

INTERIOR BOARD OF LAND APPEALS

Bob Zybach

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BOB ZYBACH

IBLA 98-218

Decided November 6, 1998

Appeal from a decision of the Mary's Creek Resource Area Manager, Bureau of Land Management, authorizing the Crooked Creek Road Restoration Project. Environmental Assessment No. OR 080-98-03.

Affirmed.

1. Environmental Policy Act—Environmental Quality: Environmental Statements—  
National Environmental Policy Act of 1969: Environmental Statements

A Finding of No Significant Impact will be affirmed with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that it is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal.

APPEARANCES: Bob Zybach, Corvallis, Oregon, pro se; John Bacho, Mary's Peak Resource Area Manager, Salem, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Bob Zybach (Appellant or Zybach) has appealed from the Decision Record and Finding of No Significant Impact issued on March 2, 1998, <sup>1/</sup> by the Area Manager, Mary's Peak Resource Area, Bureau of Land Management (BLM), authorizing removal of 2.52 miles of Crooked Creek Road located on Federal land adjacent to an anadromous fish-bearing stream in the North Fork Alsea

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<sup>1/</sup> The Decision was signed by the Resource Area Manager on Feb. 19, 1998, but not published until Mar. 2, 1998.

River Watershed, in Benton County, Oregon, 10 miles southwest of the town of Philomath. The Decision appealed from approved the implementation of proposed actions described in Environmental Assessment (EA) No. OR 080-98-03 that are designed to halt deterioration of the roadbed and reduce sediment discharge into Crooked Creek.

BLM's Decision describes the project:

The Crooked Creek Road Restoration Project is proposed to decommission approximately 2.5 miles of roadbed on federal land managed by the Bureau of Land Management (BLM). The purpose is to halt continued deterioration of the roadbed and thereby reduce the resultant negative impacts to an adjacent anadromous fish-bearing stream. The proposed project would be located in the North Fork Alsea River Watershed, in Section 11, T. 13 S., R. 7 W., W.M., Benton County, Oregon.

\* \* \* \* \*

My decision to implement the Proposed Action (Alternative B) is based on the need to reduce or eliminate further sediment discharge into Crooked Creek from road-surface runoff by eliminating motorized vehicle use and by restoring surface water flow, as near as practicable, to its natural course. Alternative A, No Action, was not chosen because it would result in continued sediment discharge into Crooked Creek, with unacceptable negative impacts on water quality and fish. In addition, continued use of the road by off-highway vehicles would disturb wildlife species.

\* \* \* \* \*

The proposed project is local in nature and potential negative impacts would be short-term. A short-term increase in turbidity and suspended sediment would be offset over time by reduced sediment delivery to the stream; other water quality parameters would likely be unaffected by this proposal. Storm discharge would be unaffected or slightly reduced as drainage from the road is redirected to natural hillslopes; summer base flow should remain unaffected. Fish would benefit from more natural, higher quality habitat and reduced sediment. Elimination of off-highway vehicles would benefit wildlife species by reducing disturbance. Native vegetation should dominate the site eventually through natural succession.

(Decision at 1-2.)

On November 12, 1997, BLM completed EA No. OR 080-98-03 (EA) concerning the Crooked Creek Road Restoration Project. It states that the purpose of the road decommissioning would be to prevent sediment discharge from road-surface runoff by eliminating motorized vehicle use and restoring surface water flow to, as near as practicable, its natural course.

(EA at 1.) The intent is further attainment of the Aquatic Conservation Strategy (ACS) adopted under the Northwest Forest Plan. Id.

The EA listed the following activities as included within the restoration project: removal of five culverts; restoration of six stream channels to approximate their original (preroad) structures and gradients; construction of approximately 28 draindips and 34 waterbars to eliminate the risk of scouring on the decommissioned roadbed; where practicable, construction of an exaggerated outslope of 10-20 percent on approximately 2.4 miles of the existing roadbed to avoid undesirable diversion of surface water and its accumulated sediment; construction of three earthberms in an effort to eliminate all motorized vehicle use; and application of native grass seed to all disturbed areas. (EA at 1-2.)

In describing the affected environment, the EA explains that the natural drainage patterns in the vicinity of the road have been significantly altered by accumulating and diverting surface water along the rutted roadbed. (EA at 5.) In recent years, the road has been utilized extensively by off-highway vehicles for recreational purposes, resulting in severe surface rutting and erosion on many of the steeper sections of road. Id. Eroded material collects near low points on the road prism or drains into intermittent channels, contributing to water quality degradation in the affected streams during storm events. In addition, the EA found that road surface rutting has progressed to gully erosion at some locations and will continue until action to control surface drainage is taken. Id.

Crooked Creek is a perennial, fourth-order tributary of the North Fork Alsea River in which eroded sediment from the degraded road surface is assumed to contribute to water quality degradation in this Creek and its tributaries, with possible detrimental impacts to anadromous fish. (EA at 5-6.) The wildlife survey determined that no habitat of endangered or protected species would be altered by the project, and that the planned removal of existing culverts on two second-order perennial streams could prevent them from acting as barriers to the migration of resident coho, steelhead, and trout in the project area. (EA at 6.) The vegetation observed in the project area consists of 45-50 year old Douglas fir, with intermixed patches of alder. Within 120 feet of each side of the creek, the 1995 riparian inventory noted 90 percent hardwoods, mostly red alder, with a few scattered big-leaf maple. (EA at 7.)

The BLM EA stated that it focussed on the following issues:

1. What effect would the road closure, restoration measures, and culvert removals have on stream sedimentation, stream channel conditions and the riparian zone?
2. What effect would the road closure have on special status, special attention, and other wildlife species and their habitat?

3. What effect would the road closure have on fish habitat and existing fish stocks?
4. What effect would the road closure have on general vegetation, and special status, special attention and other plant species?
5. What would be the effect on public and administrative access to BLM and private lands, including access for forest management and fire protection?

(EA at 3.)

The Proposed Action described in the EA is designed to address these issues and address the purposes of the project. The Proposed Action (set forth above) included design features for reducing wildlife disturbance; permitting in-stream work only during the time period (July 1-September 15) when the least impact to anadromous and resident fish would occur; limiting out-of-stream work to periods of low soil moisture; restoring the disturbed streambed to its natural stream gradient and width following culvert removal; removing, stabilizing, and seeding excess culvert excavation; blocking road access to eliminate disturbance from off-highway vehicle use; restricting equipment operation to specific daylight hours to reduce conflict with wildlife; committing to discontinue operations in order to evaluate any threatened and/or endangered animal or plant species found to be occupying the project area; and eliminating motor vehicle usage of the road by constructing berms and restoring the roadbed closer to its original contours. (EA at 4-5.) In addition to the Proposed Action, BLM considered a No Action alternative that would have retained the status quo but not have addressed the continuing stream degradation. (EA at 7-8.)

The EA addressed the environmental consequences of the Proposed Action. The EA concludes that decommissioning 2.52 miles of road, removal of stream crossing culverts, and reestablishment of a natural streambed would result in long-term reduction in suspended sediment levels and an overall improvement in water quality conditions. (EA at 8.) Channel adjustments under this proposal are expected to be insignificant, as channel base level would be maintained and the banks and bed would be provided with sufficient protection to prevent excessive erosion, channel widening, or incision. Id. The Proposed Action has been designed to comply with the ACS objectives within the Resource Management Plan to maintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Id. Wildlife species would be expected to benefit from this action due to the reduced disturbance from off-highway vehicle use. Blocking access to off-highway vehicle use within the riparian reserves would, over time, lower the sediment influx closer to preroad levels. Anadromous and resident fish would benefit from the more natural and higher quality habitat, and by the reduced sediment discharge into Crooked Creek and the North Fork Alsea River. (EA at 9.) Finally, although elimination of the

roadway would allow non-native vegetation to invade the area by creating a rooting bed, native species would eventually dominate because of shade. Id.

The EA states that formal consultation has taken place with the two adjoining landowners, and the Oregon Department of Forestry. Both adjoining landowners find the Proposed Action acceptable and the Oregon Department of Forestry supports the Proposed Action wholeheartedly. (EA at 9.) A fourth consultee was a representative of the Flat Mountain Riders, a motorcycle group. While the motorcycle group is not anxious to lose this motorcycle route, it agrees with the rationale behind the Proposed Action and will cooperate with the closure, if implemented. Id.

The no-action alternative discussion stated that ongoing natural processes and human influences would continue unaltered within the Crooked Creek riparian zone if this alternative were selected. Present uses would remain unchanged, and deterioration of the roadbed and drainage structures would continue over time. (EA at 3.)

BLM's February 19, 1998, Decision stated that it would implement the proposed actions "as described in the Crooked Creek Restoration Project EA, including design features described therein." (Decision at 1.) The Decision explained that the project is consistent with other Federal agency and State of Oregon land use plans and with Benton County's land use plan and zoning ordinances. (Decision at 2.) The Decision further stated that the project is within the coastal zone as defined by the Oregon Coastal Management Program and is consistent with the objectives of the program and State planning goals which form the basis "for compliance with the requirements of the Coastal Zone Act." Id.

Finally, the BLM Decision stated the proposed actions would be consistent with relevant laws, regulations and management plans for management of BLM-administered lands in the North Fork Alsea River Watershed, including the following:

Salem District Proposed Resource Management Plan/Final Environmental Impact Statement (Sept. 1995; the PRMP/FEIS). The environmental consequences of the proposed action do not exceed those analyzed in the PRMP/FEIS.

Salem District Record of Decision and Resource Management Plan (May 1995; the ROD/RMP). The proposed project conforms with and would follow the general management guidance outlined in the ROD/RMP; it would not retard or prevent attainment of the Aquatic Conservation Strategy Objectives.

(Decision at 2.)

In his Statement of Reasons for Appeal (SOR), which argues the inadequacy of the EA, Appellant argues that the project "will not likely achieve the objectives for which it has been proposed (improved water quality and

enhanced anadromous fish populations) and that, further, no baseline data or adequate monitoring strategy exists to determine whether objectives can or will be met." (SOR at 1.) Appellant claims the EA is rife with speculation, not facts, and that "[s]cientific management should not be driven by speculation, but by facts." Id. Zybach contends that there is no mechanism in place to measure past conditions in the project area, to measure current conditions in the area, or to establish any particular baseline criteria of importance to measure the project's success or failure to meet objectives. Id.

Second, Appellant contends that adoption of this project will have negative economic and recreational impacts upon the residents and taxpayers of Benton County, himself included. (SOR at 1.) He states that by removing a road on public land in Benton County, BLM "would therefore reduce the value of the public property within the county," with the greatest impact falling upon local residents. Id. He further claims that removal of the road will result in a reduction in recreational options, since, "[i]n its present form the road is used by recreational bikers and hikers and is possibly used by hunters, fishermen, mushroom pickers, and others as well." Id.

A third concern raised by Appellant is the claim that adoption of the project will increase risks of fire damage to other property owners in western Oregon. Zybach states that the location of the road can function as both a fire-break and as an access route for firefighters and fire equipment and that removal of the road will reduce the capability to manage wildfire in an area of known and documented fire danger. (SOR at 2.)

Zybach next contends that other individuals, business representatives, and landowners in western Oregon have also expressed reservations about this project in particular, and BLM road removal policies and plans in general. (SOR at 2.) Appellant claims that an adjacent landowner (Wes Miller) faces increased logging costs because of the alternate route he now uses, "rather than the preferred Crooked Creek Road \* \* \*." Id. Appellant further claims that "Buzz Kassner also expressed strong reservations about the reduction in recreational opportunities that road removal would cause." Id. Zybach states that owners and employees of logging firms "have also raised concerns about these types of actions in Benton County and adjacent lands managed by BLM and the USFS [United States Forest Service]." Id.

Appellant also claims that data concerning fire history, fish history, logging history, and creek sedimentation history, upon which the Decision was partially based, was "inadequately or incorrectly presented in the North Fork Alsea River Watershed Analysis (NFARWA)." (SOR at 2.) Zybach urges that information gleaned from timber cruises made and reported in 1915 should have been more carefully used in the NFARWA as it (the 1915 data) reflects a greater fire risk than presented in this study. Id. In this regard, Zybach contends that "[n]o relationship between the road's construction and use history and the logging history of the area is made."

(SOR at 3.) Similarly, Appellant complains that "[n]o fish or fishing history of the area seems to have been completed or attempted prior to this plan being developed." (SOR at 2-3.) Finally, Appellant contends that the Decision did not adequately take into account a major landslide noted in an 1892 published survey of the area, which might be a more important contributor to sedimentation in Crooked Creek than the road now slated for removal. (SOR at 3.)

In its Response, BLM states that its Proposed Action and Decision Record for this project are based on extensive scientific analysis of cause and effects of forest management actions, including the impacts of erosion and sediment yield from roads on anadromous fish and their habitats. (Response at 2.) BLM states that it considered relevant peer reviewed research on the effects of forest roads on water quality and anadromous fish and their habitats in its project analysis. In particular, BLM refers to the "Aquatic Ecosystem Assessment" in Forest Ecosystem Management: An Ecological, Economic and Social Assessment by the Forest Ecosystem Management Assessment Team, July 1993. Id. This assessment, BLM states, provides ample discussion of documented water quality and biological effects from forest roads. Id.

BLM states that the Northwest Forest Plan and the Salem District Record of Decision and Resource Management Plan identify the existing transportation network as one of the major contributing factors to declining anadromous fish runs in the Northwest, including the Oregon coastal rivers. (Response at 2.) Citing the National Marine Fisheries Services Biological Opinion/Conference Opinion on Implementation of the Land and Resource Management Plans, BLM states that the analysis of this type of project addressed therein reflects "that road restoration is perhaps the most significant action needed to improve habitat conditions for anadromous fish." Id.

The interdisciplinary team that developed the EA in this case, the Resource Area Manager explains, developed its conclusion that this road is an obvious source of accelerated erosion and fine sediment delivery to Crooked Creek based upon field inspections of the project area. (Response at 3.) These field inspections resulted in the conclusion that erosion has degraded, and will likely further degrade, water quality and anadromous habitat. Id. The BLM interdisciplinary team found that unless restoration is implemented, these conditions will continue to directly harm the anadromous fish which use the creek and river below the project area for spawning and rearing habitat. Id.

BLM, in addressing Zybach's claim that the project will have adverse economic and recreational effects, assures that it does not disregard the value of roads, but "this road was built in a poor location, which is causing environmental degradation and is no longer considered adequate for management." (Response at 3.) In his response, the Resource Area Manager explains that while roads may be considered a structure in tax assessments on private property, this is irrelevant here as BLM does not pay property

taxes, thus a road closure could not affect property values which are subject to taxation, nor would it affect the in lieu payments made by BLM to the county. Id.

In addressing Appellant's recreational concerns, the Resource Area Manager states that although the road has been open to recreation users, it was not designed for recreational vehicle use and BLM does not plan to keep it open for that purpose. (Response at 3.) BLM states that because the road was not properly designed, a number of problems were created, including constant soil erosion within a Riparian Reserve, rapid water runoff on excessively steep road grades, and road surface scouring. (Response at 4.) The Area Manager states that without significant reconstruction and annual maintenance, which are not BLM transportation management objectives at this location, the road will continue to be a soil and water resource problem area. Id. BLM claims that the continued existence of this road in its present condition will not meet the ACS objectives of the Northwest Forest Plan. Id. Finally, the Area Manager points out that the public lands that the Crooked Creek Road accesses will still be available for walk-in recreational activities from Highway 34, and that there are many other areas available in the general vicinity for recreational vehicle use. Id. He states that "[a] shortage of roads for recreational use is not evident in Benton County." Id.

In responding to Appellant's claim that the road closure will result in an increased risk of fire damage, the Resource Area Manager states that while this potential risk was identified in the EA, discussions with adjacent private landowners and the Oregon Forest Practices Act Forester reflected "no concern expressed about this project creating an inability to control fire." (Response at 4.) Of significance is the finding that within the last 25 years, "all of the human caused fires have occurred in proximity to roads." Id. The Resource Area Manager further claims that very few fires start from natural causes in this area and those that do tend to be low intensity, small (less than 1 acre) fires. Id. BLM also notes that since the road in question has not been drivable by most fire engines available in the area for many years, closing it will not reduce the available fire protection capability. Id.

In response to Appellant's claim that other individuals have also expressed reservations, BLM has addressed Zybach's claims directly. The Area Manager points out that Wes Miller has never requested use of Crooked Creek Road for his logging operation and it has never been a part of his Right-of-Way Agreement S-882. (Response at 5.) The Response reiterates that while Mr. Kassner and his motor cycle group are concerned about losing access, "they understand the proposal and agreed to support it." Id. The Area Manager states that in addition to discussions with road users, BLM considered the substantial amount of research on impacts of roads to aquatic systems in making a reasoned decision on the proposal. Id.

Finally, the Response addresses Appellant's claim that BLM did not adequately address fire history, fish history, logging history, and creek

sedimentation history data. The Area Manager explains that while fault may be found with the precision with which historic fires are depicted on BLM maps, the road issues addressed in the Crooked Creek EA are the effects that closing this road will have on the environment of Crooked Creek and the road's importance in any needed fire protection. (Response at 6.) In that regard, BLM claims, road closure will have little effect on fire protection, although the risk that a human-caused fire may occur will be reduced. Id. With regard to fish history, the Area Manager concedes that no good data exists for the fish species present prior to road construction in approximately 1936. He explains, however, that this is irrelevant "since the road restoration project is intended primarily to reduce current erosion and sedimentation problems negatively impacting existing fish and aquatic resources from this point downstream." Id. Similarly, logging history would not seem to be relevant as it relates to road restoration, as the road is not included in any Road Use Agreements maintained by BLM. Id. Finally, in addressing Appellant's claim that the EA did not address the possible impact of a pre-1892 landslide on sediment production, the Area Manager observes that this information is irrelevant to the Decision under appeal, as the Crooked Creek Road Restoration project "addresses removing a current sediment source that is independent of that landslide." Id.

We have frequently said that the environmental analysis process under the National Environmental Policy Act of 1969 (NEPA) is designed to provide decisionmakers with adequate information to make a decision, not to ensure a decision that is most solicitous of environmental conservation. The issue in this case is not whether this project is advisable but whether the decisionmaker was sufficiently advised to make a reasoned decision. Missouri Coalition for the Environment, 124 IBLA 211, 223 (1992). As stated in State of Wyoming Game and Fish Commission, 91 IBLA 364, 367 (1986):

The National Environmental Policy Act (NEPA) is essentially procedural rather than substantive. See Strycker's Bay Neighborhood Council v. Karlin, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); In re Otter Slide Timber Sale, 75 IBLA 380 (1983). NEPA proceeds from a recognition that it is inevitable that Government actions will sometimes occur which may have significant negative impacts on certain environmental values. What is critical is that the Government officials determining whether those actions should go forward have a full and complete grasp of the possible consequences of the activity in order that they may take steps to ameliorate adverse impacts to the extent possible, and, if certain impacts cannot be avoided, decide the advisability of proceeding and thereby accepting such impacts.

The fact that NEPA is essentially procedural, however, does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for the decision,

adequately explores the reasonably foreseeable impacts, and fairly analyzes alternatives to the proposed activity. Indeed, the opposite is true. Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA.

In preparing an EA, which assesses whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), an agency is required to take a "hard look" at the problem addressed, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Owen Severance, 118 IBLA 381, 392 (1991); Yuma Audubon Society, 91 IBLA 309, 312 (1986).

[1] We have also frequently said that we will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Southern Utah Wilderness Alliance, 140 IBLA 341, 348 (1997); The Ecology Center, Inc., 140 IBLA 269, 271 (1997); Blue Mountains Biodiversity Project, 139 IBLA 258, 265-66 (1997). A party challenging the determination must show that it is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Southern Utah Wilderness Alliance, *supra*, at 348; The Ecology Center, *supra*, at 271; Hoosier Environmental Council, 109 IBLA 160, 173 (1989); United States v. Husman, 81 IBLA 271, 273-74 (1984). The ultimate burden of proof is on the challenging party. G. Jon and Katherine M. Roush, 112 IBLA 293, 298 (1990); In Re Blackeye Timber Sale, 98 IBLA 108, 110 (1987). Mere differences of opinion provide no basis for reversal. *Id.*; Glacier-Two Medicine Alliance, 88 IBLA 133, 144 (1985). See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975).

We set forth the environmental analysis for this project at some length above because we believe it demonstrates that "a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable" and that BLM correctly determined an EIS was not necessary. We believe BLM's analysis of the environmental impacts from the project was comprehensive and its conclusion that these impacts, as the project is designed, are not significant, is correct. We think BLM's determination that the negative effects would be short-term and insignificant and that the long-term effects would be beneficial is reasonable. We are not persuaded that BLM overlooked significant impacts, e.g., from landslides or logging history, or improperly concluded that impacts on the economy and recreational opportunities for Benton County residents would not be significant. The fact that this project may be controversial to some does not automatically make its impacts significant. Glacier Two-Medicine Alliance, *supra*, at 143-44.

In sum, we conclude Appellant has not met his burden of showing that BLM's FONSI is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's Decision of February 19, 1998, published on March 2, 1998, is affirmed.

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James P. Terry  
Administrative Judge

I concur.

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Will A. Irwin  
Administrative Judge