



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

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October 9, 2009

ORDER

WESTERN WATERSHEDS PROJECT,)	AZ-LLAZCO1000-09-02
)	
Appellant)	Appeal from the Assistant Field
)	Manager's Final Decision dated
v.)	December 17, 2008, involving the Big
)	Sandy, Los Molinos and Diamond Joe
BUREAU OF LAND MANAGEMENT,)	Allotments, Kingman Field Office,
)	Arizona
Respondent)	
-----)	
BYNER CATTLE CORPORATION,)	
)	
Intervenor)	

Appellant's Motion for Summary Judgment Granted; Appealed Decision Set Aside

I. Summary

Appellant Western Watersheds Project (WWP) has appealed a December 17, 2008, final decision (Final Decision) issued by the Field Manager of the Kingman Field Office, Bureau of Land Management (BLM), arguing, among other things, that BLM violated the National Environmental Policy Act (NEPA). The Final Decision renewed, with modifications, the grazing permit of Byner Cattle Corp. (Byner Ranch) for the Big Sandy, Los Molinos, and Diamond Joe Allotments (collectively the "Complex").

Most of the actions authorized by the Final Decision were analyzed as the "proposed action" in an Environmental Assessment (EA) issued in September 2008.

Among other things, the Final Decision authorized the construction of water facilities (a.k.a., "proposed waters") and spring developments.

Each party has filed a motion for summary judgment.¹ As more fully explained below, WWP's motion must be granted because the EA fails to (1) address the potential for the new water facilities to dewater the Big Sandy River so as to cause significant degradation of the environment or (2) even mention the spring developments, their environmental effects, or significance of those effects.

These failures lead to the conclusion that the EA does not contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the actions authorized by the Final Decision so as to allow for informed decisionmaking and public comment. Therefore, the EA did not comply with NEPA.

II. Background Of Undisputed Facts

The following facts are undisputed. The Complex consists of 98,736 acres of public lands located about 50 miles southeast of Kingman, Arizona. The Complex occupies the Hualapai Mountains, the western slopes of the Aquarius Mountains, and the north-south trending Big Sandy River Valley lying between the two mountain ranges. Ex. 10 at 3.²

The public lands within the Complex are part of the Big Sandy Watershed. The Big Sandy River drains a large portion of those lands, including the eastern slopes of the Hualapai Mountains and the western slopes of the Aquarius Mountains. *Id.*

¹ On August 7, 2009, Byner Ranch has also filed a motion to strike one of WWP's filings. That motion is hereby denied.

² A record cite beginning with "Ex." refers to a document labeled as an exhibit and submitted by BLM in its initial filing of the administrative record shortly after the appeal was filed.

The Complex's riparian areas are found along the Big Sandy River, Deluge Wash, and Tomkins Canyon and at seeps and springs. About 14.75 miles of the River flow through the complex, with approximately 1.25 miles located on public lands and 13.5 miles on private land. On the public lands, the River's flow is either ephemeral or intermittent and is subsurface most of the year. *Id.* at 4-5.

On August 1, 2008, BLM issued a Rangeland Health Analysis (RHA) of the Byner Complex, evaluating compliance with the applicable rangeland health standards (Standards). Ex. 10. A BLM interdisciplinary team found that Standard 1 (upland sites) was being met at all 10 key areas and that 9 of the 10 key areas were meeting or making significant progress towards meeting Standard 3 (desired resource conditions). *Id.* at 55-58

While the interdisciplinary team did not evaluate the numerous springs in the Byner Complex, it surmised

that the springs in the mountainous areas of all three allotments meet Standard 2 [(riparian-wetland sites)] because of low year-round grazing pressure during the last 20 years. Some springs located in the lower portions of the three allotments may not meet Standard 2 because of higher year-round grazing pressure during the last 20 years.

Id. at 28.

It did evaluate portions of Deluge Wash and the Big Sandy River and concluded that Standard 2 was being met in the Upper Deluge Wash but was not being met in segments 6A and 6B of the River. *Id.* at 28, 56. Those segments were found to be "functioning at risk, trend not apparent." The team identified groundwater pumping from privately-owned wells and excessive deposition as factors contributing to the "functioning at risk" condition of the River segments. *Id.* at 28, 56.

Based on its analysis, the team recommended a "grazing strategy" of implement[ing] a grazing management system that provides rest for both cool and warm season grasses, forbs and shrubs. This system needs to help eliminate distribution problems along the River, the

lower areas above the River and the Mountain areas of the allotment. Range improvements needed to implement this grazing management system will be identified.

Id. at 47.

To carry out this strategy, three alternative grazing management plans were identified, including one proposed by Byner Ranch. One of BLM's proposals and Byner Ranch's proposal were much alike, contemplating the same reduction in the authorized number of cattle, similar rest/rotation schedules for grazing the numerous pastures of the Byner Complex, and construction of the same range improvements. *Id.* at 47-52.

BLM described the improvements for the Mountain Pasture as 2 traps requiring 4 miles of fence, 14 additional miles of fence for pasture boundaries, and watering facilities consisting of 3 windmills, 7 miles of pipeline, 3 storage facilities, and 7 troughs. The improvements for the East Pasture were 1 mile of fence, a cattle guard and watering facilities consisting of 2 wells, 5 miles of pipeline, 2 storage facilities, and 4 troughs. *Id.* at 49-50. The RHA does not specifically discuss where or how these facilities are to be located, constructed, or combined to deliver water.

There is a small scale map which was attached to the RHA and depicts with a star the general location of each of seven "proposed waters." The term "proposed waters" is not defined so that it is unclear whether it refers to wells, windmills, pipelines, water storage facilities, troughs, or some combination thereof.

In September 2008, BLM issued the EA analyzing alternatives for meeting the grazing strategy first defined in the RHA as well as "no action" and "no grazing" alternatives. Ex. 7. Under Alternative 1, the proposed action, BLM contemplated authorizing in a 10-year grazing permit the components of Byner Ranch's proposal described in the RHA, i.e., the reduction in the authorized number of cattle, the rest/rotation grazing schedules, and the range improvements.

The EA first describes the range improvements exactly as they were described in the RHA, with only two wells being mentioned. *Id.* at 6. Confusingly, without further explanation, the EA later states that five wells will be drilled. *Id.* at 14.

Like the RHA, the EA only generally and vaguely identifies the locations of water facilities by referencing the RHA map depicting "proposed waters." *Id.* at 6. The EA similarly does not specifically discuss where or how the water facilities are to be located, constructed, or combined to deliver water.

Instead, it only provides the following general guidelines:

Pipelines: Whenever possible, water pipelines would be buried. The trench would be excavated by a backhoe, ditch witch or similar equipment. Plastic pipe would be placed in the trench and the excavated material would be used to backfill. Most pipelines would have water tanks spaced as needed to achieve proper livestock distribution.

.....

Wells: Well sites are selected based on geologic reports that predict the depth to reliable aquifers. All applicable state laws and regulations that apply to ground water would be observed. See watering facilities below for a description of attendant facilities associated with a well.

Watering facilities: All watering facilities would be designed and managed to provide year round water for wildlife. Troughs would be placed no higher than 20" above ground level to facilitate use by wildlife. A wildlife escape ramp would be installed on all troughs. These facilities typically consist of a trough, storage tank and pipelines to and from the tank and trough. Total ground disturbance is usually less than one acre.

Id. at 3-4. BLM concludes that "[b]y installing additional water sources the impacts to riparian areas should be lessened because they will draw livestock into areas away from riparian vegetation." *Id.* at 10.

On September 26, 2008, BLM issued a proposed decision to adopt its proposed action and a Finding of No Significant Impact (FONSI) regarding the proposed action. In the proposed decision, BLM also contemplated that "certain

springs" would be developed, Ex. 5 at 4, although these developments were not mentioned in the EA nor described in the proposed decision.

After WWP submitted a protest of the proposed decision, BLM issued the Final Decision which authorized not only the proposed action but also the vague plan to develop "certain springs." In that regard, BLM stated that "certain springs located on the Byner Allotment Complex will be developed to enhance riparian habitat. This involves fencing off the water sources at the spring and piping water to a trough outside the protected area. This work will be on going over the term of the grazing permit." Ex. 2 at 6-7.

III. Discussion

A. Summary Judgment Standards

The standards for evaluating a motion for summary judgment are set forth in 2 Moore's Federal Practice § 56.15[8] as follows:

The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded. . . . It is not the function of the trial court at the summary judgment [stage] to resolve any genuine factual issue, including credibility; and for purposes of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party

Consistent with the foregoing, the Interior Board of Land Appeals (Board) has stated:

To obtain summary judgment there must be no true issue of fact. *Friends of the Earth v. Carey*, 401 F. Supp 1386 (S.D.N.Y. 1975); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945). When contemplating summary judgment all factual inferences must be drawn in the light most favorable to the opposing party. *S. J. Groves & Sons v. International Brotherhood of Teamsters*, 581 F.2d 1241, 1244 (7th Cir. 1978); *Fitzsimmons v. Best*, 528 F.2d 692, 694 (7th Cir. 1976).

Larson v. BLM, 129 IBLA 250, 252 (1994).

B. NEPA Principles

The determinative issue is whether the EA's description and impact analysis, if any, of the contemplated water facilities and spring developments complied with NEPA. The relevant principles governing NEPA's application are as follows.

"The policy goals of NEPA are to protect and promote environmental quality, 42 U.S.C 4331 (1994), through a set of 'action-forcing' procedures." *Colorado Environmental Coalition, et al.*, 149 IBLA 154, 157 (quoting *Robertson v. Methowvalley Citizens Council*, 490 U.S. 332, 348 (1989)).

NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." *Vermont Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). . . .

In *Robertson v. Methowvalley Citizens Council*, 490 U.S. 332, 348 (1989), the Court stated:

It is now well settled that NEPA does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.

National Wildlife Federation, 145 IBLA 348, 378 (1998).

Informed decisionmaking is fostered by informed public participation in the NEPA process. "One of NEPA's goals is to facilitate 'widespread discussion and consideration of the environmental risks and remedies associated with the pending project,' thereby augmenting an informed decisionmaking process." *LaFlamme v.*

FERC, 852 F.2d 389, 398 (9th Cir. 1988)(quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980)(per curiam)).

Thus,

[s]ection 102(2)(C) of NEPA and its implementing regulations generally require BLM to encourage and facilitate public involvement in the NEPA process. In discussing NEPA's purpose, 40 CFR 1500.1(b) states that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken," adding that "public scrutiny [is] essential to implementing NEPA." Further, in discussing NEPA's policy, 40 CFR 1500.2 states that "Federal agencies shall to the fullest extent possible . . . [i]mplement procedures to make the NEPA process more useful to decisionmakers and the public," and "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." In preparing environmental assessments, agencies are directed to "involve environmental agencies, applicants, and the public, to the extent practicable" 40 CFR 1501.4(b). Part 1506 of 40 CFR, which is titled "OTHER REQUIREMENTS OF NEPA," includes 40 CFR 1506.6, which is titled "Public involvement." 40 CFR 1506.6(a) directs Federal agencies to make diligent efforts to involve the public in "implementing their NEPA procedures." 40 CFR 1506.6(b) requires, in relevant part, that Federal agencies "[p]rovide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." Finally, 40 CFR 1506.6(d) mandates that Federal agencies "[s]olicit appropriate information from the public."

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Where the agency has engaged in some type of public process, the courts have scrutinized that process on a case-by-case basis to determine its adequacy.

Lynn Canal, 169 IBLA 1, 4-5; see also *The Wilderness Workshop*, 175 IBLA 124, 133 (2008) (same).

In deciding whether an . . . EA promotes informed decisionmaking, it is well settled that a rule of reason will be employed; thus, the question becomes whether the . . . EA contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed [action]. *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)).

Colorado Environmental Coalition, 149 IBLA 154, 157 (1999)

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information." *Blue Ocean Preservation Society v. Watkins*, 767 F. Supp. 1518, 1526 (D. Hawaii 1991) * * *. So long as an EA contains a "reasonably thorough discussion of . . . significant aspects of the probable environmental consequences," NEPA requirements have been satisfied. *Sierra Club v. United States Department of Transportation*, 664 F. Supp. 1324, 1338 (N. D. Ca. 1987) * * * quoting *Trout Unlimited v. Morton*, 509 F. 2d 1276, 1283 (9th Cir. 1974). [Footnote deleted.]

See 40 C. F. R. § 1508.9; *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F. 2d 1079, 1092 (D. C. Cir. 1973); *Missouri Coalition for the Environment*, 124 IBLA 211, 219- 20 (1992).

Bales Ranch, Inc., 151 IBLA 353, 358 (2000) (quoting *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247- 48 (M. D. Pa. 1992):

When BLM has complied with the procedural requirements of section 102(2)(C) of NEPA, by actually taking a hard look at all of the likely environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this [office] or a court (in the event of judicial review). . . .

In order to overcome BLM's decision to proceed with [the proposed action], [WWP] must carry [its] burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider or to adequately consider a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA.

Colorado Environmental Coalition, 149 IBLA at 157 (citations omitted).

C. WWP Met Its Burden To Show That NEPA Was Violated As A Matter Of Law Based Upon The Undisputed Facts

In its appeal, WWP asserts that BLM violated NEPA by, among other things, failing to adequately disclose and analyze the impacts of the newly-authorized water facilities. It observes that

[t]he EA never describes even the locations of these new additions. EA at 14. The EA fails to analyze or disclose whether new roads will be built to maintain the new windmills and wells or where this water is coming from. . . . Further, the BLM should have identified whether water withdrawal in the Mountain pasture and the East Pasture will affect any of the riparian habitat on the allotments through dewatering.

Ex. 2 at 4.

In its motion for summary judgment, WWP clarifies and elaborates upon its assertions, arguing that BLM failed to adequately identify the location of the water facilities and spring developments and to analyze their effects, particularly on riparian areas. WWP correctly observes that it is unclear whether the “proposed waters” on the RHA map are wells or other water facilities.

More importantly, the undisputed facts show that BLM did not consider in the EA whether the "proposed waters" would have dewatering effects on the Big Sandy River nor whether the spring developments would have any environmental impacts. In fact, there is absolutely no information regarding the spring developments, as they were not even mentioned.

Without such consideration and information, the EA failed to meet the requirement to set forth a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action to allow for informed public comment and decisionmaking. This is so for two reasons.

First, a reviewer of the EA would not be aware of the springs developments, their environmental effects, or the significance of those effects. Second, the facts show that adding water facilities would involve a substantial risk of dewatering the Big Sandy River so as to cause significant degradation of the environment.

That risk stems from the likelihood that dewatering may occur and the likelihood that dewatering may cause significant degradation. The latter prospect is evidenced by the fact that one of the factors contributing to the River's "functioning at risk" condition has been the pumping of groundwater from private wells. Proof of the former can be gleaned from a careful review of the locations of the "proposed waters" on the map. That review reveals that the locations appear to lie within the vast majority of public lands draining into the River.

Despite these likelihoods, there is no discussion in the EA of the amount of water to be taken from the wells, the sources of the water for the wells, or whether those sources are hydrologically linked to the River. More significant than the EA's omission of facts is its omission of any analysis or consideration of the possible dewatering effects.

The EA's undisputed silence regarding the spring developments' environmental effects and the potential dewatering effects of the water facilities prevents a determination that the EA contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action to allow for informed public comment and decisionmaking. The undisputed facts do not support a finding that the EA and FONSI were based on BLM's consideration of all relevant areas of environmental concern, after taking a hard look

at the potential environmental impacts of the Final Decision. Therefore, BLM did not comply with NEPA, WWP's motion for summary judgment must be granted, and the Final Decision must set aside.³

IV. Conclusion

Based upon the undisputed facts and the foregoing analysis, WWP's motion for summary judgment is hereby granted and the Final Decision is hereby set aside.



Harvey C. Sweitzer
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4, Subparts B and E (see enclosed information pertaining to appeals procedures).

See page 13 for distribution.

³ See generally *Randy A. Green et al.*, 177 IBLA 264, 281 (2009)(Decision Record (DR) and FONSI regarding sale of public land were set aside where EA was silent on whether biological resource information from 2000 adequately and accurately identified the wildlife and vegetative species and habitat in the area in 2005, and whether that information provided a reasonable basis for the EA's analysis of potential impacts to biological resources. EA's silence on this point prevented determination of whether the findings of the DR/FONSI with respect to biological resources were made based upon BLM's consideration of relevant areas of environmental concern, after taking a hard look at the potential environmental impacts of the proposed sale.).

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