

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance

151 IBLA 237 (December 16, 1999)

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SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 99-329

Decided December 16, 1999

Appeal from a decision of the Bureau of Land Management granting a minimum impact permit for filming on Federal land in Utah. EA UT-070-99-33.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Applications--Federal Land Policy and Management Act of 1976: Applications: Minimum Impact Permit

An application for a minimum impact permit to conduct filming activities on Federal land pursuant to 43 U.S.C. § 1732 (1994) and 43 C.F.R. § 2920.2-2(a) is properly granted where the proposed use is in conformance with BLM plans, policies and programs, local zoning ordinances and any other requirements, and will not cause appreciable damage or disturbance to the public lands, their resources or improvements.

APPEARANCES: W. Herbert McHarg, Esq., Moab, Utah, for Southern Utah Wilderness Alliance; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Southern Utah Wilderness Alliance (SUWA or appellant) has appealed the May 5, 1999, Decision Record and Finding of No Significant Impact (DR/FONSI) by the Field Manager, Price (Utah) Field Office, Bureau of Land Management (BLM or respondent), which granted approval to DreamWorks Production LLC (DreamWorks) for 14 days of set-up, filming of Galaxy Quest, and restoration during the period May 6-24, 1999, on Little Wild Horse Bench. This area is near Goblin Valley State Park, Utah, and has similar unique geologic features.

BLM prepared an Environmental Assessment (EA) for the project and issued a FONSI. In its May 5, 1999, DR, BLM concluded, at page 2, that:

Activities associated with the proposed action would not cause any additional impact as to what is currently occurring.

Vehicle and equipment use would be confined to existing access roads, trails and routes, and contained completely within the area outlined for filming. As previously stated, the area is within two wilderness proposals. The proposed action would have a temporary impact on the naturalness, solitude and opportunity for primitive recreation present within the area. Any short term impacts would cease when the proposed action is complete. The proposed action would have no negative impact on the long term viability of these wilderness characteristics. No irreversible or irretrievable commitment of resources would occur. The reclamation associated with the proposed action could provide a positive impact to these wilderness characters by improving the natural appearance of the site. The proposed action would not impact any federally designated wilderness area, wilderness study area or an associated area with a similar proposed action. Nor would the proposed action negate eligibility of the lands for future wilderness designation.

(DR at 2.) BLM stated the rationale for its decision approving the project, as follows:

The rationale to approve the preferred action was primarily based on the analysis of the environmental impacts presented in the attached environmental assessment as modified in this decision record. The proposed action was determined to be minimally impacting in that it is in conformance with the land use plan, BLM policies and programs, and would not cause appreciable damage to the public lands their resources or improvements. (43 CFR 2920.2-2). The company has incorporated a variety of measures into the proposed action to mitigate potential impacts from the project. The positive impacts from the proposed action outweigh the minor environmental impacts the proposed action would cause. The proposed action would not impact existing wilderness characteristics so as to negate the eligibility of the lands for wilderness designation in the future.

(DR at 3.)

Appellant filed its Notice of Appeal on June 4, 1999, after the filming and initial restoration had been completed. Reseeding is the only restoration activity remaining, and this must await appropriate seasonal conditions. On September 13, 1999, BLM filed a Motion to Dismiss the Appeal as Moot (Motion). BLM claims that the activity complained of had already taken place and the area had been rehabilitated before appellant filed its Notice of Appeal. (Motion at 3.) BLM further claims that appellant is seeking to have the Board issue an advisory opinion on a case which is moot. Id.

In its Response, appellant argues that the fact that the filming activities occurred before appellant had an opportunity to appeal, and that the same issues raised in this appeal are capable of recurring, are the

reasons that this appeal should not be dismissed as moot. (Response at 3.) Citing Southern Utah Wilderness Alliance, 111 IBLA 207 (1989), and Colorado Environmental Coalition, 108 IBLA 10 (1989), where the challenged activity also took place before appellant could appeal, SUWA claims it is directly challenging this permit under the "minimum impact" regulations which placed this decision into full force and effect. (Response at 4-5.) Appellant states that the DreamWorks filming project did not meet the requirements of the regulations and should not have been issued as a minimum impact permit. (Response at 5, citing 43 C.F.R. § 2920.2-2(a).) Appellant claims that unless this Board reviews the merits of the appeal, similar filming activities may improperly be approved under the minimum impact regulation. (Response at 5.)

Appellant claims that the film proposal did not conform to the BLM San Rafael Resource Management Plan (RMP) because the filming actions "would and did cause appreciable damage" to the public resources. (SOR at 6.) Referring to 1993 BLM Instruction Memorandum (IM) No. 94-59 (expired in 1994), appellant claims that the conclusion that this project was a minimum impact project violated guidelines contained therein. (Response at 6; SOR at 7-9.) Moreover, appellant argues, the Utah State Office should have reviewed this proposal because, following an April 15, 1999, Solicitor's memorandum to the Utah State Director, "BLM has implemented a review procedure that requires field offices to process and/or track actions proposed on such lands through the State Office." (Response at 7.) Finally, appellant states it is not confident that BLM will hold DreamWorks to restoring the area to a condition where no impairment has occurred. (Response at 8.)

The authority for BLM to consider the DreamWorks filming proposal arises under section 302 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732 (1994). The area encompassed by the permit application is located on lands administered by the BLM's Price Field Office within an area outlined and managed by the San Rafael RMP. The RMP authorizes a variety of land use actions on this land, and permit requests are considered upon application. (EA at I.B.) The location of the filming site is in T. 26 S., R. 11 E., Salt Lake Meridian, and comprises several small sites, not exceeding 10 acres, within a 26.6 acre parcel within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 7. (EA at II.B.) The area is located within an area zoned by Emory County, Utah, for mining and grazing, and the EA determined the project would not adversely affect these objectives. (EA at I.C.) BLM found that no withdrawals or specific management prescriptions limit use on the parcel in question, and appellant has pointed to none. The proposed action on the permit application was placed on the Utah Environmental Notification Bulletin Board, for review, on March 29, 1999. See DR at 4.

As an initial matter, we note that the DreamWorks project did not impact "any federally designated wilderness area, wilderness study area, or associated area with a similar proposed action." See DR at 2. While the area concerned was identified as having certain wilderness characteristics in the 1999 wilderness reinventory (EA at III.B.), the EA prepared following this proposal found that the project would be "minimally impacting" in

that it would "not cause appreciable damage" to the public lands or their resources. See DR at 3. Since the area was already heavily disturbed by camping and off-highway vehicle (OHV) use, a DreamWorks crew was required to clean up the site prior to the arrival of the filming crew. Fire rings, refuse, and graffiti were removed and OHV tracks and trails were raked out. (EA at II.B.)

The activities undertaken by DreamWorks as authorized by the permit included, in addition to site cleanup prior to filming, set design and construction, equipment and vehicle parking, filming activities, and site cleanup upon completion of filming. Existing and developed access roads only were used in this project. (EA at II.B.) The authorization approved 7 days for site cleanup and setup, 4 days for filming, and 3 days for cleanup and reclamation. (DR at 1.) The permit was subject to a reclamation bond of \$20,000, and required liability insurance in the amount of \$1,000,000. (DR at 3.) Mitigation and monitoring were specific and extensive and included a third party monitor who supervised activities associated with the clean-up and construction crews on a bi-daily basis. Two monitors were used on a daily basis during all live filming activities and were available on-site on a 24-hour basis. Any changes to the proposed action had to be brought to BLM, and the third party monitor had no authority to approve substantive deviations from the proposal. (DR at 3-4.)

Environmental Impact Statement Environmental & Engineering Consulting (EIS) conducted all third party monitoring and filed its Film Monitoring Report (Report) with BLM upon completion of the project. The Report noted that all disturbed sites have been scarified using a small tractor with a drill plow to remove hard packed areas and a harrow to groom the entire disturbed site leaving existent vegetation. (Report at 6-7.) Narrow areas where foot travel disturbance existed were hand raked. All of the 10 acres utilized by DreamWorks, as well as an additional 10 acres of preexisting disturbance, were scarified and included in the total area rehabilitated. EIS was scheduled to revisit the site in October 1999 to reseed and to contour the scarified sites. Id. at 7.

The gravamen of appellant's complaint is that this was not an appropriate action for the "minimum impact" regulation set out in 43 C.F.R. § 2920.2-2(a). Since that regulation places decisions into full force and effect, appellant argues that without an opportunity to review the determination in this case, even though the action is complete, appellant will be effectively precluded from meaningful review in future cases where the minimum impact regulation is similarly misapplied. Therefore, it argues, the Motion to Dismiss should be denied. Both in its Statement of Reasons and in its Response, appellant provides no evidence of specific environmental violations or concerns other than the alleged misapplication of the minimum impact regulation at 43 C.F.R. § 2920.2-2(a).

It is well established that the Board will dismiss an appeal as moot where, subsequent to the filing of the appeal, circumstances have deprived the Board of any ability to provide effective relief and no concrete purpose would be served by resolution of the issues presented. West Virginia Highlands Conservancy, 149 IBLA 106, 114 (1999); Jack J. Grynberg, 88 IBLA

330, 335 (1985); Douglas McFarland, 65 IBLA 380, 381 (1982); John T. Murtha, 19 IBLA 97, 101-102 (1975). Relying on this standard, however, we have declined to dismiss an appeal on the basis of mootness where, as in the judicial context, it presents an issue which is "capable of repetition, yet evading review," (Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911)), especially in circumstances where the BLM decision is placed by Departmental regulation into full force and effect pending resolution of the appeal, and action is taken pursuant thereto before the Board can act on a request for a stay or otherwise reach the merits of the case. Yuma Audubon Society, 91 IBLA 309, 312 (1986), and cases cited therein.

We have held that to dismiss an appeal presenting potentially recurring issues on the basis of mootness initially deprives the appellant of the objective administrative review to which it is entitled and may ultimately preclude any administrative review in such circumstances. Rather, the better approach is to address the issues presented, thereby affording suitable administrative review and providing the necessary direction to BLM in such likely future cases. That is the situation here.

[1] In the present case, we find that the film project is reasonably one for which 43 C.F.R. § 2920.2-2(a) may apply. That regulation authorizes issuance of a minimum impact permit if "the proposed use is in conformance with Bureau of Land Management plans, policies and programs, local zoning ordinances and any other requirements and will not cause appreciable damage or disturbance to the public lands, their resources or improvements." 43 C.F.R. § 2920.2-2(a). SUWA's SOR fails to demonstrate that the DreamWorks proposal did not conform to the San Rafael RMP. Rather, the EA notes that a variety of land uses are authorized for this area. See EA at I.B. SUWA does not attempt to refute that the "RMP allows that a variety of land use actions, including permits," on the subject lands, or that "[n]o withdrawals or specific management prescriptions limit use on the parcel in question." Id. Rather, SUWA states that allowing the project to go forward on 10 acres of soils in the area "cannot be in conformance" with the fact that the RMP designated soils in the area as "critical." (SOR at 6.) SUWA's belief that it "cannot be" that BLM allows permitting on a site containing "critical soils," without citation to the RMP, does not refute that the RMP allows just that – permitting on a case by case basis in the judgment of BLM. SUWA's commentary is an insufficient basis upon which we would reverse BLM's conclusion that the limited-duration permit is in conformance with the RMP. See Utah Trail Machine Association, 147 IBLA 142, 144 (1999) (burden upon appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in authorizing use of new trail); John Dittli, 139 IBLA 68, 77 (1997) (same with respect to right-of-way). Unlike the cases appellant cited in its Response, the actions proposed in the permit application did not violate "management framework plan" provisions as in Southern Utah Wilderness Assoc., 111 IBLA at 212, nor did BLM fail to consider the potential cumulative impacts of the filming activities in conjunction with other proposed and existing activities in the area as in Colorado Environmental Coalition, 108 IBLA at 17.

The DreamWorks project clearly was not one which would cause appreciable damage or disturbance to the public lands or their resources. The area permitted was small, approximately 10 acres, within an area which already exhibited significant disturbance and littering, apparently by campers, bikers, and OHV enthusiasts. The cleanup initiative provided for in the permit and its stipulations, and carried out by DreamWorks before and after the spatially and temporally limited activity, resulted in the restoration of the natural landscape as well as the values which SUWA purports to represent.

Nor can we find any deficiency in BLM's assessment of possible environmental concerns. It is well established that a BLM decision to proceed with a proposed action, absent preparation of an environmental impact statement, will be held to comply with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994), if the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom, or that such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. National Wildlife Federation, 151 IBLA 66, 76 (1999), and cases cited. An appellant seeking to overcome such a decision must carry its burden of demonstrating, with objective proof, that BLM failed to consider adequately a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. Southern Utah Wilderness Alliance, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993), and cases cited. In our review of the EA in this case, we find that BLM has taken a "hard look" at the potential impacts of the proposed action and that SUWA has failed to establish any NEPA violation.

We also find no basis to reverse in appellant's reliance upon a 1993 IM that lapsed by its own terms in 1994, nearly 5 years before this proposal was submitted. To be clear, this IM No. 94-59 would have, if in effect and binding on all BLM offices, prohibited BLM from issuing the DreamWorks permit as a minimum impact permit. That IM states unequivocally that

filming or video activity is more than minimum impact under any one of the following conditions:

a. Location Variables

1. When any sensitive habitat or species may be impacted.

* * * * *

b. Activity Variables

1. Major use of pyrotechnics * * *.
3. Use of explosives * * *.

5. Disturbance *** to ***.
 - b. Sensitive soils.
6. Use of Heavy Equipment.

(IM No. 94-59 at 1.) In addition, the IM goes on to state that impacts are more than minimal if helicopters are authorized to fly lower than 1,000 feet in Congressionally Proposed Wilderness Areas. Id. at 2.

Were this IM to be binding on BLM, the permit issued here could not have been considered one to have "minimum impact" as required in 43 C.F.R. § 2920.2-2(a). DreamWorks fully intended to use pyrotechnics, explosives, a helicopter below 1,000 feet, and artificial "rain," as well as heavy equipment. But, as BLM correctly points out, that IM expired. (BLM Response at 4.) While BLM appears to concede that some BLM offices continue to employ the standards stated in the IM to make "minimum impact" determinations, id., BLM could have included such standards in the BLM Manual but has not done so. Accordingly, we will not reverse BLM for failure to adhere to an expired IM.

Nor will we construe the regulation to define "non-minimal impacts" as stated in the IM. While it is true that the IM defined minimal impacts to exclude some of the uses permitted here, had it wanted to do so permanently, BLM could have done so by incorporating such definitions in its regulations or Manual. It did not. We will not bind BLM to construe its regulation to incorporate the definitions in the expired IM, lest its failure to reissue the IM came from some concerns with its application that BLM wanted to avoid.

That leaves us to review the impacts under the terms of the regulation, as we did above. Even considering the activities planned by DreamWorks and referenced in the IM, we cannot reverse BLM on the facts of this case. SUWA does nothing to demonstrate clearly that the impacts were other than minimal in fact. The helicopter did not take off or land on Federal land, nor did SUWA adequately explain how the temporary use of protected pyrotechnics or vehicles by DreamWorks, followed by significant mitigation and clean-up, would materially affect the soils any more than the increasing vehicular use by the public (see EA at IV.B), which affords no mitigation and creates such adverse impacts as graffiti and trash. (EA at II.B.) SUWA's charges about impacts appear to be derived from the IM alone, rather than a significant impact which actually happened or created a worse result than the status quo on other than a very temporary basis. Certainly, the pictures of post-filming mitigation efforts do not sustain SUWA's claims.

Because the IM does not bind BLM at this time, BLM is left to decide in its discretion when a minimal impact permit is allowed. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); Kings Meadow Ranches, 126 IBLA 339, 342 (1993); Animal Protection Institute of America, 118 IBLA 63, 76 (1991). A party challenging BLM's DR/FONSI must do more than offer a contrary opinion; an appellant must show by a preponderance of the evidence that BLM erred when

collecting the underlying data, when interpreting that data, or when reaching its conclusion, and not simply that a different course of action is available. Animal Protection Institute of America, supra, and cases cited therein. Mere professional disagreement voiced by appellant does not suffice to establish error in a determination made by an expert BLM review team based upon all available data. See, e.g., Riddle Ranches, Inc. v. BLM, 138 IBLA 82, 85-86 (1997).

With regard to appellant's claim that State Office review did not occur and that this violated Departmental policy, the record reflects otherwise. On April 20, 1999, for example, Roger Zortman of the Utah State Office coordinated by memorandum on the permit application and arranged a conference call with Greg Thayn and Don Banks of the State Office and Richard Manus, Tom Rasmussen, and Mark Mackiewicz of the Price Field Office. The purpose of the coordination was "to correct any deficiencies in the NEPA process/documentation and allow UT to exercise its delegated authority in administering the action." (Roger Zortman memorandum dated April 20, 1999, at 1.) We find that the spirit and intent of the April 15, 1999, Solicitor's Memorandum relied upon by appellant has been complied with.

To the extent not specifically addressed herein, the appellant's other arguments have been considered and rejected.

Therefore, 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. Respondent's Motion to Dismiss is denied as moot.

James P. Terry
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge