

INTERIOR BOARD OF LAND APPEALS

Wilderness Watch, et al.

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WILDERNESS WATCH, ET AL.

IBLA 2003-72

Decided February 17, 2006

Appeal from a decision record and finding of no significant impact issued by the Field Manager, Kingman Field Office, Bureau of Land Management, approving construction of a road for motorized access to an inholding in the Mount Tipton Wilderness. AZA 30755; EA No. AZ-030-99-006.

Appeal dismissed in part; decision reversed in part, vacated in part, and remanded.

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

An EA serves to (1) provide evidence and analysis for determining whether to prepare an EIS or a FONSI; (2) aid an agency's decisionmaking process when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary. If the agency chooses to prepare an EA for a proposed action, but the resulting analysis projects a significant impact, the EA is insufficient and an EIS is required. To support a FONSI, and, hence, the conclusion that an EIS is not required, an EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts from it are insignificant. Where the EA met the first two standards of the test but failed to make a convincing case that the identified impacts were not significant, the FONSI is reversed.

2. Wilderness Act

Section 4(c) of the Wilderness Act provides that "subject to existing private rights, there shall be \* \* \* no

permanent road within any wilderness area designated by this chapter and, \* \* \* there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats \* \* \* within any such area.” 16 U.S.C. § 1133(c) (2000). If there is no evidence of existing private rights, no road or regular and continuous motorized use amounting to use of a road may be recognized to have existed at the time of wilderness designation. Where BLM relied on the existence of a route used by a random vehicle at the time of the designation of wilderness to justify authorizing, later, a “road receiving regular and continuous use” within a wilderness area, this conclusion is in error.

### 3. Wilderness Act

Under 43 CFR 6305.10(a), governing access to wilderness inholdings, BLM may approve only “routes and modes of travel to your land” that existed on the date of wilderness designation. Where the record does not show that BLM gave proper attention to the historic access pertinent to the inholdings in question, a decision approving motorized access cannot be sustained and must be vacated.

APPEARANCES: TinaMarie Ekker, Policy Director, Wilderness Watch, Missoula, Montana; Ronni M. Flannery, Esq., Missoula, Montana, for Wilderness Watch, et al.; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

### OPINION BY ADMINISTRATIVE JUDGE HEMMER

On December 4, 2002, TinaMarie Ekker, the Policy Director of Wilderness Watch, submitted a notice of appeal and petition for stay of “the decision allowing routine motor vehicle travel by Brian Siefker and Valerie Schunn through the Mount Tipton Wilderness” issued October 25, 2002, by the Kingman, Arizona, Field Office, Bureau of Land Management (BLM). Ekker filed this appeal on behalf of Wilderness Watch and also listed Richard Leibold and Jessica Pope as appellants. On December 16, 2002, Wilderness Watch submitted a document by which it sought to add the Maricopa Audubon Society (represented by Robert A. Witzeman), the Center for Biological Diversity (represented by Brian Segee), and the Arizona Wilderness Coalition (represented by Don Hoffman) as appellants. By Order dated January 16,

2003, the Board granted a stay, thereby suspending access pending review, and deferred any question regarding the joinder of additional appellants.

### Background

In section 3 of the Wilderness Act of 1964, 16 U.S.C. § 1132(b) and (c) (2000), Congress required the Secretaries of Agriculture and the Interior to recommend lands for possible designation as “wilderness.” Congress defined the term:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (2000).

Section 4(c) of the Wilderness Act provides: “Except as specifically provided for in this chapter, and subject to existing private rights, there shall be \* \* \* no permanent road within any wilderness area designated by this chapter and, \* \* \* there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats \* \* \* within any such area.” 16 U.S.C. § 1133(c) (2000). With respect to accessing isolated inholdings within wilderness, section 5(a) of the Wilderness Act provides:

In any case where State-owned or privately owned land is completely surrounded by \* \* \* lands designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned or privately owned land shall

be exchanged for federally owned land in the same State of approximately equal value \* \* \*.

16 U.S.C. § 1134(a) (2000).

Under section 603 of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. § 1782 (2000), Congress established additional obligations for the Secretary of the Interior with respect to wilderness areas, including a non-impairment standard for areas suitable for preservation as wilderness, subject to certain valid existing rights. 43 U.S.C. § 1782(c). Under section 603(a) the Secretary was obligated to review roadless areas of 5,000 acres or more and report to the President the Department's recommendations regarding their suitability for wilderness designation. 43 U.S.C. § 1782(a). The President was required to advise Congress of his recommendations with respect to wilderness designation of areas identified as suitable by the Secretary. 43 U.S.C. § 1782(b). Such a recommendation becomes effective only by Act of Congress. Id.

Consistent with directives in the Wilderness Act and FLPMA, the Secretary of the Interior established 15 wilderness study areas (WSAs) in Arizona comprising 276,464 acres of public lands managed by BLM within its Phoenix and Safford districts. BLM considered environmental impacts of designating each of the 15 WSAs as wilderness in the February 1989 Arizona Mohave Final Wilderness Environmental Impact Statement (Arizona Mohave EIS), prepared under the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000).<sup>1/</sup> One such area was the Mount Tipton WSA.

The Mount Tipton WSA includes, inter alia, Secs. 31, 32, and 33, T. 25 N., R. 18 W., Salt and Gila River Meridian, Mohave County, Arizona. At the time the EIS was issued, BLM depicted Section 33 to be comprised entirely of private lands. The Arizona Mohave EIS discussed construction of "about 1.2 miles of road \* \* \* across Section 32, T. 25 N., R. 18 W., to reach private land in Section 33" in conjunction with the Mount Tipton Wilderness designation. (Arizona Mohave EIS at 20.) The EIS was vague regarding the nature of the proposed road. It discussed both a proposed road and a possible right-of-way expected to be granted, either one to access a private inholding. Id. at 136. The EIS did not identify the inholder or the location of the inholding. In a letter in the record dated January 7, 1988, however, Bill Hamilton, later identified in the record as Charles W. Hamilton, had asserted that he owns the N½ Section 33 and had requested vehicular access along a "jeep trail" in Section 32 so that he could maintain a water well for livestock. The EIS expressly

<sup>1/</sup> Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), requires Federal agencies to prepare an EIS for a major Federal action significantly affecting the quality of the human environment.

concluded that construction of the anticipated road would “involve impairment of natural character on two acres” and that “[p]erception of naturalness would be lost or impaired over an area of 200 acres.” *Id.* at 20, 136; see also at 139, 140. The relevant maps of the Mount Tipton Proposed Wilderness, Maps 2-4 and 2-5, EIS at 22, 24, show an existing road crossing Section 6 into an inholding in Section 31, but only a “vehicle way” crossing Section 32 to Section 33.<sup>2/</sup>

Congress enacted the Arizona Desert Wilderness Act on November 28, 1990. 104 Stat. 4469. Section 101(b) designated the Mount Tipton Wilderness Area, which encompassed approximately 31,070 acres of the Cerbat Mountain Range in western Arizona. *Id.* Congress provided that, “subject to valid existing rights, the wilderness designated \* \* \* shall be administered by the Secretary of the Interior in accordance with the provisions of the Wilderness Act.” *Id.* Section 101(c) required the Secretary to provide the map depicting the wilderness to Congress. As best we can determine, the final wilderness designation is consistent in respects relevant here with Map 2-4 found in the Arizona Mohave EIS at page 22. See Figure 1 (attached hereto).

Marble Canyon, a deep valley draining to the west from the ridge of the Cerbat Mountains, is a prominent feature in the southern part of the Mount Tipton Wilderness and provides one of only a few means of access to the wilderness lands; following the canyon leads deeper into the wilderness than other routes. The section containing the private lands, Sec. 33, T. 25 N., R. 18 W., is situated near the eastern, or upper, end of Marble Canyon and is completely surrounded by the Mount Tipton Wilderness. The closest boundary of the wilderness area is at least two sections away from Section 33. (Figure 1.) Although BLM has acquired approximately 160 acres in the southern half of the section, the remainder remains in private hands, and those lands therefore constitute wilderness inholdings.

When the Mount Tipton Wilderness was created, an existing road was “cherry-stemmed” through that part of the wilderness area in Sec. 1, T. 24 N., R. 19 W., and Sec. 6, T. 24 N., R. 18 W., to reach the private inholding in the SE $\frac{1}{4}$  Sec. 31, T. 25 N., R. 18 W.<sup>3/</sup> The cherry-stemmed road did not extend through Section 32 for

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<sup>2/</sup> Maps in the record reveal a small private parcel in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  Section 31, to which the existing road provides access.

<sup>3/</sup> During the wilderness study phase, lands occupied by roads or other intrusions which would seemingly disqualify a parcel from wilderness consideration were often found. In many cases where a road entered, but did not bisect, an area otherwise possessing wilderness characteristics, the area occupied by the road was designated a “nonwilderness corridor.” Such corridors appeared on the inventory maps in the shape of a “cherry stem.” Boundaries of an inventory unit containing a “cherry stem”  
(continued...)

access to private inholdings in Section 33. (Figure 1.) Thus, to the extent the Arizona Mohave EIS discussed a potential road to be constructed across Section 32, it did not happen. No road was cherry-stemmed there.

That the Mount Tipton Wilderness did not ultimately include a motorized road across Section 32 is confirmed by the fact that the route across Section 32, identified as MT5 and 1.3 miles in length, is listed as a “closed vehicle route” in the Wabayuma Peak and Mount Tipton Management Plan, Environmental Assessment, and Decision Record (MTMP), August 1995, at 14. The MTMP identified “all approved motorized and mechanized uses in the wilderness that have been approved \* \* \*.” *Id.* at 15 (Table 4). Such approved uses did not include any motorized use within Section 32. The MTMP established a 10-year plan for management of the two wilderness areas considered. With respect to vehicular use, the MTMP set particular objectives for the areas. Objectives 1 and 2 were to maintain or enhance the natural untrammelled appearance of landscapes within the areas (objective 1) and provide opportunities for primitive and unconfined recreation (objective 2). *Id.* at 21, 29. Among the management actions BLM established to accomplish objective 1, BLM planned to reclaim eight miles of vehicle routes within the Mount Tipton Wilderness; with respect to closed vehicle route MT5 in Section 32, the MTMP set a management goal to “allow natural revegetation.” *Id.* at 23. The MTMP made clear that its objective with respect to inholdings was to acquire them. *Id.*

Siefker and Schunn first acquired property in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 33, T. 25 N., R. 18 W., in July 1998 when they purchased 40 acres of vacant land on the southern slope of Marble Canyon from Mary Presnell for \$10,000. According to Wilderness Watch, Mohave County records show that Presnell had acquired this property in 1991 by paying back taxes owed by the owners who acquired the land in 1901 and abandoned it sometime prior to 1974. (Statement of Reasons (SOR) at 2.)<sup>4/</sup> Soon after acquiring the property in 1998, Schunn and Siefker filed an application with BLM, serialized AZA 30735, seeking permission to access their newly acquired property by reconstructing an “existing roadway” traversing the adjoining Section 32 within the Mount Tipton Wilderness. With their application, Siefker and Schunn enclosed the plans for a ranch house, barn, riding area, and stables on the

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<sup>3/</sup> (...continued)

were drawn around the intrusion so as to exclude it from the area being considered for wilderness values. See National Outdoor Coalition, 59 IBLA 291, 296 (1981).

<sup>4/</sup> A Joint Tenancy Deed, June 23, 1998, provides that the purchase price was \$10 and other valuable consideration. Other documents in the record indicate that the total purchase price was \$10,000, while Presnell “carried the financing with \$1,000 down.” (Undated Memorandum in reference to Maricopa Audubon Society questions 9-6 and 9-7; see also Property Information sheets at 5; SOR at 2.)

property. They stated that they needed motorized access “for transport of horses and construction equipment for ranch house and barn[,] also to travel to and from ranch.” (July 31, 1998, Written Proposal for Access Permit at 1.) They asked BLM to expedite the application “as we have already submitted for our building permit and did not anticipate this time factor in our construction schedule.” Id.

By letter dated August 10, 1998, BLM requested more information from Schunn and Siefker, including more specific information about “how frequently [they] will require use of the access road through wilderness.” On September 4, 1998, they responded that they would need 16 round trips total for an unspecified number of trucks and a trailer during the construction phase. They stated that they sought to modify the existing roadway by grading, adding culverts “to make it passable,” and that they needed permanent use for “2 four wheel drive pickups including 2 horse trailers” to conduct 2 round trips daily for three seasons and 1 round trip for each pickup weekly during winter. (Sept. 4, 1998, letter.) On September 7, 1998, Siefker and Schunn entered into a real estate option for the purchase on or before March 17, 1999, of 10 acres of vacant land in the N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  Section 33, from Tom and Mona Hart for \$10,000.

In subsequent discussions between Siefker and BLM, Siefker contended that the Arizona Mohave EIS had identified the “Marble Canyon access” and that the basis for his request for a road was the EIS, which he believed provided “sufficient analysis to authorize a permit.” (Nov. 19, 1998, conversation record between BLM and Siefker; Nov. 25, 1998, letter from Siefker to BLM.) By letter dated December 21, 1998, BLM advised Siefker that it was in the process of preparing an environmental assessment (EA) to consider authorizing access to the Section 33 inholding. BLM explained that the Arizona Mohave EIS was not a sufficient basis upon which to grant the access Siefker requested. BLM stated:

Anticipated actions [in the EIS] included such things as road access to private holdings, developments needed for cattle or wildlife, etc., but the environmental effects of each of these anticipated actions were described only in limited detail. The EIS describes the road in question with no detail other than that it would be approximately 1.2 miles long. In other words, the EIS did not address details such as the extent of construction, frequency of use and the like. The impacts presented in the EIS discuss only wilderness values that would be affected, and did not address impacts to other resources. A detailed description and impact analysis is necessary to process the request for an access permit.

(Dec. 21, 1998, letter from BLM to Siefker.) Accordingly, BLM made clear its understanding that the road had not been authorized in the EIS.

On January 8, 1999, BLM presented for public comment EA AZ-030-99-006. The proposed action was a 3-year access permit. BLM described it as follows:

Brian Siefker and Valerie Schunn, owners of private property within the boundaries of Mount Tipton Wilderness, have requested motorized access (backhoe tractor, 2-ton flatbed truck, four-wheel drive pickups, various trailers) to their 40-acre parcel of private land in Marble Canyon within the Mount Tipton Wilderness, on which they intend to develop a horse-breeding ranch.

The private parcel is located in T. 25 North, R. 18 West, Section 33, NE $\frac{1}{4}$ SW $\frac{1}{4}$ . The motorized equipment would travel a 1.2-mile jeep trail within the wilderness to reach the private inholding in Marble Canyon. The jeep trail has been closed to motorized and mechanical vehicle use since designation of the Mount Tipton Wilderness on November 28, 1990.

\* \* \* \* \*

The purpose and need of the proposed action is to enable the private landowners to have reasonable access to their property for the purpose of constructing, and then operating, a horse-breeding ranch. Motorized use through wilderness would include transport of the owners, their families, employees and other invited guests to the private land. Motorized transportation is also needed to enable the owners to bring supplies, provisions, personal gear and horses to and from the private property. The owners consider it reasonable to transport such items with motorized equipment as opposed to transport by backpack or horse.

(1999 EA at 1.) BLM explained that Siefker and Schunn had acquired 40 acres in 1998 and were anticipating acquiring 10 more acres in March 1999, both within Section 33, which contained parcels owned by nine private parties. *Id.* at 3.<sup>5/</sup>

BLM asserted that the Arizona Mohave EIS had “recognized the probability of road ‘construction’ through Marble Canyon to gain access to private land in Section 33, and addressed impacts of such an action.” (1999 EA at 2.) As for the proposed access route, BLM described it as follows:

Access to the property as proposed would take place along a jeep trail which is an extension of a “cherrystem” road. \* \* \* This jeep trail

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<sup>5/</sup> The properties are now held by five private parties. (2002 EA at 11.)

appears to have been constructed with heavy machinery many years ago, but was not maintained. Prior to wilderness designation it received light use by 4-wheel drive vehicles, probably by hunters, recreationists and the local rancher. Since 1990 it has been posted as closed to mechanized and motorized equipment. At present it exhibits some natural reclamation, with vegetation becoming established in the trail and brush encroaching from the sides at some locations.

(1999 EA at 4.) Under the proposed action, access would be authorized in a permit from BLM, valid for a period of 3 years. (1999 EA at 2.) The permit would allow one round trip with a backhoe, one round trip with a four-wheel drive truck to conduct tests, 16 round trips with trucks to deliver building materials and construction equipment, 360 round trips (2 per day) with four-wheel drive vehicles to gain access for construction activity, 1,000 round trips per year for routine daily access by four-wheel drive vehicles between March 1 and November 30, and 13 round trips per year for routine weekly access between December 1 and February 28. (1999 EA at 2-3.)

