

INTERIOR BOARD OF LAND APPEALS

Paul B. Smith and Bill Myers
and
The Boulder Technical Advisory Group

153 IBLA 334 (September 29, 2000)

Title page added by:
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PAUL B. SMITH and BILL MYERS
THE BOULDER TECHNICAL ADVISORY GROUP

IBLA 95-706, 95-707

Decided September 29, 2000

Appeals from a Decision Notice and Finding of No Significant Impact for the Elkhorn Mountains Travel Management Plan, which revises and updates the existing travel management in the Elkhorn Mountains and amends the Headwaters Resource Management Plan. MT 1782A.

Affirmed.

1. Environmental Policy Act–Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements–National Environmental Policy Act of 1969: Finding of No Significant Impact

Where the EA supporting the Decision Notice and Finding of No Significant Impact describes the proposed action of the Montana Department of Fish Wildlife and Parks as maintaining an "observed" late-winter elk population of 2,000 rather than maintaining a late-winter elk population of 2,000, the inclusion of the word does not result in a new proposal or overrule the population objectives in the State Elk Plan and its use is not inconsistent with the Decision where the record shows that the target elk population contained in Elkhorn Mountains Travel Management Plan is in fact based on the elk population objectives established in the State Elk Plan which BLM has no authority to alter.

2. Environmental Policy Act–Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements–National Environmental Policy Act of 1969: Finding of No Significant Impact

A BLM finding (based on preparation of an EA) that no significant environmental impact will occur as a result of issuing a travel management plan will be affirmed when the record shows that BLM took a hard look at the environmental consequences of its

action and appellant fails to show that BLM's finding was based 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.

APPEARANCES: Paul B. Smith, Esq., 1/ Boulder, Montana, for himself and on behalf of Bill Myers; Bud Smith, Boulder, Montana for the Boulder Technical Advisory Group; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Paul B. Smith, for himself and Bill Myers, and the Boulder Technical Advisory Group (TAG), have appealed from a Decision Notice and Finding of No Significant Impact (FONSI) for the Elkhorn Mountains Travel Management Plan dated August 1995 and signed by the District Manager, Butte (Montana) District Office, Bureau of Land Management (BLM); the State Director, Montana/Dakotas, BLM; the Forest Supervisor, Helena National Forest, U.S. Forest Service (FS); and the Forest Supervisor, Deerlodge National Forest, FS. Notice to the public of the Decision Notice and FONSI was published August 9, 1995, and August 14, 1995, in the Helena Independent Record and The Montana Standard, Butte. The Decision affects approximately 160,000 acres of FS land and 75,000 acres of BLM land that are managed in collaboration with the Montana Department of Fish, Wildlife, and Parks (MDFWP) as the Elkhorn Cooperative Management Area. 2/ The Decision Notice also stated that the Elkhorn Mountains Travel Management Plan amended the BLM Headwaters Resource Management Plan (RMP).

An August 14, 1995, News Release issued by the Helena National Forest in conjunction with the issuance of the Decision Notice and FONSI provides

1/ The record shows that Paul B. Smith and Bill Myers filed a notice of appeal and statement of reasons and that each document is signed by "Paul B. Smith Individually and on behalf of Bill Myers." While it is not evident from either of these filings that Paul B. Smith is authorized to practice before the Department pursuant to 43 C.F.R. § 1.3 and thus to represent Bill Myers, a subsequent note accompanying his proof of service return receipt cards, see 43 C.F.R. §4.410, is signed by Paul B. Smith on stationery letterhead from the "Law Offices of Paul B. Smith."

2/ The Notice advised that decisions made by the FS were subject to appeal pursuant to FS regulations at 36 C.F.R. § 215.7 and that decisions made by BLM were subject to appeal to this Board. The record shows that Appellants filed appeals with both agencies.

background information and a succinct description of the Elkhorn Mountains Travel Management Plan. It states:

The Forest Service and the Bureau of Land Management have decided to adopt an updated travel management plan for the Elkhorn Mountains. Officials of the Helena and Deerlodge National Forests and the BLM Headwaters Resource Area received cooperation and support from the Montana Department of Fish, Wildlife and Parks in examining a variety of alternatives for traveling in the Elkhorns. The joint decision comes after years of public involvement, analysis and deliberation.

