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March 12, 2010

ORDER

WESTERN WATERSHEDS PROJECT, Appellant ("WWP")	)	NV-043-09-04
v.	)	Appeal from the Field Manager's Final Decision dated December 3, 2008, involving a term permit renewal for the Six Mile Allotment, Egan Field Office, Nevada
BUREAU OF LAND MANAGEMENT, Respondent ("BLM")	)	
------------------------------------	)	
BARRICK GOLD OF NORTH AMERICA, INC., Intervenor	)	

Partially Granting Summary Judgment
And Remanding Final Decision to BLM

Summary of Rulings

This order finds that BLM's NEPA review that led to the above captioned final grazing decision ("FD"), including its Supplemental Memo issued to correct factual errors in the Environmental Assessment ("EA"), took an adequate "hard look" at the FD's impacts on sage grouse and other wildlife habitat. Therefore, WWP's motion for summary judgment is denied and BLM's is granted on this issue. On the other hand, BLM violated the National Environmental Policy Act, 43 U.S.C. § 4321 *et seq* ("NEPA"), by failing to adequately consider alternatives to the FD and the need for the proposed action. Therefore, WWP's motion for summary judgment is granted and BLM's is denied on this issue. This order remands the FD to BLM to conduct further NEPA review consistent with these rulings.

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Description of Allotment, BLM Decision, and Proceedings

The Western Watersheds Project ("WWP") has appealed the above captioned December 3, 2008 Final Decision ("Final Decision") of the Bureau of Land Management's Egan Field Office ("BLM"), located in Ely, Nevada. The Final Decision renewed the grazing permit for Paris Livestock ("Paris" or "the permittee") to run cattle and sheep on the Six Mile Allotment (the "Allotment"). Paris Livestock holds the permit under a lease granted by Barrick Gold of North America, Inc. ("Barrick"), the owner of the base property located within the Allotment boundaries. Barrick has intervened in this appeal

The following description of the Allotment is taken from BLM's Environmental Assessment ("EA") prepared to consider the proposed action to renew Paris Livestock's grazing permit for the Six Mile Allotment, dated November 19, 2008.[1]

> The Six Mile Allotment (0613) encompasses approximately 21,335 public land acres. Approximately 80 acres of private ground occur in the east portion of the allotment. The allotment is situated in southern Newark Valley, south of Highway 50. The allotment is located entirely within White Pine County, in the western portion of the Ely BLM District approximately 50 miles west of Ely, Nevada. The allotment is situated on the west side of Buster Mountain. The native range of the allotment is entirely unfenced and borders the Newark, South Pancake, Monte Cristo, and Moorman Ranch Allotments. Native range is grazed exclusively by sheep. Two crested wheatgrass seedings (Fernando Seedings) totaling about 1000 acres occur in the middle portion of the allotment. These seedings are entirely fenced, and are grazed exclusively by cattle.
>
> Elevations range from about 6300 feet at valley bottom to 8400 feet on Buster Mountain. Average annual precipitation is 8 - 12 inches. Salt

[1] The EA is combined with the Final Decision and a Standards Determination Document ("SDD") dated September 26, 2008, as a single document in the administrative record. The Final Decision runs from pp. 1-14; the EA from 15-40; and the SDD from 41-76).

> desert shrub and winterfat plant communities occur in the lower portions of the allotment while sagebrush/perennial grass communities and pinyon/juniper woodlands dominate the benches and higher elevation sites. A water development that originates on private ground serves cattle grazing in the Fernando Seedings. Sheep may also use this development when grazing native range. Water is sometimes hauled for sheep grazing when snow is not available. There are no public land water sources in the allotment. Two small springs occur on private ground on Buster Mountain.
>
> The Six Mile Allotment occurs within the Newark Valley Watershed. The allotment also occurs within the Central Nevada Basin and Range (028B) Major Land Resource Area (MLRA).

(EA at 23).