The EA made clear that the impacts under the proposed permit would vastly exceed the effects on 200 acres of wilderness anticipated from construction originally identified in the Arizona Mohave EIS in 1989. (Arizona Mohave EIS at 136.) BLM concluded that if the proposed action were to be implemented in Marble Canyon, wilderness values would be impaired on 1,223 acres of public lands. (1999 EA at 5.) BLM stated that “most visitors’ perception of naturalness” on the proposed route would be affected. *Id.* BLM explained that “most visitors to this wilderness do not expect to directly encounter or hear nearby motorized vehicles. Some visitors would be quite bothered while others would be less affected.” *Id.* at 6. The only alternative considered by BLM was “No Action,” where mechanized and motorized access would not be authorized. (1999 EA at 3, Map 2 - Project Area.)

BLM received considerable public opposition to the EA, and no public support, in 15 comment letters received in January and February 1999.<sup>67</sup> Commenters expressed concern that the proposed level of motorized use was unwarranted and excessive. They focused in particular on the nature of what “adequate” access was required to be provided by law, and whether Siefker and Schunn were entitled to any motorized access when they acquired the property well after the Mount Tipton Wilderness was created and at a time when the road had already been closed. *See* 1999 comment letters. Commenters questioned the “status of the 40 acre parcel when it was acquired in June 19[98]” and whether there had “been any legal determination relating [to] land use at the time of purchase.” (Jan. 29, 1999,

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<sup>67</sup> Among the ostensible appellants here, BLM received comments from Wilderness Watch, Pope, Leibold, and the Maricopa Audubon Society.

comment letter of Maricopa Audubon Society.) In a letter dated February 1, 1999, the Arizona Game & Fish Department noted that the route had been closed to public access since wilderness designation and queried how BLM would manage public access once opened for use by private landowners. It recommended that BLM acquire the inholding instead.

While BLM was in the process of receiving comments, Siefker and Schunn acquired additional property in Section 33, also in January 1999. They purchased two vacant 5-acre tracts from Ron Jones for \$3,500, property which Jones had purchased in 1995 for \$300. (Property Information sheets.) In March 1999 Siefker and Schunn also exercised their option to purchase the 10 acres of vacant land from Tom and Mona Hart. The Harts had acquired this land in 1992 for an undisclosed amount. (Property Information sheets.) As a result of their acquisitions, by the spring of 1999 Siefker and Schunn possessed a total of 60 acres in the southern half of Section 33. Their property borders the private property in the north half of Section 33 claimed by Bill (Charles W.) Hamilton and discussed in the 1988 letter described above, and, in part, private property to the south. The remaining boundaries (the east, west, and, in part, south) abut wilderness. See 1999 EA Map 2.

In a letter to Siefker and Schunn dated April 13, 1999, BLM advised them of the public opposition to the proposal and suggested that they consider alternative levels of access. Over the ensuing months, Siefker and Schunn discussed with BLM various options for reducing possible impacts to wilderness values. In a letter dated April 21, 1999, Siefker and Schunn indicated that they were willing to accept a compromise involving “104 roundtrips per year including pulling a horse trailer.” See also, e.g., Apr. 26, 1999, May 3, 1999, conversation records; May 4, 1999, letter from BLM to Schunn and Siefker; May 23, 1999, July 31, 1999, and Aug. 20, 1999, letters from Siefker and Schunn to BLM (discussing Aug. 11, 1999, meeting).

By letter dated December 13, 1999, Siefker and Schunn withdrew their application for wilderness access in favor of a right of access based upon an existing “RS 2477” road.<sup>27</sup> Siefker and Schunn reconsidered, however, after BLM informed them that “[t]he vehicle way in Marble Canyon \* \* \* is not recognized by BLM as a R.S. 2477 road, nor does it appear on the Mohave County list of nominated routes.” (Jan. 21, 2000, BLM Letter to Siefker and Schunn.) In a letter to BLM dated February 25, 2000, Siefker and Schunn stated that they wished to reassert their

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<sup>27</sup> This is a reference to Revised Statute 2477, Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (formerly codified at 43 U.S.C. § 932 (1970)), repealed by FLPMA, Pub. L. No. 94-579, section 706(a), 90 Stat. 2793. This statute provided: “The right of way for the construction of highways over the public lands, not reserved for public uses, is granted.”

application for a permit. BLM accepted this position and advised Siefker and Schunn that it would proceed with the process of considering the application and EA. (Apr. 13, 2000, BLM letter to Siefker and Schunn.) On May 22, 2000, however, BLM advised them that it was withholding any decision until such time as it received review of the issues “at the national level.”

By facsimile transmission received at the Kingman Field Office, BLM, on June 16, 2000, Siefker proposed to sell the land to BLM:

After calculating all of our costs we figure that we are in the Mt Tipton property \$1,150 per acre or \$69,000 for the 4 parcels consisting of 60 acres. We also have 2 parcels totaling 40 acres worth \$450. per acre or \$18,000 in the Wabayuma Pk Wilderness. <sup>[8/1]</sup>

We would like to offer all these properties (total of 100 acres) to you for purchase at our cost basis for a total of \$87,000 if you close within 45 days of today's date.

Siefker also asserted that he would be acquiring Schunn's interest in the venture, although the record does not verify that this has happened. See July 7, 2000, letter from Siefker to BLM (discussing agreement to purchase Schunn's interest). While there is no formal response in the record to Siefker's proposed sale to BLM, BLM memoranda show that the proposal was considered, and that BLM acquired property value information for all of the private parcels in Section 33 and in the Wabayuma Wilderness in June 2000, in order to assess a proper appraised value of the lands Siefker proposed to sell to BLM. See, e.g., Property Information sheets; various e-mails and telefax sheets dated June 2000.

During July and August 2000, Siefker and BLM communicated in various letters regarding his continued interest in processing his application and proceeding with his plans. Between October 2000 and June 2002, nothing appears in the official record BLM has provided us. A number of documents appear, however, as attachments to pleadings. <sup>2/</sup> These documents make clear that BLM and Siefker continued to discuss the proper appraised value of the Siefker inholdings for purposes of BLM's considering whether to acquire them.

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<sup>8/</sup> Siefker and Schunn acquired the 2 parcels in the Wabayuma Wilderness in 1998 and 1999 at a total cost of \$12,500. (Property Information sheets.)

<sup>2/</sup> Wilderness Watch acquired much of this information in response to an Oct. 24, 2003, request under the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2000). (Wilderness Watch Reply Ex. 7.) It is incumbent on BLM to submit the entire record to the Board. Dugan Production Corp., 103 IBLA 362, 364 (1988).

By letter dated September 13, 2000,<sup>10/</sup> Seifker wrote to BLM regarding “properties I own or control that have conservation values to BLM.” He asked BLM to contact him if it was interested in any of the properties, which included the Mount Tipton Wilderness inholdings. In November 2000, an appraisal was completed for Siefker and Schunn’s private properties in Section 33.<sup>11/</sup> By letters dated February 2, 2001, BLM forwarded offers to purchase the four parcels in Section 33 based upon fair market value appraisal amounts. BLM offered \$14,000 for the 40-acre parcel, \$4,750 for the 10-acre parcel, and \$2,500 each for the 5-acre parcels. A BLM e-mail dated February 21, 2001, noted that Siefker was not interested in the offers because “he has too much invested and cannot recoup his costs at the appraised current value.” No further discussion on this matter appears in the record.

