(^{124}\)

Judge Jackson points specifically to the absence from the record of the draft EA and the original comments submitted on the draft EA. But in the Revised EA, which BLM included in the administrative record, BLM re-stated the substantive comments received on the draft EA and responded to those comments.\(^{125}\) We will not assume that, in addition to the Revised EA, the decisionmaker considered the draft EA and original comments such that they should have been included in the administrative record. Moreover, in this case, the record supports BLM's decision, the appellant has not argued that the record is incomplete, and the draft EA and text of the original comments are publicly available on BLM's website.\(^{126}\) In these circumstances, we see no reason to remand this case.

Nothing in the record or the pleadings suggests the absence of any documents that the decisionmaker considered and therefore should have been included in the administrative record, and Judge Jackson's assumption that BLM omitted correspondence or data from the record is speculative.

Finally, with respect to Judge Jackson's position that the Board has "erect[ed] rules of practice to avoid deciding issues raised on appeal,"\(^{127}\) his view is


\(^{124}\) DR at 7 (citing the Coeur d'Alene RMP, Revised EA, and FONSI).

\(^{125}\) Revised EA, Appendix Q.


\(^{127}\) 192 IBLA at 134.
contrary to long-established Board precedent and the burden of proof an appellant must satisfy on appeal.\textsuperscript{128}

CONCLUSION

We conclude that the Committee has not shown error in BLM’s decision denying the Committee’s protest. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,\textsuperscript{129} we affirm BLM’s decision.

\textit{/s/}

Silvia M. Riechel
Administrative Judge

I concur:

\textit{/s/}

Amy B. Sosin
Administrative Judge


\textsuperscript{129} 43 C.F.R. § 4.1.
ADMINISTRATIVE JUDGE JACKSON DISSenting:

I am unable to concur in affirming BLM's decision in this case.

BLM failed to provide its complete administrative record to authorize logging on Blue Creek Bay, Lake Coeur d'Alene.

First and foremost, BLM only provided the Board with a "package" containing only 5 documents, which apparently came from its case file that was serialized as DOI-BLM-ID·C010-2015-0013-EA: (1) Forest Management Decision (FMD) for the Wallace L. Forest Conservation Area (WFCA) at Blue Creek Bay Vegetation Treatment and Trails; (2) Revised Environmental Assessment (EA) for the WFCA at Blue Creek Bay Vegetation Treatment and Trails; (3) Finding of No Significant Impact (FONSI) for the WFCA at Blue Creek Bay Vegetation Treatment and Trails; and (4) Notice of Final Decision Regarding Vegetation Treatments in the WFCA (with response to protests). Its package also included copies of a 2007 Resource Management Plan (RMP), as well as appellant's protest, notice of appeal, stay petition, and statement of reasons with attachments. BLM provided no originals, only copies of the 4 documents at issue on appeal (i.e., its FMD, EA, FONSI, and Final Decision). It provided no documents or other information supporting its findings in the FMD, EA, FONSI, and Final Decision (e.g., BLM's repeated characterization of the WFCA as being in "poor heath," an issue contested by appellant). Nor does it include internal or external correspondence (e.g., emails obtained from BLM under the Freedom of Information Act (FOIA) suggesting bias by those who prepared the EA), meeting notes, telephone memoranda, or similar records (e.g., WFCA Advisory Committee Report on Findings, dated October 10, 2016), or WFCA Advisory Committee member comments on scoping and the draft EA.

Simply stated and in my view, BLM did not provide the Board with its case file or a complete administrative record, as required by rule and Board precedent. Others believe BLM is entitled to a presumption of regularity that whatever it provides to the Board is the "complete administrative record" that cannot be questioned unless there is evidence to the contrary. I do not believe the presumption should be extended to the compilation of the "complete administrative record," but even if it did, I would find the emails obtained from BLM under FOIA and the October 2016 report submitted to BLM suffice for that purpose.
BLM noncompliance with the rule at 43 C.F.R. § 4.411(d)(3) prevents the Board from independently reviewing the decision on appeal and determining whether it is adequately supported in the record and reached the right result for the right reason.

The Board has long recognized the seminal importance of having the complete administrative record of the decision on appeal: "[I]t is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board . . . forward the complete, original administrative record to the Board within ten business days of receipt of a notice of appeal." To the same effect, the Board has stated its expectations in clear, unmistakable terms: "BLM has no discretion as to whether the case file should be submitted to the Board for review. A case file may not be withheld while BLM reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons." To underscore its importance, the Board has even provided guidance for how to amass a complete administrative record:

The proper assembly of a case record should not be a difficult matter. However, the agency should not wait to begin this task until after a notice of appeal has been filed. It should start to assemble a file at the initiation of any process which might culminate in a decision subject to this Board's review. The first document placed in the record should be the one that initiates the process. In certain cases, this might be a notice from the agency, which should be placed in a file with any documents necessary to establish the basis for issuing the notice . . . . Any correspondence should be dated and included in the case file chronologically as it is issued or received along with memoranda of meetings and telephone conversations. See NLRB v. West Texas Utilities Co., 214 F.2d 732, 737 (5th Cir. 1954). It may be necessary to add additional reports, plans, and other documents, depending on the type of case. The final documents added should be the decision and proof of service thereof. The record should be maintained in such a manner that when a notice of appeal is timely filed, the only task remaining is to add the notice to the record and transmit it immediately to this Board.[3]

1 Utah Chapter Sierra Club, 114 IBLA 172, 175 (1990).
3 Mobil Exploration and Producing Southeast, Inc. (MOEPSI), 90 IBLA 173, 177 (1986).
In a similar vein, the Board quoted from the BLM Manual for how to prepare a case file and commended to both the Minerals Management Service (MMS) and the Office of Surface Mining Reclamation and Enforcement (OSM) their use of its approach, which then stated:

If an appeal is filed against a Bureau decision, the office in which the appeal is filed (usually the District Office) will forward the official case file to the Board within 10 business days of receipt of the appeal, using Bureau Form 1842-1 as a cover memorandum. The official case file must be reviewed for completeness, and whether associated reports, files, etc., (e.g., the resource management plan or the master appraisal) are included or otherwise appropriately referenced. It is recommended that a dummy file be created and retained for interim use and as assistance to the field solicitor. All files are sent certified mail, return receipt requested to ensure delivery and notify the sender of the delivery date. The Board will docket the case, inform the State Office of the docket number, and then adjudicate the case. The Board is the sole determinant as to whether or not it will hear an appeal. See James C. Mackey, [96 IBLA 356, 94 I.D. 132 (1987)] and 43 CFR § 4.400-4.414. Extra care must be taken in the processing and handling of the official record concerning the appeal, as disciplinary action will be taken against Departmental employees who tamper with the official record.[4]

As the Board echoed in Dugan Production Co.: "MMS is reminded of its obligation to submit the complete, original administrative record to this Board, including all original documentation involved in the matter. Failure to provide an adequate administrative record that contains documentation establishing relevant facts may, as in this case, result in our being unable to affirm decisions by MMS."[5] Unless BLM affirmatively represents it provided the Board with the “complete administrative record” for the decision being appealed, we may “summarily set

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[5] Dugan Production Co., 103 IBLA 362, 364 (1988) (emphasis added), vacated on reconsideration, 117 IBLA 153 (1990) (vacated based on evidence provided on reconsideration that was missing from the record provided by BLM): but see id. at 161 (Administrative Judge Hughes dissenting) (“The majority's action sends the clear message to MMS (and to BLM and the Office of Surface Mining Reclamation and Enforcement) that it has no obligation to comply with the Board's demands that we be given the complete, original administrative record when the notice of appeal is filed. Instead, the Board today tells the agency that it only needs to worry about preparing the case file if it loses the first round.”).
aside a decision and remand the case to rectify a deficient record.” The Board may also set aside and remand a decision “if it is not supported by a case file providing information upon which the Board may conduct an independent, objective review of the basis of the decision.” I would follow that approach and either require BLM to submit its entire case file and “complete administrative record” for the Forest Management Decision or set aside and remand its decision for not having done so.

The Board here holds that BLM need not provide its entire case file to the Board, which I believe is an integral part of a “complete administrative record.” There are no consequences to BLM so long as a majority of the Board finds the record provided by BLM is sufficient to affirm its decision. In fact, the only sanction for not complying with our rule is that the Board might conceivably vacate and remand a decision on appeal, as occurred in Dugan Production, but even then, the Board could later set aside its remand if BLM belatedly provided evidence that was missing from the administrative record earlier submitted to the Board. Of even greater concern to me are potential impacts to the Board’s decisionmaking process and reputation. Deferring to BLM on what documents the Board needs to consider in order to review its decision could put Board credibility and our decisionmaking at risk of not being viewed by the public as fair, impartial, and independent. I would err on the side of transparency and require full compliance with 43 C.F.R. § 4.11(d)(3) before affirming a BLM decision on appeal.

I find the documents BLM provided to the Board simply do not constitute its entire case file in DOI-BLM-ID-C010-2015-0013-EA or represent the complete administrative record for the Forest Management Decision at issue on appeal. Since I do not know what is in the case file or missing from the administrative record in this case, I cannot in good conscience perform an independent review and determine whether the decision on appeal reached the right result for right reason based on so scant a record as was here provided by BLM. Others may find these documents constitute a “complete administrative record,” but I do not. Others may believe it is appellant’s burden to identify specific deficiencies in the record provided to the Board, but such a burden would be nearly impossible for them to meet. After all, BLM is not required to identify or provide a copy of its administrative record to the appellant, and the original of its “complete administrative record” can only be viewed at the IBLA office in Arlington, Virginia. Imposing such a burden on

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6 Larry Smith, 183 IBLA 321, 323 n.2 (2013) (citing MOEPSI, 90 IBLA at 177).
8 See supra note 5.
appellants is neither fair nor necessary where the Board is fully capable of enforcing its rules, as it does when dismissing an untimely appeal under 43 C.F.R. § 4.411(a).

*BLM's noncompliance with our rule will make defense of its decision more difficult if judicial review is sought.*

When we affirm a decision based on less than the entire case file and a complete administrative record, we do a disservice to the Department by hamstringing the Department of Justice's ability to defend the Department and making it far more likely that our decision will be set aside on judicial review. This concern was detailed in *Dugan*, wherein the Board stated:

... [T]he agency casefile must be complete because it may be subject to direct judicial scrutiny. It is well established that, absent a complete record, a reviewing court is incapable of complying with the procedural requirements statutorily mandated by the Administrative Procedure Act (APA), 5 U.S.C. §§ 501 through 706 (1982). *See, e.g.*, *Higgins v. Kelley*, 574 F.2d 789, 792 (3rd Cir. 1978). Where the announced validity of the agency's action is not sustainable on the administrative record made by that agency, courts are instructed to vacate the agency decision and remand the matter for further consideration. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

When a suit for judicial review of Departmental action is filed, the Board forwards to the reviewing court the agency casefile that it has used, together with pleadings filed with it by the parties. In so doing, the Board is required to certify, under oath, that the records before it constituted the agency's complete administrative record in the matter, so that the reviewing court may meet its statutory requirements under the APA. Thus, the onus is on the Board to ensure that it has received the complete file from the Departmental agency that is the sole repository of documentation on the matter, in this case, the RMP office, MMS. *By requiring Departmental agencies to assemble case records prior to administrative review, the Board not only ensures that it will have an adequate basis for intelligent review of the correctness of the agency's decision, but also greatly facilitates handling of appeals to the judiciary and, ultimately, avoids having decisions by agencies of the Department vacated on judicial review.*

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10 *Dugan Production Co.*, 103 IBLA at 364 (emphasis added); see *MOEPSI*, 90 IBLA at 177.
It is difficult to envision how a reviewing court could defer to any findings and conclusions based on so meagre an administrative record as is here presented.

For all of the above reasons, I dissent from our affirming the Forest Management Decision based on less than the entire case file and, therefore, not a complete administrative record.

*The Board should not erect rules of practice to avoid deciding issues raised on appeal.*

I also write separately to express my concern with the majority disregarding issues and arguments, either because they repeat previously rejected issues and arguments or because they raise new issues or arguments not previously raised and rejected. When the Board applies such rules in its decisionmaking process, it does not preclude these issues from being raised and decided on judicial review. What I find truly objectionable is the transformation of past dicta into a Board holding that must be followed. Under similar circumstance, we frequently decided the merits of an issue and then criticized the appellant for raising such issues, but we are now proceeding to erect a rule of pleading that may become binding on what issues may be considered by the Board in future appeals. This is unnecessary, because our refusal to decide an issue because it was previously raised and rejected or not previously raised in the administrative process simply means an appellant has exhausted administrative remedies and can have these issues decided on judicial review without the benefit (or burden) of a Board decision on the merits.

The Board undoubtedly has the authority to decide these issues pursuant to its de novo authority to decide cases as fully and finally as might the Secretary. We can choose not to decide an issue for any reason or no reason at all, but our choice is not binding on a Federal District Court on judicial review. I therefore believe the Board can decide all issues raised on appeal, but recognize that the scope of our discussion in deciding such issues can be a function of the quality of BLM's earlier rejection of an issue or the similarities and differences between a “new” issue and those previously raised in the administrative process or, even, the importance of the “new” issue to a full and proper adjudication of the BLM decision under review. Thus, based on the arguments and issues advanced in appellant's statement of reasons (SOR), I believe the Board should address their merits and not summarily reject them. After all, many of the "new" issues were earlier raised in the WFCA Advisory Committee Report on Findings, dated October 10, 2016,11 and many of its previously raised and rejected arguments were summarily rejected by BLM.

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11 SOR, Att. 6.
I, therefore, respectfully dissent.

/s/
James K. Jackson
Administrative Judge