



**United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS**

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March 1, 2006

DECISION

WESTERN WATERSHEDS PROJECT,	:	NV-010-2004-01
	:	NV-010-2004-02
Appellant	:	
	:	Appeal of Assistant Field Manager's Final
v.	:	Multiple Use Decision dated June 30,
	:	2004, for the Spanish Ranch and Squaw
BUREAU OF LAND MANAGEMENT,	:	Valley and Spanish Ranch Allotments,
	:	Elko Field Office, Nevada
Respondent	:	
-----	:	
BARRICK GOLDSTRIKE MINES, INC.	:	
	:	
Intervenor	:	

FINAL DECISION DATED JUNE 30, 2004, REVERSED
EXCEPT TERMS AND CONDITIONS 1 AND 2A THROUGH 2F FOR LIVESTOCK
MANAGEMENT AND SELECTED ACTIONS 1, 3, AND 5 FOR WILDLIFE
MANAGEMENT

BACKGROUND

Western Watersheds Project (Appellant) has appealed from and petitioned for a stay of portions of a Final Multiple Use Decision for the Spanish Ranch, Squaw Valley and Elevenmile Flat Allotments (FMUD) (Hrg. Exh. 35) issued June 30, 2004, by the Assistant Field Manager, Renewable Resources, Elko Field Office, Nevada, Bureau of Land Management (BLM or Respondent). The FMUD contains selected actions relating to the management of livestock, wild horses, wildlife, and other resources "to ensure progress towards and achieve the standards for rangeland health and multiple use objectives." (Hrg. Exh. 35 at 1)

The FMUD establishes separate livestock grazing systems for the Spanish Ranch, Squaw Valley, and Elevenmile Flat Allotments (the Allotments). The FMUD establishes short-term and long-term grazing systems. The short-term system consists of two alternatives for certain riparian areas: (1) disallowing cattle grazing and trailing and placing restrictions on sheep grazing, bedding, and trailing (Terms and Conditions 1 and 2a through 2f for livestock

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management) or (2) restricting cattle grazing and trailing in accordance with the long-term grazing system (Term and Condition 2g for livestock management). (Hrg. Exh. 35 at 6-8)

Appellant has appealed and petitioned for a stay of all of the selected actions under the FMUD, except Term and Condition 1 for livestock management, which keeps fire closures in place until standards for the closed areas are met, Term and Condition 2a for livestock management, which is the portion of alternative (1) for the short-term system that prohibits cattle grazing and trailing, and selected actions 1, 3, and 5 for wildlife management, which provide for fence modifications to facilitate big game movements, evaluation of the availability and condition of habitat for augmentation of mountain quail populations, and development of two guzzlers for wildlife. (Appeal and Petition for Stay at 32)

Initially, the Hearings Division had jurisdiction over the appeal and petition so far as they relate to livestock grazing management decisions made in the FMUD and the Interior Board of Land Appeals (the Board or IBLA) had jurisdiction over the appeal and petition to the extent they pertain to other decisions made in the FMUD. BLM filed a response in opposition to the petition and requested consolidation of the matters before the Hearings Division and the Board. By Order dated August 23, 2004, the Board transferred the matter before it "to the Hearings Division for consolidation with the appeal from the grazing portion of the FMUD." Western Watersheds Project v. BLM, IBLA 2004-298 (August 23, 2004). Accordingly, both matters were consolidated by my Order dated September 14, 2004, in which I also granted Appellant's petition for stay.

The events leading up to issuance of the FMUD are as follows. In 1985 BLM issued a Draft Resource Management Plan and Environmental Impact Statement (Draft RMP/EIS) (Hrg. Exh. 2) for the Elko Resource Area. That Area included the Rock Creek Allotment, which was later divided into the Spanish Ranch and Squaw Valley Allotments which are the subject of this proceeding. (Tr. 64)

The Draft RMP/EIS analyzed management alternatives, including an alternative eliminating livestock grazing (Alternative E) and Alternative D, the preferred alternative. Alternative D included a livestock management prescription to increase over the long-term the availability of livestock animal unit months (AUM's) over active preference, subject to the condition that there would be no change in active preference unless adequately supported by monitoring. Another livestock management prescription was to "[i]mplement a rangeland monitoring program to determine if management objectives are being met and adjust grazing management systems and livestock numbers as required." (Hrg. Exh. 2 at 2-18)

Alternative D, including those prescriptions, was the preferred alternative in a Proposed Resource Management Plan and Final Environmental Impact Statement (Proposed RMP/FEIS)

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(Hrg. Exh. 3) issued in 1986 and was approved in the Resource Management Plan Record of Decision (ROD) (Hrg. Exh. 4) issued in 1987. The Draft RMP/EJS, Proposed RMP/FEIS, and ROD, read in combination, constitute the Resource Management Plan (RMP) for the Elko Resource Area. (Id. at 1)

Many years later BLM conducted an evaluation of livestock grazing and other multiple uses within the Squaw Valley, Spanish Ranch, and Andrae Allotments and issued a draft evaluation for public comment on May 2, 1997 (1997 Evaluation) (Hrg. Exh. 9). The 1997 Evaluation analyzed monitoring information collected between 1983 and 1996 to determine if current management practices and grazing systems were complying with the RMP, Rangeland Program Summary (RPS) (Hrg. Exh. 5), Standards and Guidelines for Rangeland Health for Northeastern Nevada, and allotment specific multiple use objectives. A 30-day comment period was provided for the interested public to submit written comments and concerns regarding the evaluation.

A proposed multiple use decision for the grazing system outlined in the 1997 Evaluation was never issued or implemented largely because of uncertainties associated with a possible pending land exchange for the Squaw Valley Allotment. Instead, efforts to finalize a grazing plan for the allotment were reinitiated. (Hrg. Exh. 34 at 2)

The public comments received regarding the 1997 Evaluation prompted BLM to change the evaluation and proposed management actions. (Hrg. Exh. 27 at 1) The actions selected for implementation were described in the "Squaw Valley and Spanish Ranch Allotments Management Action Selection Report (MASR)" (Hrg. Exh. 26) issued to the interested public on October 2, 2003. The MASR included responses to public comments on the 1997 Evaluation as well as new monitoring data collected between 1997 and 2003.

In the MASR the BLM concluded that livestock grazing management and wild horse population levels are causal factors in the non-attainment of some objectives for the Allotments and a few Standards for Rangeland Health for the Northeastern Great Basin Area of Nevada. (Hrg. Exh. 26 at 2-3) Those standards are Standard 1 for upland sites, which provides that upland soils exhibit infiltration and permeability rates that are appropriate to soil type, climate, and landform; Standard 2 for riparian and wetland sites, which requires that riparian and wetland areas exhibit a properly functioning condition and achieve state water quality criteria; and Standard 3 for habitat, which mandates that habitat conditions meet the life cycle requirements of threatened and endangered species and that habitats exhibit a healthy, productive, and diverse population of native and/or desirable plant species, appropriate to the site characteristics, to provide suitable feed, water, cover and living space for animal species and to maintain ecological processes. (Id.) To achieve or make significant progress toward attainment of the standards and objectives, certain management actions were selected.

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Those selected actions became the proposed actions in a Proposed Multiple Use Decision (PMUD) (Hrg. Exh. 27) for the Spanish Ranch and Squaw Valley Allotments issued by BLM on October 2, 2003. BLM did not receive any protests to the PMUD from Appellant or any other interested publics. An Environmental Assessment was prepared for the PMUD (PMUD EA) (Hrg. Exh. 25) analyzing the proposed actions and alternatives which was available for review at BLM's Elko Field Office but not circulated to the interested public. (Tr. 161)

Because changes were made to the 1997 Evaluation based on public comments, BLM issued a 2003 supplement to a biological assessment (BA) (Hrg. Exh.30) which it had submitted to the U.S. Fish and Wildlife Service (FWS) in July of 1998. Based on that BA, the FWS had issued on November 20, 1998, a biological opinion for livestock grazing in the Squaw Valley Allotment. The 2003 supplement outlined changes in grazing management to reduce hot season use in habitat for the Lahontan cutthroat trout (LCT), a species listed as threatened under the Endangered Species Act (ESA). On June 29, 2004, the FWS issued a no jeopardy biological opinion (BO) (Hrg. Exh. 34) for the proposed livestock grazing management within the Squaw Valley Allotment.

The next day, June 30, 2004, BLM issued the FMUD (Hrg. Exh. 35), including adapted terms and conditions from the 2004 BO, and a corresponding environmental assessment (FMUD EA) (Hrg. exh. 37), as well as its Finding of No Significant Impact (FONSI). (*Id.*) In the FONSI BLM concluded that the proposed actions will not have a significant effect on the human environment and therefore that BLM was not required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C), to prepare an environmental impact statement.

NEPA ADEQUACY WITH REGARD TO RANGE IMPROVEMENT PROJECTS

The FMUD identifies fence construction, or re-construction, which is an integral part of the grazing system set out in the FMUD. Construction on some of the proposed fence projects has already begun and two fences totaling approximately 7 miles, the Lower Squaw Creek Fence and the Upper Willow Creek Fence, have already been completed. However, the majority of the proposed 117 miles of fence projects has yet to be undertaken. Appellant contends that BLM violated NEPA in various ways, including failing to analyze the effects of the fence projects in the FMUD EA.

The adequacy of [the FMUD] EA, under section 102(2)(C) of NEPA, must be judged by whether BLM * * * took a "hard look" at the potential environmental impacts of the proposed [action]. See Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991) and cases cited. In addition, because an EA is prepared for the purpose of determining whether an EIS is required by section

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102(2)(C) of NEPA, the EA must make a convincing case that the [proposed action] will not result in any significant impact, or that any impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Id.

In general, both an EIS and EA must fulfill the primary mission of NEPA, which is to ensure that in exercising the substantive discretion afforded it to approve or disapprove [a proposed action], BLM is fully informed regarding the environmental consequences of such action. See 40 C.F.R. §§ 1500.1(b) and (c); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). In deciding whether an EIS or EA promotes informed decisionmaking, it is well settled that a rule of reason will be employed; thus, the question becomes whether an EIS or 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)).

* * * * *

In order to overcome BLM's decision to proceed with [a proposed action], [an appellant] 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], 142 IBLA [49,] 52 [(1997)]; [Southern Utah Wilderness Alliance], 127 IBLA 331, 350, 100 I.D. 370, 380 (1993).

Colorado Environmental Coalition, et al., 149 IBLA 154, 156-57 (1999). BLM avers that NEPA analysis of the fence projects identified in the FMUD is unnecessary because, according to BLM, the FMUD does not explicitly authorize the construction of those fences. In its post-hearing brief, BLM argues:

The FMUD does not specifically authorize any fencing (Tr., p. 2835-36). BLM always intended to prepare site specific NEPA analysis when actual fence sites were proposed. (Hrg. Exh. 27, p. 10). The scale of the Allotments prevents a detailed analysis of range improvements at this time because such an analysis would require knowledge of precise locations. The concept of a fence drawn on a map of the Allotments can not be adequately analyzed at this point * * *. With respect to rangeland improvements, the FMUD is "conceptual." (Tr., p 3108). This is due to scale.

Respondents' Response Post-Hearing Brief at 28-29.

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Respondent's argument in this regard has already been addressed by the Board on interlocutory appeal. With regard to the remaining portion of the Allotment Division Fence the Board wrote:

BLM and Barrick also state that the fence and the other minimizing/enhancement measures were incorporated into the Betze Project SEIS Mitigation Plan, and that implementation of the Mitigation Plan was approved in the April 1, 2003, ROD. (Joint Appeal at 9.) But, we have carefully reviewed the Mitigation Plan itself, which is Appendix A of the Final SEIS, and the Upper Willow Creek Habitat Enhancement Plan (Enhancement Plan), which is Appendix B of the Final SEIS and which is incorporated in the Mitigation Plan, and find no mention of the allotment division fence. Nor is the fence described anywhere in the April 1, 2003, ROD, which merely incorporates the monitoring and mitigation measures of the Mitigation and Enhancement Plans. We find no evidence that BLM approved construction of the allotment division fence in that ROD.

* * * * *

In these circumstances, the FMUD, together with the June 2004 FONSI/DR, constituted the authorization to undertake that work, which WWP then appealed and sought to stay.

Based on our review of the FMUD, WWP's Petition, and other related documents, we conclude that the Stay Order stayed BLM's approval of construction of the remainder of the allotment division fence. Accordingly, the decision being appealed is the Stay Order issued by Judge Heffernan on September 14, 2004.

Western Watersheds Project v. BLM, et al., 166 IBLA 30, 35-37 (2005) (emphasis added).

BLM argues that future analyses will be conducted to meet NEPA requirements for the fence projects. In so arguing BLM fails to appreciate the fact that the timing of its NEPA analysis is critical. See, e.g., Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000) (proper timing is one of NEPA's central themes). The pertinent regulations provide that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values * * *," 40 CFR 1501.2, and that an EIS "shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." 40 CFR 1502.5. While the latter provision refers to an EIS rather than an EA (which is what BLM prepared), there is no difference between an EA and an EIS in terms of the

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importance of their timing and value to achievement of the goals of NEPA. See Metcalf, 214 F.3d at 1143. Thus, the environmental review documents must be prepared prior to any irreversible and irretrievable commitment of resources. Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998); Union Oil Co. of California, et al., 102 IBLA 187, 191 (1988).

BLM should have analyzed the fence projects in the FMUD EA because, contrary to BLM's argument, the FMUD clearly commits BLM to constructing the fences, as they are integral to carrying out the grazing systems established by the FMUD. The grazing systems outlined in the FMUD are dependent on the construction of fences and the pastures those fences define. In the FMUD, under the heading "Range Improvements," BLM writes: "The range improvements listed are needed to implement the grazing systems outlined above." (Hrg. Exh. 35 at 23-25) In the FMUD EA, BLM states: "Construction of range improvement projects is essential in improving livestock distribution and control." (Hrg. Exh. 37 at 35)

In order to implement grazing under the FMUD in the Spanish Ranch Allotment, at least three fences will have to be constructed to keep cattle within four separate pastures. The required fences are the Red Cow Pasture Fence, the Big Cottonwood Canyon Riparian Fence, and the Cornucopia Fence.¹ (Respondent's Exh. G-2; Appellant's Exh. A-3; Hrg. Exh. 35 at 23, Table 5) These fences define borders on the Red Cow Riparian, Cornucopia, Big Cottonwood Riparian, and Big Cottonwood Uplands pastures. Each of these pastures is identified in the FMUD with season of use restrictions and specific AUM authorizations. (Hrg. Exh. 35 at 16, Table 3) In the FMUD, BLM also identifies construction of the Winters Creek Corridor Fence and holding pens in the Winters Creek and Burner Hills pastures as being important for grazing under the FMUD. (Hrg. Exh. 35 at 24)

Grazing in the Squaw Valley Allotment is divided into short-term (2004-2006) and long-term (2007-2014) management strategies. In the Squaw Valley Allotment, the Trout Creek Fence and Toe Jam Fence define boundaries on the Soldier Field Riparian Pasture, Trout Creek Riparian Field, and Toe Jam Riparian Pasture. (Respondent's Exh. G-3; Hrg. Exh. 35 at 23) The short-term management strategy established in the FMUD does not involve grazing these pastures separately. However, the long-term management strategy does. (Hrg. Exh. 35 at, 18-20) Additionally, completion of the Spanish Ranch and Squaw Valley Allotments Division fence is also necessary for grazing under both the long-term and short-term grazing systems for the Squaw Valley Allotment. (Tr. 2282) In the FMUD, BLM explains:

¹ Completing reconstruction of the Winters Creek fence may also be necessary for implementation of the FMUD. (Tr. 3045; Respondent's Exh. G-2; Appellant's Exh. A-3; Hrg. Exh. 35 at 23, Table 5)

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The Allotment Boundary [Division] Fence between Spanish Ranch and Squaw Valley and the Lower Squaw Field Fence are first priority. These fences are needed to divide the allotments and control livestock from crossing the boundary and to allow scheduled rest periods within riparian pastures.

(Hrg. Exh. 35 at 23-24) The FWS' BO, in reference to grazing on the Squaw Valley Allotment, explains: "Implementation of the short and long-term grazing systems would require construction of the fences outlined in Table 1." (Hrg. Exh. 34 at 2) The referenced Table 1 in the BO includes the Spanish Ranch-Squaw Valley Allotment Division Fence, Trout Creek Fence, and Toe Jam Fence. (Id. at 8)

The need for the fences described above is highlighted by the fact that multiple BLM witnesses testified throughout the hearing that herding is an ineffective means of controlling cattle within the over 400,000 acres of the Spanish Ranch and Squaw Valley Allotments. (Tr. 954, 2135, 2525, 3040) Salt licks were also identified as an inadequate means with which to control cattle movement in the Allotments. (Tr. 2136) With the exception of the already constructed fencing, all of the fences discussed above must be built in order for the FMUD to work. These fence projects are fundamental and integral to the grazing system outlined in the FMUD.

Given BLM's commitment to constructing the fences and failure to analyze the effects of that construction, Appellant has clearly met its burden of demonstrating that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action. This conclusion follows from the admissions of BLM's own employees as well as the evidence of the potential effects of the fence projects which BLM did not adequately consider.

Several BLM employees acknowledge that the fence projects require further NEPA analysis. Clinton Oke is BLM's Assistant Field Manager for Renewable Resources and the authorized officer who signed the FMUD and FONSI. (Tr. 25) At hearing Mr. Oke stated: "It, it, it [the FMUD] does not authorize it [the fences]. What it does is it lays it out. The final authorization will be through site-specific NEPA analysis and, and also a Decision Record that would be signed to it." (Tr. 439) Tyson Gripp is a BLM Rangeland Management Specialist and one of the principal drafters of the FMUD. (Tr. 624, 1072) Mr. Gripp testified that the FMUD proposes fence construction in a "conceptual" way and that full NEPA analysis will be conducted for each range improvement project prior to its construction. (Tr. 3108) Mr. Gripp also testified that NEPA analysis for the range improvement projects, including some fences, may result in categorical exclusions. (Tr. 3109) The FMUD states that "Site specific EA's will be completed for all range improvement projects." (Hrg. Exh. 35 at 24) In its post-hearing reply brief BLM argues: "BLM never intended to authorize specific range improvement projects

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through the FMUD and knows it must perform additional NEPA analysis prior to siting of those improvements and installation, if any." Respondents' Response Post-Hearing Brief at 42.

Thus, BLM consciously chose not to conduct NEPA analysis for fencing projects which are necessary for grazing under the FMUD. Segmentation of the NEPA process in this way has many potential negative consequences.

In Idaho Natural Resource Legal Foundation, Inc., 96 IBLA 19, 32 (1987), some of these potential negative consequences were explained as follows:

Thus, courts have refused to allow segmentation of projects into discrete units for purposes of [NEPA] analysis since not only may synergistic effects be ignored under such an approach, but also the partial completion of a project may so prejudice the decisionmaker that subsequent recognition of adverse environmental impacts which might have convinced the agency not to proceed as an original matter may be overwhelmed by consideration of the time, efforts, and expenditures already made.

(Burski, A.J., concurring).

At multiple junctures during the hearing Mr. Oke explained that he relied on the advice and input of his staff with regard to understanding conditions on the Allotments and the effects of the FMUD on the Allotments. (Tr. 37, 61, 78, 83, 91, 97, 123, 132, 135, 153, 159, 198, 287, 293-294, 341, 373, 443, 467, 538, 603, 607, 619). His staff testified that the fences would have impacts which, while potentially capable of being mitigated, cannot be ascertained without identifying the specific locations of those fences which were not adequately discussed in the FMUD EA.

For example, Mark Coca, who is BLM's Weeds Management Specialist and a member of the team that prepared the FMUD EA, testified that the proposed fencing projects could cause weed infestations on the Allotments. (Tr. 3113, 3121; Hrg. Exh. 37 at 44) During the hearing Mr. Coca was handed a map (Hrg. Exh. 25, Map 2) of the Allotments from the PMUD and responded to questioning as follows:

Q: When you produced the EA, was this the extent, this map the extent of your knowledge about the proposed fence?

A: Yes.

Q: Are the locations of these fences as depicted on this map precise enough for you to determine impacts to invasive nonnative species?

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* * * * *

A: Well, not really. Just looking at this map, where these, the red lines are, the proposed fence, it doesn't show me, I guess, enough of an exact location where these fences would be to really determine how that would affect the, known infestations we have on these two Allotments.

Q: Is the scale a bit of a problem as well?

A: Yeah. There's -- Looking at the, the scale bar thing on the bottom of the map, I guess that the, the red lines could be off by half-mile to a mile or so. And that's quite a bit of difference, if it was, that I really have no way of, of determining anything.

(Tr at. 3141) Mr. Coca identified several mitigation measures (Tr. at 3121-22) which, in his opinion, if implemented would make a fence-caused weed infestation unlikely. However, these mitigation measures are not part of the FMUD and the FMUD EA does not adequately discuss these measures nor the effects of fencing which they would mitigate.

The fencing projects and the location of the fences identified in the FMUD may also have significant implications for sage grouse. Sage grouse are a BLM-recognized sensitive species and there are more than 44 sage grouse leks, or breeding/nesting sites, in the Allotments. (Tr. 1429, 39, 44, 2737-8; Hrg. Exh. 9 at 11-12, Appendix T map 8; Hrg. Exh. 35 at Attachment 2) BLM estimates that the sage grouse population in the Allotments is at a "moderate" but historically low level. (Hrg. Exh. 9 at 11)

Kenneth Wilkinson is a BLM Wildlife Biologist and one of the preparers of the FMUD EA. (Tr. 1373; Hrg. Exh. 37 at 44) Mr. Wilkinson testified that activities including fence construction can lead to fragmentation and loss of sage grouse habitat. (Tr. 1455, 2830-32) Gregg Simonds is a rangeland management expert who was hired by the Squaw Valley Allotment permittee, Barrick Goldstrike Mines Inc., (Barrick), to develop a grazing management plan for that Allotment. (Tr. 2338-40) Mr. Simonds testified that in his research he identified sage grouse collisions with fences as the second most common cause of sage grouse mortality, second only to raptor predation. (Tr. 2503) In fact, when BLM, FWS, and Barrick developed the Upper Willow Creek Habitat Enhancement Plan,² fence construction was initially avoided because of sage grouse mortality concerns. (Tr. 2524; Hrg. Exh. 23, Appendix B, at 2)

² The Upper Willow Creek Habitat Enhancement Plan was developed, in part, as mitigation for Barrick's Betze project mine which is located approximately fifteen miles south-east of the Allotments. (Tr. 2524; Hrg. Exh. 23, Appendix B, at 2)

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At hearing Mr. Wilkinson explained that sage grouse leks need to be considered when locating fence projects on the Allotments. (Tr. 2739) According to Mr. Wilkinson, fences should be located as far away from leks as possible and at least one-half mile from individual leks.³ (Tr. 2832) Mr. Wilkinson also testified that when locating fences, BLM needs to consider how male sage grouse will travel between roosting areas and leks in relation to the Allotment's topography. (*Id.*)

Mr. Wilkinson identified a number of mitigation techniques which would reduce the impacts to sage grouse from fences and fence construction. (Tr. 2831-33) Additionally, Mr. Wilkinson identified mitigation techniques that would help prevent fences from being barriers to big-game migration. (Tr. 2831-33) Once again, the identified mitigation techniques were not incorporated into the FMUD nor were the techniques or effects of fencing adequately discussed in the FMUD EA so that Mr. Oke and the interested public could understand the impacts of the fencing projects on sage grouse.

Fences may also have significant implications for wild horses. Bryan Fuell is BLM's Wild Horse Specialist and one of the preparers of the FMUD EA. (Tr. 1515; Hrg. Exh. 37 at 44). According to Mr. Fuell, fences are a significant hindrance to the movement of wild horses across the Allotments. (Tr. 1523-24) Mr. Fuell testified that, after reconstruction of the Winters Creek Fence, that fence will have to be "laid down" or possibly have crossing sections constructed out of pipe so that wild horse migration is not unduly restricted. (Tr. 1529-30) Relatedly, Katie Fite, Western Watersheds Projects' Biodiversity Director, testified that she was unable to evaluate the impacts of the proposed fences on, among other things, riparian sites because of the lack of information regarding the fences and their locations in the FMUD. (Tr. 1553, 1697, 1720-21, 1943-44)

In sum, BLM's failure to conduct adequate NEPA analyses of the fence projects violated BLM's obligation to conduct NEPA analyses at the earliest possible time and prior to any irreversible and irretrievable commitment of resources. See 40 CFR 1501.2; Metcalf, 214 F.3d at 1143; Friends of Southeast's Future, 153 F.3d at 1063; Union Oil Co., 102 IBLA at 191. BLM's brief references to the fences in the FMUD and FMUD EA violates the rule of reason which requires that BLM's analyses of those fences be a reasonably thorough discussion of the significant aspects and probable environmental consequences of the proposed action. See Colorado Environmental Coalition, 149 IBLA at 156-57. BLM failed to take a hard look at the

³ A cursory comparison of the location of leks identified on map 8 of Hearing Exhibit 9 with the roughly depicted proposed fence corridors on Respondent's Exhibits G-2 and G-3 suggests that BLM may be challenged to locate the proposed fences a half-mile from sage grouse leks, particularly in view of the fact that additional leks have been identified since Map 8 was created. (Tr. 2737)

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environmental consequences of the fence projects and to demonstrate that any significant impacts from the fences will be rendered insignificant through mitigation measures. See id.

NEPA ADEQUACY WITH REGARD TO NOTICE AND COMMENT

Appellant argues that BLM violated NEPA by failing to provide a public notice and comment period for the FMUD EA which was issued simultaneously with BLM's corresponding FMUD and FONSI. (Tr. 455) In the FMUD EA, BLM states:

This Environmental Assessment (EA) replaces the Spanish Ranch and Squaw Valley Allotments Multiple Use Decision EA (BLM/EK/PL-2003-025) due to changes brought forward into the Final Multiple Use Decision (FMUD) by the U.S. Fish and Wildlife Service's Biological Opinion (BO).

(Hrg. Exh. 37 at 1).

Whether a public notice and comment period is required for environmental assessments is a question which has been subject to some discussion. See Southern Utah Wilderness Alliance, 122 IBLA 334 (1992); Fort Belknap Community Council, 144 IBLA 92 (1998). However, the IBLA appears to have recently answered this question in the affirmative.

In Lynn Canal Conservation Inc., 167 IBLA 136 (2005), the Board wrote:

It has frequently been pointed out that NEPA is essentially procedural in nature, designed to insure that Federal agencies make fully informed and considered decisions. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). Its purposes cannot be met when, as in this case, there has been little or no public involvement. The Board holds that BLM's failure to provide notice of the availability of the draft EA to the general public, including interested and affected members of the public and organizations and allow a period for comment, or alternatively to provide notice of the EA and proposed pending decision with time to provide written comments, violated 40 CFR 1506.6(a), (b), and (d). Stated in another manner, the requirement in 40 CFR 1501.4(b) that an agency involve the public "to the extent practicable" in preparing an EA, the requirement in 40 CFR 1501.4(e)(1) that a FONSI be made available to the public, the requirement of 40 CFR 1506.6(a) that Federal agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," the requirement of 40 CFR 1506.6(b) that environmental documents be made available, and the requirement of 40 CFR 1506.6(d) that an agency solicit information from the public would be

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diminished or rendered meaningless if an agency can, as in this case, complete an EA and FONSI without any notice to the public calculated to allow participation and an opportunity to challenge the decision. Presumably the instruction of 516 DM 3.3.A (May 27, 2004) that "[t]he public must be provided notice of the availability of EAs" means documents upon which comments can be made, not documents and decisions which are fait accompli.

The Board's ruling is supported, if not required, by recent court decisions. Most notably, the Ninth Circuit has concluded that 40 CFR 1506.6 requires that "[t]he public must be given an opportunity to comment on draft EAs and EISs * * *." Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002), amended, 350 F.3d 816, 830 (2003), second amendment, 371 F.3d 475, 487 (2004).

Id. at 145 (footnote omitted).

Lynn Canal Conservation Inc. has settled the question of whether notice and comment is required for environmental assessments. A separate notice and comment period was required for the FMUD EA, because BLM made substantive changes to the PMUD EA, which it did not identify or explain, that required a distinct notice and comment period for the FMUD EA. Providing decision makers with an opportunity to consider and incorporate public input in the decision making process is one of NEPA's central themes. See 40 CFR 1503.4. However, here, in the absence of public comments, BLM made important changes to the PMUD and PMUD EA and then issued the FMUD, FMUD EA, and FONSI without giving the public an opportunity to address those changes. With the exception of the Terms and Conditions BLM adapted from the FWS' BO, BLM did not even endeavor to disclose the changes it made in the FMUD and FMUD EA or explain its reasoning for making changes in the those documents. Under Lynn Canal Conservation Inc. this procedure was per se illegal.

The salient question, in analyzing whether NEPA's notice and comment requirements have been met, is whether the public has had an opportunity to comment on a decision before that decision has been made. See Lynn Canal Conservation Inc., 167 IBLA at 145. Respondent argues that because the public had an adequate opportunity to comment on the PMUD EA no violation of NEPA's notice and comment requirements has occurred with regard to the FMUD EA.

In its post-hearing response brief Respondent explains:

The PMUD was mailed to the interested public, with instructions for filing a protest, on October 2, 2003. The PMUD included a notice that an EA had been prepared and was available at the BLM Elko Field Office. (Hrg. Exh. 27, p. 59). BLM received no protests or comments on either the PMUD or the

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EA during the protest/comment period. During this time, FWS was working with BLM on formal consultation under the federal Endangered Species Act (ESA), and developing the mandatory terms and conditions for implementation of the grazing system. Because no protests or comments were made to BLM on the PMUD, draft EA, or FONSI, BLM's draft EA/FONSI differs with the final EA/FONSI only to the extent that the latter incorporates the mandatory terms and conditions resulting from the formal consultation process. (Tr., p. 3107).

Respondent's Response Post-Hearing Brief at 12-13. Later in its brief Respondent reiterates its position explaining that:

Because no protests or comments were received on the PMUD or draft EA, no changes were made to the proposed action between the draft EA and the final EA, save for the mandatory terms and conditions imposed on BLM by FWS. (Tr., p. 3107).

Id. at 30.

Thus, it is Respondent's position that the only difference between the FMUD/FMUD EA and the PMUD/PMUD EA is that the FMUD/FMUD EA incorporates the mandatory terms and conditions from FWS' BO. In support of this position Respondent cites the testimony of Mr. Gripp who is BLM's "Lead Preparer" of the PMUD/PMUD EA and FMUD/FMUD EA. (Tr. 1072; Hrg. Exh. 37 at 44) At hearing Mr. Gripp responded to questioning as follows:

Q: Can you explain to the Court precisely how the Proposed Action in the PMUD EA and FMUD EA differ?

A: The only real difference in the Proposed Action on these two EAs is, is that we implemented the Mandatory Terms and Conditions that were given to us through the Fish and Wildlife Service through their BO, most of which had already been incorporated in the, in our existing Terms and Conditions. But there was some, some new ones re-, you know, that required reporting things and requiring monitoring from, on an annual basis, and things like that.

(Tr. 3107) Comparison of the PMUD EA and the FMUD EA reveals differences between the two documents besides incorporation of the mandatory terms and conditions from FWS' BO. For example, the analysis section of the no action alternative in the PMUD EA does not address visual resource management whereas BLM has added a section analyzing visual resource management to the corresponding section of the FMUD EA. (Compare Hrg. Exh. 25 at 35 to Hrg. Exh. 37 at 43)

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Other variations between the proposed and final Environmental Assessments are even more consequential and of greater concern. For example, in the PMUD EA, BLM included sage grouse management stipulations (stipulations) which were omitted from the FMUD EA. Under the PMUD/PMUD EA, the following management stipulation was incorporated into the grazing management strategy for the Willow Creek Reservoir, Willow Creek South, Lower Squaw Creek, and Rock Creek Riparian pastures or fields:

* * * Make progress towards providing for a minimum of seven inches of lateral perennial grass herbaceous cover on an annual basis measured at key areas during the May to early June nesting period. Herbaceous cover includes residual cover from prior year(s) and any new current year's growth. Make progress towards providing a minimum of 15% to 18% basal cover of native perennial grasses on the same areas. Note that these height and cover values are in addition to those for overstorey shrubs relative to vegetation type where key area are located or proposed. Make progress towards meeting Rangeland Health Standards and Guidelines, WAFWA and Nevada BLM sage grouse guidelines for all sage grouse seasonal use areas as measured at key study transects.

(Hrg. Exh. 25 at 10, 12, Table 4).

Mr. Gripp testified that he had prepared Table 4 for the FMUD/FMUD EA and had been told by Mr. Oke or Mr. Wilkinson to remove the sage grouse stipulations from Table 4. (Tr. 1373, 1081, 1090.) This constituted a substantive, material change, which required public comment before finalizing the Environmental Assessment under the auspices of IBLA's decision in Lynn Canal Conservation Inc.

Mr. Oke's testimony seems to indicate that he does not know, or remember, why the sage grouse stipulations were removed from Table 4. (Tr. 433) Mr. Gripp recalled that Mr. Oke and Mr. Wilkinson discussed removal of the stipulations, but he could not remember the content of that discussion. (Tr. 1092)

Mr. Wilkinson testified that a meeting took place in late June of 2004 during which the decision was made to remove the sage grouse stipulations from Table 4 of the FMUD/FMUD EA. Regarding who made the decision to remove the stipulations from Table 4, Mr. Wilkinson testified as follows:

Q: And it - - Was it your suggestion to remove the, the language from the Table 4?

A: No.

Q: Was it Mr. Oke's decision?

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A: No, there was a, another person there at the meeting. There was an oversight from Tyson, I was thinking, but Mr. Carl Scheetz was there, too. He was the Range Team Lead.

Q: He was for the Elko Resource, or Elko Field Office?

A: Right.

(Tr. 1497) Mr. Scheetz was not a witness at hearing.

At hearing Mr. Wilkinson testified that although the seven-inch cover height stipulation had been removed from Table 4 of the FMUD/FMUD EA, sage grouse habitat provisions have been added to the "Other Management Decisions" section of the FMUD for specific key areas. (Tr. 1494) While provisions have been added calling for a minimum of 15-percent perennial native grass canopy cover and 10-percent perennial native forb cover at key areas, none of these provisions include the minimum seven-inch cover height stipulation that was specifically included in the PMUD EA. (Hrg. Exh. 35 at 37-59) Additionally, seven-inch cover provisions in the Other Management Decisions section of the PMUD/PMUD EA were deleted in the Other Management Decisions section of the FMUD/FMUD EA. (Compare Hrg. Exh. 27 at 27- 50 to Hrg. Exh. 35 at 37-59) Once again these constitute substantive material changes which required public notice and comment before finalizing the Environmental Assessment under the Lynn Canal Conservation Inc. precedent.

Mr. Wilkinson testified that the seven-inch cover stipulations are not appropriate for the Allotments due to factors including the possibility that snow could cause herbaceous cover to lay flat and the presence of grasses that are relatively short. (Tr. 2744) However, Mr Wilkinson also testified that grasses on the Allotments, would, or could, maintain seven inches of height at a 50-percent utilization rate and that a number of grasses found on monitoring sites in the Allotments are not considered short. (Tr. 2745, 2870-74) If factors, including the average heights of grasses on the Allotments, warranted redaction of the seven-inch cover height stipulations from the PMUD EA, a reasonably detailed explanation of those circumstances should have been offered in the FMUD EA. The omission of the seven-inch cover stipulations from the FMUD and FMUD EA is of particular significance because Appellant argues, and has offered evidence supporting its position, that maintaining seven-inches of herbaceous cover on sage grouse nesting and breeding habitat is important for preserving sage grouse. (Exh. A-38 at 977, Table 3; Tr. 1822) Appellant, and other interested publics, should have been afforded the procedural opportunity to comment on the removal of these stipulations before the Environmental Assessment was finalized. Given these facts, simply eliminating the seven-inch cover stipulations from the FMUD EA without explanation and an opportunity for the public to comment on that decision is violative of NEPA's notice and comment requirements, as described by the Board in Lynn Canal Conservation Inc., 167 IBLA at 145.

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Another variation between the PMUD EA and the FMUD EA occurs in the context of planning for wild horses. In the PMUD EA, BLM estimates that the total population of wild horses on the Allotments is 773. (Hrg. Exh. 25 at 24) In the FMUD EA, BLM revises that estimate to 1,237. (Hrg. Exh. 37 at 31) Because wild horses on the Allotments reproduce at an annual rate of 20 to 25 percent (Tr. 1546), the revised herd estimate cannot be based on reproduction alone. More importantly, in the environmental consequences section of the PMUD EA, BLM states that wild horses will be removed from the Allotments to "40% below AML [(appropriate management level)]," whereas the FMUD EA indicates that wild horses will be managed within the AML.⁴ (Hrg. Exh. 25 at 31; Hrg. Exh. 37 at 38)

BLM has also added information to the FMUD EA regarding noxious weeds which was not present in the PMUD EA. In the section of the FMUD EA analyzing environmental consequences of the proposed action, BLM states: "Most of the noxious weeds found within the Squaw Valley and Spanish Ranch Allotments are found along the roads where major man caused disturbances have occurred. Livestock only attribute to a small portion of the spread of noxious weeds." (Hrg. Exh. 37 at 33-34). Also added to this portion of the FMUD EA is BLM's account of treating 75 acres of noxious weeds within the Allotments since 2001. (Id.)

Examination of the PMUD EA and FMUD EA also reveals a possible discrepancy regarding management of wetlands and riparian zones. In the environmental consequences analysis section for the proposed action of the PMUD EA, BLM indicates that hot season grazing will only occur once in a four-year grazing cycle on riparian and wetlands. (Hrg. Exh. 25 at 30) This provision has been eliminated from the corresponding section of the FMUD EA. (Hrg. Exh. 37 at 38) While this particular restriction is prescribed for most of the riparian pastures in the Squaw Valley Allotment through other provisions of the FMUD, its omission from the general analysis section suggests that other riparian pastures, particularly those in the Spanish Ranch Allotment, will be subject to hot season grazing more than once in a four year cycle.⁵

The most significant difference between the PMUD EA and the FMUD EA is the addition of approximately seven pages of terms and conditions implementing the FWS' "Reasonable and Prudent Measures 1 and 2" which BLM has adapted from the BO. BLM's

⁴ The undersigned is aware that both the PMUD and FMUD set an AML for wild horses of 150 to 250 horses.

⁵ The undersigned recognizes that this modification to the PMUD EA may have been made by BLM simply to clarify potentially confusing language. However, in the absence of an explanation from BLM in the FMUD EA, the undersigned and the public cannot know BLM's motives or reasoning for making this amendment.

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consultation with FWS regarding LCT resulted in these reasonable and prudent measures, and their corresponding terms and conditions, which were designed by FWS to ensure survival of the LCT. With regard to these measures, and their corresponding terms and conditions, FWS explains in the BO:

The measures described below are nondiscretionary and must be undertaken by BLM so that they become binding conditions of any grant or permit issued to the lessee(s) or permittee(s), as appropriate, for the exemption in section 7(o)(2) to apply.

(Hrg. Exh. 34 at 43).

Mr. Oke testified that BLM is not afforded any flexibility in implementing the terms and conditions set out in the BO. Mr. Oke testified as follows:

A: * * * Fish and Wildlife Service is responsible to take a look at threatened and listed species under their jurisdiction, and then what they do is they come back and give us what we call a "Biological Opinion." That Biological Opinion will have Standards into it that are called "Terms and Conditions," you know, and those Terms and Conditions, I have no flexibility over anything other than to put those in the Final Multiple-Use Decision, because we're dealing with habitat that's certain listed species.

(Tr. 315).

This is correct, as stated, however, despite the mandatory nature of the terms and conditions in the BO, BLM has apparently used discretion in its implementation of those terms and conditions. At pages 6-11 of the FMUD,⁶ the terms and conditions from the BO are adopted and recited almost verbatim. However, there are some discrepancies between the terms and conditions in the BO and those in the FMUD.

For example, Term and Condition 3i on page 8 of the FMUD states:

Livestock (cattle and/or domestic sheep) grazing along Upper Rock, Toe Jam, Frazer, Lewis, Nelson and Upper Willow Creeks under the proposed long-term livestock grazing system, shall be contingent upon achievement of: 1) four of six

⁶ The language adopting the terms and conditions from the BO in the FMUD and the FMUD EA is identical. However, "Table 6" which is referenced in both the FMUD and the FMUD EA is only present in the FMUD.

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4-year stream riparian objectives for Upper Rock, Toe Jam, Frazer Creeks listed in Table 6 of this decision; and all stream riparian objectives for Lewis, Nelson, and Upper Willow Creeks listed in Table 7 of this decision.

(Hrg. Exh. 35 at 8). Corresponding language occurs at page 49 of the BO (Hrg. Exe. 34 at 49), and the BO refers the reader to a single table, "Table 9" for all of the contingent stream riparian objectives. One problem here arises because the stream riparian objectives listed in Table 6 of the FMUD are not, in fact, identical to those in Table 9 of the BO. The short-term, 4-year objectives in Table 6 of the FMUD comport with the corresponding objectives in Table 9 of the BO. However, the 8-Year Long-Term Objectives in Table 6 of the FMUD vary from those in Table 9 of the BO. (See Hrg. Exh. 34 at 49-51; Hrg. Exh. 35 at 61-62)

Unlike the BO, which lists long-term objectives as a single numeric benchmark, the FMUD utilizes numeric designations followed by a plus-or-minus range. For example, the Riparian Condition Class for the upper reach of Upper Rock Creek in the BO is greater than or equal to 66 percent (under this system, percentages indicate proximity to the optimum, thus 100-percent is ideal and higher percentages are preferable). (See Hrg. Exh. 34 at page 51, Table 9, Footnote 2; Tr. 2065). In Table 6 of the FMUD, BLM set the parallel long-term objective for the same stream at 67 percent plus or minus 7 percent. (Hrg. Exe. 35 at 61) Thus, rather than a specific standard, BLM has adopted a range which could fall six percentage points below the standard set by FWS in the BO.

BLM has taken the same range-based approach to setting standards for most of the long-term objectives identified in Table 6. In some cases the least desirable⁷ end of the potential range identified by BLM meets the minimum requirement set by FWS in the BO. However, in certain instances the range allows the standard to sink below that identified in the BO. (See Hrg. Exh. 35 at 61-62; compare Hrg. Exh. 34 at 49-51). For example, the shorewater depth objective for the lower reach of Upper Rock Creek identified in the BO is equal to or greater than .7 inches. (Hrg. Exh. 34 at 49) In the FMUD the same objective is set at .7 inches plus or minus .3 inches. (Hrg. Exh. 35 at 61) Thus, the FMUD allows for a shorewater depth objective that is almost half of what is required in the BO. In Frazer Creek the FMUD allows for a long-term average riparian condition class that could fall thirteen percentage points below what the BO requires. (Compare Hrg. Exh. 35 at 62; to Hrg. Exh. 34 at 50) This same scenario is repeated for many of the long-term objectives identified in Table 6 of the FMUD. (Hrg. Exh. 35 at 61-62)

⁷ Not all measures/criteria are more desirable as they increase numerically. For example, streambank angle is theoretically ideal at 90 degrees and less desirable as the angle approaches being flat or 180 degrees. (Tr. 2066-67)

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In one instance, the entire range allowed under the FMUD falls below the BO requirement. For the riparian condition class identified for the upper reach of Toe Jam Creek, the FMUD sets out a long-term objective of 67-percent plus or minus 7-percent. (Hrg. Exh. 35 at 61). Even at the high end of this range (74-percent), the objective in the FMUD fails to meet the minimum 75-percent required by the BO. (Hrg. Exh. 34 at 50)

These variations in the long-term objectives are particularly relevant because, under terms and conditions 1c and 1d for implementation of the BO's Reasonable and Prudent Measure 2, the BO predicates future grazing on meeting the long-term riparian objectives outlined in its Table 9. (Hrg. Exh. 34 at 52-53) In the FMUD, BLM has taken liberties in reproducing its corresponding terms and conditions 1c and 1d. In section 1c of the FMUD, BLM omits any citation to Table 6, whereas section 1c of the BO explicitly cites Table 9. (See Hrg. Exh. 35 at 10; compare Hrg. Exh. 34 at 52-53) Of more concern is BLM's iteration of term and condition 1d for reasonable and prudent measure 2. In this provision of the BO, FWS writes:

* * * BLM shall evaluate the monitoring data collected from Upper Rock, Toe Jam, Frazer, Lewis, Nelson, and Upper Willow Creeks to determine if the achievement of any applicable short-term and/or long-term riparian objectives **as outlined in Table 9** have been jeopardized.

(Hrg. Exh. 34 at 53) (emphasis added) BLM's corresponding section 1d in the FMUD reads as follows:

* * * BLM shall evaluate the monitoring data collected from Upper Rock, Toe Jam, Frazer, Lewis, Nelson, and Upper Willow Creeks to determine if the achievement of any applicable short-term and/or long-term riparian objectives have been jeopardized.

(Hrg. Exh. 35 at 10) In order to mirror the effect of section 1d in the BO, BLM's section 1d should read "to determine if the achievement of any applicable short-term and/or long-term riparian objectives **as outlined in Tables 6 and 7** have been jeopardized." Because BLM did not reference the numeric standards listed in Tables 6 and 7 of the FMUD, section 1d in the FMUD has become a vague statement of general aspiration rather than a concrete requirement like its counterpart in the BO.

Under the circumstances here, the amendments or changes BLM made to the PMUD/PMUD EA, including but not limited to the elimination of measures to protect sage grouse habitat and BLM's adaptation of the FWS' BO, warranted a separate notice and comment period for the FMUD EA. Because BLM failed to offer the public notice of and an opportunity to comment on the FMUD/PMUD EA, or to even identify and explain its changes to

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the PMUD/PMUD EA, BLM's decisions have been made in a "black box" leaving the public to ponder why and how BLM reached the conclusions it did. This circumstance is one that NEPA is intended and designed to avoid. Accordingly, I find that BLM violated the public notice and comment requirements of NEPA, as outlined in Lynn Canal Conservation Inc., 167 IBLA 136 (2005), by failing to provide any notice and comment period for the FMUD EA.

NEPA ADEQUACY WITH REGARD TO CUMULATIVE IMPACTS ANALYSIS

NEPA's implementing regulations define cumulative impacts as " * * * the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR 1508.7. BLM's failure to analyze the fence projects (see discussion supra) necessary to implement grazing under the FMUD constitutes a failure to analyze the cumulative impacts of the FMUD.

This failure is procedurally flawed for the reasons enunciated by the IBLA in Owen Severance et al., where the Board explained:

[A] FONSI may be set aside when BLM fails to consider the indirect and cumulative impacts of [a project]. Southern Utah Wilderness Alliance, 150 IBLA 158, 167-69 (1999). Similarly, a decision to proceed with a * * * project based on a FONSI is properly set aside when the record, including the EA and comments on the EA, discloses the existence of other planned * * * projects which, together with the proposed [project], will have cumulative impacts on the environment which have not been analyzed in the EA or FONSI. See Wyoming Outdoor Council, 158 IBLA at 172-74; Southern Utah Wilderness Alliance, 124 IBLA 162, 169 (1992).

Owen Severance et al., 163 IBLA 208, 219 (2004).

One example of a cumulative impact BLM has failed to consider because it failed to analyze the fence projects is the cumulative impact of the fences and the Betze project on sage grouse habitat. BLM acknowledges that activities, including fence construction and the Betze project, may have adverse impacts on sage grouse habitat (Tr. 1455, 2830-32; Hrg. Exh. 23 at xx, Table S-1), yet it has not analyzed those impacts in combination.

The Betze mining project involves pumping water out of a mine and may draw down the water table more than ten feet (de-watering) on lands within a fifteen mile radius of that mine. (Hrg. Exh. 23 at ix, Table S-1) De-watering will occur on lands adjacent to the Allotments. (Hrg. Exh. 23 at i, Figure 3.21; Tr. 2541-2545) In fact, the lands that may be de-watered as a result of the Betze project include a portion of the Squaw Valley Allotment. (Tr. 2545) In the

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Final Supplemental Environmental Impact Statement for the Betze project mine, BLM explains that de-watering from that project may cause a "reduction in riparian and mesic communities affecting the amount of potential brooding and foraging habitats for sage grouse. Habitat effects could alter sage grouse distribution and possibly reduce regional grouse population." (Hrg. Exh. 23 at xx, Table S-1) Because BLM has not analyzed impacts to sage grouse habitat from the fence projects, it cannot know the cumulative impacts from the FMUD and Betze project on sage grouse habitat and has thus failed to analyze the cumulative impacts of the FMUD.

NEPA ADEQUACY WITH REGARD TO THE RANGE OF ALTERNATIVES CONSIDERED

In this case, BLM considered in detail only one alternative to the proposed action: a no-action alternative. Appellant claims that BLM failed to consider a reasonable range of alternatives to the proposed action in violation of section 102(2)(E) of NEPA, as amended, 42 U.S.C. 4332(2)(E) (2000).

Section 102(2)(E) requires BLM to consider "appropriate alternatives" to the proposed action as well as their environmental consequences. See 40 CFR 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F. 2d 1457, 1466 (10th Cir. 1984); Larry Thompson, 151 IBLA 208, 219 (1999). "Such alternatives should include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 CFR 1500.2(e)." Headwaters, Inc. v. BLM, 914 F. 2d 1174, 1180- 81 (9th Cir. 1990); City of Aurora v. BLM, 749 F. 2d at 1466- 67; Sierra Club Uncompahgre Group, 152 IBLA 371, 378- 79 (2000); Defenders of Wildlife, 152 IBLA 1, 9 (2000); Larry Thompson, 151 IBLA at 219- 20. Consequently, to prevail in its assertion that BLM's range of alternatives was unlawfully narrow, Appellant must show that another alternative would meet the purposes of the proposed action, be feasible, and have lesser impacts. See Great Basin Mine Watch, 159 IBLA 324, 354-55 (2003).

When evaluating the adequacy of the range of alternatives, courts have often noted that "the heart of the environment analysis under NEPA is analysis of alternatives to the proposed project." See Davis v. Slater, 148 F. Supp. 2d 1195, 1210 (D. Utah 2001); Township of Belleville v. Fed. Transit Admin., 30 F. Supp.2d 782, 798 (D.N.J. 1998), citing 40 CFR 1502.14 and 42 U.S.C. § 4332(2)(E) (2000) (stating that "[i]nvestigating reasonable alternatives is, without doubt, a primary obligation imposed under NEPA.") The Board has explained that "[t]he purpose of the NEPA process is * * * to ensure that the decision-makers are fully apprised of the likely impacts that various alternative courses of action might produce so that their selection from the alternatives represents an informed choice." In re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995).

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Thus, all reasonable alternatives must be considered and obvious alternatives may not be ignored. In re Stratton Hog Timber Sale, 160 IBLA 329, 337 (2004). Here, with regard to the large and dynamic project of managing grazing on the Allotments, the evidence shows that there are obvious alternatives that merited detailed analysis besides the proposed action and no-action alternatives.

In the FMUD EA, BLM did discuss, but eliminated from detailed consideration, a no-grazing alternative because that alternative is an action not in conformance with the RMP. BLM also eliminated from detailed analysis other alternatives, including: (1) setting target utilization and streambank trampling standards and removing livestock once standards are reached, (2) changing class of livestock from cattle to horses or sheep, (3) eliminating hot season grazing, and (4) using such techniques as riding, herding, and placing salt or other attractants on uplands to draw livestock away from riparian areas. According to BLM, these alternatives "could be implemented to improve upland and riparian habitat conditions" but were eliminated from detailed analysis because:

Movement of cattle based on reaching selected utilization and streambank trampling standards can be labor intensive and difficult to enforce. Experiences in the Elko District have shown this technique to be largely ineffective with the exception of cases where the livestock operator is highly motivated or is able to focus management over a relatively small area. Conversion of cattle use to horses or sheep use is not a practical option for the Squaw Valley or Spanish Ranches, while techniques such as riding, herding, and salting are generally only effective if used in conjunction with a grazing system designed to improve stream and riparian habitats. Elimination of all hot season grazing would likely lead to over use of other pastures in the allotment.

(Hrg. Exh. 37 at 24).

While BLM is only obligated to briefly discuss alternatives which are eliminated from detailed study, see 40 CFR 1502.14; IMC Chemical Inc., et al., 155 IBLA 173,199 (2001), its single-sentence, cursory dismissals of alternatives that it acknowledges "could be implemented to improve upland and riparian habitat conditions" (Hrg. Exh. 37 at 24) do not comply with the "rule of reason" which applies to both the range of alternatives and the extent to which each alternative must be addressed. In re Stratton Hog Timber Sale, 160 IBLA at 337. Under that rule, BLM is "required to provide enough detail in a NEPA document to establish that it has taken a good-faith objective, hard look at the environmental consequences of the proposed actions." Utah Wilderness Association, 140 IBLA 147, 152 (1997) (quoting In Committee for Idaho's High Desert, SEC 92-ID 101, at 11).

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Neither BLM's NEPA documentation nor the record demonstrate that BLM's decision-maker, Mr. Oke, was fully apprised of the likely impacts of these alternatives or that BLM took a good-faith objective, hard look at these alternatives to the proposed action. The necessity of considering most of those alternatives in detail as reasonable alternatives is demonstrated by the hearing record, which controverts many of BLM's stated reasons for not considering them in detail.

This is not to say that BLM was obliged to choose any one of those alternatives as its final action, but that detailed analyses of those alternatives, or even additional explanation as to why those alternatives were rejected from further consideration, would have added to Mr. Oke's understanding of the FMUD and to the public's understanding as well. Considering additional alternatives in detail would have helped to ensure that BLM's decision-maker took a good-faith objective, hard look at the proposed action and was fully apprised of the likely impacts from various alternative courses of action, as is required by NEPA. See In re Bryant Eagle Timber Sale, 133 IBLA at 29.

During the hearing Mr. Oke equivocated as to why the alternatives were eliminated from detailed analysis. Ultimately, Mr. Oke explained why only one action alternative was selected, using the following analogy:

A: * * * Simply put, if you were to have a car - - and I'm going to put this as simple as simple as possible. - -

Q: All right.

A: - - and that car had tires on it that would work, and they're round, and they do everything you need to do, and, and it's the best that you could choose out of a number of things in front of you, with experience and the staff that you, was given to you, taking a very hard look at this, would you take a square pair of tires to get down the road, or would you make that trip with a round pair of tires? What, what would you do? Put yourself in my shoes.

(Tr. 471-72).

While I hesitate to ascribe a specific meaning to Mr. Oke's analogy, his testimony suggests that viable alternatives were rejected for detailed analysis only because they were not the preferred alternative. This interpretation of Mr. Oke's testimony is corroborated by the testimony of Carol Evans, who is a BLM Fisheries Biologist and one of the FMUD EA preparers. (Tr. 2016; Hrg. Exh. 37 at 44)

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At hearing Ms. Evans explained her understanding of why other possible alternatives were not considered in the FMUD EA as follows:

Q: What types of alternative actions did the team consider?

* * * * *

A: We also considered - - we discussed changing class of livestock to, to yearlings. Yearlings work better for riparian management. Cow/calf pairs tend to hang on stream bottoms. And, you know, you don't get as good as results if you, if you have a grazing system with yearlings, yearlings spread out. And I've seen really good results with yearlings still in terms of improvements. So we had real, real strong discussions about changing class of livestock from cow/calf pairs to yearlings. That is a desirable thing to do. And it may still be done down the road. But at the time the livestock operations felt that they, that that just was not a workable alternative for them. We discussed converting more AUMs from cattle, from cattle to sheep. Sheep generally are more compatible with, with riparian management and also management of other areas because you can move them around more. You can have more control over them without fencing. And that, that was a viable alternative. But, but again, the ranching operations just felt that that was not a change they could make economically.

(Tr. 2128-30).

Her testimony demonstrates that known viable alternatives to the proposed action existed, including converting cattle AUM's to sheep AUM's, which BLM chose not to consider in detail. Given this testimony, the cursory explanation in the FMUD EA that "[c]onversion of cattle use to horses or sheep use is not a practical option for the Squaw Valley or Spanish Ranches" (Hrg. Exh. 37 at 24) is inadequate to explain why this alternative was not analyzed in detail and does not comport with NEPA's requirement to take a good-faith objective, hard look at viable alternatives.

The only explanation of the meaning of the FMUD EA phrase "not a practical option" is Ms. Evans' testimony that the permittees did not feel they could make the conversion to sheep economically. While "[a]n agency is obligated to take the needs and goals of the project applicant in mind when considering alternatives, Citizens Against Burlington, Inc. v. Busey, 290 U.S. App. D.C. 371, 938 F.2d 190, 196 (D.C. Cir. 1996), * * * that obligation does not limit the scope of the agency's analysis to what the applicant says it needs." Southern Utah Wilderness Alliance, et al. v. Norton, 237 F.Supp.2d 48 (D.D.C. 2002). Ms. Evans' explanation suffers

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from the absence of any indication of the severity of the economic impacts or that BLM made an independent investigation or analysis of the economics.

BLM's stated reasons for not considering the use of target utilization and streambank trampling standards to trigger cattle movement from one pasture to another is unpersuasive. BLM explained that this alternative can be labor intensive, difficult to enforce, and only effective with a motivated livestock operator or in a small geographic area. (Hrg. Exh. 37 at 24) The testimony indicates that Barrick is a highly motivated livestock operator. (Tr. 2110, 2127, 2424) Additionally, under the FMUD, BLM has committed itself to a monitoring regime which indicates that BLM is capable of accessing the Allotments and evaluating vegetation components at multiple locations. (Hrg. Exh. 35 at 6-10; Tr. 2098, 2153, 2149) Finally, the testimony at hearing shows that utilization triggers are being successfully employed by the Forest Service to manage livestock grazing within two miles of the Allotments. (Tr. 1734) Under these circumstances, BLM's one-sentence dismissal of this alternative from further consideration is inadequate to demonstrate a good-faith hard look.

BLM states that it did not consider eliminating hot season grazing in further detail because elimination would likely lead to overuse in other pastures on the Allotments. (Hrg. Exh. 37 at 24) By couching this alternative in absolute terms (i.e., a complete elimination of hot season grazing) BLM has failed to consider any alternative to hot season grazing in good faith. Many things are irrational in absolute terms, and the obvious alternative BLM should have considered is a reduction in hot season grazing rather than its total elimination. With regard to the Squaw Valley Allotment, the hot season grazing regime outlined in the FMUD is actually an amorphous delegation of authority which gives the permittee unfettered discretion to decide when to graze various pastures. As Ms. Fite explained at hearing, this flexibility virtually precludes any analysis or evaluation of the proposed grazing system. (Tr. 1961) By failing to identify and consider a single alternative which includes a reduction in hot season grazing, BLM has failed to meet its obligation under NEPA to investigate reasonable and obvious alternatives to the proposed action. Township of Belleville, 30 F. Supp.2d at 798; In re Stratton Hog Timber Sale, 160 IBLA at 337.

Finally, BLM inexplicably did not identify reduced grazing as a potential alternative. The intended purpose of the proposed action is to meet, or make substantial progress toward, remedying problems caused in large part by grazing. (Hrg. Exh. 35 at 1; Hrg. Exh. 26 at 2) Accordingly, a reasonable range of alternatives to meet this intended purpose should include the alternative of reducing authorized grazing. (Tr. 1736) Reducing authorized AMU's is arguably consistent with the RMP's prescription to "[i]mplement a rangeland monitoring program to determine if management objectives are being met and adjust grazing management systems and livestock numbers as required." (Hrg. Exh. 4 at 2)

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In the MASR, BLM stated:

Little benefit to riparian and other habitats will be realized by simply reducing livestock numbers. Even small numbers of livestock can adversely impact plant communities if grazing occurs season-long on an annual basis. The proposed grazing systems are predicated on moving livestock at key times to reduce grazing impacts to plants during critical growth periods or to provide for adequate rest or recovery periods following grazing use in the same or subsequent years. The effectiveness of this approach has been demonstrated in the Elko District and elsewhere.

(Hrg. Exh. 26 at 68).

However, this is not a convincing rationale for failing to consider reductions in livestock use as part of a solution to remedy the problems caused by grazing. The fact that reductions in livestock numbers alone may not adequately address the problems does not mean that reductions cannot contribute to the remedy for the problems. (Tr. 1736, 2497-99) Under these circumstances, BLM has violated NEPA by failing to consider an obvious alternative to the proposed action. See In re Stratton Hog Timber Sale, 160 IBLA at 337.

Based on the evidence presented at hearing, I find that alternatives exist, including converting cattle AUM's to sheep AUM's, reduced grazing, reduced hot season grazing, and utilization of streambank trampling standards to trigger cattle movement, which meet the purposes of the proposed action, are feasible, and would have lesser impacts but which were not considered by BLM. BLM has not considered an adequate range of alternatives or provided adequate detail to demonstrate that it took a good-faith objective, hard look at the alternatives it rejected from detailed analyses. See Utah Wilderness Association, 140 IBLA at 152. Under these circumstances there is a significant risk that Mr. Oke's decision to sign the FMUD was made without being fully apprised of the likely impacts from various alternative courses of action. Accordingly, I find that BLM's alternatives analysis in the FMUD EA is in violation of NEPA. See In re Bryant Eagle Timber Sale, 133 IBLA at 29.

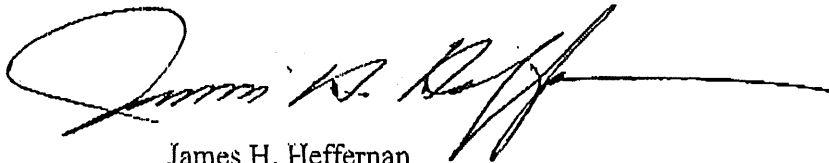
CONCLUSION

Based upon the foregoing, **THE FINAL DECISION DATED JUNE 30, 2004, IS REVERSED FOR FAILURE TO COMPLY WITH NEPA, EXCEPT TERMS AND**

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**CONDITIONS 1 AND 2A THROUGH 2F FOR LIVESTOCK MANAGEMENT AND
SELECTED ACTIONS 1, 3, AND 5 FOR WILDLIFE MANAGEMENT.**



James H. Heffernan
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 C.F.R. Part 4 (see enclosed information pertaining to appeals procedures).

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