BLM presented a revised EA on October 25, 2002. This 2002 EA considered four alternatives, instead of the two considered in the 1999 EA. Alternative 1, Expanded Motor Vehicle Use, is the same or similar to the proposed action considered in the 1999 EA. (2002 EA at 5.) BLM expanded its discussion of this alternative, considering round trips for septic system approval and backhoe access. Alternative 2, Limited Motor Vehicle Use, would allow preparation and maintenance of “the existing vehicle way,” to be accomplished without motorized or mechanized equipment, at the level of use existing when the wilderness was designated (hence, no leveling, widening, or other improvements); one round trip with a backhoe to conduct work on the private land; motor vehicle use for the specific purpose of septic system approval; 10 round trips with trucks not exceeding two tons to deliver materials and construction equipment; one motor vehicle round trip per day, Monday through Friday, during the construction phase for access (total of 130 trips); and routine access Monday through Friday following construction (not to exceed two trips per week between March 1 and November 30 and one trip per week between December 1 and February 28, or 91 trips per year). BLM proposed, alternatively, between 282-332 horse-drawn wagon trips instead of motorized vehicles as a part of Alternative 2. (2002 EA at 6, 9-10.) Alternative 3, Non-Motorized/Non-Mechanized Access, would allow development of the private property by use of pack horses or mules “to carry or drag construction materials, equipment, and supplies to the private property” (an estimated 100 round trips) and daily routine access by foot or horseback. (2002 EA at 7.) Under Alternative 4, No Action, access would be made by foot or horseback and development could still occur, but no dragging of materials would be authorized. Common to all alternatives, BLM proposed to construct a barrier and gate to exclude the general public. *Id.* at 4; see also at 9-10 (comparison

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<sup>10/</sup> A copy of this communication is not in the record but is available in Exhibit 1 of Wilderness Watch’s Reply brief.

<sup>11/</sup> The appraisal is not in the record but is discussed in materials that are part of Exhibit 1 of Wilderness Watch’s Reply brief.

chart). BLM noted that it had considered the option of an exchange or purchase of the land but that Siefker and BLM had been unable to reach agreement on the land's value. Id. at 4.

BLM explicitly considered the relationship of the proposed action to other land use plans and governing legal authority. BLM concluded that all four proposed alternatives conformed to the 1989 Arizona Mohave EIS because it had “recognized the probability of road ‘construction’ through Marble Canyon to gain access to private land in section 33, and assessed impacts of such an action.” (2002 EA at 3.) BLM stated that, although the 1995 Wabayuma Peak and Mount Tipton Wilderness Management Plan, Environmental Assessment, and Decision Record had not addressed motorized access to inholdings within the Mount Tipton Wilderness, the document had considered as a management action “the acquisition of wilderness inholdings by the federal government.” Id. at 3-4. Other than this comment, the EA does not make a finding that the decision is consistent with the MTMP. <sup>12/</sup>

In this EA, BLM expanded its consideration of the affected environment and the history of the road segment. BLM noted that the 1.2 mile segment had been constructed with heavy equipment, but was not maintained and, prior to wilderness designation, received “light use by high clearance vehicles, most likely driven by hunters, recreationists and the local cattle rancher, who also owns private land adjacent to” Siefker and Schunn. (2002 EA at 11.) BLM explained that, at present, Marble Canyon is remote and rugged, with “excellent opportunities for solitude and natural quiet.” Id. at 12. It “exhibits a high degree of naturalness, with little evidence of human use and development. \* \* \* Mount Tipton Wilderness is classified as Visual Resource Management Class I, which is a classification reserved for highly scenic areas located in special management areas, such as wilderness.” Id. at 12. The management objective for Class I lands is preservation of the existing character of the landscape; any change should be very low and must not attract attention. Id. BLM explained that most visitors who travel up-canyon “would follow the path of the old vehicle way.” Id.

BLM addressed impacts of all alternatives in the EA. (2002 EA at 15-28; see also at 25-26 (comparison chart).) With respect to Alternatives 1 and 2, BLM explained that the impacts would be that wilderness values would be “impaired or diminished on 1,210 public acres by the sights, sounds, and other evidence of motorized vehicles \* \* \*.” (2002 EA at 15 (Alternative 1), 19 (Alternative 2 would be the same).) At these pages, BLM explained that the impacts would be both long-term and temporary, and that the route would appear to observers to be a “road receiving regular and continuous use.” Most visitors’ perceptions of naturalness would be

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<sup>12/</sup> The MTMP was not provided in the record. The Office of Hearings and Appeals library subsequently acquired it.

affected, and the visual resource management objectives for Marble Canyon would not be met. Id. at 16, 19. BLM stated:

The effects that temporary sights and sound from motorized vehicle operation within the project area could have on an individual wilderness visitor's perception of naturalness, solitude opportunities and primitive recreation experiences will vary with the sensitivity of the person to such circumstances. It is assumed that most visitors to this wilderness do not expect to directly encounter or hear nearby motorized vehicles.

Id.; see also at 20. <sup>13/</sup> BLM noted that these changes "may cause wilderness recreation visitors to avoid using the Marble Canyon area" and may divert them outside of Mohave County. Id. at 19, 21.

The EA attached the comments and provided responses. Regarding the issue of adequate access, BLM stated that the Wilderness Act and its regulations required it to provide "adequate" access, which includes serving the reasonable purposes for which the land is held. (2002 EA at Responses to Comments 7-1 and 15-3.) BLM acknowledged that the land in Section 33 was vacant at the time the wilderness was created, id. at Responses to Comments 9-1 and 9-3, but stated that Siefker's and Schunn's subsequent acquisition of what had been vacant land at the time of wilderness designation had no bearing on its decision under the Wilderness Act. Id. at Responses to Comments 5-1 and 15-4. In addressing the fact that motorized use conflicts with the wilderness purposes for which the Mount Tipton Wilderness was created, BLM answered: "It is reasonable to assume \* \* \* that a day-hiker in Marble Canyon would probably see and/or hear a motor vehicle in wilderness at some point during their outing. This impact may be the unavoidable result of conflicting legislative mandates that BLM must follow \* \* \*." Id. at Response to Comment 13-2 (referring to Alternative 1).

On the same date BLM issued the 2002 EA, the Field Manager, Kingman Field Office, issued a finding of no significant impact (FONSI) and a decision record (DR), adopting Alternative 2, Limited Motor Vehicle Use, with some modifications, allowing wilderness access to Siefker and Schunn. The decision adopted motorized use rather than the 282-332 horse-drawn wagon option within Alternative 2. His conclusion that the decision would produce no significant impact (FONSI) reads, in its entirety:

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<sup>13/</sup> The EA suggested that the impacts of the non-motorized Alternative 2, as opposed to the motorized Alternative 2, might be perceived to be "more compatible with a wilderness setting." (2002 EA at 20.)

Wilderness character and ecological processes in Mount Tipton Wilderness will not be permanently harmed by implementation of the selected actions. There will be no irreversible or irretrievable commitments of, or damage to, natural resources caused by the selected actions. Less than one percent of the Mount Tipton Wilderness is potentially harmed by this action. All of the impacts created by the presented actions on public lands can be reclaimed or reversed if the action is discontinued.

The proposed action is not controversial, nor does it establish precedent. Access authorizations to nonfederal lands surrounded by wilderness are specifically permitted under Section 5(a) of the Wilderness Act.

The Field Manager explained that his decision to adopt Alternative 2 was based on several factors. He stated that the Wilderness Act requires adequate access, and that the “use of motor vehicles is the only reasonable and practical method available to the landowners” to accomplish the stated objectives because use of pack animals is “unreasonable due to the increased time and cost” of doing so. (DR/FONSI at 2-3.) “BLM can authorize access consistent with the route and mode of travel in existence at the time of designation (43 CFR 6305). The vehicle route that provides access to the property was in use by motor vehicles prior to wilderness designation.” *Id.* at 3. He also stated that the Arizona Mohave EIS “identified the likelihood of private land access.” *Id.* The added stipulations relate to monitoring maintenance and use, emergency access, and the barrier and gate to control unauthorized use by the public.

### Appeal and Analysis

Ekker filed a notice of appeal with BLM on December 4, 2002. Although it purports to be the notice of appeal for Wilderness Watch, Richard Leibold, and Jessica Pope, it is signed only by Ekker as Policy Director for Wilderness Watch. On December 16, 2002, Wilderness Watch filed an additional document requesting that the Maricopa Audubon Society, the Center for Biological Diversity, and the Arizona Wilderness Coalition be added as parties to the notice of appeal. This document was also signed only by Ekker. All six purported appellants submitted a joint statement of reasons (SOR) on January 6, 2003, also signed solely by Ekker.

BLM moved to dismiss all parties except Wilderness Watch, citing rules governing who may practice before the Department at 43 CFR 1.3. BLM contends that Ekker has not shown that she is qualified in her position as Policy Director of Wilderness Watch to represent the other five organizations or individuals, either as an attorney or under any of the other exceptions listed in 43 CFR 1.3.

In response, Wilderness Watch states that it does not purport to represent the interests of the other participants. Conceding that Ekker is not an attorney or otherwise qualified under 43 CFR 1.3 to represent them, the other five participants contend that, in signing the notice of appeal, addendum, and SOR, Ekker was not representing them but only aiding the process as a courtesy to the others by performing the clerical act of providing a signature for them. Each of the five participants has provided a declaration that it is representing its own interests in the appeal and that all named individuals are authorized to practice before the Board, either under 43 CFR 1.3(a)(3) or (a)(3)(iii). They argue that “[t]here is a significant difference between appellants consenting to having a nonlawyer represent their collective interests on the merits and appellants consenting to having a co-appellant sign a document on their behalf.” They contend that the motion to dismiss should be denied as no prejudice has occurred by this “technical deficiency.”

Given that Wilderness Watch timely filed its appeal, and only a single SOR was filed, nothing we say with respect to the number of appellants properly joined in the appeal has any bearing on our consideration of the merits. Nonetheless, we must identify who is and who is not an appellant in this action. The Arizona Wilderness Coalition and Center for Biological Diversity cannot establish standing under 43 CFR 4.410 (“Who may appeal”) as parties to the case, as they were not among those who commented on the 1999 EA and there is no record of their participation in this matter prior to their attempt to join in the appeal which had already been filed. See, e.g., The Friends and Residents of Log Creek, 150 IBLA 44, 46-47 (1999). Their appeals are accordingly dismissed for lack of standing.

To invoke the jurisdiction of the Board, the “person who wishes to appeal to the Board must file \* \* \* a notice that he wishes to appeal.” 43 CFR 4.411(a). “Representation of parties in proceedings before Appeals Boards of the Office of Hearings and Appeals is governed by [Departmental rules at 43 CFR] Part 1.” 43 CFR 4.3. A party may be represented by himself or herself, an attorney or family member, or, if it is an association, an officer or full-time employee. 43 CFR 1.3. By virtue of the admitted explanation of her status, Ekker simply was not qualified to represent Pope, Leibold, or the Maricopa Audubon Society under 43 CFR 1.3, as she was not a lawyer, and was not an officer or full-time employee of the Maricopa Audubon Society or a family member of Leibold or Pope. Where a notice of appeal is filed by a person who is unqualified to represent a party under 43 CFR 1.3(b), that notice of appeal is properly dismissed as to the parties she is not qualified to represent. Helmut Rohrl, 132 IBLA 279, 281 (1995).

Accordingly, we dismiss the appeals of Leibold, Pope, the Maricopa Audubon Society, the Arizona Wilderness Coalition, and the Center for Biological Diversity due

to a lack of compliance with the rules and requirements of the Board. We proceed to review Wilderness Watch's arguments on the merits.<sup>14/</sup>

Next, Wilderness Watch contends that this case is governed by section 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a) (2000), and the Department's access regulation at 43 CFR Subpart 6305. Wilderness Watch contends that BLM has never undertaken in this matter the proper application of the Wilderness Act, but rather has presumed that it must provide, as "adequate," whatever form of motorized access a person may wish to pursue inside a pre-established wilderness. Wilderness Watch argues that, consistent with the primitive nature of wilderness, Congress forbade permanent roads and motorized vehicles within wilderness areas, and that the only narrow exception for such use is for "existing private rights." 16 U.S.C. § 1133(a). It contends that there are no such private rights in this case because Siefker and Schunn purchased their inholdings as undeveloped parcels of land years after the Mount Tipton Wilderness was established, and because no evidence exists that anyone associated with the subject property was using the contested route for motorized access at the time of wilderness designation. Wilderness Watch contends that BLM failed to provide evidence concerning the level and type of access at the time of wilderness designation in 1990.

Wilderness Watch argues that BLM's regulations regarding "adequate" access require that, if no pre-existing rights existed, only non-motorized use may be allowed. They argue, further, that access is the only question to be answered, and that the word "adequate" does not require and cannot be interpreted to require BLM to allow construction of any access demanded by inholders sufficient to meet their desired development plans. Noting that the regulations require that adequate access be defined by that which provides the "least impact" on wilderness character, Wilderness Watch contends that the maximum desired use of the inholding cannot be the gauge for what sort of access is required. It asserts that the decision should be reversed because the access granted exceeds that authorized by regulation and would establish a permanent road, contrary to statute.

Wilderness Watch also argues that BLM's decision violates section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000). Wilderness Watch contends that BLM did not adequately analyze the indirect and cumulative effects of the proposed road construction and the subsequent motorized access, and that BLM did not make any

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<sup>14/</sup> Wilderness Watch served its notice of appeal and SOR on Siefker and on Schunn. Neither has made an appearance in this matter.

finding that its decision complies with its own wilderness management regulations, in violation of both NEPA and the APA.<sup>15/</sup>

In over 110 pages of response, BLM counters point by point each of Wilderness Watch's contentions, often responding to individual sentences. The legal analysis presented by BLM's counsel, however, appears based not on an articulated legal position of the agency on how to construe BLM's varying obligations to implement FLPMA, the Wilderness Act, and NEPA, but rather on two affidavits (totaling 30 pages) of a BLM employee purporting, *inter alia*, to make statements regarding his findings and how the relevant statutory and regulatory authority works. As best we can determine, BLM contends that relevant law requires that "adequate access" be provided to inholders and avers that it is providing that access which existed on the date of the wilderness designation, based on evidence that recreationists and ranchers were using the identified route. In response to Wilderness Watch's argument that there is no evidence that these particular applicants requesting access, or their predecessors, ever used Marble Canyon to access the inholding at issue, BLM retorts that it is Wilderness Watch that has not provided evidence as to the type or degree of access that may or may not have been enjoyed at the time of wilderness designation. BLM comments that Wilderness Watch has misconstrued the purpose of the evaluation called for by the regulations and states that existence of a route leading to an inholding is sufficient evidence that landowners may have used the route to access their property. Asserting that its NEPA obligations were satisfied, BLM argues that its environmental discussion was both significant and detailed and that an adequate range of alternatives and cumulative effects was considered.

Wilderness Watch has filed several notices of supplemental authority, advising the Board of Federal Court decisions rendered after completion of the briefing by the parties. (Apr. 7, 2005, Notice at 1.) See Barnes v. Babbitt, 329 F. Supp. 2d 1141 (D. Ariz. 2004), vacating the Board's decisions in National Wildlife Federation, 151 IBLA 104 (1999), and Erik and Tina Barnes, 151 IBLA 128 (1999); Alleman v. United States, CV 99-3010-CO, Findings and Recommendations (D. Ore. Jan. 10, 2005), adopted at 372 F. Supp. 2d 1212 (D. Ore. 2005) (holding that the Wilderness Act put the parties on notice that the United States did not recognize roads to exist

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<sup>15/</sup> The APA (Administrative Procedure Act) appears in Title 5 of the United States Code. Wilderness Watch does not identify which provision it believes is violated and requests only that the Board ensure that the facts in the record support BLM's outcome. We presume that Wilderness Watch means to cite 5 U.S.C. § 706 (2000) which governs judicial review of agency action. As we are not within the judicial branch of Government, we make no effort to address argument on this point. The remainder of this decision expressly addresses whether the facts of record support the decision in the context of considering arguments under NEPA and the Wilderness Act.

within a wilderness area). BLM's counsel argues that the facts of the Federal court cases differ so substantially from the facts here that those cases are irrelevant.

[1] We begin with the NEPA issue. BLM's finding that the project would create no significant impact to the human environment is fundamentally at odds with articulated conclusions within the EA. The EA described the impacts of Alternatives 1 and 2, including the chosen alternative, as ensuring that the visual resource management guidelines for the wilderness would not be met. The goals for Class 1, the category in which the Mount Tipton Wilderness falls, are preservation of existing character. The chosen action would defeat that goal. The impacts of the proposed action would, by their very description, defeat objectives 1 and 2 of the 1995 MTMP for the Mount Tipton Wilderness. These objectives are to maintain or enhance the natural untrammelled appearance of the landscape and provide for primitive recreation and maintenance of the naturalness of the area. The proposed action would controvert the MTMP's management goal of allowing the MT5 route across Section 32 to return to its natural state. (MTMP at 21, 23, and 29.) The impacts of a "road receiving regular and continuous use" (EA at 19), would compromise the solitude, primitive and "naturalness" characteristics, and undeveloped nature of Marble Canyon, which constituted the very statutory basis for the area's designation as wilderness as a matter of law (16 U.S.C. § 1131(c) and 43 U.S.C. § 1782(a) (2000)). A wilderness area is one of a size that allows "preservation and use in an unimpaired condition." 16 U.S.C. § 1131(c) (2000). The EA found that the impacts would be so significant that it would anticipate that persons in search of wilderness recreation would stop using the Marble Canyon area and go outside Mohave County. It is difficult to understand what BLM thinks could rise to the level of a "significant" impact on wilderness if the potential destruction of a designated area's use by the public for that purpose and the defeat of articulated management plans, objectives, and categories of use do not constitute one.

BLM appears to have paired the option to employ an EA for environmental analysis with a coincident obligation to render a FONSI. The obligation to conduct environmental analysis is a legal requirement of NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000). The determination regarding effects is one to be made as a matter of fact based on the record constituting the environmental document chosen. BLM found and articulated significant impacts in its analysis in the EA, yet defined them as not "significant" as if this was its only choice once it prepared an EA.

NEPA is a procedural, not a substantive, statute and thus does not mandate a substantive outcome; it surely does not mandate a FONSI each time an EA is prepared. Rather, if the agency chooses to, it may prepare an EA instead of an EIS for a proposed action. Then it may decide to go forward with the action on the basis of the EA if it makes a corresponding finding (amply supported by the facts of record) that there is no significant impact (a FONSI), subject to agency rules and those of the

Council on Environmental Quality (CEQ) at 40 CFR Subpart 1500. If, by contrast, the analysis projects a significant impact, the EA is insufficient and an EIS is required. An EA thus serves to (1) provide evidence and analysis for determining whether to prepare an EIS or a FONSI; (2) aid an agency's decisionmaking process when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary. 40 CFR 1508.9; Southern Utah Wilderness Alliance, 166 IBLA 270, 277 (2005). To support a FONSI, and, hence, the conclusion that an EIS is not required, an EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts from it are insignificant. Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994).

Applying these principles here, it is clear that BLM failed to employ the EA in the correct manner required in 40 CFR 1508.9, because the EA does not meet this test in supporting a FONSI. The EA took a hard look at environmental consequences and generally identified relevant areas of environmental concern, but failed to make a convincing case that the identified impacts were not significant.

In fact, the only basis BLM proffers for such a conclusion is its mathematical comparison of acreage affected to the size of the Mount Tipton Wilderness. The Field Manager determined that "less than one percent" of the acreage would be affected. (As Mount Tipton is over 30,000 acres in size, and the chosen decision would affect wilderness values on 1,210 acres, the basis for this figure is unclear.) Whatever its derivation, such statistics obscure the reality described in the EA. The 1,210 acres are located exclusively along one of few access points into the Mount Tipton Wilderness. While the record contains no information regarding the percentage of visitors that enter the Wilderness through Marble Canyon, the map shows the Marble Canyon route as the access venturing farthest into the Wilderness and the EA finds that "most visitors" entering Marble Canyon use that route to access the Wilderness. Remarkably, BLM expressly found that "most visitors" using the once-jeep-trail route will be affected by its transformation into a road with the motorized use identified in Alternative 2, so much so that many will stop using Marble Canyon and potentially the Mount Tipton Wilderness. The "Impacts of Alternative 2 - Limited Motor Vehicle Use" section of the EA states: "Ongoing natural reclamation of the vehicle way would most likely still be arrested and reversed at this level of wheeled vehicle use"; "[v]isual resource management objectives for Marble Canyon would still not be met"; "[t]he perception of naturalness in Marble Canyon may still be diminished for wilderness visitors"; and "[t]he natural conditions of quiet a visitor expects to encounter in wilderness would be diminished for some visitors when vehicles negotiate the vehicle way." (2002 EA at 18-19.) While the EA shows that BLM

undertook the requisite hard look at the project's potential impacts to wilderness character, it does not support dismissing them to render a FONSI.<sup>16/</sup>

We also reject any suggestion that BLM was free to render a FONSI under NEPA because the 1989 Arizona Mohave EIS already envisioned construction of a road. Such a conclusion is not supported by the record for three reasons.

First, the 1989 EIS addressed that option in the context of examining the environmental effects of designating the Mount Tipton WSA as wilderness. It is clear from the maps in the record and the MTMP, at 14-15, that when Congress established the Wilderness in 1990 no construction decision was made. Rather, the subsequent decision according to the MTMP was to close the road to motorized use as part of wilderness management rather than to construct a road.

Second, the extent to which BLM could resurrect a discussion of potential road construction which never materialized in the final wilderness designation decision in order to tier to the EIS, see DR/FONSI at 3, would be framed by the impacts addressed in the EIS.<sup>17/</sup> Yet, the impacts from the road development contemplated in the Arizona Mohave EIS are overshadowed by the impacts resulting from Alternatives 1 and 2 considered in the EA. The 1989 EIS expressly stated that the impacts of anticipated road construction along the 1.2 miles in Section 32 to provide limited access to an inholder (likely Hamilton for his livestock water well) would "involve impairment of natural character on two acres" and that "perception of naturalness would be lost or impaired on an area of 200 acres." (Arizona Mohave EIS at 36, 139, 140.) The 2002 EA considered proposed access to landowners who did not exist as inholders in 1989, and therefore could not conceivably have been the inholders for which access was considered in the Arizona Mohave EIS. In 2002, BLM reported that if the chosen alternative is implemented, "the wilderness values of naturalness and opportunities for solitude and primitive and unconfined recreation would be impaired or diminished on 1,210 public acres by the sights, sounds and

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<sup>16/</sup> In considering the "significance" of the impacts to be considered, an agency must take into account the context in which the project takes place, including the setting of the proposed action, and its locale, "rather than the world as a whole." 40 CFR 1508.27(a). BLM appears to have considered the impacts on the world as a whole, rather than the fact that it proposed debilitating impacts on wilderness values of one of only limited access routes into the Wilderness – a route used by "most people" visiting the Mount Tipton Wilderness through Marble Canyon.

<sup>17/</sup> The CEQ regulations define "tiering" as "coverage of general matters in broader [EISs] \* \* \* with subsequent narrower statements or environmental analyses \* \* \* incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 CFR 1508.28.

other evidence of motorized vehicles within the wilderness, and from the presence of structures, noise from electric generators and other machinery, and night-lighting on the private property.” (2002 EA at 14, 18 (impacts from Alternatives 1 and 2 would be similar).) A map was included to show the extent of the area which BLM estimated would be impacted. (2002 EA at 16 (Map 3).) Thus, the action considered in 1999-2002 does not correspond to the construction of a road considered back in 1989. Were BLM to attempt to “tier” the EA to the EIS, it would be clear that the impacts of the chosen decision vastly exceed anything previously considered in the EIS.

Finally, BLM prepared an EA in 1995 in association with the MTMP. On the basis of this 1995 EA, BLM prepared a FONSI with its Decision Record to adopt management objectives 1 and 2 and the plans for the Mount Tipton Wilderness described above. See MTMP at 87 (FONSI). BLM makes no effort to square the 1995 decision that there were no significant impacts from deciding to maintain or enhance the natural untrammelled appearance of the landscape, to allow revegetation of the previously closed vehicle route across Section 32, and to provide for primitive recreation, with a finding in 2002 that there are no significant impacts from re-opening the route to regular and continuous motorized use and potentially driving away the recreational users. In fact, in this instance, we find the EA’s failure to accurately identify the import of the 1995 MTMP as it relates to the proposed action to constitute a notable failure to take a “hard look” at the impacts of the proposed action. The EA’s vague comment that the 1995 MTMP “does not specifically address motorized access to wilderness inholdings,” when that MTMP expressly addressed motorized use of the wilderness in a number of contexts, see MTMP at 14-15, 21-29, is less than forthright.

BLM was undoubtedly influenced by a perceived obligation to provide Siefker and Schunn with access under statutory authority other than NEPA. “The Wilderness Act of 1964 assures owners of wilderness inholdings the right of adequate access. \* \* \* The purpose of the alternatives is to enable the private landowners to have adequate access to their property.” (2002 EA at 2.) To the extent the Field Manager may have believed that any effects identified must be found to be inconsequential when paired with BLM’s duty to provide the inholder with access, such a merging of statutory obligations was improper. Whether or not BLM is required to provide access, and whatever the nature of such access, if BLM’s “hard look” at environmental impacts of the outcome it chose identified significant impacts, BLM was bound under NEPA to say so. Accordingly, we reverse the FONSI.

[2] Turning to the Wilderness Act issues, we first reject BLM’s finding in the DR that the proposed action to allow regular and continued use of the route as, effectively, a road is permissible because such use is consistent with prior use of Section 32 at the time of wilderness designation. BLM argues that it is providing the

access consistent with that which existed on the date of the wilderness designation because the route was in existence at the time and because it was in use by motor vehicles. The DR adopts such reasoning in reaching the conclusion to approve Alternative 2. (DR/FONSI at 3.) While the route was clearly delineated and vehicles traversed the land, the finding that the use of the route as a road subject to regular and continuous motorized transportation is consistent with the state of affairs in 1990 is not supported by the record as a matter of fact and is an error of law.

As a matter of fact, at the time of wilderness designation the route was a jeep trail that was not maintained and supported only “light use” from random vehicles. (1999 EA at 4.) “This jeep trail appears to have been constructed with heavy machinery many years ago, but was not maintained. Prior to wilderness designation it received light use by 4-wheel drive vehicles, probably by hunters, recreationists and the local rancher.” *Id.* (emphasis added). In 2002 BLM reiterated that the area was “rugged,” with little evidence of use by man; the route had exhibited “light use by high clearance vehicles, most likely driven by hunters, recreationists and the local cattle rancher, who also owns private land adjacent to” that acquired by Siefker and Schunn. (2002 EA at 11-12.) Random use of an old jeep trail did not rise to the level of a permanent or temporary road.

The fact that the vehicle route “was in use by motor vehicles prior to wilderness designation,” *id.*, does not mean that increasing motorized access to the level of regular and continuous use such that it will be perceived as a road is consistent with anything taking place at the time of the wilderness designation. If the access decision delineates a road requiring a gate to avoid increased public use of the road, impairing or diminishing wilderness values on 1,210 acres, and deterring use of the Wilderness for recreation, that decision is logically inconsistent with use of the route described in the 1989 EIS contemporaneous with wilderness designation. It is also inconsistent with the decision of the President to recommend the area as wilderness, given that wilderness is, by definition, “roadless.”

As a matter of law, it is clear that the land designated within the Mount Tipton Wilderness could not have contained a road. Section 4(c) of the Wilderness Act requires that “subject to existing private rights, there shall be \* \* \* no permanent road within any wilderness area designated by this chapter and, \* \* \* there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats \* \* \* within any such area.” 16 U.S.C. § 1133(c) (2000). FLPMA section 603(a), 43 U.S.C. § 1782(a) (2000), also required the Secretary to make recommendations regarding roadless areas of 5,000 acres or more in size. As a tautological matter, unless lands within it were “cherry-stemmed” out of the boundaries of the Mount Tipton Wilderness, section 32 was a roadless area subject to existing private rights.

Two Federal courts recently addressed precisely this question. In Barnes v. Babbitt, 329 F. Supp. 2d at 1157, the United States District Court for the District of Arizona reversed this Board's decisions in Erik and Tina Barnes, 151 IBLA 128 (1999) (Barnes), and National Wildlife Federation, 151 IBLA 104 (1999) (NWF). Applying regulations found at 43 CFR Subpart 8560 (1999), the Board had affirmed BLM decisions approving requests to reclaim the routes and utilize motorized vehicles to reach an inholding within the Arrastra Mountain Wilderness created by the Arizona Desert Wilderness Act on grounds that the Secretary must provide access to wilderness inholdings "as is adequate to secure to the owner of the inholding the reasonable use and enjoyment thereof." Barnes, 151 IBLA at 135; see also NWF, 151 IBLA at 106. As BLM did here, in those cases it relied upon evidence of existing motorized access routes as justification for the reclamation of the route into a road. The Court disagreed because, by definition, a designated wilderness area "lacked roads that had been improved or maintained by mechanical means for relatively regular and continuous use" in order to qualify for such designation. 329 F. Supp. 2d at 1155 (reversing NWF); and 1157 (reversing Barnes); see also Alleman v. United States, 372 F. Supp. 2d at 1227 ("The Wilderness Act and its supporting regulations clearly established that the government did not recognize roads or motorized access within the wilderness area.") Because there was no evidence of private existing rights, no road or motorized use could be recognized to have existed at the time of designation. 329 F. Supp. 2d at 1157. <sup>18/</sup>

Accordingly, as a matter of fact and law, the existing route at the time of designation of the Mount Tipton Wilderness did not include and could not have included a road with regular and continuous motorized use. To the extent BLM's DR relied on the existence of a route at the time of the 1990 designation of wilderness for authorizing in 2002 a "road receiving regular and continuous use" (2002 EA at 16), this conclusion is in error. Indeed, when concluding that regular and continuous use was inconsistent with the purpose for which wilderness was established, the court in Barnes observed that, under the proposed action in that case, one route "would be used between thirteen and twenty-six times each year," another route "would be used ten to fourteen times," and another "would be used twenty times a year." Barnes v. Babbitt, 329 F. Supp. 2d at 1155 n.13. By comparison here, BLM characterized pre-designation use of the "existing vehicle way" as "light use." (2002 EA at 10.) It then approved an action authorizing 91 round trips per year following construction (which adds another 143 round trips). This use is neither consistent with any evidence regarding use of the jeep route in 1990 in this record, nor with the legal definition of

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<sup>18/</sup> No evidence suggests the route is an R.S. 2477 highway. Notably, however, the magistrate's ruling, adopted by the United States District Court for the District of Oregon in Alleman, rejected an assertion that a route was an R.S. 2477 highway on grounds that a wilderness designation is a clear indication that the Government did not consider the contested route to be a public road. 372 F. Supp. 2d at 1225-28.

the land as wilderness in 1990.<sup>19/</sup> Accordingly, we reverse the DR to the extent that it concluded that the access authorized was consistent with use of the route at the time of wilderness designation.

[4] We turn to whether there is any other basis upon which we could affirm, subject to procedurally correct NEPA review, BLM's decision to approve the road access in Alternative 2 to the Siefker/Schunn inholding. As noted above, access to wilderness inholdings is governed by sections 4 and 5 of the Wilderness Act, 16 U.S.C. §§ 1133 and 1134 (2000). Section 4 ensures that roads are not allowed unless authorized by "existing private rights." 16 U.S.C. § 1133(a) (2000). Section 5 provides that, otherwise, the inholder "shall be given such rights as may be necessary to assure adequate access \* \* \*." 16 U.S.C. § 1134(a) (2000). Thus, it is clear from the statute that existing private rights to access will be honored. 16 U.S.C. § 1133(a) (2000). Both section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (2000), and section 101(f) of the Arizona Desert Wilderness Act, 104 Stat. 4469, make wilderness designations "subject to valid existing rights."

The statutory requirement that access be provided to inholdings is implemented by the Department at 43 CFR 6305.10 ("How will BLM allow access to State and private land within wilderness areas?")<sup>20/</sup> The rule establishes that, once a wilderness area is created, motorized access is provided to inholders with existing private rights to such access as was existing and in use on the date of designation. 43 CFR 6305.10(a). Without such prior use, however, the inholder will receive BLM's approval only for a mode of access that is "non-motorized." 43 CFR 6305.10(b). The rule provides as follows:

(a) If you own land completely surrounded by wilderness, BLM will only approve that combination of routes and modes of travel to your land that –

(1) BLM finds existed on the date Congress designated the area surrounding the inholding as wilderness, and

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<sup>19/</sup> Counsel for BLM argues that we should distinguish Barnes v. Babbitt on its facts. The Department did not appeal this decision, which was rendered by the same Federal District Court governing the area in which the Mount Tipton Wilderness is located, and it is thus controlling precedent in that district. Given the similarities between that case and this one, we find no basis not to follow it.

<sup>20/</sup> As cited above, the Barnes v. Babbitt court considered regulations, 43 CFR Subpart 8560 (1999), in effect prior to this rule, which was promulgated in 2000.

(2) BLM determines will serve the reasonable purposes for which the non-Federal lands are held or used and cause the least impact on wilderness character.

(b) If you own land completely surrounded by wilderness, and no routes or modes of travel to your land existed on the date Congress designated the area surrounding the inholding as wilderness, BLM will only approve that combination of routes and non-motorized modes of travel to non-Federal inholdings that BLM determines will serve the reasonable purposes for which the non-Federal lands are held or used and cause the least impact on wilderness character.

43 CFR 6305.10. This regulation is intended to be “no more restrictive than necessary to carry out the requirements of the Wilderness Act and FLPMA, including [m]anaging wilderness so as to leave it unimpaired for future use and enjoyment as wilderness [and p]roviding for its protection and the preservation of wilderness character.” 65 FR 78358, 78359 (Dec. 14, 2000).

The DR purports to follow this rule in finding that motor vehicles used the route and that “BLM can authorize access consistent with the route and mode of travel in existence at the time of designation decision.” (DR/FONSI at 3.) This conclusion ignores the plain language of the regulation which explicitly requires BLM to make a finding regarding the extent of allowable motorized use by the inholder to the inholding in question, not by the general public. The access to be authorized is circumscribed by that “combination of routes and modes of travel to your land [which] BLM finds existed on” the date of designation. 43 CFR 6305.10(a)(1) (emphasis added). Only non-motorized use will be approved to anyone without such ongoing use at the time of designation. 43 CFR 6305.10(b).

BLM made no finding regarding the nature of access at the time of wilderness designation to the relevant 60 acres later acquired by Siefker and Schunn. BLM admits that it “never claimed \* \* \* that the current inholder or even the previous owners used the route prior to designation.” (BLM Answer at 25.) BLM relies instead for its approval of access to the Siefker/Schunn parcels on access undertaken by others for use of the Mount Tipton Wilderness. The 2000 rulemaking made clear that the pronoun “your” was employed deliberately to require a nexus between the inholding in question and the access considered.

In accordance with these final wilderness management regulations, BLM will only approve the kind and degrees of access that you enjoyed immediately before the wilderness area across which you must travel to reach your inholding was designated as wilderness and BLM determines will serve the reasonable purpose for which the non-

Federal lands are held or used and cause the least impact on wilderness character. By providing for BLM land managers to approve only access routes that were in existence at the time of wilderness designation, the final rule in many cases effectively ratifies the inholder's original choice of route and mode of travel.

\* \* \* \* \*

[Y]ou may maintain existing routes to the degree you or your predecessors maintained them at the time of wilderness designation. BLM will not allow you to upgrade your access routes beyond the condition that existed on the date Congress designated the area as a wilderness \* \* \*.

65 FR at 78369-70.

This language suggests that approving access would merely ratify the inholder's (or its predecessor's) choice of route and mode of travel contemporaneous with wilderness designation. The private lands Siefker and Schunn propose to develop are vacant lots, and were so at the time of wilderness designation. Evidence that there was ever any historic access to the property at issue is nonexistent in the record. Rather, it suggests that the existing "vehicular way" was never used in a manner that would support BLM's decision. See Wilderness Watch Reply, Ex. 6 (photographs and accompanying descriptions).

Use of the Section 32 "vehicle way" by recreational users and hunters for access to public lands at the time of wilderness designation is entirely irrelevant to what BLM must consider in approving access to any inholding. Likewise, that "the local rancher" may have used and enjoyed a right of access to an adjacent parcel has no bearing on the question of what access is required to be provided to the Siefker/Schunn parcels. Further, the distinction between allowing motorized versus nonmotorized use is to be made based on the nature of use by the parcel holder at the time of designation; it is not to be based, as BLM suggests in the DR, on what is "reasonable and practical \* \* \* to accomplish the stated objectives [of the inholder] for the private land." (DR/FONSI at 3.) <sup>21/</sup>

It would appear that the rule meant to demand contemporaneous use of a private existing access right at the time of wilderness designation as the prerequisite

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<sup>21/</sup> Moreover, under either subsection (a) or (b), BLM may only approve the method of access which "causes the least impact on wilderness character." BLM would be required to make this finding whatever mode of access is ultimately authorized. 43 CFR 6305.10. It did not do so here.

to granting motorized use. See Barnes v. Babbitt, 329 F. Supp. 2d at 1148-50. The question of whether BLM could even authorize motorized, as opposed to nonmotorized, use if a private right of access existed on the date of designation but was not in use at the time does not even arise here because it is not possible in this record to determine whether any private right attached to the inholdings acquired by Siefker and Schunn. BLM entirely concedes this, asserting that “[t]here has been no determination whether, as a matter of law, the inholders have any existing private rights or not.” (BLM Response at 15.) BLM’s dismissal, as “mere argument,” *id.*, of the suggestion that such a determination needs to be made, as well as its insistence that Wilderness Watch bore the burden to provide evidence as to the nature of access enjoyed in association with the parcels owned by Siefker and Schunn at the time of wilderness designation, plainly disregards both the statutes, which ensure that wilderness is subject to a “private existing right,” and the Departmental regulation requiring BLM to make the findings BLM demands of Wilderness Watch.

The most fundamental queries necessary for determining the type of access to be allowed in this case have not yet been answered. It is BLM that must make these findings under the express terms of its own rule and that bears the burden of developing the record sufficient to justify its approval of motorized access to the Siefker/Schunn parcels through a wilderness area based on a finding of a legal right of such access. BLM’s attempt to allow such access without having made the legal determination required by the Wilderness Act, 16 U.S.C. § 1133(a) (2000), FLPMA, 43 U.S.C. § 1782 (2000), the Arizona Desert Protection Act, 104 Stat. 4469, and Departmental regulations, 43 CFR 6305.10, is plainly unsupportable.

It is worth noting recent Ninth Circuit precedent regarding one additional statute that has been discussed in Barnes, Alleman, and other access cases as relevant to the obligation of the United States to provide access to inholders of private lands within public lands. Section 1323(b) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. § 3210(b) (2000), provides:

(b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof; Provided, That such owner comply with rules and regulations applicable to access across public lands.

The issue of whether this section applies to public lands managed by BLM has been a source of considerable debate before the Board. Initially, the Board presumed that the provision applied outside of Alaska. *E.g.*, Mathilda B. Williams, 124 IBLA 7, 12

(1992), citing Utah Wilderness Association, 80 IBLA 64, 77, 91 I.D. 165, 173 (1984), vacated on judicial remand (Order, Feb. 26, 1986). Later, based on the vacatur of the Utah Wilderness Association decision, the Board decided that the question remained an open one. Southern Utah Wilderness Association, 127 IBLA 331, 366, 100 I.D. 370, 389 (1993). Suffice it to say that the Board has not reached a definitive conclusion on the point. Bear River Development Corporation, 157 IBLA 37 (2002) (plurality of opinions).

The Ninth Circuit has issued decisions on the companion subsection 1323(a) of ANILCA applicable only to Forest Service lands. 16 U.S.C. § 3210(a) (2000). The Ninth Circuit's current analysis of that provision makes clear that, to the extent ANILCA might be found to apply here, the Ninth Circuit would nonetheless insist on the precise determination of the private right existing at the time of wilderness designation that we require here based on BLM regulation 43 CFR 6305.10.

In the last dozen years, the Ninth Circuit had issued decisions suggesting that common law claims of rights of access were preempted by the corresponding provision of ANILCA applicable within the National Forests. 16 U.S.C. § 3210(a), cited in Adams v. United States, 255 F.3d 787, 794 (9th Cir. 2001); Adams v. United States, 3 F.3d 1254, 1255, 1258 (9th Cir. 1994). In 2005, however, the Ninth Circuit revisited this view in light of Forest Service regulations requiring consideration of a common law right of access. In Skranak v. Castenada, 425 F.3d 1213 (9th Cir. 2005), the Circuit held that the "Forest Service is free to interpret [ANILCA] as creating a means of access for those who do not own pre-existing easements at all or as requiring that pre-existing easements be taken into consideration in determining the scope of access granted." 425 F.3d at 1220. The relevant regulation there, 36 CFR 251.114(f), required a determination to be made regarding the existence of an easement granting legal access. The Ninth Circuit concluded that its prior view that ANILCA preempted the determination of any common law right was not pertinent where the Forest Service had an express regulation requiring it to address that right and reversed the Forest Service for "refusing to determine whether the [inholder] had easements permitting them access" where such a determination was required by regulation in order to establish the nature of access allowed. 425 F.3d at 1221.

To the extent this precedent could be construed to be relevant here, it confirms that BLM, too, is required by law and by 43 CFR 6305.10 to make the determination regarding the nature of any private right. Without proof of any historic right of access to the land acquired by Siefker and Schunn and available (and in use) at the time of wilderness designation, it appears that 43 CFR 6305.10(a) does not apply and BLM may only authorize non-motorized access under 43 CFR 6305.10(b). Accordingly, we remand this matter to BLM so that it may seek the information necessary to make the findings required by its rule.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of Leibold, Pope, the Maricopa Audubon Society, the Arizona Wilderness Coalition, and the Center for Biological Diversity are dismissed, the FONSI is reversed, and the DR is reversed to the extent that it concluded that the access authorized was consistent with use of the route at the time of designation. In all other respects the decision is vacated and the matter is remanded to BLM.

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Lisa Hemmer  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge