United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
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June 21, 2006

DECISION

FOREST GUARDIANS,	:	NM-060-2004-013
	:	
Appellant	:	Appeal of Assistant Field Manager's Final Decision Record dated April 22, 2004 involving the Rio Hondo Allotment, Roswell Field Office, Roswell, New Mexico
v.	:	
BUREAU OF LAND MANAGEMENT,	:	
	:	
Respondent	:	

Appearances: James Jay Tutchton, Esq., Denver, Colorado, for Forest Guardians

John L. Gaudio, Esq., Santa Fe, New Mexico, for the Bureau of Land Management

Before: Administrative Law Judge Robert G. Holt

I. Introduction

The environmental advocacy group, Forest Guardians, filed this appeal under the Taylor Grazing Act 1/ challenging a BLM decision to use an aerial application of a chemical herbicide for removal of woody shrubs on a grazing allotment. Forest Guardians claims that BLM violated various environmental protection statutes, including the National Environmental Policy Act ("NEPA"). 2/ BLM argues that it complied with the law, particularly when it incorporates other environmental analyses by reference through "tiering."

The following discussion will show that the decision must be vacated because its supporting Environmental Assessment ("EA") failed to consider a reasonable range of alternatives in violation of NEPA. BLM missed a stage of analysis when it tiered the EA to a previously prepared program Environmental Impact Statement ("EIS") for treatment of

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1/ 43 U.S.C. §§ 315-315n (2000).

2/ 42 U.S.C. §§ 4321- 4347 (2000).

vegetation. The program EIS supported a decision to use a combination of vegetation management methods, of which chemical herbicide was but one. The other methods included manual, mechanical, biological and prescribed burning. BLM's EA began by analyzing only the chemical herbicide method. Between the program EIS and the site-specific EA, BLM skipped the analysis of which of the five methods it should use and only analyzed the chemical method. Missing this step caused BLM to state the purpose and need for its project too narrowly and that in turn resulted in consideration of an unreasonably narrow range of alternatives.

II. Background

The case began when BLM authorized the chemical treatment of public lands on the Hondo Canyon Ranch grazing allotment (#64060) in a decision issued by its Roswell (New Mexico) Field Office on May 22, 2004. The decision approved treatment of 2,739 acres with the herbicide, tebuthiuron, by aerial application at the rate of 0.75 pounds per acre. In order to satisfy NEPA requirements, BLM prepared an EA 3/ which it tiered to a previously prepared program EIS for Vegetation Treatment on BLM Lands in Thirteen Western States. 4/ The EA stated that its purpose was to "analyze the impacts of reducing the amount of catclaw acacia and creosote by application of tebuthiuron." It analyzed three alternatives: (1) no action; (2) apply the same herbicide at a different rate; and, (3) apply the same herbicide without designated leave areas.

Forest Guardians appealed the decision and petitioned for a stay. After Administrative Law Judge Harvey C. Sweitzer denied the petition for stay, 5/ Forest Guardians waived its right to a hearing and the parties stipulated that I decide the appeal on written memoranda. 6/ The parties have now completed the briefing and the appeal is ready for decision.

III. Standard of Review

The person appealing a BLM decision has the burden of proving error. 7/ The appellant must support the appeal by "argument or evidence" that establishes error by the standard of a

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3/ Exhibit 1.

4/ Exhibit 8.

5/ Motion to Dismiss Denied, Petition for a Stay Denied, dated July 9, 2004.

6/ Order Cancelling Prehearing Conference and Hearing; Establishing Briefing Schedule, dated March 3, 2006.

7/ See National Park Service (Stuart G. Ramstad), 125 IBLA 335, 345 (1993).

preponderance of the evidence. 8/ In applying this standard, the Board of Land Appeals has held that an appeal must fail where the parties have expressed a mere difference of opinion. 9/

> As a general rule, when the BLM decision is based on consideration of all relevant factors and the record indicates that individuals knowledgeable in their fields contributed input to the decision, BLM is entitled to rely on their expertise. A mere difference in opinion will not overcome the reasoned opinions of the Secretary's technical staff * * * The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective evidence rather than differences of opinion. 10/

Further, reviewers must give BLM decisions deference. These decisions are

> entitled to considerable deference even though reasonable men might differ in making such assessments. When BLM's subjective assessments are challenged on appeal, there must be a showing of clear error of law or demonstrative error of fact. 11/

Under this standard, Forest Guardians has shown that BLM made an error of law by not examining a reasonable range of alternatives.

IV. Discussion

A. BLM's Environmental Analysis does not Satisfy the National Environmental Protection Act

This discussion will begin by reviewing the NEPA statute and its implementing regulations. These requirements will then be compared with BLM's EA to determine compliance. The reasons for BLM's non-compliance will next be examined; and finally, the other arguments and evidence of the parties will be analyzed.

8/ Leonard J. Olheiser, 106 IBLA 214, 216 (1988).

9/ Committee for Idaho's High Desert, 137 IBLA 92, 99 (1996).

10/ Klamath Siskiyou Wildlands Center, 157 IBLA 322, 328 (2002).

11/ Committee for Idaho's High Desert, 137 IBLA 92, 99 (1996).

1. The NEPA Statute and Regulations

NEPA requires federal agencies to take a "hard look" at the environmental impacts of their actions before starting a project. 12/ In this case BLM used an EA to attempt to fulfill this requirement. Regulations promulgated by the Council on Environmental Quality allow federal agencies to use shorter EAs to determine if the circumstances require a full environmental impact statement or to aid compliance with NEPA when no EIS is necessary. 13/ Because NEPA requires an EIS for major federal actions that will significantly affect the quality of the human environment, 14/ a federal agency usually prepares a formal finding of no significant impact ("FONSI") when an EIS is not required. Since BLM made no FONSI in this case, it appears to have used the EA for the general purpose of aiding compliance with NEPA. For whatever purpose BLM prepared the EA, the regulations specifically require that the EA contain a brief discussion of at least three elements: (1) the need for the proposal; (2) alternatives as required by section 102(2)(E) of NEPA 15/; and, (3) the environmental impacts of the proposed action and alternatives.

The regulations also authorize EAs to incorporate by reference the general discussions of a broader program EIS. The technique, known as "tiering", 16/ saves the work of repeating a previous NEPA analysis. In this case BLM specifically tiered its EA to the prior EIS for Vegetation Treatment on BLM Lands in Thirteen Western States. 17/ This broader program EIS supported a decision to use a range of five vegetation treatment methods: manual, mechanical, biological, prescribed burning and chemical. 18/ The decision specifically required additional NEPA analysis for each local project:

> [The EIS] provides NEPA compliance by assessing the program impacts of treating undesired vegetation species; the necessity for treatment is determined by BLM's land use plans. Once a treatment project has been identified, site specific

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12/ Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 448 (10th Cir. 1996).

13/ 40 CFR 1508.9 (2005).

14/ 42 U.S.C. 4332(2)(C) (2000).

15/ 42 U.S.C. 4332(2)(E) (2000).

16/ 40 CFR 1508.28 (2005).

17/ Exhibit 1 at 2.

18/ Record of Decision, Vegetation Treatment on BLM Lands in Thirteen Western States at 6 (1991) (Exhibit 8).

> environmental analyses for evaluating the treatment project impacts on the specific resources of the local project area will be completed prior to any treatment of undesired vegetation. 19/

Even though BLM's program EIS supported a decision to use a range of five methods for vegetation treatment, the analysis in the narrower site-specific EA now under review began with a proposal to use only one of the available five choices, i.e., a specific type of chemical. The alternatives to the proposal merely considered variations on the use of the one chemical. Except for the no action alternative, they each required chemical application, to the exclusion of any other method.

After examining both the program EIS and the site-specific EA, one wonders how BLM determined to use only chemicals on this grazing allotment. The record embodied in the EIS and EA does not provide the public with a written record of how BLM made the decision to use only a chemical herbicide. BLM completely skipped any analysis of which method described in the program EIS to use and went straight to the conclusion that it should use a specific chemical.

BLM's failure to analyze more of the alternatives identified in the program decision violates the express provisions in NEPA to evaluate a reasonable range of alternatives, violates the regulations for preparation of EAs, and does not follow the representations of the program decision itself. NEPA expressly requires the responsible official to include a detailed statement on "alternatives to the proposed action." 20/ The regulations for preparation of EAs also require a discussion of alternatives. 21/ Further, the program decision for vegetation management also requires an analysis of the alternative methods of treatment:

> The method of treatment to be used shall be determined by several factors such as environmental impacts, effectiveness of practices in meeting objectives, human health, safety, cost effectiveness, project longevity, and technology available. Each proposed project will be reviewed prior to treatment by completing a project(s) specific environmental analysis. 22/

19/ Id. See also Final Environmental Impact Statement, Vegetation Treatment on BLM Lands in Thirteen Western States, ch. 1, p. 42 (1991) (Exhibit 8).

20/ 42 U.S.C. 4332(2)(C)(iii) (2000).

21/ Id. at 1508.9.

22/ Record of Decision, Vegetation Treatment on BLM Lands in Thirteen Western States at 3 (1991) (Exhibit 8).

Because the EA did not consider a reasonable range of alternatives, BLM made an error of law and its decision must be vacated.

2. Reasons for BLM's Error

BLM's error stems from the narrow purpose statement it used for the EA. BLM simply states: "The purpose of this environmental assessment is to analyze the impacts of reducing the amount of catclaw acacia and creosote by application of tebuthiuron." This narrow statement both presupposed a conclusion to use a chemical and foreclosed analysis of any of the other methods of treatment. Courts have found such a practice to violate NEPA because it provides an "obvious way for an agency to slip past the structures of NEPA." 23/

The narrow purpose statement necessarily prevented BLM from considering a reasonable range of alternatives. Because the purpose statement only considered application of a single type of chemical herbicide, BLM did not analyze the other vegetation management methods. Thus BLM did not analyze whether other methods such as manual, mechanical, biological or prescribed burning, might accomplish the vegetation treatment it proposed with less environmental impact.

This narrow purpose statement may be compared to the one considered by the Board of Land Appeals in Committee for Idaho's High Desert. 24/ The decision before the Board in that case also involved a project to use herbicides for control of vegetation on a grazing allotment. Similarly, BLM had tiered the supporting EA to the same 1991 program EIS for Vegetation Treatment in Thirteen Western States. 25/ However, the EA stated the purpose of the project more broadly: "to better control sagebrush and snakeweed encroachment in crested wheatgrass seedings." 26/ This purpose statement generated a range of alternatives that considered several methods of treatment: a specific herbicide, (different than the one contained in the proposed action); prescribed burning; mechanical brush control; and, no action. 27/ The Board found the EA prepared by BLM satisfied the requirements of NEPA. The contrast between the EA considered by the Board in Committee for Idaho's High Desert and the EA now under consideration demonstrates how a broader purpose statement can generate consideration of a reasonable range of alternatives.

23/ Simmons v. U.S. Army Corps of Eng'rs., 120 F.3d 664, 666 (7th Cir. 1997).

24/ 137 IBLA 92 (1996).

25/ Id. at 95. See Exhibit 8.

26/ Id. at 93.

27/ Id. at 94.

3. Arguments of Forest Guardians and BLM

Forest Guardians and BLM have made more specific arguments to support their positions. However, neither party states a persuasive reason for reversal or affirmation of the decision.

Forest Guardians correctly points out that BLM erred because it considered a too narrow range of alternatives. However, BLM does not necessarily have to consider the alternatives Forest Guardians suggest. Forest Guardians argues that BLM should have considered preventative measures such as reduced grazing, ending suppression of wild fires, and controlled burning, as alternatives to chemical treatment. Forest guardians points to the case of Blue Mountain Biodiversity Project v. U.S. Forest Service 28/ as precedent for considering preventative measures as an alternative.

Forest Guardians' argument does not satisfy its burden to show that another alterative would accomplish the intended purpose, be technically and economically feasible and have a lesser impact. 29/ It has not presented any facts to support its argument that preventative measures would control the undesired vegetation on the allotment with less impact.

BLM counters these arguments by pointing out (1) that it did analyze reduced grazing in the 1994 Rangeland Reform EIS 30/ and in the 1997 Roswell Resource Management Plan and Record of Decision, 31/ and (2) that it did analyze other herbicides, prescribed fire, and mechanical treatments in the 1991 Vegetation Treatment EIS 32/ and the 1997 Roswell Resource Management Plan EIS. 33/

28/ 229 F. Supp 2d 1140 (D. Or. 2002).

29/ Great Basin Mine Watch, 159 IBLA 324, 354 (2003) (citing Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990)("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).")); City of Aurora v. Hunt, 749 F.2d 1457, 1466-67 (10th Cir. 1984); Sierra Club Uncompahgre Group, 152 IBLA 371, 378 (2000); Defenders of Wildlife, 152 IBLA 1, 9 (2000); Larry Thompson, 151 IBLA 208, 219-20 (1999).

30/ Exhibit 10.

31/ Exhibits 9 and 11.

32/ Exhibit 8.

33/ Exhibits 9 and 11.

BLM's argument cannot prevail because it shows that BLM only considered the preventative measures in other contexts, for broader areas, and not for the specific site. Indeed the 1991 program vegetation treatment decision requires an EA for the specific treatment site. Even the later 1997 Roswell Resource Management Plan requires an analysis of the specific site to determine which method of a range of vegetation management methods to use.

In conclusion, it must be recognized that BLM enjoys great discretion in managing the public lands. Indeed it may have made the correct decision in choosing an areal application of Tebuthiuron to manage the vegetation on this grazing allotment. However, BLM erred by not documenting an evaluation of other alternatives for vegetation treatment. It thus did not follow the procedural steps required by NEPA. 34/

B. Comments on Other Alleged Errors

1. Non-binding Dicta

Forest Guardians has alleged several additional errors as grounds for reversal. It argues (1) that BLM failed to consider an important aspect of the problem, (2) that the EA did not include a cost and benefit analysis, (3) that the EA contained an inadequate consideration of cumulative impacts or connected actions, (4) that BLM violated the Endangered Species Act ("ESA"), and (5) that BLM violated the Federal Land Policy and Management Act ("FLPMA"). Because BLM's decision can be reversed on the sole ground that it failed to consider a reasonable range of alternatives, these additional grounds for reversal need not be addressed. Nevertheless, comments on the party's arguments may help the preparation of a new environmental assessment. The parties must recognize these comments as non-binding dicta, meaning that I offer them for whatever help the parties may find them. Any subsequent evaluator must consider a revised EA on its own merits.

2. Failure to Consider an Important Aspect of the Problem

Forest Guardians first argues that BLM failed to consider an important aspect of the problem 35/ because it did not consider whether leaving the woody brush, such as catclaw acacia

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34/ Sierra Club v. Espy, 38 F.3d 792, 802 (5th Cir. 1994) (NEPA "is a procedural statute that * * * does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a 'hard look at environmental consequences.'"), quoting Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 676 (5th Cir. 1992), cert denied, 506 U.S. 823 (1992).

35/ See, e.g., Friends of the Bow v. Thompson, 124 F.3d 1210, 1217 (10th Cir. 1997).

and creosote, would actually benefit this allotment. It supports its argument with a well-reasoned Declaration of Dr. Walter G. Whitford. 36/

However, the public record shows that BLM had considered the desirability of woody brush in prior decisions. The applicable resource management plan contains a discussion of vegetation management 37/ and sets threshold levels for catclaw and creosote. 38/ Further, the EA's no action alternative did consider the effect of leaving the woody brush. 39/

Turning to the evidence offered by Forest Guardians, the opinion of Dr. Whitford contrasts with the opinion of BLM as reflected in the resource management plan's decision to limit catclaw and creosote to specific threshold levels. While the opinions of Dr. Whitford command respect, the Board of Land Appeals has held such a difference of opinion cannot overcome the reasoned opinions of the Secretary's technical staff. 40/ Further the declaration of Dr. Whitford does not contain sufficient objective evidence to demonstrate that BLM's technical staff made a error of fact in reaching its opinion. Therefore, Dr. Whitford's opinions do not justify rejecting the EA.

3. Lack of a Costs and Benefits Analysis

Forest Guardians also argues that the EA should have contained a costs and benefits analysis, citing the regulations at 40 CFR 1502.23. BLM counters that the regulations only require a costs and benefits analysis for a full EIS and then only if it can aid in selecting the proposed action.

However, the prior program decision for vegetation treatment, to which BLM tiered its EA, specifically requires a cost-benefit analysis:

> Land treatments proposed for livestock forage improvement will be subject to a cost benefit analysis to ensure total benefits gained will equal or exceed the cost of treatments. The economic analysis will identify the most economical treatment

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36/ Exhibit 3.

37/ Roswell District New Mexico, Bureau of Land Management, United States Department of the Interior, Roswell Approved Resource Management Plan and Record of Decision at 33 (Oct. 1997).

38/ Id. at 35.

39/ Exhibit 1 at 3 and 19.

40/ Klamath Siskiyou Wildlands Center, 157 IBLA 322, 328 (2002).

> practice. Control of noxious weeds required by law will not be subject to a benefit-cost analysis; however, the most economical and efficient method will be analyzed along with the safety of the proposed kind of treatment. 41/

Because BLM has expressly tiered its EA to the EIS supporting the program decision for vegetation treatment, BLM should consider following the statements in the decision record and prepare a cost-benefit analysis for the proposed project, or explicitly explain why it does not consider one necessary.

4. Inadequate Consideration of Cumulative Impacts and Connected Actions

Forest Guardians next argues that BLM did not the consider the cumulative impacts or connected actions of its proposed decision and thus violated 40 CFR 1508.25(a) and 1508.7. It specifically criticizes BLM for not following the standards identified in Tomac v. Norton 42/ for a meaningful cumulative analysis. Further, Forest Guardians identifies 50 other vegetation manipulation projects 43/ and 7 herbicide projects to reduce woody shrubs 44/ which it claims are cumulative or connected.

Forest Guardian's identification of these other projects does not prove that BLM failed to consider them as cumulative or connected actions. BLM approved the 7 herbicide projects in 2005 after it prepared the EA for this project in 2003 and Forest Guardians has not shown that the 7 herbicide projects were future actions reasonably foreseeable in 2003. Further, Forest Guardians has not shown that the 7 herbicide projects involve the same chemical or the same watershed as the project considered in the EA. And Forest Guardians has not identified the 50 vegetation manipulation projects with enough detail to show that they would be cumulative or connected to the project.

41/ Record of Decision, Vegetation Treatment on BLM Lands in Thirteen Western States at 9 (Exhibit 8).

42/ 433 F.3d 852, 864 (D.C. Cir. 2006).

43/ Exhibit 4.

44/ Exhibit 5.

Nevertheless, BLM's analysis of the cumulative impacts 45/ does not provide a model of thoroughness. BLM should consider following the standards described in Tomac v. Norton 46/ in the future preparation of any EA for this project. It should consider explicitly identifying

> (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions - past, present, and proposed, and reasonably foreseeable - that have had or are expected to have impacts on the same area; (4) the impacts or expected impacts from those other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate. 47/

5. Violation of the Endangered Species Act

Forest Guardians also claims that BLM violated the ESA because (1) it did not consider endangered species which may occasionally visit the project area and (2) it did not request a protected species list from the Fish and Wildlife Service ("FWS") during 2004 but, rather, used an outdated 1997 list. BLM counters that it did consider species movements in the EA. 48/ Further, BLM points out that the Board has held that since BLM is an agency of the Department of the Interior, it is not obligated to request information from the FWS because it is also an agency of the Department of the Interior. 49/ BLM appears to be correct on these points.

Forest Guardians cites to three Federal Register announcements as evidence that BLM failed to consider an endangered species in its analysis. The FWS published all three in 2005 after the date of the EA in 2003. Thus they cannot provide persuasive evidence that BLM erred at the time it prepared the EA. 50/ One cite identifies three species of snails and one amphipod as endangered, but does not describe sightings or habitat within the project area. The remaining two cites describe a proposal to reintroduce an endangered species, the Northern Aplomado Falcon,

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45/ Exhibit 1 at 20.

46/ 433 F.3d 852 (D.C. Cir. 2006).

47/ Id. at 864.

48/ Exhibit 1 at 16 and 6-19.

49/ Oregon Natural Resources Council, 116 IBLA 355, 372 (1990); Oregon Natural Resources Council, 115 IBLA 179, 185 (1990).

50/ 70 FR 46,304 (Aug. 9, 2005); 70 FR 6,819 (Feb. 9, 2005); 70 FR 54,701 (Sept. 16, 2005).

which the FWS had not yet implemented at the time of publication. This evidence cannot satisfy Forest Guardian's burden to prove that BLM made an error.

However, the EA for the grazing authorization within the allotment that includes the area which is the subject to this vegetation treatment project identifies the bald eagle and peregrine falcon as threatened or endangered species. 51/ Yet, the EA under review states there are no known threatened or endangered species in the project area. 52/ BLM should reconcile these apparently conflicting statements in any revised EA.

6. Violation of the Federal Land Policy and Management Act

Finally, Forest Guardians argues that BLM violated FLPMA's multiple use provision by favoring short-term livestock grazing goals while sacrificing long-term ecosystem health. Again, Forest Guardians relies on the Declaration of Dr. Whitford 53/ to show that the project will produce little livestock range or wildlife benefit, and that the expense, detriment to the land, lost aesthetic and recreational opportunities, and diminution in habitat will outweigh the benefits of the project.

However, the record shows that BLM has analyzed the effects of livestock grazing on public lands in prior documents including the 1995 Rangeland Reform EIS 54/ and the Roswell Resource Management Plan. 55/ The EA also concludes that application of herbicides will likely have a beneficial effect on the allotment. 56/ BLM and Dr. Whitford have thus developed different opinions about the efficacy of the project. As noted before, the Board has held that such a difference of opinion cannot overcome the reasoned opinions of BLM's technical staff. 57/ Further, the declaration of Dr. Whitford does not contain sufficient objective evidence to demonstrate that BLM's technical staff made a error of fact in reaching its opinion. From the

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51/ Environmental Assessment for Grazing Authorization, Allotments 64060 & 64560, dated October 1998 at 8. (Tab 17 of Appeal File).

52/ Exhibit 1 at 6.

53/ Exhibit 3.

54/ See Exhibit 10.

55/ See Exhibit 11 at 30-32.

56/ Exhibit 1 at 12-13.

57/ Klamath Siskiyou Wildlands Center, 157 IBLA 322, 328 (2002).

arguments and evidence presented in this proceeding, BLM does not appear to have violated FLPMA.

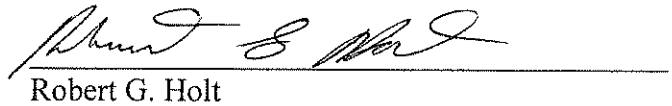
The preceding comments express the view that BLM did not fail to consider an important aspect of the problem or violate FLPMA, but that BLM should consider additional detail and analysis in its discussions of (1) costs and benefits, (2) cumulative impacts and connected actions and (3) endangered species. Because BLM must revise the EA to analyze a reasonable range of alternatives, I offer these comments for whatever help they may be for the next revision.

V. Conclusion

To summarize, BLM's decision to use chemicals to reduce the amount of woody brush on the Hondo Canyon Ranch allotment must be vacated because BLM failed to analyze a reasonable range of alternatives in its environmental assessment. BLM explicitly tiered its EA to the program EIS for Vegetation Treatment on BLM Lands. The program EIS supported a decision to use a range of methods to treat vegetation. However, the site-specific EA for the project began with the stated purpose of using only one specific chemical. As a result the EA did not analyze other alternative methods of vegetation treatment such as manual, mechanical, biological or controlled burns. Especially where BLM tiers a site-specific EA to a program EIS, as here, the analysis in the EA should begin where the EIS left off. The EA prepared by BLM does not show how BLM moved from a decision to use a range of treatment methods to a decision to use a single chemical treatment method. The decision supported by the EA must therefore be vacated and returned for further analysis in compliance with NEPA.

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).



Robert G. Holt
Administrative Law Judge

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