In 1990, BLM acknowledged that the Allotment was historically heavily grazed by livestock, as well as wild horses, from the late 1800's until 1990. BLM then conducted a Grazing Evaluation, Management Action Selection Report, Plan Conformance, and NEPA (National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*) Compliance record, culminating in issuance of a Grazing Final Multiple Use Decision ("FMUD") for the Six Mile Allotment on April 19, 1991. The FMUD reduced cattle use in the crested wheatgrass seedings from 432 to 287 AUMs, grazed by 43 head. Sheep AUMs were retained at 922 (840 head) in active use, but stipulations were inserted governing sheep use areas, seasons of use, water haul locations, and other terms and conditions. Sheep were authorized to graze the native range in fall, winter, and spring (11/1 to 4/15) each year. Cattle were authorized to graze the Fernando crested wheatgrass seedings in the warmer months, from 4/15 to 10/31 each year. The FMUD also limited wild horse use to 11 head (135 AUMs).

The Allotment has been grazed in accord with the 1991 FMUD since that date. However, since 2000, actual use, especially sheep use on the native range pastures, has averaged considerably below the authorized level. Cattle use has averaged 254 AUMs from 2001 to 2007, not counting 2006, when the permittee took voluntary non-use, totally resting the Fernando Seedings that year. Sheep use has averaged

only 319 AUMs annually from 2001 to 2007, not counting 2003, when no sheep used the Allotment. When that year is included, the average sheep use on the native range for the past seven seasons has been 273 AUMs annually, 30% of the full authorized preference. Sheep have mostly grazed in mid-winter, and have made spring use of the Allotment in only three years from 2000 to 2007.

The current grazing permit for the Allotment held by Paris Livestock is for a term running from November 1, 2006 until October 31, 2011, when Paris' lease from Barrick is set to expire. BLM expects Paris' lease to be renewed upon its expiration. In any event, the renewed 10-year permit would be reissued to the appropriate permit holder upon expiration of the current lease. BLM elected to consider renewal of the permit for the Six Mile Allotment at this time in accord with a policy to review compliance with the standards for rangeland health of grazing operations in the Ely District in accord with the Ely Proposed Resource Management Plan and Final Environmental Impact Statement dated November 2007 (" Ely RMP/EIS"), and the Ely District Record of Decision and Approved Resource Management Plan dated August 2008 ("Ely ROD").

BLM began the review process for the Six Mile Allotment by compiling monitoring data from 2001 to 2007 for the Allotment in order to assess its compliance with the Northeastern Great Basin Area Standards and Guidelines for rangeland health. In its Standards Determination Document issued on September 26, 2008 ("SDD"), BLM found that the health of soils and vegetation on the Allotment achieved Standard #1 for upland sites. Standard #2 for riparian and wetland sites was determined to be not applicable, since there are no such sites on public land on the Allotment.

BLM found that conditions on the Allotment's native range did not achieve Standard #3 for habitat. However, BLM determined that the Allotment was making significant progress toward achieving this standard. BLM concluded that the Allotment's failure to meet the habitat standard was not due to current livestock grazing practices, but was caused by historical factors such as past overgrazing, drought, and wild horse use. Monitoring studies indicated that portions of the Allotment were characterized by inappropriate plant composition. In those areas shrub species dominated over native grasses and forbs, and Indian ricegrass was often absent entirely, indicating the range condition was below its ecological site

potential. BLM determined that the current and renewed grazing permit system would allow continued progress toward achieving the habitat standard.

BLM continued its environmental review by defining the proposed action as the renewal of the grazing permit for the Six Mile Allotment with the same level of authorized AUMs and essentially the same terms and conditions as the existing permit issued to Paris Livestock. BLM then prepared an EA dated November 19, 2008 for this action, in accord with NEPA. The EA was tiered to the Ely District RMP/EIS which had considered a range of alternatives for grazing operations in the area including the Allotment, including not allowing any grazing. The EA determined that the "no action" alternative would actually be the same as the proposed action, which is to renew the permit with no changes. The EA did not consider any other specific alternatives since BLM determined there were no unresolved conflicts concerning alternative uses of available resources.

The EA also considered potential effects of the proposed action on relevant parameters of environmental concern, including its effects on soils, wildlife habitat, special status species, invasive weeds, and range conditions. The EA also found that the permit renewal's cumulative effects would not be significant. BLM determined that the renewed permit's terms and conditions would act as sufficient measures to mitigate environmental impacts. Thus, BLM issued its Finding of No Significant Impact ("FONSI") with the EA, finding that an EIS need not be prepared.

In accord with the EA and FONSI, BLM issued its Final Decision ("FD") on December 3, 2008, to renew Paris Livestock's grazing permit for the Six Mile Allotment for a 10-year term. The FD contains virtually all the same terms and conditions as the previous permit, with several additional utilization guidelines and conditions. Total authorized AUMs remained at 1354, with 145 suspended, for a total active use of 1209 AUMs. The FD allocates 287 AUMs for 43 head of cattle authorized to use the Fernando crested wheatgrass seedings from 4/15 to 10/31. Sheep are authorized to use the remaining 922 AUMs, for 840 head grazing the native range areas from 11/1 to 4/15. The sheep are directed to use 380 AUMs east of Belmont Road in spring (3/01 - 4/15), and 542 AUMs in winter, west of the road. Other terms and conditions require water hauling for sheep, and restrict sheep from winterfat bottoms and from the water development inside the seedings area.

The FD modifies one term from the previous permit by adding a 40% spring "allowable use level" for Indian ricegrass, winterfat, and black sagebrush on native range by all herbivores, including wild horses. This is in addition to the 50% yearlong allowable use level for these key species, which was in the prior permit. The FD also adds a term establishing a 55% allowable use level for crested wheatgrass in the Fernando seedings for fall/winter use by all herbivores. Finally, in response to a comment by the Nevada Division of Wildlife, BLM added a term, common to all new permits, requiring removal of livestock from pastures in which utilization objectives have been met.

WWP filed its Notice of Appeal, Statement of Reasons, Appeal, Statement of Standing, and Petition for Stay, on January 12, 2009. BLM filed its Response to Petition to Stay on January 26, 2009. On February 10, 2009, WWP filed supplemental information in support of its appeal, consisting of a series of map overlays derived from the Ely RMP/EIS, the Nevada Division of Wildlife, and oil and gas lease maps. These maps showed the presence of several sage grouse leks within and near the Allotment; at least two ferruginous hawk nest sites within the Allotment; that most of the Allotment was considered year-round sage grouse habitat; and that part of the Allotment was considered potential pygmy rabbit habitat. This information appeared to directly contradict statements in the EA that there was no sage grouse or pygmy rabbit habitat, and that there were no raptor nest sites on or near the Allotment.

On February 20, 2009, I issued an order denying WWP's petition for a stay of the FD, on the basis that WWP could not show any relative harm to its interests if the stay were granted. A stay of the FD would have simply re-imposed the prior grazing permit's terms and conditions, with no change in authorized use, but without the FD's several new more arguably protective utilization guidelines and conditions. The order denying WWP's petition for a stay noted, however, that WWP had raised potential issues for further adjudication, particularly concerning the existence of sage grouse habitat on the Allotment, and the effect of the FD on such habitat. As a related matter, the order also indicated further proceedings could also consider whether significant progress towards meeting the habitat standard on the Allotment could be sustained if Paris elected to use its full preference on the native range portions of the Allotment.

As agreed in a conference call with the parties, on May 1, 2009, BLM filed a memorandum providing supplemental information ("BLM Supplemental Memo") derived from further analyzing WWP's maps and other data concerning the existence of sage grouse and other wildlife habitat on the Allotment. The Supplemental Memo acknowledged that BLM had "unintentionally erred" in the EA in failing to note the existence of sage grouse leks and habitat, as well as ferruginous hawk nest sites on the Allotment. The Supplemental Memo confirmed the presence of five documented sage grouse leks on the Allotment, and that about 76% of the Allotment consists of potential year-round sage grouse habitat. The Memo also confirmed the presence of two ferruginous hawk nest sites on the Allotment, and a third nest site located just outside the Allotment's northwest boundary. The Memo maintained the EA's position that there was no known pygmy rabbit habitat on the Allotment. BLM's Supplemental Memo further maintained the EA's and FD's position that issuance of the FD would not adversely affect the existence or habitat of sage grouse or any other wildlife on the Allotment, and that current livestock grazing practices will result in continued progress toward meeting the wildlife habitat standard.

The parties then agreed to attempt to resolve this proceeding by means of cross-motions for summary judgment and responses. Pursuant to the agreed schedule, WWP filed its Motion for Summary Judgment on October 2, 2009; BLM filed its Cross-Motion for Summary Judgment and Response to Appellant's Motion for Summary Judgment on October 29, 2009; WWP filed its Summary Judgment Reply and Response to BLM's Motion for Summary Judgment on November 23, 2009; and BLM filed its Summary Judgment Reply on December 14, 2009. Barrick filed a notice that it supported BLM's position on the motions. The motions for summary judgment are now ripe for determination.

Discussion

- Legal Standards

The Interior Board of Land Appeals ("IBLA") has followed the procedure authorized in the federal courts by holding that summary judgment may be granted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. Rule 56(c). In

considering a motion for summary judgment, all factual inferences and conflicts must be resolved in the light most favorable to the non-moving party. *Larson v. BLM*, 129 IBLA 250 (1997); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A summary judgment motion filed under F.R.C.P. Rule 56 may be decided on the basis of the pleadings, documentary evidence, affidavits, and other evidence admissible or usable at trial. *Celotex, supra*, 477 U.S. at 324.

Also applicable to this case is the following requirement for responding to a motion for summary judgment:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

F.R.C.P. Rule 56(e). "To be considered on a motion for summary judgment, an affidavit must satisfy three prerequisites: it must be sworn upon personal knowledge; it must state specific facts admissible in evidence at the time of trial; and it must be offered by a competent affiant." *Federal Civil Rules Handbook* (West Group, 2003) at 842.

In this case, where both parties have filed cross-motions for summary judgment, it would be incumbent primarily on the Appellant, WWP, to file such affidavits and evidentiary materials in order to raise disputed factual issues for hearing, since BLM has already filed such materials in the administrative record, consisting of the FD, EA, SDD, and related documents. In the absence of such a filing of substantive and specific evidentiary material by the Appellant, potential factual issues must generally be resolved in favor of BLM's position.

The IBLA has defined the scope of review of a BLM grazing decision and the burden an appellant must bear to overturn such a decision as follows:

> Under 43 C.F.R. § 4.478(b), BLM's adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an administrative law judge and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis.

West Cow Creek Permittees v. BLM, 142 IBLA 224, 236 (1998). To reverse a BLM grazing decision, an appellant must carry this burden by a preponderance of the evidence. *Smigel v. BLM*, 155 IBLA 158, 164 (2001).

With respect to NEPA, the Interior Board of Land Appeals has frequently considered the standards BLM must meet in order to comply with the statute, and those an appellant must meet in order to show that BLM did not do so.

> NEPA requires consideration of potential impacts of a proposed action in an environmental impact statement (EIS) if that action is a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A BLM decision approving an action based on an EA and FONSI, rather than an EIS, generally will be affirmed if BLM has taken a "hard look" at the proposal being addressed and identified relevant areas of environmental concern so that it could make an informed determination as to whether the proposal's impacts are insignificant or will be reduced to insignificance by the adoption of appropriate mitigation measures. *Oregon Chapter of the Sierra Club*, 172 IBLA 27, 46-47 (2007). To prevail on appeal, appellants must demonstrate by a preponderance of the evidence that the EA does not support the FONSI because the EA contains either an error of law or a demonstrable error of fact, or fails to consider a substantial environmental question of material significance. *Wilderness Watch*, 176 IBLA 75, 87 (2008) [and cases cited].

Escalante Wilderness Project, et al. v. BLM, 176 IBLA 300, 303 (2009).

The Council on Environmental Quality ("CEQ") regulations implementing NEPA define an EA as a concise document that serves to "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). Further, an EA "[s]hall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). These requirements for the contents of an EA are echoed in the Department's NEPA regulations at 43 C.F.R. §§ 46.300-325. A site-specific EA may appropriately be tiered to a previously completed programmatic EIS that covers a larger area or a broader range of proposed actions, as provided in 40 C.F.R. § 1508.28 and 43 C.F.R. § 46.140. In this case, BLM appropriately tiered the EA and FONSI supporting the FD to the Ely RMP/EIS and ROD.

As seen in the IBLA formulation of the standard, an appellant bears a heavy burden of proof to show that a BLM EA and FONSI failed to comply with NEPA. Especially to prevail on a motion for summary judgment, there must be a fairly glaring error of fact or failure to consider a substantial environmental question of material significance, on the face of the EA or other supporting documents. In this case, WWP makes two main arguments that it asserts merit granting summary judgment against BLM. First, WWP argues that BLM violated NEPA by failing to take a hard look at impacts to sage grouse and to ferruginous hawks on the Allotment. Second, WWP contends BLM violated NEPA by failing to consider a reasonable range of alternatives in its EA supporting the FD.

- <u>Hard Look at Wildlife Impacts</u>

BLM admits it erred unintentionally in the EA by stating that there were no sage grouse leks, sage grouse habitat, or ferruginous hawk nests on the Six Mile Allotment. In its Supplemental Memo, BLM corrected these errors. In fact, over 75% of the Allotment is year-round sage grouse habitat, and there are several sage grouse leks and hawk nest sites on and near the Allotment. The Supplemental Memo also discussed at some length the potential for livestock grazing to affect this wildlife habitat on the Allotment. As concluded in the EA, the Supplemental Memo confirmed BLM's position that current livestock grazing as authorized by the FD will not adversely affect wildlife habitat, and will actually operate to foster

continued significant progress towards meeting the standard for wildlife habitat. Thus, despite its factual error in the EA, BLM has consistently adhered to its position that:

> With limited spring use and good sheep distribution, light grazing pressure in the term permit renewal area would benefit any sage grouse that may be present in the area by increasing herbaceous vegetative production and nesting cover. Improved vegetation production and cover has also been shown to increase chick forage and insect production.

(EA at 26). BLM also asserts that the FD will have no effect on habitat values for the ferruginous hawk and other wildlife species. As stated in the Supplemental Memo, BLM concludes: "[t]he statement in the Affected Environment Table in the EA that livestock practices as proposed may result in the improvement of habitat for sensitive species would still apply." (Supplemental Memo at 7).

WWP argues that the EA's failure to recognize the existence of sage grouse and hawk habitat on the Allotment was a "demonstrable error" and "failure to consider a substantial environmental question of material significance" that permeated BLM's entire analysis of environmental impacts, and which was not remedied by the *post hoc* Supplemental Memo. WWP asserts that BLM did not adequately discuss its own guidance documents on effects of livestock grazing on sage grouse, and that the additional discussion in the Supplemental Memo did not satisfy NEPA's requirements for public participation in the decision-making process.

The EA standing alone, with its erroneous statements on the absence of sage grouse leks and hawk nests on the Allotment, and its cursory discussion of impacts of the FD on wildlife habitat, would not satisfy NEPA's "hard look" standard. The Supplemental Memo, however, includes several pages discussing the impacts of livestock grazing on sage grouse with respect to the specific seasons of use and pastures on the Allotment. For example, the Memo points out that sheep use the two native range pastures (east and west of Belmont Road) only in winter and early spring, and that they forage primarily on black sagebrush communities, leaving sage grouse preferred habitat – grasses and Wyoming sagebrush communities – largely intact. The Supplemental Memo, by correcting the errors in the EA and providing a

site-specific discussion of how the FD would affect sage grouse and other wildlife habitat, supplies the necessary consideration of the environmental question concerning the FD's effects on sage grouse habitat. Thus, the EA with the Supplemental Memo would satisfy the "hard look" standard if it could be accepted without otherwise contravening proper NEPA procedure.

Although not specifically authorized by NEPA, courts have allowed agencies to address new information in reports issued after the filing of an EIS or EA, for certain limited purposes, without requiring a more formal re-opening of the NEPA review process. "Courts have upheld agency use of such SIRs [Supplemental Information Reports] and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS." *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000)(and cases cited). "In condoning the use of SIRs, however, we have repeatedly warned that once an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute." *Id.*

In this case, the information BLM incorporated into its Supplemental Memo was not necessarily "new," since it was available in BLM's own Ely RMP/EIS, among other sources. Rather, the mapping information provided by WWP was included in the Supplemental Memo and used to correct factual errors in the EA concerning the extent of sage grouse and other wildlife habitat on the Six Mile Allotment. This distinction does not, however, alter the principle allowing an agency to use SIRs for their proper purpose – to determine whether the new or corrected information is significant in terms of altering the analysis of the environmental impact of the proposed action. In the Supplemental Memo, which is equivalent to an SIR, BLM determined that the corrected factual information was not significant in that respect.

BLM points out that the original EA assumed the possibility of sage grouse use on the Allotment in concluding that continued light grazing under the FD (at least at the level of the permittee's past average use of about 300 AUMs annually) "would benefit *any* sage grouse that may be present in the area by increasing herbaceous vegetation and nesting cover." (EA at 26). The Supplemental Memo, while now recognizing the definite occurrence of prime sage grouse habitat on the Allotment, maintains that same conclusion. Thus, BLM has determined that the new

correct information does not alter its environmental analysis and is hence not significant within the meaning of NEPA. BLM therefore determined that it did not need to file a supplemental EA or otherwise reopen its NEPA review of the action resulting in the FD. BLM properly incorporated the Supplemental Memo, as an SIR, into its NEPA review leading to the FD without preparing a supplemental EA. The FD will therefore not be remanded to BLM on the ground that it failed to take a "hard look" at the FD's impacts on sage grouse or other wildlife.

WWP contends that, even with the Supplemental Memo, BLM failed to take the requisite hard look at the FD's impacts on sage grouse and other wildlife. However, WWP here is simply offering its differing opinion on those impacts -- an opinion it has failed to support with affidavits or other evidentiary material contradicting BLM's position.

WWP cites general principles found in BLM and other Department guidance documents on sage grouse management. However, the content of these documents is not in dispute. WWP provided the corrected mapping information showing the location of sage grouse leks and habitat, and ferruginous hawk nests, on the Allotment. Those facts are also no longer in dispute. WWP does not attempt to dispute BLM's site specific information set forth in the Supplemental Memo explaining why BLM believes the FD will not adversely affect sage grouse habitat on the Allotment. While WWP appears to object in general to the compatibility of livestock grazing with healthy sage grouse habitat, it has offered no affidavits or other evidentiary material focusing on the actual effects of the FD on sage grouse habitat on the Six Mile Allotment, that could raise a material disputed issue of fact to defeat BLM's cross-motion for summary judgment. Therefore, on the issue of whether BLM took a "hard look" at the impacts of the FD on sage grouse and other wildlife habitat, WWP's motion for summary judgment is denied, and BLM's cross-motion is granted.

- Alternatives and Need

NEPA regulations require an agency to include in an EA "brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), [and] of the environmental impacts of the proposed action and alternatives . . ." 40 C.F.R. § 1508.9(2)(b). NEPA § 102(2)(E), 43 U.S.C. § 4332(2)(E), requires federal agencies to

"study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Citing this clause, the Department's NEPA regulations allow the EA to consider only the proposed action, without additional alternatives, when the responsible official "determines that there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources." 43 C.F.R. § 46.310(b). In this case, BLM relied on this apparent exemption from the requirement to consider alternatives to the proposed action.

The simple fact is that BLM did not consider any alternatives to the proposed action in its NEPA review culminating in issuance of the FD. The EA first notes that the "no action" alternative was not considered because it is the same as the proposed action, and that the "no grazing" alternative was analyzed in the Egan RMP/EIS and would be inconsistent with the Ely RMP/EIS. The EA then asserts that "[n]o additional site specific alternatives are necessary for analysis since there are no unresolved conflicts concerning alternative uses of available resources." (EA at 22).

In view of facts evident on the face of BLM's own EA and associated documents, this statement is a bit too facile. A red flag should go up when at least one of the standards for rangeland health was not met on the Allotment, while the permittee has only been grazing at a fraction of the Allotment's full authorized use. Although BLM determined that current livestock grazing was not a cause of failure to meet the habitat standard, and that significant progress was being made, BLM repeatedly noted the very light use sheep have made of the native range pastures during the past seven years. Average sheep use on the Allotment over that period has been 273 AUMs, only 30% of the authorized level of 922 AUMs that is perpetuated by the FD. Whether significant progress toward meeting the standard could be sustained if the permittee tripled actual use, as allowed by the FD, constitutes an "unresolved conflict concerning alternative uses of available resources" that should have required BLM to at least consider one or more alternatives to the proposed action.

BLM actually relies on the permittee's anticipated voluntary decision continue such light use as a basis for maintaining that the FD would allow the Allotment to keep making progress toward meeting the habitat standard. In discussing anticipated impacts of the proposed action, the EA states that "[i]t is

expected that Paris Livestock . . . would continue to take voluntary non-use on a large portion of their grazing permit." (EA at 32). In the Supplemental Memo, BLM states that "[i]t is not likely that full active use would be applied for by the permittee." The Memo then says that if Paris Livestock did apply for full active use, "BLM would seek verbal agreement to use less than full active use and would inform the permittee of the latest findings regarding known sage grouse activity and occurrence." (Supplemental Memo at 4). This statement on its face indicates that BLM itself does not believe that the permittee should be allowed to use its full active preference on the Allotment, and runs contrary to the assurance on the same page that, in that event, "significant progress toward achieving the habitat standard would still be the case." There is thus an apparent "unresolved conflict concerning alternative uses of available resources" if the permittee were to use its full active preference on the Allotment, as allowed under the FD.

As a related matter, the EA does not adequately address whether the Intervenor, Barrick, or its lessee, Paris, have any need or desire to maintain an active preference at a level more than three times their average actual use. In the section on "Need for the Proposal" the EA simply recites the boilerplate concerning the process to renew permits to qualified applicants pursuant to applicable laws and regulations. Nothing is stated regarding the particular needs of the permittee on the Six Mile Allotment concerning such key factors as numbers of head of livestock, total AUMs, pasture rotations, seasons of use, trailing, and coordination with the permittee's other livestock operations. While some of this information is scattered in other parts of the EA and associated documents, there is no actual "discussion" or "brief discussion of the need for the proposal" as required by the NEPA regulations, 40 C.F.R. § 1508.9(b); 43 C.F.R. § 46.310(a)(2). Such a discussion should at least briefly address the need for the proposal with respect to some of the key specific terms and conditions that would be included in the proposed grazing permit.

The most obvious alternative BLM should have addressed would be one reducing the maximum authorized preference on the Allotment to one closer to the permittee's actual use and need. Such a consideration would specifically address the potential of a conflict between increased actual use and sustaining healthy wildlife habitat on the Allotment. Other possible alternatives could consider different terms and conditions designed to avoid livestock impacts on sage grouse leks or other key habitat sites on the Allotment. Perhaps analysis of such alternatives will still

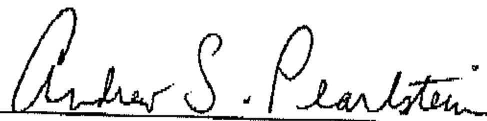
conclude that the FD remains the preferred alternative. However in view of the unresolved conflict shown in the EA between the permittee's potential use of its full active preference and sustaining healthy sage grouse habitat, such a consideration of alternatives should have been done. Therefore, summary judgment will be granted to WWP on this issue and BLM's cross-motion denied. The FD will be vacated and remanded to BLM to consider appropriate alternatives to the FD and to supplement its discussion of the need for the proposal.

Conclusions and Order

BLM's NEPA review that led to the FD, including its Supplemental Memo issued to correct factual errors in the EA, took an adequate "hard look" at the FD's impacts on sage grouse and other wildlife habitat. Therefore, WWP's motion for summary judgment is denied and BLM's cross-motion is granted on this issue. On the other hand, BLM violated NEPA by failing to adequately consider alternatives to the FD and the need for the proposed action. Therefore, WWP's motion for summary judgment is granted and BLM's is denied on this issue. Hence, the FD is remanded to BLM to conduct further NEPA review consistent with these rulings.

Appeal Information

Any person who has a right to appeal under 43 C.F.R. § 4.410 or other applicable regulation may appeal this order to the Interior Board of Land Appeals. The notice of appeal must be filed with the office of the Administrative Law Judge who issued the order, within 30 days of receiving the order, and a copy of the notice must be served on the other parties. In accordance with 43 C.F.R. § 4.478(c), the Board will issue an expedited briefing schedule and decide the appeal promptly.



Andrew S. Pearlstein
Administrative Law Judge

See Distribution on page 17.

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