The analysis process and decision deliberation was lengthy because of the many agencies involved, the "mountain range-wide" type analysis, and the great public interest and input. Agency officials feel the Decision, a modification of Alternative 4 in the Environmental Assessment, represents a balance between motorized travel opportunities and protection of the resource values of the area, including wildlife and their habitats.

National Forest System lands in the Elkhorn Mountains have been managed as a Wildlife Management Unit since Forest Plans were completed in the mid-1980's. Bureau of Land Management lands in the Elkhorns are managed for multiple use, but also consistent with the direction provided in the Elkhorn Memorandum of Understanding which established the "Elkhorn Cooperative Management Area". In looking at travel management, resource managers have grappled with balancing the needs of wildlife while providing recreation opportunities to the variety of users of the Elkhorn Mountains.

The Decision Notice and Response to Comments outline the concerns raised by the public throughout the analysis process and how the Decision addresses those concerns. The major concerns included ensuring adequate motorized and non-motorized recreation opportunities, protection of the wilderness and roadless character in the Elkhorns, and leaving things as they are. Other concerns included game retrieval during hunting season, law enforcement, implementation costs, impacts to wildlife habitat, soil erosion and noxious weed spread, access to private inholdings, access to mining claims, access to manage grazing allotments and public access to public lands.

BLM and Forest Service decision makers believe their decision represents a balance between the public's desire for recreational opportunities while ensuring protection for the soil, water, vegetation, and wildlife resources in the Elkhorns.

Specifically, the decision does the following things:

Establishes designated routes (area closure) for motorized travel with some exceptions for off-road vehicle use by snowmobiles in some areas and for motorbikes and ATV's in one area near Radersburg.

Establishes motorized trails with no width restrictions (to be used by any motorized vehicle) on many of the current Forest System roads that are primitive.

Establishes several additional winter route closures to protect big game winter areas.

Restricts some access during the big game hunting season to increase deer and elk security, but also establishes 7 new (and maintains one existing) hunting retrieval routes.

Maintains motorized access to Tizer Lakes and around Bullock Hill, but does not allow for motorized access of Tizer Basin trails.

Restricts motorized use on several "unsafe" routes and/or routes which are severely eroding. Public use is also restricted on routes which provide access only to private inholdings.

Provides additional winter access for wildlife viewing in Crow and Indian Creeks.

(FS News Release at 1-3.)

Because Smith & Myers and TAG in their Statements of Reasons raise some of the same issues and offer similar supporting arguments, we deem it appropriate in the interest of judicial economy to consider them in a single decision. In their Statement of Reasons on Appeal (SOR), Smith & Myers express three concerns which they "believe erroneously addressed the rights and interests of their properties and/or did not adequately resolve access to BLM properties." *Id.* at 1. The TAG appeal addresses six issues, three of which are the same as those raised by Smith & Myers.

Both Smith & Meyers and TAG point out an error in a Correction Notice promulgated September 11, 1995, by the District Manager, making corrections to the Travel Plan Decision Map that accompanied the August 1995 Decision Notice for the Elkhorn Mountains Travel Management Plan. Appellants state that "[t]he road segment referred to (T4N, R2W, Sections 23 and 25) in the Dry Creek area should read (T4N, R3W, Sections 23 and 25)." Appellants further state that "any references in the Decision Notice regarding the selected alternative concerning obtaining an easement over [segment T.4 N., R.3 W., secs. 23 and 25] should be deleted." (Smith & Myers SOR at 1; TAG SOR at 1.)

Second, Smith & Myers and TAG assert that the Travel Plan Decision Map does not show that a portion of Brown's Gulch Road 8517 is a private road maintained by private landowners. (Smith & Myers SOR at 1, 2; TAG SOR at 2.) ^{3/} Smith & Myers further assert that the Environmental Assessment (EA) and the Decision Notice state that there is no recorded easement on Brown's Gulch Road. Appellants state that at the meeting which generated the Correction Notice of September 11, 1995, "remarks by agency representatives of the Decision Notice, * * * indicated that the United States * * * was asserting a prescriptive easement agreement as to that segment of the road on private land." (Smith & Myers SOR at 2.) Appellants request that the record be clarified to indicate that, by adopting the Elkhorn Mountains Travel Management Plan, BLM was not also asserting a prescriptive easement over the privately-owned segment of the Brown's Gulch Road. (Smith & Myers SOR at 2.) Specifically, Appellants argue that it is necessary for the Federal Government to issue "a disclaimer as to any prescriptive rights being asserted by the adoption of the Travel Plan * * * [in order] to clarify what appears to be apparent now by the map and map legend." (Smith & Myers SOR at 2.)

TAG suggests that because the access over the private section of the Brown's Gulch Road maintained by private landowners may not be permanent, BLM and the FS should "work out an agreement with those landowners that would continue to allow public access absent the landowners granting a permanent easement." (TAG SOR at 2.) Recognizing the private owners presently allow public access, TAG desires a more secure arrangement to maintain public access. While TAG does not advocate a permanent easement, it urges BLM to coordinate an agreement with the private landowners that would allow continued public access. TAG also asserts that the landowners in Brown's Gulch Road "desire that the opening of the upper portion of the road on Forest Service property be open May 1 instead of May 15 each year" and argues that opening the road prior to May 15 is not an unreasonable request, and that granting it should not involve any consequences affecting resource management objectives. (TAG SOR at 2.)

Thirdly, Smith & Myers and TAG both argue that "the word 'observed' [in] Chapter III-19 EA should be deleted from the environmental assessment as it does not reflect what the statewide elk plan states, which is, 'maintain the current late winter population of 2000 elk.'" (Smith & Myers SOR at 2; TAG SOR at 3.) The EA at Chapter III-19, "Security Areas," states that "[s]pecific elk objectives for the Elkhorn Mountains (set by MDFWP in the State Elk Plan) are to maintain an observed late-winter elk population of 2,000 elk with 10 percent of these being antlered bulls." The Appellants argue that, as used, an "observed" late-winter elk population of

^{3/} Appellants do not clarify in their SOR's whether Smith or Myers (or both) own the land upon which the Brown's Gulch Road segment is located or whether both Appellants have an ownership interest in and maintain the segment of Brown's Gulch Road on private land.

2,000 elk would allow a larger herd and that reference to an "observed late-winter elk population of 2,000 elk" misrepresents the State's policy which is to "maintain the current late winter population of 2,000 elk" by appearing to endorse a late-winter herd that is larger than 2,000. To support this position, Appellants state that "[d]epending upon weather conditions it is estimated that 40 to 80 percent accuracy is all that is attainable by aerial observation," concluding that a count based on "observed" elk might reflect an actual herd of 2,500 to 5,000 elk. Appellants argue that "target populations and antlered bull ratios were used in the Travel Plan in determining elk security areas, and road restrictions," and that future adjustments to the Travel Management Plan could be compromised by the existence of significantly larger herds. (Smith & Myers SOR at 2; TAG SOR at 3.)

On February 1, 1996, BLM filed a Consolidated Answer which addressed the appeals of Smith & Myers and TAG and also those of other appellants challenging the BLM Decision Notice for the Elkhorn Mountains Travel Management Plan.

In response to the first issue raised by both appellants in this appeal, BLM acknowledged that the September 11, 1995, Correction Notice to the Elkhorn Mountains Travel Management Plan Decision Notice contained a typographical error which incorrectly identified a road segment in the Dry Creek area of the Southern Elkhorn Mountains as being in T. 4 N., R. 2 W., secs. 23 and 25. The BLM stated: "The BLM agrees that the typographical error was committed and that the BLM does not have any plans to obtain an easement on the private road." (Consolidated Answer at 2.) Thus, as to this issue the appeals are moot.

With respect to Smith & Myers' argument regarding the need for a disclaimer to clarify that approval of the Elkhorn Mountains Travel Management Plan will not result in the assertion of prescriptive rights by the United States to use private land on Brown's Gulch Road, Counsel for BLM responded that:

The [Appellants] argue that legends on travel maps should note that the lower portion of the road in question [Brown's Gulch Road] should be shown as being in private ownership. Additionally, the Appellants argue that the government is obligated to provide a disclaimer concerning prescriptive use of the road.

The Elkhorn Mountains Travel Management Plan applies only to public lands. The issue raised by the Appellants is not relevant to the analysis done by the Bureau of Land Management or to the Decision issued by the BLM.

(Consolidated Answer, at 4.)

In response to TAG's concerns about the Brown's Gulch Road BLM notes that the upper portion of Brown's Gulch Road is under FS jurisdiction and therefore these issues should be addressed by the FS.

In response to Appellants' third common concern challenging the EA's use of the word "observed," Counsel for BLM acknowledges that several appellants had questioned the use of the word "observed" in the EA and states:

The environmental analysis and selection of a preferred action is an attempt by the BLM to effectively manage elk habitat, specifically hunting season security areas. Conversely, the responsibility of establishing elk herd sizes, censusing elk populations, and managing numbers of elk in the Elkhorn Mountains is [the] sole responsibility of the Montana Department of Fish, Wildlife and Parks. The separation of responsibilities is quite clear in our opinion: the federal agencies manage the habitat base whereas the state wildlife agency manages the elk resource. The issue of "observed" wintering elk and the implications to overall elk population estimates is clearly out of the scope of this document and not the responsibility of the BLM. Therefore, this is not a valid issue as it pertains to the decision at hand.

In evaluating the use of the word "observed" in the document, we feel that it is used in good faith and accurately expresses the intent of the sentence in which it is used.

We realize aerial census techniques provide only an index or estimate to the overall population of the mountain range. However, the Montana Department of Fish, Wildlife and Parks has vast experience and expertise in counting and estimating elk populations in the Elkhorns. We have confidence in the ability of the Department to effectively manage the elk population in the Elkhorns within the guidelines and framework of the State Elk Management Plan and within the habitat base provided on BLM lands.

(Consolidated Answer at 4-5.)

The other three issues raised only by Tag concern its opposition to choices made by BLM. First, TAG advocated an alternative access route to the road segment in the Dry Creek area. TAG expressed its opinion that the alternative route "that went solely on public land, but which would require some primitive 2-track road building for a few hundred yards in Section 12 or 13, T5N, R3W, across Dry Creek and east to the next gulch" should have been the preferred access route. TAG complains that if some type of accommodation with the private landowners does not materialize the Elkhorn Mountains Travel Management Plan would result in the denial of public access to

6,000 acres of public land. TAG asserts that such a scenario would not be an issue if its proposed alternate route were selected because the alternate route would assure public access. (TAG SOR at 1-2.)

In response, BLM asserts that the Appellant's opposition falls short of showing error. BLM states that "[t]he record reveals that the decision maker concluded that road construction was a less desirable alternative and that current access was sufficiently secure to not require development of a new access road." (Consolidated Answer at 2.) Appellant's concern for obtaining access to public land by a route different from the access route selected by BLM does not contradict BLM's analysis and conclusion that access to the public lands is secure.

Further, TAG contends that the public road on secs. 13 and 24, T. 5 N., R. 3 W., which is designated as a retrieval road, should be open year around because it may be the only access road to public land. (TAG SOR at 1-2.)

In response, BLM states that its

decision to utilize this road for retrieval purposes only stems from the comprehensive analysis of the Dry Creek to Devil's Fence geographic area. The EA analysis indicated that this area met several criteria listed in the rationale for completing this document. Of particular concern is displacement of elk to private lands during the hunting season and winter period. Providing recreational opportunities is also an important issue. The area in question is heavily roaded with nearly every road passing through private lands at some point. It was BLM's intention under the proposed action to provide as much big game security as possible and still provide maximum recreational benefit. BLM chose as the primary open road in this area the road that is located about ½ mile east and parallel to the road of concern to appellants. To meet the objectives of this plan for security cover (III-19) and "effective" winter range for elk (III-21) and mule deer (IV-21), BLM felt that the use on several roads needed to be restricted. The decision was to select the roads to be designated "open" at least seasonally by those that would meet the objectives of the plan most effectively. In this particular case, BLM selected the road as described above.

The BLM concluded this was the better selection for several reasons. Preliminary contacts and negotiations with the private landowner have indicated that access can be obtained through a variety of options (i.e., exchange, easements, cooperative agreement), it sustains the most use in relation to the adjacent roads, it provides access to the largest blocks of public land, it provides a "loop" route as

it connects to the remaining road system, and it is centrally located to the security habitat on public land, therefore providing the most recreational opportunity.

The road chosen by the appellant was not chosen because it would not provide a through route—that is, it would "dead-end" on private lands, it provided access to considerably less public land than the other route, and by choosing it, the roadless or security area created to the east was considerably larger than the balance we were trying to achieve between security and recreational access.

(Consolidated Answer at 3.)

Second, TAG supported keeping open the BPA road from Dry Creek west between September 1 to February 1 to allow access for motorized mountain lion hunting as opposed to the May 15 to December 2 period as provided in the Decision. (TAG SOR at 2.) BLM explained the basis for its decision:

The geographic area located between Dry Creek on the east and Elkhorn Creek on the west is a very important elk and mule deer winter range. The BPA road is located near the center of this habitat unit and basically divides the area into north and south halves. Disturbance to big game during the winter period is thoroughly addressed in the EA (see III-21; IV-18, 20 and 21) and a special concern for animals in the southwest Elkhorns (IV-19; 24). In the analysis the BLM concluded that this area is important enough to wintering big game that human disturbance should be minimized.

(Consolidated Answer at 5-6.)

Finally, in response to TAG's support for leaving the road to Leslie's Lake to the Skyline Mine and the Tacoma Gulch Road open year around (TAG SOR at 3), BLM points out that these roads are on FS lands and raise issues outside the scope of BLM's authority. (Consolidated Answer at 6.) We note that TAG also filed a notice of appeal with an identical SOR with the FS. Thus, in accordance with the published Decision Notice to the public, these issues will be considered by FS and not BLM. See footnote 2 supra.

We find the record properly designates the private segments of Brown's Gulch Road, and we reject Smith & Myers' assertions that approval of the Elkhorn Mountains Travel Management Plan requires a disclaimer for further clarification. We note the map, that is part of the Decision Notice of August 1995, labeled as "Elkhorns Travel Plan Decision," identifies the "Elkhorn Cooperative Management Area boundary." The Elkhorn Cooperative Management Area encompasses approximately 235,000 acres of FS and BLM-administered land and also includes a considerable amount of

land, identified in the legend of the map as "Private and other land, not affected by the Plan." The map shows that many of the roads within the Elkhorn Cooperative Management Area boundary arise on private land or other land not affected by the Travel Plan.

The Elkhorn Mountains Travel Management Plan EA, completed in January 1995, identified 15 "main access roads," which, under each of the four alternative courses of action considered by the EA, were "open to motorized uses on a year-long or seasonal basis." Brown's Gulch Road (No. 8517) was identified as one of the 15 main access roads into the Elkhorn Cooperative Management Area. (EA, Chapter II-4.) As Appellants and the legend of the map showing the Elkhorns Travel Plan Decision point out, the lower portion of Brown's Gulch Road is on private land within the Elkhorn Cooperative Management Area. See Elkhorns Travel Plan Decision Map. The EA also identified Brown's Gulch Road as one of 27 "[p]ublicly-used roads * * * lacking recorded easements in the Elkhorns * * *." (Chapter III-29.) Chapter IV of the EA, entitled "Environmental Consequences," addresses the issue of prescriptive easements as follows:

Currently, many private landowners in and around the Elkhorns allow public access across private lands in spite of the lack of legal rights-of-way. In the reasonably foreseeable future, these landowners may elect to "cut off" this access. Although public "prescriptive" use may provide the case for public use of a given road, the legal proceedings can be long and expensive. Therefore, * * * change[s] [in] traffic patterns and recreational use of the Elkhorns may influence future landowner tolerance for allowing access.

(EA, Chapter IV, at 63-64.)

The clarification Smith & Myers seek by way of a disclaimer of prescriptive rights is to conform to the map and legend which distinguish roads not under Federal ownership. The September 11, 1995, Correction Notice at 2, states that one of the map legend symbols, the shaded areas which represent private land, should read as follows: "Private and other land, not affected by the Plan. This Plan shows some access roads and/or road segments that are not under Federal jurisdiction. These routes are shown to help prioritize needs for obtaining recorded easements." Because of remarks by FS officials at the meeting discussing the Correction Notice, Appellants argue that BLM should execute a Disclaimer because the Elkhorn Mountains Travel Management Plan is a joint Decision and because Brown's Gulch Road leads to both FS and BLM land. Appellants present no evidence to show that either the FS or BLM contemplate asserting prescriptive rights over private lands. Appellants recognize that the map and legend clarify that the bottom portion of Brown's Gulch Road is private road. Since BLM only has jurisdiction to affect public land no further clarification is warranted. The Elkhorn Mountains Travel Management Plan does not include a plan to, nor does it contemplate a plan to, assert prescriptive easements over the private road segments covered by the Plan. We find nothing in the

record to persuade us that approval of the Plan will have that result. ^{4/} Thus we find no merit to the second issue raised by Smith & Myers and TAG.

[1] The challenge to the inclusion of the word "observed" in the EA to reference the target elk population raises the issue of whether the word "observed" as used in the EA to reference the objectives of the MDFWP Elk Plan proposes a new action for analysis.

The letter to the public dated August 14, 1995, enclosing the Decision Notice and FONSI states that it has several parts, including Appendix B, the "Response to Public Comments on the EA." At page 13, Appendix B, a response to a comment regarding elk populations being too high states:

The population objective for elk numbers in the Elkhorns is stated as "2,000" in the Montana Dept. Fish, Wildlife, and Parks Elk Plan based on an assessment of the habitat carrying capacity and hunter recreation demand. This objective is being monitored through annual population surveys, vegetation trends on public land, and game damage complaints from private land owners. * * * The objective can be "amended" if monitoring indicated a need.

There is no dispute that the specific objective of the MDFWP Elk Plan is to maintain a late-winter elk population of 2,000 in the Elkhorns. (TAG SOR at 3; Smith & Meyers SOR at 2, Appendix B at 13.) Also, BLM acknowledges "that aerial census techniques provide only an estimate of the overall population." (Consolidated Answer at 4.) Appellants argue that including the word "observed" allows the late-winter elk population in the Elkhorns to exceed 2,000, that using it incorrectly states the objective of the State Elk Plan and that as a result of its use, the analysis supporting the Elkhorn Mountains Travel Management Plan is flawed because it was based on the State Plan target elk population of 2,000.

We recognize that inclusion of the word "observed" to reference the target elk population can be interpreted to refer to a population that exceeds the 2,000 State Elk Plan target population. However based on our review of the record it is clear that the proposed action in the Elkhorn

^{4/} We recognize that state courts adjudicate the use, by prescriptive easement, of roads over private lands. In Eddie S. Beroldo, 123 IBLA 156, 159 (1992), this Board stated: "When a dispute arises between non-Federal parties over access rights across non-Federal land, BLM cannot adjudicate those rights. The forum for such disputes is the state courts." Additionally, the Department has asserted that when Federal lands are involved, "the proper forum for adjudicating R.S. 2477 rights-of-way is the state courts in the state in which the road is located." See Eddie S. Beroldo, *supra* at 159, fn. 4.

Mountains Travel Management Plan was in fact based on the objectives in the State Elk Plan. Thus, we do not find that the use of "observed" in the EA was intended to propose an action other than that analyzed in the EA. As explained in the FS News Release, supra, under the MOU which established the Elkhorn Cooperative Management Area, MDFWP manages the elk population and sets the population objectives, and FS and BLM manage the base land for habitat security and multiple use. BLM has no authority to affect population objectives established by the State Elk Plan.

The EA states at Chapter III - 21, Winter Range:

The Elkhorn Mountains are unique in the state because much of the elk winter range is publically-owned. Where elk winter on private land, abundance is dictated by landowner tolerance; winter ranges in public ownership can be managed to the benefit of wildlife populations. In some herd segments, elk winter predominantly on private land. These low elevation areas are also prone to human development and subdivision. *
* *

Both the Forest Service and MDFWP have standards and objectives for managing big game winter range in the Elkhorns. MDFWP Elk Plan objectives include; "improving habitat conditions on publicly owned winter ranges so that the percentage of wintering elk using private lands is reduced from 30 percent to 10 percent." In recognition of the important public winter range values in Crow Creek, motorized vehicle use was restricted (12/1-5/15 annually) by the Forest Service in 1984. This restriction was intended to reduce stress to wintering elk and prevent potential displacement of elk to adjacent private land.

In addition to the Forest Plan standard that restricts motorized travel on big game winter ranges from 12/1 - 5/15, there are specific Forest Plan goals for Management Area E1 that include: "optimizing big game winter range," and "providing for other resources as long as their uses are compatible with maintaining elk winter range."

* * * * *

For the purpose of this analysis, all elk winter ranges were mapped, they are displayed on Map III-5. Based on a review of the pertinent literature, "effective winter range" was defined as winter range at least ½ mile from a road open to motorized travel. Under the current travel management plan, there are 32,335 acres of "effective" winter range in the Elkhorn Mountains. This is a maximum number of acres and would vary from one year to another depending on weather patterns, particularly snow depth and temperature.

The Decision Notice and FONSI, D. Big Game at 7, states:

With this Decision, there is an increase in elk security of about 5 percent over the mountain range from what it is currently. In addition, we have decreased open road densities in the various elk herd units nearly to Forest Plan standards.... We feel this Decision represents the upper level of public or "social" acceptance for restrictions on motorized travel. Therefore, there are limited opportunities in the future for any further increases in elk security through the implementation of road restrictions. For this reason if the objectives of the State Elk Plan cannot be met in the future, options other than travel management would need to be considered.

The word "observed," as used in the EA, was not intended to propose a new action and the record supports a finding that its use, while subject to interpretation, is in fact not inconsistent with the Decision.

[2] None of the concerns raised by either Smith & Myers or TAG to highlight defects in or to support their challenge to the Decision Record and FONSI is compelling. Appellants offer their opinion that a particular alternate access route is preferable to that set forth in the Decision. No proof, however, has been offered to demonstrate that the Decision is wrong or that BLM failed to consider the consequences of the Decision. When BLM has prepared an EA and finds that no significant environmental impact will occur as the result of authorizing a specific action on the public lands, BLM's action will be affirmed on appeal if BLM has taken a hard look at the environmental consequences of its action, considering all relevant matters of environmental concern, and has made a convincing case either that no significant impact will result or that any such impact will be rendered insignificant by mitigating measures. F. Larry Bartee, Steven R. Talley 141 IBLA 55, 59 (1997); Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140-41 (1992), and cases cited therein. A party challenging a finding that there was no significant impact 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. F. Larry Bartee, supra at 59; Oregon Natural Resources Council, 139 IBLA 16, 22 (1997). The burden to demonstrate error falls on the appellant. Coy Brown, 115 IBLA 347, 357 (1990). We find no error in BLM's analysis in the EA, and we affirm BLM's Decision to approve the Elkhorn Mountains Travel Management Plan based on its Environmental Analysis and FONSI.

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.

Gail M. Frazier
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge