United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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WESTERN WATERSHEDS PROJECT, *ET AL.*
v.
BUREAU OF LAND MANAGEMENT

IBLA 2019-115, *et al.* Decided June 10, 2019

Appeals of and petition to stay the effect of an Administrative Law Judge's orders granting a full stay of BLM grazing decisions. DCHD-2019-0030, *et al.*

Appeals consolidated; intervenor status granted; Appellants' motion to file amended appeal and petition for stay brief granted, and accepted as filed; petition to stay the Administrative Law Judge's stay orders denied; expedited briefing schedule established for the remaining briefs.

APPEARANCES: Scott Lake, Esq., Boise, Idaho, for Western Watersheds Project and Wilderness Watch; Paul A. Turcke, Esq., Boise, Idaho, for intervenors Sellman, Lahtinen, Van Prow, and Urquidi; W. Alan Schroeder, Esq., Boise, Idaho, for intervenors J.R. Simplot Co. and Gilbert Gene King; Katie Fite, Public Lands Director, Boise, Idaho, for intervenor WildLands Defense; Anne Corcoran Briggs, Esq., U.S. Department of the Interior, Office of the Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION AND ORDER BY ADMINISTRATIVE JUDGE HAUGRUD

Western Watersheds Project and Wilderness Watch (collectively WWP) appeal from and petition to stay the effect of seven stay Orders issued on March 21, 2019, by Administrative Law Judge (ALJ) Harvey C. Sweitzer.[1] The Orders grant a full stay of the effect of seven grazing permit decisions made by the Bureau of Land Management (BLM) involving three allotments in southwest Idaho: the Battle Creek, Owens, and East Castle Creek allotments. As described in our previously distributed Docketing Notice dated May 10, 2019, the Board docketed WWP's seven appeals of the ALJ's stay Orders consecutively as IBLA 2019-115 through IBLA 2019-121. This Opinion and Order

[1] WWP's Amended Notice of Appeal, Petition for Stay, and Statement of Reasons (filed May 10, 2019).

INDEX CODE:
43 C.F.R. § 4.21
43 C.F.R. § 4.404
43 C.F.R. § 4.406
43 C.F.R. § 4.471
43 C.F.R. § 4.478

consolidates the appeals for briefing, resolves pending procedural motions, denies WWP's petition to stay the effect of the ALJ's stay orders, and sets an expedited briefing schedule for the remaining pleadings.

The Appeals Are Consolidated for Briefing

WWP's appeals involve a number of similar facts and legal issues that make consolidation appropriate to facilitate their efficient resolution.[2] Accordingly, the Board consolidates the appeals for purposes of briefing and motion practice, and all future filings should be captioned under the common docket number of IBLA 2019-115, *et al.* To the extent a motion or other document relates only to a subset of the consolidated seven appeals, the filing party should note that fact in the text and identify the relevant appeals by their docket number(s).

Resolution of Procedural Motions

A number of procedural motions are pending. On May 6, 2019, permittees J.R. Simplot and Gilbert Gene King (Simplot/King permittees) filed a motion to intervene in four of the appeals[3] and a response to WWP's Appeal Brief. On the same date, permittees within the Owens allotment (Owens permittees[4]) filed a response to WWP's Appeal Brief addressing the remaining three appeals.[5] With no party raising an objection to the Owens permittees' brief, we interpret the brief as also constituting a request to intervene in those three appeals. On May 9, 2019, WildLands Defense filed a motion to intervene in all seven appeals, although it did not include a brief. As authorized by the Board's rules,[6] we grant the motions to intervene in the appeals referenced by the moving parties and accept the briefs that have been filed by the Simplot/King permittees and the Owens permittees.

On May 10, 2019, WWP filed a Notice of Errata and Motion for Leave to File an Amended Notice of Appeal, Statement of Reasons, and Petition for Stay ("Amended SOR"). WWP attached its proposed Amended SOR to the motion. We grant the motion and accept the Amended SOR as filed.

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[2] 43 C.F.R. § 4.404.

[3] The appeals are IBLA 2019-115, -116, -120, and -121.

[4] Counsel for the Owens permittees identifies his clients as Sellman, Lahtinen, Van Prow, and Urquidi.

[5] IBLA 2019-117, -118, and -119.

[6] 43 C.F.R. § 4.406.

To date, two additional briefs have been filed. On May 17, 2019, WWP filed a Reply to the permittees' briefs. On May 20, 2019, BLM filed a response to WWP's appeal entitled "Non-Opposition to Full Stay of the Challenged Grazing Decisions," in which BLM – as it did below – takes the position that it does not oppose the ALJ's grant of the permittees' request for a full stay from BLM's grazing decisions. At this point, all parties except WildLands Defense have filed briefs on the merits of the appeal.

Petition to "Stay the Stay Orders" Denied

As part of its appeal of the ALJ's stay Orders, WWP requests a "stay of the stay orders" pursuant to 43 C.F.R. § 4.21.[7] Staying the ALJ's stay Orders would put BLM's grazing decisions into effect, as issued. WWP does not explicitly explain why a stay pending Board review is needed other than to argue its merits position that the ALJ erred in applying the stay criteria in deciding to stay the seven BLM decisions. Although the permittees and BLM filed briefs in opposition to WWP's appeal, none of them directly responds to WWP's petition to stay the effect of the ALJ's stay Orders until the Board ultimately issues a final decision on the appeal. For the reasons discussed below, we deny WWP's stay petition.

The regulation authorizing the interlocutory appeal of an ALJ's stay orders in grazing appeals[8] implicitly recognizes the Board's authority to stay the effect of such stay orders by providing that the ALJ's decision remains in effect on appeal "[u]nless the Board or a court orders otherwise . . . ."[9] As with stays of final decisions, a party requesting a stay of an ALJ's interlocutory order bears the burden of proof to demonstrate that a stay should be granted.[10] Specifically, the petition for a stay must show sufficient justification based on the following standards: (1) the relative harm to the parties if the stay is granted or denied; (2) the likelihood of appellant's success on the merits; (3) the likelihood of immediate and irreparable harm if the stay is not

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[7] Amended SOR at 12; *see also id.* at 18 ("[T]he stay orders must themselves be stayed, and ultimately reversed.") and 21 ("WWP requests that the Board stay, and ultimately reverse, ALJ Sweitzer's March 21, 2019 decisions staying in full . . . the final grazing decisions.").

[8] 43 C.F.R. § 4.478(a) ("Any person who has a right of appeal under § 4.410 or other applicable regulation may appeal to the Board from an order of an administrative law judge granting or denying a petition for stay in accordance with § 4.411.").

[9] *Id.* § 4.478(d).

[10] *Id.* § 4.21(b)(2).

granted; and (4) whether the public interest favors granting the stay.[11] A failure to satisfy any one of the stay criteria will result in denial of a petition for stay.[12]

Because the merits of the appeal will address whether the ALJ erred in applying these same four criteria,[13] it is important not to conflate the stay petition and merits analyses. When a party seeks a "stay of a stay," its burden is not satisfied merely by arguing that the ALJ erred in issuing the underlying stay – that is the issue that will be decided on the merits of the appeal. Rather, the movant must demonstrate that the ALJ's order should be stayed during the pendency of the appeal to the Board, which is a different analysis even though the same criteria are being applied. For example, in deciding whether to issue a stay, the ALJ would assess whether irreparable harm would occur during his review of BLM's decisions, a process that may take several years.[14] In contrast, in deciding whether to stay the stay, the Board's analysis of irreparable harm must focus on the effects of the stay decision over a much shorter period, since by regulation we must complete this appeal "promptly" following "expedited briefing."[15] The existence or extent of irreparable harm may be vastly different given these different contexts.

In this instance, WWP has not attempted to distinguish between the merits of its appeal and the need for a stay pending Board review. For example, WWP argues that the ALJ erred by failing to recognize that irreparable harm would occur to the environment if BLM's decisions were stayed in full,[16] but it does not attempt to explain whether that same harm will occur during the much shorter time period during which the Board will decide the merits of this appeal. This pleading defect is particularly problematic in this case because WWP sought a partial stay in the proceedings before the ALJ (seeking to stay only the portions of BLM's decisions that authorized construction of

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[11] *Id.* § 4.21(b)(1); *see also Southern Nevada Water Authority & BLM,* 191 IBLA 382, 401 (2017)[a] (setting forth criteria for stay of final ALJ decision in grazing appeal).

[12] *Ute Indian Tribe of the Uintah & Ouray Reservation*, 192 IBLA 281, 285 (2018)[b]; *Wildlands Defense*, 192 IBLA 209, 220 (2018)[c]; *Lisa Young*, 192 IBLA 54, 65 (2017)[d]; *Southern Nevada Water Authority & BLM,* 191 IBLA at 401.

[13] *See* 43 C.F.R. § 4.471(c) (stating four criteria that ALJ must apply to assess whether a stay should be granted); *see also Native Ecosystems Council.* 189 IBLA 383, 386 (2017)[e] (explaining the four stay criteria an ALJ must apply and the need for appellant to show error in ALJ's decision).

[14] *See, e.g.*, WWP Reply at 7 ("[T]he BECO appeals could very well last for six years or more."); BLM Brief at 9 (estimating that ALJ's review could take five or six years based on current backlog).

[15] 43 C.F.R. § 4.478(c).

[16] Amended SOR at 18-20; WWP Reply at 10-12.

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a) GFS(MISC) 29(2017)
b) GFS(O&G) 3(2018)
c) GFS(MISC) 3(2018)
d) GFS(MISC) 31(2017)
e) GFS(MISC) 9(2017)

range improvement projects) and similarly asks in this appeal that the Board ultimately issue a partial stay.[17] But if we granted the requested "stay of the stay orders," BLM's decisions would go back into effect in their entirety, presumably potentially causing the alleged irreparable harm from range improvements that WWP seeks to avoid. By failing to distinguish between its merits position and its petition for a stay, WWP simply fails to demonstrate that immediate and irreparable harm will occur during this appeal absent a stay of the ALJ's Orders.

The same pleading defect exists with respect to the public interest and balance-of-harms criteria: *i.e.*, WWP presents its merits arguments on how the ALJ erred with respect to those criteria but does not present any argument on how those criteria justify a stay of the ALJ's Orders pending the Board's expedited review. Thus, WWP has not met its burden of demonstrating that a "stay of the stay Orders" is justified. Its petition is accordingly denied.

Expedited Briefing Schedule for Remaining Briefs

As noted earlier, all parties except WildLands Defense have filed merits briefs, and WWP has filed a reply to the briefs filed by the Owens and Simplot/King permittees. As directed by 43 C.F.R. § 4.478(c), the Board hereby issues the following expedited schedule to complete briefing in this consolidated appeal so that we can decide the appeal promptly:

- WildLands Defense may file one brief addressing issues raised by the other parties' submissions no later than July 1, 2019. The brief should not exceed 30 pages.

- WWP's Amended SOR appears to eliminate but not add arguments on appeal. Nevertheless, to the extent the Owens permittees, Simplot/King permittees, or BLM believe the Amended SOR raises new issues to which they have not had the opportunity to respond, they each may file a supplemental opposition brief addressing those issues. The supplemental opposition briefs must be filed no later than July 1, 2019, and may not exceed 10 pages.

[17] WWP Reply at 17-18.

- WWP may file a reply to BLM's response brief (filed May 20, 2019), and to any supplemental opposition brief, if filed, no later than July 15, 2019. The reply may not exceed 20 pages.

/s/
K. Jack Haugrud
Administrative Judge

I concur:

/s/
Silvia Riechel Idziorek
Acting Chief Administrative Judge

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OWYHEE COUNTY BOARD OF COMMISSIONERS

IBLA 2015-195 Decided June 17, 2019

Appeal from a Bureau of Land Management decision authorizing the installation of a stone memorial in a wilderness area.

Decision set aside and remanded.

APPEARANCES: Douglas D. Emery, Esq., Murphy, Idaho, for appellant; Mel M. Meier, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE IDZIOREK

The Owyhee County Board of Commissioners (County) appeals a Bureau of Land Management (BLM) decision authorizing the Idaho Department of Fish and Game (IDFG) to install a stone marker in a wilderness area to memorialize the deaths of two IDFG officers.

SUMMARY

The National Environmental Policy Act (NEPA) requires an agency to complete an environmental analysis of an action before the action is undertaken. Here, the action occurred before BLM completed its environmental analysis and issued its decision. This sequence of events violated NEPA, and this violation was neither cured by the subsequently-issued environmental analysis, nor was it harmless error. We therefore set aside BLM's decision and remand this matter for appropriate action.

INDEX CODE:
40 C.F.R. § 1502.9
40 C.F.R. § 1508.9
43 C.F.R. § 4.21
43 C.F.R. § 46.305
43 C.F.R. § 46.310

BACKGROUND

The IDFG's Request to Place a Stone Memorial in the Owyhee River Wilderness Area

This appeal arises from a request by IDFG to place a stone marker memorializing two IDFG officers killed in the line of duty in 1981.[1] The IDFG proposed placing a 550-pound stone marker, 2 feet by 2 feet by 3 feet, at the site at which the officers died in the Owyhee River Wilderness Area and South Fork Owyhee Wild and Scenic River corridor.[2] IDFG planned to place the marker during a memorial service it would hold on site on May 13, 2013, during Police Week.[3] To evaluate IDFG's request, BLM began preparing an environmental assessment (EA) to fulfill its obligations under NEPA to examine the environmental impacts of the transportation and placement of the stone marker.[4]

From the documents in the administrative record, it appears that as early as December 2014, IDFG began planning a memorial to take place at the site during Police Week 2015.[5] By April 2015, IDFG had specific plans to place the stone marker on May 13, 2015, despite uncertainty about when BLM would complete the EA and issue a decision.[6] Just before the scheduled event, BLM informed IDFG that the decision would not be issued in time for the planned ceremony, but BLM never directed IDFG that it could not place the stone marker until the procedural requirements were satisfied. For example, the record shows BLM explained to IDFG that, even if the decision was issued before the planned ceremony on May 13, 2015, it would not be effective until 30 days

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[1] *See* IDFG Stone Marker Environmental Assessment DOI-BLM-ID-B050-2015-0008-EA at 3 (May 2015) (Administrative Record (AR) 583-591) (EA).

[2] *Id.* at 4; Letter from IDFG to BLM re: Placement of Memorial for William H. "Bill" Pogue and Conely Elms at Bull Camp on the South Fork of the Owyhee River (Apr. 9, 2015) (AR 573-577) (IDFG Proposal).

[3] IDFG Proposal (AR 573); Presidential Proclamation 3537, Peace Officers Memorial Day and Police Week (May 4, 1963) (AR 687-688).

[4] EA at 4, 5-6; 42 U.S.C. §§ 4321 - 4370m-12 (2012) (NEPA).

[5] E-mail from Greg Wooten, IDFG, to James Fincher, BLM (Dec. 15, 2014) (AR 569) (informing BLM that IDFG was planning a visit for May 16, 2015, and was interested in placing a memorial stone).

[6] E-mail from Greg Wooten, IDFG, to James Fincher, BLM (Mar. 26, 2015) (AR 564) (informing BLM that IDFG was working on the inscription for the stone); IDFG Proposal (AR 573) (explaining that IDFG wanted to place the stone marker on May 13, 2015, "in the exact location" the event occurred; it had coordinated with a nearby ranch for lodging; and it had already invited all of the conservation officers in Idaho and the IDFG Director, who "will be present on May 13, 2015[,] for the placement").

after issuance.[7] But instead of instructing IDFG to delay the ceremony until the NEPA analysis was complete and the decision was effective, BLM relied on IDFG to "make [its] decision accordingly,"[8] "hoping" that IDFG would consider postponing the event.[9]

On May 12, 2015, the day before the planned ceremony, the Acting State Director for BLM's Idaho State Office informed the Director of IDFG that the EA was not complete. The Acting State Director explained that the Department of the Interior Solicitor's Office "identified NEPA concerns that need to be addressed in the draft EA before [BLM] makes a [] decision."[10] The Acting State Director also said that BLM was "awaiting a response from the Shoshone Paiute Tribes based upon government[-]to[-] government consultation."[11] The Acting State Director concluded by reminding IDFG that BLM's decision would not be effective until 30 days after it is signed.[12]

Early in the morning of May 13, 2015, the Acting State Director asked the Acting Field Manager for BLM's Owyhee Field Office whether IDFG was proceeding with the placement, and the Acting Field Manager replied that she had not heard from IDFG.[13] In an exchange of text messages that afternoon, the IDFG Enforcement Bureau Chief wrote the Acting Field Manager, "Nothing we intend to do is irreversible, [the stone marker] can be moved as easily as placed."[14] The Acting Field Manager responded, "Understand. ...decision will not be issued today."[15]

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[7] E-mail from Michelle Ryerson, BLM, to BLM staff (May 8, 2015) (AR 664); *see also* E-mail from Jeffery Foss, BLM Acting State Director, to Virgil Moore, IDFG Director (May 11, 2015) (AR 666 and 676) ("The decision becomes effective after the 30 day appeal period closes."); E-mail from Jeffery Foss, Acting State Director, to Virgil Moore, IDFG Director (May 12, 2015) (AR 677) ("As indicated previously, a decision to authorize an activity on public land is not effective until the end of the appeal period (30 days from date of the decision), pending the outcome of any requests to stay the decision.").

[8] E-mail from Michelle Ryerson, BLM, to BLM staff (May 8, 2015) (AR 664).

[9] E-mail from Michelle Ryerson, BLM, to Jeffery Foss (May 12, 2015) (AR 677).

[10] E-mail from Jeffery Foss, Acting State Director, to Virgil Moore, IDFG Director (May 12, 2015) (AR 677).

[11] *Id.*

[12] *Id.*

[13] E-mails between Jeffery Foss and Michelle Ryerson (May 13, 2015) (AR 686).

[14] Text messages between G Wooten IDFG and M Ryerson BLM (May 12, 2015) (AR 692).

[15] *Id.*

IDFG held the ceremony on May 13, 2015, with 74 people present.[16]

One day after IDFG installed the stone marker, on May 14, 2015, BLM issued a finding of no significant impact documenting its conclusion, based on the analysis in the EA, that the placement of the marker would not have a significant effect on the quality of the human environment.[17] That same day, the Acting State Director signed BLM's decision authorizing the placement of the marker.[18] By regulation, the decision would not be effective until after the 30-day appeal period.[19] The Acting State Director e-mailed the IDFG Director the Notice of State Director's Final Decision the evening of May 14, 2015.[20] The next day, BLM notified the interested public that it issued the decision and EA.[21]

Owyhee County Board of Commissioners Appeal

The Owyhee County Board of Commissioners appealed BLM's decision.[22] The County argues that BLM "failed to coordinate the proposed action" with the County as required by the Federal Land Policy and Management Act (FLPMA) and a "Protocol for Coordination" between the County and BLM.[23] The County also asserts that BLM "failed to follow the provisions of various BLM directives and handbook requirements regarding coordination with state and local government" during its decision-making process, including preparation of its NEPA analysis.[24] Finally, the County alleges that the stone marker was placed on May 13, 2015, a day before BLM issued its decision and the EA supporting the decision.[25] The County concludes that, had it been consulted, it "may well have been able to craft an alternative that would have honored the fallen officers,

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[16] BLM's Answer at 3; IDFG's Answer at 2; *id.*, Attachment (Declaration of Greg Wooten) at 2-3, ¶ 9; *Game wardens' memorial allowed in wilderness*, OWYHEE AVALANCHE, June 3, 2015 (AR 680-81).

[17] FONSI (AR 592).

[18] Notice of State Director's Final Decision (May 14, 2015) (AR 579-582).

[19] *See* 43 C.F.R. § 4.21(a) (Effect of decision pending appeal).

[20] E-mail from Jeffery Foss, Acting BLM State Director, to Virgil Moore, IDFG Director (May 14, 2015) (AR 668)

[21] Letter to Interested Public (May 15, 2015) (AR 635).

[22] Notice of Appeal and Statement of Reasons (SOR).

[23] SOR at unpaginated (unp.) 2 (citing FLPMA, 43 U.S.C. §§ 1701-1787 (2012), and Protocol for Coordination Between BLM-Boise District and Owyhee County, Idaho (Feb. 14, 2006) (AR 701-706)).

[24] *Id.*; *see id.* at unp. 3-5 (citing BLM, A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners (2012) (AR 1-56); BLM NEPA Handbook H-1790-1 (2008) (AR 57-240)).

[25] SOR at unp. 2.

with less impact to the wilderness which was designated as a result of legislation proposed and supported by Owyhee County."[26] The County asks that the memorial be "removed from the wilderness until the decision process can be done correctly."[27]

BLM filed an answer to the County's appeal. BLM argues that it did not violate any requirements under NEPA or FLPMA for public involvement and that the County's claims are moot because it has not suffered a harm for which relief can be granted.[28] BLM also argues that any procedural or substantive inadequacies are only harmless error.[29] In arguing harmless error, BLM asserts on appeal that it was "unaware that IDFG placed the memorial prior to the decision being signed" because BLM told IDFG that it was still working on the decision on May 12, 2015, and IDFG did not say the placement was complete in a May 14, 2015, text message.[30] BLM concludes: "While it is correct that IDFG installed the monument earlier, that action is, at best, error on the part of IDFG, not BLM."[31]

The Board granted IDFG's motion to intervene in the case,[32] and IDFG filed an answer to the County's statement of reasons. IDFG represents that it "worked with BLM to receive the needed approval" and that "[u]pon receiving notice from BLM of approval and that the decision would be signed, IDFG proceeded with the planned memorial ceremony and placement of the [s]tone [m]arker."[33] IDFG argues that it would be "an extreme hardship" to move the marker and conduct another ceremony, and "[p]enalizing IDFG for alleged BLM administrative process flaws would be a miscarriage of justice."[34]

DISCUSSION

The Appeal Is Not Moot

Before turning to the merits, we address BLM's contention that because the stone marker has been installed, there is no effective relief that the Board can grant the County and the appeal is therefore moot.[35] The burden on a defendant of demonstrating that a

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[26] *Id.* at unp. 6.
[27] *Id.*
[28] BLM's Answer at 1-2, 6-17.
[29] *Id.* at 2, 17-18.
[30] *Id.* at 17 n.4.
[31] *Id.* at 17.
[32] Order: Motion to Intervene Granted; Briefing Schedule Issued (July 24, 2015).
[33] IDFG's Answer at 2; *see also id.*, Attachment (Declaration of Greg Wooten) at 2, ¶¶ 3, 7, 8 (recounting communications from BLM that IDFG interpreted as approval).
[34] IDFG's Answer at 2.
[35] BLM's Answer at 15-16.

case is moot is a heavy one,[36] and "completion of activity is not the hallmark of mootness."[37] The Board has consistently held that an appeal is only moot when, due to events occurring after the appeal is filed, there is no effective relief that the Board can afford the appellant.[38]

Here, the events that purportedly render this appeal moot did not occur after the appeal was filed but *before* it was filed, and in fact before BLM's decision had even been issued. Because no relevant events occurred after the appeal was filed, there are no events that could have rendered the appeal moot.

Furthermore, the appeal is not moot because the Board could grant effective relief to the County. We can set aside BLM's decision, which would require BLM to determine how to address the situation. BLM could, for example, prepare a new decision and supporting NEPA analysis that, to the extent practicable, considers alternatives and accounts for input from the County, Tribes, and other stakeholders.[39]

We conclude that, even though IDFG already placed the marker, the Board can grant the County effective relief, and this appeal is not moot.

BLM Violated NEPA By Allowing IDFG
to Place the Marker Before BLM Completed the EA

The County focuses most of its briefing on BLM's alleged failures to consult with the County and how these failures allegedly violated FLPMA and NEPA. However, we resolve this appeal based on the fact that the stone marker was installed before BLM completed its NEPA analysis and issued its decision authorizing the installation. While no one disputes this sequence of events, IDFG and BLM characterize what happened in markedly different ways. IDFG says BLM informally approved its actions before the installation took place,[40] while BLM maintains that it issued its decision without

[36] *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001).
[37] *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002).
[38] *Chipmunk Grazing Association, Inc.*, 188 IBLA 35, 40 (2016)[a]; *Bush Management Company*, 189 IBLA 217, 219 (2017)[b]; *accord Neighbors of Cuddy Mountain*, 303 F.3d at 1065 ("[A] case is moot only where no effective relief for the alleged violation can be given.").
[39] *See* SOR at unp. 6 (advocating for "an alternative that would have honored the fallen officers, with less impact to the wilderness" area); *see* 43 C.F.R. § 46.305 ("The bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared.").
[40] IDFG's Answer at 2 and Attachment (Declaration of Greg Wooten) at 2, ¶¶ 3, 7, 8.

a) GFS(MISC) 16(2016)
b) GFS(MIN) 3(2017)

knowledge that IDFG had already placed the marker at the site.[41] Regardless of which account is more accurate, BLM violated NEPA.

As the Ninth Circuit Court of Appeals has explained, NEPA "is a procedural statute that requires the Federal agencies to assess the environmental consequences of their actions before those actions are undertaken."[42] NEPA's implementing regulations require that an agency's NEPA procedures "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[43] The Ninth Circuit has emphasized that "[p]roper timing is one of NEPA's central themes. An assessment must be 'prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'"[44] For that reason, courts have held that NEPA "requires federal agencies to evaluate the environmental consequences of their actions *prior* to commitment to any actions which might affect the quality of the human environment."[45]

Here, the record shows that IDFG held its event and placed the stone marker before BLM issued its EA and authorized the action. By not completing its EA before the action took place, BLM failed to ensure that environmental information was available to the decisionmaker and properly evaluated before IDFG took actions that might affect the environment.

IDFG asserts that BLM had informally authorized the action before it took place. But IDFG's argument does not assist it. If BLM authorized the action before it completed

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[41] BLM's Answer at 17 n.4.

[42] *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004).

[43] 40 C.F.R. § 1500.1(b); *see also Defenders of Wildlife v. N.C. DOT*, 762 F.3d 374, 394 (4th Cir. 2014) ("Environmental Assessments and Environmental Impact Statements must be completed 'before decisions are made and before actions are taken.'") (quoting 40 C.F.R. § 1500.1(b)).

[44] *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (quoting 40 C.F.R. § 1502.5).

[45] *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original); *see also New Mexico ex. rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009) ("[BLM] was required to analyze any foreseeable impacts of such use before committing the resources."); *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (concluding that the government "prepared the EA too late in the decision-making process, i.e., after making an irreversible and irretrievable commitment of resources.").

the EA, BLM violated NEPA by making its decision without the benefit of the required environmental analysis.[46]

In sum, the sequence of events – in which IDFG undertook the project before BLM had completed the EA and issued its decision – resulted in a NEPA violation regardless of what representations IDFG believed BLM had made and regardless of BLM's after-the-fact decision authorizing placement of the marker.

Allowing Placement of the Marker
Before Completing the EA Is Not "Harmless Error"

Counsel for BLM confirms that the marker was installed before BLM's authorization but argues that this at most constituted "harmless error."[47] The implication of BLM's argument is that the after-the-fact EA cured any NEPA violation BLM committed. For the following reasons, we conclude that BLM did not cure the NEPA violation, and the error was not harmless.

1. BLM's After-the-Fact EA Did Not Cure the NEPA Violation

BLM's after-the-fact authorization could not lawfully and properly correct the NEPA violation. With BLM's EA and decision being predicated on the assumption that the event had not yet occurred, its entire analysis was flawed with a mistaken statement of purpose and need, an inapposite range of alternatives, and an inaccurate assessment of the environmental baseline.

When BLM conducts an EA, it must include a brief discussion of appropriate alternatives to its proposed action.[48] The identification of appropriate alternatives is informed by BLM's stated purpose and need for its proposed action.[49] To analyze the

[46] *See, e.g., Save the Yaak Committee*, 840 F.2d at 718-19 (Forest Service violated NEPA by awarding road construction contracts prior to completing EAs); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 230 (D.D.C. 2003) ("[I]ssuance of the permits in question prior to conducting an EA 'amounted to a surrender of the Government's right to prevent activity in the relevant area.'" (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000))).

[47] BLM's Answer at 3, 17.

[48] 40 C.F.R. § 1508.9(b); 43 C.F.R. § 46.310(a).

[49] *06 Livestock Co.*, 192 IBLA 323, 341-42 (2018)[c] (citing *Western Watersheds Project*, 191 IBLA 351, 357 (2017)[d] ("The purpose and need of a proposal controls the selection of alternatives that BLM should analyze in the EA, because each alternative must meet the purpose and need for the proposal."); *Roseburg Resource Co.*, 186 IBLA 325, 336

c) GFS(MISC) 7(2018)
d) GFS(MISC) 28(2017)

potential impacts of the alternatives it identifies, BLM must determine the "baseline" conditions at the site against which to measure those impacts.[50] In assessing whether an EA has properly addressed these elements, we are guided by a "rule of reason."[51]

Here, BLM identified the purpose and need as follows: "The BLM is responding to a proposal from the IDFG to transport and place[] . . . a stone marker at the site and [determine], in doing so, how to minimize effects to wilderness character and Wild river values."[52] But at the time of BLM's decision, the question was no longer whether to respond to IDFG's proposal, but how to respond to the unauthorized placement of the marker. Instead of reflecting that IDFG had already installed the stone marker, the EA and the decision, by their plain language, purport to authorize IDFG to place the marker sometime in the future. Because BLM's stated purpose and need do not correspond to the question before BLM at the time, they are not reasonable.

This inaccurate statement of the purpose and need for BLM's decision leads to other deficiencies in BLM's NEPA analysis. For example, one of the alternatives BLM considered in its EA was placement of the stone marker without using motorized vehicles; this alternative is no longer feasible because IDFG already used motorized vehicles to bring the stone marker and guests to the site.[53] Furthermore, BLM's environmental analysis was predicated on inaccurate baseline information that assumed the event had not taken place and the marker had not been installed. By mistakenly assuming the existence of a relatively undisturbed site, BLM could not accurately determine the effects of its alternatives—which presumably, at this point, would include either allowing the marker to remain in the wilderness area or requiring IDFG to move it. The inaccurate baseline information by itself would be enough to establish a NEPA violation.[54]

(2015)[e] ("[T]he purpose and need of a project drives the identification and choice of alternatives.")).

[50] *Southern Utah Wilderness Alliance*, 194 IBLA 98, 106 (2019)[f] ("The purpose of establishing a baseline is to identify current conditions against which BLM may measure impacts from a proposed action."); *BLM v. Western Watersheds Project*, 191 IBLA 144, 225 (2017)[g] ("'Without establishing the baseline conditions[,] . . . there is simply no way to determine what effect the proposed [action] . . . will have on the environment and, consequently, no way to comply with NEPA.'" (quoting *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988))).

[51] *Southern Utah Wilderness Alliance,* 194 IBLA at 102.

[52] EA at 3.

[53] *Id.* at 5 (describing alternative 3); IDFG's Answer, Attachment (Declaration of Greg Wooten) at 2-3, ¶ 9.

[54] *See, e.g., NRDC v. U.S. Forest Service,* 421 F.3d 797, 813 (9th Cir. 2005) (by using inaccurate economic data in a NEPA analysis, "Forest Service violated NEPA's procedural

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e) GFS(MISC) 17(2015)
f) GFS(MISC) 3(2019)
g) GFS(MISC) 23(2017)

2. The NEPA Violation Is Not Harmless Error

In support of its argument that the timing of its decision is harmless error, BLM cites an unpublished order in *Kevin Kane*, a 2012 case in which the Board dismissed an appeal of a trail project because we found that Mr. Kane lacked standing to appeal.[55] In that case, the BLM decisionmaker, after issuing the decision authorizing the trail improvements, learned that some of the proposed improvements had been completed at the direction of the BLM field office before she authorized them.[56] "[S]he immediately directed BLM staff to complete an assessment of their environmental impacts . . . to determine whether the decisionmaker's newly-acquired knowledge of the pre-decisional improvements constituted 'new information' and impacted BLM's NEPA analysis and decision in such a way as to require NEPA supplementation."[57] In dicta, the Board stated that "[t]he timing of the improvements effected prior to issuance of the decision constitutes harmless error" because BLM properly determined that supplementation was not required.[58] Among other things, BLM had found that "[t]he direct, indirect, and cumulative impacts resulting from the pre-decisional implementation activities are consistent with the effects anticipated from the Selected Alternative as analyzed in the EA."[59] Furthermore, "the public had adequate opportunities to provide input regarding the implementation activities, which are the same as the activities described in the EA's Selected Alternative."[60]

The unpublished order in *Kevin Kane* has no precedential value and is not binding on the Board.[61] Furthermore, and contrary to BLM counsel's assertion, the discussion of harmless error in that order is dicta. The order dismissed the appeal for lack of standing,[62] and the discussion of harmless error was not necessary to that dismissal.

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requirement to present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered"); *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1030-31 (2d Cir. 1983) (NEPA analysis defective because it contained inaccurate baseline information on fisheries).

[55] BLM's Answer at 17-18 (citing *Kevin Kane*, Order: Appeal Dismissed; Petition for Stay Denied as Moot, IBLA 2012-27 (Aug. 30, 2012) (*Kevin Kane*)).

[56] *Kevin Kane* at 13-14.

[57] *Id.* at 14.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See, e.g., Southern Utah Wilderness Alliance,* 190 IBLA 152, 162 (2017)[h]; *Colorado Environmental Coalition*, 173 IBLA 362, 369 (2008)[i].

[62] *Kevin Kane* at 1, 3.

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h) GFS(O&G) 7(2017)

i) GFS(O&G) 5(2008)

But most important, the circumstances that supported the Board's finding of harmless error in *Kevin Kane* do not exist here. In *Kevin Kane,* although the Board termed BLM's unauthorized installation of improvements as harmless error, it really concluded that BLM had appropriately fixed the NEPA violation and cured the error. Upon learning of the unauthorized improvements in that case, BLM immediately took corrective action, ordering "an assessment of their environmental impacts in accordance with 40 C.F.R. § 1502.9(c)" to determine whether new information required supplementation of the EA.[63] BLM ultimately concluded, for a variety of reasons as noted above, that supplementation of the EA was not required, and the Board agreed with this conclusion.[64] Accordingly, although the Board stated that BLM's actions were harmless error, the Board's Order actually found that BLM had properly addressed and corrected the problem.

In contrast to *Kevin Kane,* upon learning that an unauthorized installation had occurred, BLM took no corrective action. It simply let stand an analysis and decision predicated on the assumption that no unauthorized activity had occurred. The failure to take corrective action is not harmless error and makes this case distinguishable from *Kevin Kane.*

REMEDY

Because BLM erred in the timing and substance of its NEPA analysis in this instance, we set aside BLM's decision and remand this matter to BLM for further action. We have no authority to order BLM to remove the marker or take any other specific steps. We therefore leave it to BLM's discretion on remand to determine the appropriate course of action based on the facts before it.

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[63] *Id.* at 14; *see* 40 C.F.R. § 1502.9(c) (explaining when agencies must supplement environmental impact statements).

[64] *Kevin Kane* at 14.

CONCLUSION

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,[05] we set aside BLM's decision and remand the matter to BLM for action consistent with this decision.

/s/
Silvia Riechel Idziorek
Acting Chief Administrative Judge

I concur:

/s/
K. Jack Haugrud
Administrative Judge

[05] 43 C.F.R. § 4.1.