INTERIOR BOARD OF LAND APPEALS

Oregon Natural Resources Council,
Lake County, Oregon, Intervenor

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OREGON NATURAL RESOURCES COUNCIL

LAKE COUNTY, OREGON, Intervenor

IBLA 94-605 Decided March 31, 1997

Appeal from a Decision of the Area Manager, Lakeview Resource Area, Oregon, Bureau of Land Management, implementing the Integrated Noxious Weed Control Plan, Environmental Assessment No. OR-93-013-03-01, pursuant to and in accordance with a June 6, 1994, Finding of No Significant Impact.

Affirmed.

1. Appeals: Generally--Rules of Practice: Appeals: Statement of Reasons

   An appellant is required by 43 C.F.R. § 4.412 to affirmatively state why the decision under appeal is in error. This requirement is not satisfied if the appellant has merely resubmitted previously submitted comments which have been addressed in the decision documents, and fails to affirmatively show why the decision appealed from is in error.

2. Environmental Quality: Environmental Statements

   A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's Decision if it is reasonable and supported by the record on appeal.

APPEARANCES: Wendell Wood, South Central Field Representative, Oregon Natural Resources Council, for Appellant; Ray Simms, for the Board of Commissioners, Lake County, Oregon, Intervenor; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Oregon Natural Resources Council (the Resources Council) has appealed a June 7, 1994, Decision issued by the Area Manager, Lakeview

Resource Area, Oregon, Bureau of Land Management (BLM), to implement a weed control plan within the Lakeview Resource Area, Oregon. The Decision was issued after a June 6, 1994, Finding of No Significant Impact (FONSI) for the Integrated Noxious Weed Control Plan, which was based upon Environmental Assessment (EA) No. OR-93-013-03-01. The Resources Council's Statement of Reasons (SOR) on appeal also contained a petition for a stay of "all action on any proposed noxious weed spray activities," pending final decision on appeal.

The basis for BLM's action is found in 43 U.S.C. § 1903(b) (1994), which reads in pertinent part: "(b) The Secretary shall manage the public rangelands in accordance with the Taylor Grazing Act (43 U.S.C. 315-315(o)), the Federal Land Policy and Management Act of 1976 (43 U.S.C. [§§] 1701-1782) and other applicable law consistent with the public rangelands improvement program pursuant to this chapter." The contemplated chemical herbicidal treatment would be carried out by BLM concurrently with chemical herbicidal treatment on nearby private and Lake County, Oregon, lands in a coordinated weed control project, pursuant to the provisions of the Carlson-Foley Act of 1968, Pub. L. No. 90-583, 82 Stat. 1146, 43 U.S.C. §§ 1241, 1242, 1243 (1994), and the Federal Noxious Weed Act of 1974, Pub. L. No. 93-629, 88 Stat. 2151, 7 U.S.C. § 2808 (1994). Implementing regulations are found at 43 C.F.R. § 4120.5-2.

The Department must prepare an environmental assessment record on each range improvement project authorized by 43 U.S.C. § 1903(b) (1994) before funds can be spent. If, based on the EA, the Department determines that the project will have a significant impact on the quality of human environment, an environmental impact statement (EIS) prepared pursuant to the National Environmental Policy Act is necessary. 43 U.S.C. § 1904(d) (1994). However, if the Department finds that there is no significant impact and prepares a FONSI, it may carry out the range improvement project without preparing an EIS.

The EA prepared for the Integrated Noxious Weed Control Plan approved by the Area Manager describes the combination of methods, including physical (mechanical, manual, prescribed fire), chemical, biological, and cultural, to control noxious species of weeds on BLM managed Federal lands. The weed control plan proposed for fiscal year 1994 would treat 500 acres using biological control, 1/ 40 acres using physical control, 2/ and 307.8 acres using chemical control. 3/ (EA No. OR-93-013-03-01, Table 1, at 5.)

1/ Biological control is defined as "use of insects, pathogens, and grazing." (EA No. OR-93-013-03-01, at 3.)
2/ Physical control includes "hand pulling and hand grubbing with hand tools, collecting plant residue by bagging and burning or other proper disposal." (EA No. OR-93-013-03-01, at 2.)
3/ Chemical control includes "the use of herbicides and fertilizers." (EA No. OR-93-013-03-01, at 3.)

Four herbicides were proposed for chemical control: 2,4-D, picloram, dicamba, and glyphosate. APPENDIX 3, HERBICIDE DESIGN FEATURES.

On July 12, 1994, the Lake County, Oregon, Board of Commissioners petitioned for intervenor status and opposed the Resources Council's petition for stay, asserting that "to delay the implementation of the BLM [weed control] plan will result in the loss of progress made the past several years in controlling and eventually eradicating certain noxious weeds." Lake County filed a brief in support of its petition, which states, in pertinent part:

> As the noxious weed problem in Lake County is serious and over 1/3 of the area of Lake County is managed by BLM, it is vitally important to the citizens of Lake County to have BLM participate effectively in a control program. To control weeds on only private lands does not address the problem adequately.
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> Although non-chemical means may be available they are slow to make progress. Because of the scope of the problem it is essential to use more effective and faster means.
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> The chemicals involved have been cleared for the planned use when the label is followed. Lake County, which has been contracted to apply the chemical, employs licensed applicators. The program of BLM is in compliance with EPA and USDA guidelines for herbicide application and should be allowed to continue.

Lake County, Oregon, Letter dated July 12, 1994, requesting intervenor status.

By Order dated August 22, 1994, this Board granted Lake County's Petition to Intervene and denied the Resources Council's Petition for Stay.

In its June 23, 1994, SOR, the Resources Council argues that the Lakeview Resource Area Manager's June 7, 1994, Decision is in error for the following reasons:

> 1. On page 3 of the EA BLM acknowledges that a Pesticide Use Proposal (PUP) must be acquired before "additional herbicides, such as atrazine, clopyralid, tebuthiuron, triclopyr, diuron, and chlorsulfuron...will be available for use." BLM should not proceed with this decision while the agency is still "under a court injunction for chemical application under the FEIS for Vegetation Treatment," and before receiving the approved PUPs by the Office of Environmental Policy and Compliance's Departmental Pesticide Working Group in Washington, D.C. It is premature to make this decision and FONSI at this time.

> 2. We believe BLM to be incorrect by including Dicamba as among the list of herbicides that BLM says on page 3 of the EA that are "approved for use on BLM administered lands...." Enclosed is the Interior Department's "1993 (most recent) Guidance For Pesticide Use Proposals. While 2,4,-D [sic] dimethylamine salt, glyphosate and Picloram are listed among already approved chemicals, Dicamba is only listed as approved under B on page 2 for use by the Bureau of Indian Affairs "to control brush on rangeland and non-cropland areas not adjacent to inhabited areas." BLM does not have the same approval under items A, C or D (which relates to pesticides which can be applied on BLM lands without futher [sic] PUP approval.)

(Resources Council's SOR at 2.)

[1] The Resources Council also incorporates by reference the contents of an April 4, 1994, letter to the Area Manager commenting on BLM's March 4, 1994, draft EA for the Weed Control Program. In adjudication of the Resources Council's Appeal, we will first address the contents of the April 4, 1994, letter.

The Resources Council letter to the Area Manager consisted of 11 pages of single-spaced type and cited published and unpublished opinions describing the effects of the four herbicides identified for use in the weed control program. The Resources Council alleged that the cited findings "completely repudiate * * * [ten] assertions made in the [draft] EA." The Resources Council then enumerated and discussed the 10 assertions, identified and discussed 18 additional specific points of concern with the draft EA, and addressed several areas of general concern. 4/

By letter dated June 7, 1994, the Area Manager sent the final Integrated Noxious Weed Control Program Environmental Assessment (EA No. OR-93-013-03-01) (including Appendix 4), the FONSI, dated June 6, 1994, and associated Decision Record to the Resources Council. The Area Manager's cover letter acknowledged receipt of the Resources Council's comments and stated: "Five comment letters were received on the draft EA. The comments were summarized and a response was prepared (refer to Appendix 4). Many comments were incorporated into this updated EA. Changes are shown in italics." A review of the final EA and Appendix 4 indicates that the concerns set out in the Resources Council's April 4, 1994, letter were addressed. Certain of its concerns were addressed at page 10 and on pages 13 through 17 of the final EA. The Resources Council's concern that BLM discuss the dangers to those exposed to the spraying of specific compounds of herbicides was answered at page 12, paragraph 4, at pages 13 through 17,

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4/ The Resources Council also asserted that it wishes "to incorporate by reference the comments made by * * * the Oregon Natural Desert Association [ONDA]." The ONDA's comments were not appended to the Resources Council's letter and are not found in the record.

and in Appendix 3 of the final EA. Additionally, the Resources Council's 18 specific concerns were addressed in the final EA. (Resources Council Letter of Apr. 4, 1994, pages 5 through 11; final EA, Appendix 4: SUMMARY [OF] COMMENTS AND RESPONSES.)

The Resources Council SOR merely incorporates its April 4, 1994, letter by reference. It does not object to or express specific concurs regarding BLM's responses set out in the final EA, and it makes no effort to show how those responses are in error. This Board has repeatedly stated that an appellant is required to point out affirmatively why the decision under appeal is in error. Oregon Natural Resources Council, 122 IBLA 65, 67 (1992); In Re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991); Andre C. Capella, 94 IBLA 181 (1986); United States v. De Fisher, 92 IBLA 226 (1986). In Shell Offshore, Inc., 116 IBLA 246, 250 (1990), we held that this requirement is not satisfied if the appellant "has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision * * * addressing these points." The BLM has provided a comprehensive EA fully addressing the Resources Council's arguments submitted during the public comment period. The Resources Council's resubmission of its letter of April 4, 1994, without comment or analysis, fails to affirmatively show why the Decision on appeal is in error, as is required by 43 C.F.R. § 4.412.

[2] We turn now to a consideration of the Resources Council's first assertion of error on appeal. Responding to a comment from the Resources Council that BLM should discuss the success and failures of previous attempts to control noxious weeds, BLM included the following new material in the final EA:

> Herbicide control has proven successful on several noxious weed species over the last several years within the LRA [Lakeview Resource Area]. Current herbicides approved for use on BLM administered lands include 2,4-D, dicamba, picloram, and glyphosate. Additional herbicides, such as atrazine, clopyralid, tebuthiuron, triclopyr, diuron, and chlorsulfuron, are incorporated into the FEIS [Final Environmental Impact Statement] for Vegetation Treatment on BLM Lands (Thirteen Western States); these will be available for use when approved and are covered by the EA. (BLM administered lands in Oregon and Washington are currently under a court injunction for chemical application under the FEIS for Vegetation Treatment.) Chemical application requires the submission of a Pesticide Use Proposal. Herbicide design features as shown in Appendix 3 will be used. Fertilization may be used to reduce noxious weeds by increasing competition of desirable plant species or by direct effect.

(EA at 3.)

On appeal the Resources Council asserts that it is premature for BLM to go forward with the spraying of noxious weeds with the herbicides 2,4-D,

dicamba, picloram, and glyphosate because it has not yet received PUP's authorizing the use of other herbicides. Additionally, the Resources Council argues that BLM should not implement its Decision to include herbicidal treatment of noxious weeds in the Lakeview Resource Area while it is still under a court injunction "for chemical application under the FEIS for Vegetative Treatment." (SOR at 2.)

We find the Resources Council's arguments to be without merit. In 1987, the United States District Court for the District of Oregon found that the Final Northwest Area Noxious Weed Control Program EIS for noxious weed control (as supplemented in March 1987) contained a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed actions of the BLM," and partially dissolved an injunction prohibiting BLM from all herbicide spraying in the State of Oregon. 5/ As a result of the partial dissolution, BLM was "permitted to use products containing the herbicides Dicamba, glyphosate, picloram, and 2,4-D to control and eradicate noxious weeds on public lands in Oregon." Northwest Coalition for Alternatives to Pesticides v. Richard E. Lyng, supra. The partial dissolution of the injunction was affirmed on appeal. See Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588 (9th Cir. 1988).

The four herbicides considered in EA No. OR-93-013-03-01 to control noxious weeds are the same as those the Federal District Court found permissible for use on Federal public lands in Oregon. The Resources Council asserts that BLM should wait to treat noxious weeds with the approved herbicides until after other herbicides may or may not be approved. This is nothing more than a difference of opinion. The use of those herbicides is not prohibited as a matter of law.

The Resources Council's second assertion of error pertains to BLM's finding that dicamba was approved for use on BLM-administered lands. The Resources Council suggests that a PUP does not exist for dicamba. It supports its assertion by alluding to a document in the record entitled "1993 Guidance for Pesticide Use Proposals," stating that dicamba's use is limited to Bureau of Indian Affairs range areas and noncrop-bearing lands not adjacent to habitation. (1993 Guidance for Pesticide Use Proposals at 2, item B.)

EA No. OR-93-013-03-01 contains a section entitled "Herbicide Design Features," (Appendix 3), stating that while the four chemicals are

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5/ Effective Mar. 1, 1984, the court had "enjoined the defendants from all spraying of herbicides within Region Six of the U.S. Forest Service and within the BLM Districts within the State of Oregon, until completion of a Worst Case Analysis, pursuant to * * * 40 CFR § 1502.22 in force [at the time]." Northwest Coalition for Alternatives to Pesticides v. Richard E. Lyng, 673 F. Supp. 1019, 1021 (D. Or. 1987).

authorized for use in the Lakeside Resource Area, their actual application will depend on a number of determinations. This section states:

> Four chemicals are authorized for use under this decision. They include 2,4-D, picloram, dicamba, and glyphosate. A list of new approved formulations is available at the BLM District Office. The applicator will use the herbicide to which the targeted weed species is most susceptible and will be of least detriment to non-target vegetation. Prior to use of a specific chemical and formulation, the BLM will complete a Pesticide Use Proposal.
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> The chemicals will be applied only in accordance with the EPA's label. All application methods may be used for each herbicide except glyphosate, which will not be applied aerially.

(Appendix 3, at 1.)

The record also shows that the EA identifies "an updated list of 'Herbicide Formulations Approved for Use on BLM Lands' * * * released on March 3, 1994." (Final EA at 14.) The herbicide formulations approved for use on BLM lands include four EPA registered and approved formulations for dicamba and three for dicamba plus 2,4-D. (File Attachment 15, at 3, 4.)

The Resources Council is correct in its assertion that a PUP is required before any chemical formulation can be used on BLM lands. However, it incorrectly assumes that because a PUP for dicamba is not found in the record that dicamba is not a herbicide approved for use on BLM lands. Northwest Coalition for Alternatives to Pesticides v. Lyng, supra; Herbicide Formulations Approved for Use on BLM Lands, supra at 3, 4.

We find that EA No. OR-93-013-03-01 adequately examines the effect of the proposed weed control plan on native vegetation, special status species, riparian, wetlands and watersheds, wildlife, fish, livestock and wild horses, cultural resources and human health. The Resources Council's SOR fails to identify deficiencies in the EA and the June 6, 1994, FONSI that are premised on an error of law, a demonstrable error of fact, or which show a failure to consider and analyze an environmental question of consequence to the action under review. The record indicates that BLM took a "hard look" at the environmental consequences of its proposed weed control plan.

A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's Decision if it is reasonable and supported by the record on appeal. Sierra Club, Toiyabe Chapter, 131 IBLA 342 (1994); The Steamboaters, 131 IBLA 223 (1994); Southern Utah Wilderness Alliance, 127 IBLA 331, 100 Interior Dec. 370 (1993).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge