

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASSOCIATION,)	Civil No.03-1017-JE
et al.,)	
)	
Plaintiffs,)	
)	FINDINGS AND
v.)	RECOMMENDATION/
)	ORDER
BUREAU OF LAND MANAGEMENT, et al.,)	
)	
Defendants.)	
)	

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JELDERKS, Magistrate Judge:

Plaintiffs Oregon Natural Desert Association, Committee for the High Desert, and the Western Watersheds Project bring this action for declaratory and injunctive relief against the Bureau of Land Management (BLM) and BLM officials. Plaintiffs claim that in issuing the Southeast Oregon Resource Management Plan, (the SEORMP), defendants violated the National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321-4370; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (as amended); and the Taylor Grazing Act, 43 U.S.C. §§ 315-315r (as amended).

The parties have filed dispositive motions. I recommend granting defendants' motion for judgment on the basis of the administrative record, and denying plaintiffs' dispositive motion. I deny defendants' motion to strike.

BACKGROUND

The SEORMP is intended to guide the BLM for the next twenty years in managing 4.6 million acres of public land in southeastern Oregon. Most of the land is in Malheur County, with portions in Grant and Harney Counties. BLM divides these

lands, which are within the Vale District, into the Malheur and Jordan Resource Areas. The land is bounded by Idaho to the east, Nevada to the south, the Vale District's Baker Resource Area to the north, and the Burns District's Three Rivers and Andrews Resource Areas to the west.

The Sagebrush Steppe ecosystem covers the land at issue. "This ecosystem contains a broad diversity of landform and vegetation types, ranging from vast expanses of sagebrush-covered plateaus to rugged mountains blanketed with western juniper woodland and grassland." SEORMP at 5.

STANDARDS

Judicial review of an agency's action is governed by the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. The court may set aside an agency's action if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" 5 U.S.C. § 706(a)(2). Before a court overturns an agency decision under this standard,

the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). This standard applies to an agency's interpretation of its own regulations, particularly when scientific methods are at issue. Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1376 (9th Cir. 1998) (citations omitted). "An agency action is also arbitrary and capricious if the agency fails to 'articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made.'"
Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv., 12 F. Supp. 2d 1121, 1131 (D. Or. 1997) (quoting Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (further citations omitted)). "The principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."
Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2381 (2004).

DISCUSSION

I. NEPA Claims

"The purpose of NEPA is to ensure that federal agencies consider the environmental impact of their actions."

Municipality of Anchorage v. United States, 980 F.2d 1320,

1329 (9th Cir. 1992). NEPA does not mandate a particular substantive result, but prescribes a process. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 347-50 (1989). NEPA requires that federal agencies prepare detailed statements of the anticipated impacts of proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The process usually begins with the preparation of an environmental assessment, which is used to determine whether the agency should prepare a more detailed Environmental Impact Statement (EIS), or issue a "finding of no significant impact" (FONSI). 40 C.F.R. § 1508.9(a)(1) (defining environmental assessment).

Once the court is satisfied that a federal agency's exercise of discretion is truly informed, the court must defer to the agency's "'informed discretion.'" Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)). Federal agencies have broad discretion in defining the purpose of a project. Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998). The court must decide whether the EIS promoted sufficiently informed decision-making and public participation, without substituting its judgment for that of the agency on the wisdom or prudence of a proposed action.

California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). An EIS should be upheld if its discussion of the significant aspects of the probable environmental consequences is reasonably thorough. Morrison, 153 F.3d at 1062-63.

A. Range of Alternatives on Livestock Grazing

Here, the BLM considered seven alternatives in deciding how much land to exclude from livestock grazing: **A**, which would have excluded 50,604 acres; **B**, 41,874 acres (status quo); **C**, 50,710 acres; **D**, 50,710 acres; **D2**, 1,491,874 acres; **E**, the entire planning area; and the chosen alternative, 58,900 acres. Given the total area of 4.6 million acres, BLM chose to exclude slightly more land than is currently excluded from grazing.

Plaintiffs argue that the BLM did not seriously consider reducing the authorization for grazing, measured in "animal unit months," or AUMs. Plaintiffs note that the BLM chose to maintain the current grazing authorization "until analysis or evaluation through the adaptive management process identifies a need for adjustments to meet objectives." EIS at 246. Plaintiffs cite Kern v. U.S. BLM, which stated: "If an agency were able to defer analysis discussion of comparable analysis in connection with later site-specific projects, no environmental consequences would ever need to be addressed in an EIS at the RMP level [as here] if comparable consequences might arise, but on a smaller scale, from a later site-specific

action proposed pursuant to the RMP." 284 F.3d 1062, 1072 (9th Cir. 2002).

I conclude, however, that defendants considered an adequate range of alternatives in determining the number of AUMs that would be permitted. The plan allows the BLM to reduce permitted AUMs as much as ten percent.

The SEORMP is a comprehensive plan covering the use of 4.6 million acres for the next twenty years. Despite plaintiffs' challenges, the SEORMP cannot be expected to address specific issues in detail. The SEORMP, given its intended geographic scope and duration, also may properly include potential adjustments if the BLM learns that the original alternative chosen was not meeting the intended goals. NEPA "is designed to require such analysis as soon as it can reasonably be done." Id.

Plaintiffs note that alternative D2, which would have excluded almost 1.5 million acres, was added in the final stage of planning, and the public had no opportunity to comment on it. In proposing alternative D2, the BLM was responding to public comments and agency recommendations. The BLM was not required to allow the public a second opportunity to comment. See Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d. 520, 548 (8th Cir. 2003).

B. Off-Highway Vehicle Use

Plaintiffs concede that defendants considered a broad range of alternatives for lands that are open to off-highway vehicle (OHV) use. Plaintiffs argue, however, that defendants improperly considered an unreasonably narrow range of alternatives for lands that are closed to OHV use.

The BLM properly considered a range of alternatives on OHV use. Despite plaintiffs' arguments, both "limited" and "closed" designated areas are protected from damage caused by off-road traffic.

C. "Hard Look" at Environmental Consequences

The Ninth Circuit uses "a 'rule of reason' standard in reviewing the adequacy of a NEPA document." Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 992 (9th Cir. 2004) (quoting Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001)). "Through the NEPA process, federal agencies must 'carefully consider[] detailed information concerning significant environmental impacts,' but they are 'not require[d] to do the impractical.'" Id. (citations omitted). "Alternatively phrased, the task is to ensure that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action." Id. at 993.

Here, plaintiffs contend that the EIS fails the rule of reason test because it does not sufficiently analyze various environmental consequences, including the spread of noxious weeds, destruction of microbiotic crusts¹, the effects on wilderness values, and the impact of livestock grazing. Plaintiffs argue that by deferring consideration of specific environmental consequences, the SEORMP allows the BLM to avoid considering them entirely.

Defendants respond that plaintiffs are attempting to require that the BLM use the SEORMP to address every potential environmental issue, no matter how specific. I agree with defendants that the SEORMP was not meant to be the sole guide for decisions on activities in the Planning Area. Instead, the SEORMP addresses on "broad resource objectives and direction." At a more specific level than the SEORMP, there are activity plans that concern, for example, grazing allotments or noxious weed control. Even more detailed are the site-specific decisions, which are required before a project may be carried out in a particular location.

1. Noxious Weeds

Plaintiffs contend that the BLM did not adequately address the role of livestock in spreading noxious weeds. However, the

¹Microbiotic crusts, which help prevent the spread of noxious, exotic weeds, can be destroyed by livestock grazing.

EIS includes a plan for controlling noxious weeds, as well as discussions of the relationship between noxious weeds and wild horses, and native plants and animals.

2. Microbiotic Crusts

Plaintiffs contend that defendants failed to collect information about the location of microbiotic crusts, and therefore failed to consider the effect of grazing on the crusts. I conclude, however, that the EIS's discussion of the environmental consequences of the SEORMP on the crusts was sufficient in light of the available information.

3. Wilderness Values

In 1989, the BLM analyzed wilderness study areas (WSAs) in the land covered by the SEORMP. Plaintiffs argue that because conditions may have changed since 1989, defendants have a duty to reassess areas that were not recommended for designation in the 1989 analysis. Plaintiffs also contend that the BLM must assess wilderness values on non-WSA roadless areas because such areas may qualify as wilderness. Plaintiffs assert that more than a million acres of land outside the current WSA boundaries may qualify for the BLM wilderness designation. Plaintiffs argue that defendants have completely failed to collect and discuss this information in the EIS, violating the "hard look" standard.

Defendants respond that the current EIS need not revisit the 1989 WSA analysis. I agree with defendants that because the preparation of WSA inventories does not by itself change the management or use public lands, the WSA claim here is not viable. Plaintiffs have not shown that the BLM is legally required to perform a wilderness inventory. See Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004) ("a claim under [APA] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take").

4. Livestock Grazing

Plaintiffs contend that the BLM has not taken a "hard look" at the impacts of livestock grazing. Plaintiffs argue that defendants may not defer performing a detailed, comprehensive analysis to later decision-making processes, such as the Geographic Management Area process.

Defendants argue that the SEORMP "represents mid-scale management," and therefore BLM does not need to conduct a "fine-scale" site-specific analysis of the effects of livestock grazing. I agree that because of the scope of the SEORMP, the BLM's analysis of livestock grazing is sufficient.

5. Overall Failure

Plaintiffs contend that the FEIS includes cursory environmental analyses, showing an overall failure to take a

"hard look" at the environmental consequences of the proposed action. Plaintiffs argue that defendants decided to maintain the status quo on livestock grazing without taking a hard look at the environmental impacts of grazing.

Defendants again respond that they are not required to be more specific in their environmental analysis because of the broad scope of the SEORMP. Defendants rely on their argument that the more specific decisions will be made later, using more specific plans. I agree with defendants that plaintiffs are attempting to require that the SEORMP address issues with more specificity and greater detail than is legally required.

Plaintiffs also contend that the BLM failed to prepare an "analysis of the management situation," or AMS, as provided in 43 C.F.R. § 1610.4-4. Plaintiffs state that the BLM never prepared an AMS as part of creating the SEORMP. I agree with defendant that the BLM has discretion in deciding whether or not to publish a separate AMS.

6. Cumulative Impacts

Plaintiffs contend that the EIS does not adequately discuss the cumulative impacts of the proposed action. Plaintiffs argue that the EIS's discussion of the cumulative impacts of grazing is "little more than a series of optimistic, generalized statements."

I disagree. The BLM's discussion of cumulative impacts was adequate given the level of detail required in the SEORMP.

II. FLPMA and Taylor Grazing Act Issues

Defendants contend that plaintiffs' claims under FLPMA and the Taylor Grazing Act are not justiciable because the challenged SEORMP is a general plan and does not authorize any specific actions that would harm plaintiffs. Plaintiffs respond that they are challenging a "final agency action" in the BLM's adoption of the SEORMP. Plaintiffs state that they are challenging the discrete agency actions, such as inventorying wilderness values on public lands and using that information in making resource management planning decisions in the SEORMP. Plaintiffs contend that the BLM is required to make such inventories, although it has discretion in how it weighs the inventory information.

I agree with defendants that plaintiffs' claims under FLPMA and the Taylor Grazing Act are not justiciable. The SEORMP does not authorize specific actions that could harm plaintiffs. See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998) (in determining whether claims are justiciable, courts "must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further

factual development of the issues presented."). For example, the SEORMP itself does not authorize grazing; rather, specific grazing permits, subject to annual review, authorize grazing.

III. Defendants' Motion to Strike

Defendants move to strike the two declarations and two exhibits submitted by plaintiffs. Defendants argue that plaintiffs may not submit documents not included in the administrative record.

Plaintiffs respond that the documents are admissible. Plaintiffs rely on the exception for documents showing that the EIS failed to mention a serious environmental consequence, failed to discuss a reasonable alternative, or otherwise swept problems "under the rug." Oregon Natural Res. Council v. Lowe, 109 F.3d 521, 526-27 (9th Cir. 1997).

I deny the motion to strike. The documents submitted are admissible under the exception noted by Lowe.

CONCLUSION

Plaintiffs' dispositive motion (#51) should be denied. Defendants' motion for judgment on the basis of the administrative record (#81) should be granted, and a final judgment should be entered dismissing this case with prejudice. Defendants' motion to strike (#87) is denied.

SCHEDULING ORDER

The above Findings and Recommendation are referred to a United States District Judge for review. Objections, if any, are due April 14, 2005. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

A party may respond to another party's objections within 10 days after service of a copy of the objections. If objections are filed, review of the Findings and Recommendation will go under advisement upon receipt of the response, or the latest date for filing a response.

DATED this 29th day of March, 2005.

/s/ John Jelderks
John Jelderks
U.S. Magistrate Judge