

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2002-71

Decided November 16, 2004

Appeal from a decision by the Kanab Field Office, Bureau of Land Management, Kanab, Utah, finding no significant environmental impacts and approving a programmatic environmental assessment authorizing guided vehicle tours. EA UT-046-01-002.

Set aside in part and remanded; affirmed in part; stay denied as moot.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

In preparing a programmatic environmental assessment to assess whether an environmental impact statement (EIS) is required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), an agency must take a “hard look” at the proposal being addressed and identify relevant areas of environmental concern so that it can make an informed determination as to whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures.

A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is based on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial

environmental question of material significance to the proposed action.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

A decision permitting guided vehicle tours over designated roads, ways, or trails within a wilderness study area is properly set aside when the record shows that such routes cross through and parallel to riparian/wetland zones and have caused damage to such resources, and fails to disclose what information BLM had before it when it concluded that the addition of tour traffic would have no significant impact on riparian/wetland areas on the designated travel routes.

3. National Historic Preservation Act: Undertaking--Public Lands: Special Use Permits--Special Use Permits

A programmatic environmental assessment analyzing the impacts of guided vehicle tours to as yet unidentified archaeological or historic sites which are or may become eligible for inclusion on the National Register of Historic Places, to be permitted at some future date, does not constitute “undertaking” for purposes of triggering consultation with the State Historic Preservation Officer (SHPO) pursuant to the Utah State Protocol Agreement between BLM and the SHPO.

APPEARANCES: Liz Thomas, Esq., Moab, Utah, for the Appellant; David K. Grayson, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Southern Utah Wilderness Alliance (SUWA) has appealed ^{1/} from the September 12, 2001, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Acting Field Office Manager, Kanab (Utah) Field Office (KFO), Bureau of Land Management (BLM), providing for the issuance of special recreation permits (SRP's) for guided vehicle tours on public lands managed by the KFO. Tours are to be authorized pursuant to 43 CFR Part 2930, ^{2/} which provides for the issuance of permits for commercial use of the public lands. ^{3/} 43 CFR 2931.2(a); 43 CFR 2932.11. BLM published its "Programmatic Environmental Assessment for Guided Vehicle Tours," EA-UT-046-01-002 (PEA), for comment on August 10, 2001. The PEA was tiered to the 1984 Vermilion, 1981 Zion, and 1981 Paria Management Framework Plans (MFP's), as amended, and to the 1984 Cedar, Beaver, Garfield, Antimony Resource Management Plan, as amended. The final PEA was issued on September 11, 2001, and on September 12, 2001, the KFO Manager signed the DR/FONSI. Together, the PEA and the DR/FONSI establish the terms and conditions under which applications for SRP's to conduct guided vehicle tours in the KFO will be considered.

SRP's are issued under the general authority of the Secretary of the Interior to administer use of the public lands, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000). BLM has discretionary authority to issue an SRP. 43 CFR 2932.26. BLM may issue an SRP if the proposed activity is consistent with BLM objectives, responsibilities, or management programs for the public lands involved. Owen Severance, 118 IBLA 381, 389 (1991), and cases cited. Concerning whether to issue an SRP, BLM bases its decision on a number of factors, including the "public interest served" and "resource protection." 43 CFR 2932.26(d) and (e). SUWA's challenge to BLM's authority to issue SRP's under the terms and conditions set forth in the DR/FONSI is premised primarily on the adequacy of BLM's environmental analysis in the PEA, including BLM's plan for protecting cultural resources.

^{1/} With its notice of appeal, SUWA petitioned for a stay of the decision. That petition is denied as moot.

^{2/} At the time the DR/FONSI was issued, the regulations pertaining to SRP's were found at 43 CFR Subpart 8372. Effective Oct. 1, 2002, the regulations were recast in "plain English." See 67 FR 61740 (Oct. 1, 2002).

^{3/} "Commercial use" is defined by 43 CFR 2932.5 as "recreational use of the public lands and related waters for business or financial gain."

[1] In preparing a PEA to assess whether an environmental impact statement (EIS) is required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), an agency must take a “hard look” at the proposal being addressed and identify relevant areas of environmental concern so that it can make an informed determination as to whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures. Native Ecosystems Council, 160 IBLA 288, 292 (2004); Southern Utah Wilderness Alliance, 159 IBLA 220, 234-35 (2003); Colorado Environmental Coalition, 142 IBLA 49, 52 (1997).

In considering whether BLM has taken the requisite hard look at the environmental consequences of a proposed action, this Board has indicated that it will be guided by a rule of reason:

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on “incomplete and uncertain information.” Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1526 (D. Hawaii 1991) * * *. So long as an EA contains a “reasonably thorough discussion of . . . significant aspects of the probable environmental consequences,” NEPA requirements have been satisfied. Sierra Club v. United States Department of Transportation, 664 F. Supp. 1324, 1338 (N.D. Ca. 1987), * * * quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974) [Footnote deleted.]

Bales Ranch, Inc., 151 IBLA 353, 358 (2000), quoting Don’t Ruin Our Park v. Stone, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992), and authorities cited. A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is based on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Great Basin Mine Watch, 159 IBLA 325, 353 (2003); Southern Utah Wilderness Alliance, 158 IBLA 212, 219-20 (2003); The Ecology Center, 140 IBLA 269, 271 (1997). Mere differences of opinion provide no basis for reversal. Rocky Mountain Trials Association, 156 IBLA 64, 71 (2001).

Having set forth the legal principles governing our review of this appeal, we now turn to the information set forth in the PEA.

The Kanab area “offers scenic vistas and geologic features which attract visitors from around the world.” (PEA at 11-12.) The topography includes “ponderosa pine forest, sand dunes, sage brush steppe, riparian areas, pinyon-juniper woodland, vernal pools, slickrock benches, potholes, deep canyons and free flowing spring fed streams,” with elevations “from approximately 4,500 to 8,000 feet.” Id. at 7. The winters bring sub-zero temperatures to Panguitch; summer temperatures surge to “over 100 degrees in the Kanab Creek area.” Id. The area “is surrounded by National Parks, National Monuments, National Forests, Wilderness Areas and A National Recreation Area,” and there is a “broad spectrum of recreational activities available to tourists.” Resource development is being replaced by tourism as a major source of income in the area. Id. at 11. Interest in guided vehicle tours “has increased dramatically over the past few years,” and, at the time the PEA was prepared, the KFO had received several proposals for such expeditions. Id. at 1, 5.

A “guided vehicle tour” is defined as one in which a paid guide takes clients to areas “to view, photograph, sketch or paint scenery, archaeological ruins and sites, wildlife and people in outdoor settings.” Id. at 1. The tours would involve use of motorized vehicles and bicycles, camping, and foot travel. By allowing the tours, the PEA states, BLM would “provide an opportunity for interpretation of cultural and natural resources, expanding opportunities for recreational use of the public land, and provide economic benefits for guide businesses and the local economy,” and would “protect resources through regulated and monitored use in sensitive areas.” Id.

BLM considered three alternative actions with respect to guided vehicle tours: a “proposed action” (Alternative A); a no action alternative (Alternative B), in which guided tours within the Kanab District would not be authorized; and an “agency preferred alternative” (Alternative C). (PEA at 5.) Under all alternatives, tours in critical wildlife habitat either would not be permitted or would be restricted by seasonal timing limitations. Id. at 6.

Under Alternative A, BLM would require tour applicants to identify archaeological or historic sites they wished to visit; BLM would then determine whether visitation was appropriate, considering all relevant factors, and would impose appropriate limitations on the tour, including limits on group size and means of access. Alternative A would permit the use of four-wheel drive vehicles, all-terrain vehicles (ATV’s), and mountain bikes, and would permit overnight camping. It would authorize tour guides to offer several types of tour packages to clients, including

(1) tours that are guided for the duration of the expedition; (2) guide-operated shuttles to designated drop-off points, where clients would then proceed on foot without guides; or (3) vehicle rentals from guides, including ATV's and mountain bikes. The vehicle rental option would allow clients to proceed without a guide for the duration of the tour. Groups generally would be limited to a maximum of 25 people, including guides, but applications would be considered for over 25 people on a case-by-case basis. Before BLM would authorize a tour larger than 25 people, however, additional NEPA analysis would be undertaken. BLM would monitor archaeological sites to determine whether visitation resulted in negative impacts, and would take appropriate action if it did. Those actions could include "development of a mitigation plan, a reduction in visitor numbers, or outright closure of the site." Id. at 5.

Alternative C differs from Alternative A in that it prohibits ATV and mountain bike tours in wetlands/riparian zones "on the loop within the Moquith Mountain Wilderness Study Area (WSA) Loop, and [on] the Elephant Cove Way within Parunuweap WSA," although vehicles driven by tour guides would be permitted in those areas. Id. at 5. Camping would be restricted "within ¼ mile of any riparian area or in Parunuweap Canyon from ½ mile above Merwin Canyon to ½ mile below Bay Bill Canyon (to prevent disturbance to peregrine falcons.)" Id. at 6. Group size would be limited to 12 people in wetlands/riparian zones, WSA's, and critical wildlife areas. ^{4/} Rental of ATV's and mountain bikes and touring without a guide would be permitted, except in the restricted areas just mentioned. Id. at 5-6.

The KFO Manager rejected the no action alternative, because "Guided Vehicle Tours can be accommodated with minimal impacts anticipated to public lands and resources." (DR/FONSI at 1.) Alternative A was rejected because it could "produce unacceptable impacts to wildlife, wetlands/riparian zones and [WSA's]." Id.

^{4/} The draft PEA released on Aug. 10, 2001, would have restricted all tours to no more than 12 individuals and five vehicles, and permitted no camping. ("Kanab Field Office Stipulations for Commercial Permits," Aug. 10, 2001, PEA at 5 and 25 ¶ 7.) The Final PEA released Sept. 11, 2001, contained changes resulting from comments opposing the ban on camping and restrictions on the number of persons to be permitted per tour. Accordingly, the Sept. 11, 2001, PEA modified the draft PEA to include camping (except within ¼ mile of any riparian area, or in peregrine falcon habitat in the Parunuweap Canyon) and to permit tours of 25 persons, except in WSA's, riparian areas, and critical wildlife areas, which would still be restricted to 12 persons, including guides. (PEA at 6; see also PEA at 22, pertaining to "Public Notice and Availability.")

Accordingly, the DR/FONSI authorized guided vehicle tours as described in Alternative C, the “agency preferred alternative.”

All tour permits will be issued subject to a variety of stipulations, including the provision that, “[i]f resource damage is occurring in any area within the Kanab Field Office [sic], management options in that area include a reduction in visitor numbers or closure of the area to use.” (KFO “Stipulations for Commercial Permits,” PEA at 26.) BLM may alter the “terms, conditions, or stipulations of a permit at any time for, among other things, impacts to resource values. (“Statewide Stipulations for Commercial Permits,” *id.* at 24, 25 ¶ 24.) There are a number of stipulations governing the use of motor vehicles, both within and outside of WSA’s. *Id.* at 26-27. Wilderness inventory and study areas will continue to be monitored “to assess impacts on wilderness character.” *Id.* at 27 ¶ 14.

In its Statement of Reasons on Appeal (SOR), SUWA alleges that, in issuing the DR/FONSI, BLM failed to comply with the requirements of section 102(2)(C) of NEPA, 42 U.S.C. § 4332 (2)(C) (2000), because the underlying PEA failed to disclose, much less scrutinize, impacts on authorized travel routes. (SOR at 17-18.) Additionally, SUWA argues that BLM did not take a hard look at the impacts on the Moquith Mountain WSA and riparian areas, including the “east Fork of the Virgin River,” in the Parunuweap Canyon WSA. (SOR at 9-11; Reply to BLM Answer (Reply) at 4-6.) SUWA maintains that BLM did not examine impacts to sensitive species, air quality, and water quality. (SOR at 11-17; Reply at 7-10). SUWA further charges that the PEA violates the Utah Riparian Management Policy (URMP) (SOR at 18-19; Reply at 10), and the National Historic Preservation Act, 16 U.S.C. § 470f (2000). (SOR at 19-23).

SUWA appears to suggest that BLM obscured information concerning designated travel routes. It observes that the route did not appear on the 1980 wilderness inventory map and was not mentioned in BLM’s 1980 Wilderness Intensive Inventory Narrative, the Vermilion MFP, or the March 1998 or August 2000 MFP amendments, and that it was not officially recognized until a Federal Register notice published on July 13, 1998, temporarily closed routes other than the Moquith Mountain Loop route. (See Ex. 3 to Reply; SOR at 4-5.)^{5/}

^{5/} We note, however, that the BLM case file contains two 1:100,000-scale topographic maps, one for the Kanab area and one for the Panguitch area. The maps depict highways, roads, and other manmade features, as well as water features, contours and elevations, and recreation sites. On both of these maps, which are approximately 2 x 3 feet in size, BLM officials have hand-drawn designated vehicle
(continued...)

SUWA also objects to motorized travel in the Moquith Mountain WSA and on the Moquith Mountain Loop route. However, the Utah State Director approved an amendment to the 1984 Vermilion MFP, which governs the Moquith Mountain WSA.^{6/} That amendment specifically stated that “motorized use will be restricted in and through islands of vegetation located within the area that will remain open to OHV use.” (August 2000 Vermilion MFP amendment at 1.)

SUWA concedes that the question of whether the Moquith Mountain Loop is open to motorized traffic was decided as the result of the planning process leading to the August 2000 Vermilion MFP amendment, but nonetheless contends that BLM’s decision was improper, as the Loop did not exist on October 21, 1976, and therefore does not qualify as an “existing way” as that term is defined in the Interim Management Policy for Lands Under Wilderness Review (IMP), BLM Manual, H-8550-1.^{7/} Pursuant to 43 CFR 1610.5-2, land use planning decisions are properly protested to the State Director, whose decisions are final for the Department. The time for appealing issues relating to the adequacy of the MFP amendments or their supporting NEPA analyses has long since passed, and the Board is not the proper forum to adjudicate those issues in any event. See Friends of the River, 146 IBLA 157, 163-64 (1998); National Organization for River Sports, 140 IBLA 377, 384 (1997); Wilderness Society, 90 IBLA 221, 224 (1986). Accordingly, the Board will not entertain SUWA’s arguments challenging the status of the Moquith Mountain

^{5/} (...continued)

guide routes, using red and yellow markers. Those maps were referenced in, and appear to be incorporated as part of, the PEA and the official case file.

^{6/} The Loop route was designated “open” in Figure 4, Alternative 3 of the April 2000 EA supporting the Vermilion MFP amendment. See Ex. 4 to Reply. It is clear from Ex. 4 that the phrase “10 miles of routes on Moquith Mountain” refers to the Moquith Mountain Loop.

^{7/} In furtherance of the statutory directive in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (2000), the Department adopted the IMP, which governs BLM’s management of WSA’s pending Congress’ determination that a WSA should be included in the permanent wilderness system. See Nevada Outdoor Recreation Association, 136 IBLA 340, 342 (1996); Oregon Natural Resources Council, 114 IBLA 163, 167 (1990); The Wilderness Society, 106 IBLA 46, 55 (1988). The IMP was originally published at 44 FR 72014 (Dec. 12, 1979), and was amended at 48 FR 31854 (July 12, 1983). It is now contained in BLM’s Manual as a handbook, H-8550-1 (Rel. 8-67 (7/5/95)). Page references in the text are to the Handbook edition. The IMP specifies that “vehicle designations in WSA’s are to be handled through the land-use planning process.” BLM Manual, H-8550-1, at 47.

Loop on October 21, 1976, or alleging that it was not properly designated a route open to OHV use in August 2000.

In addition, SUWA cites FLPMA, 43 U.S.C. § 1782 (2000), and the IMP to show that BLM is required to manage WSA's so that the suitability of such areas as wilderness is not impaired. (Reply at 4-5.) SUWA contends that "there is no record that the IMP standard has been addressed in any previous management decision," so that "BLM must make a determination as to whether the nonimpairment standard is being met on the 'existing ways and trails' that the [P]EA considers open for motorized travel." *Id.* at 4. We first note that the Federal Register notice submitted as Ex. 3 to SUWA's Reply included a determination that

no impairment of wilderness values is occurring on the majority of the dunes. However, impairment is occurring in peripheral areas of the northern portion of the dunes where vegetation is more prevalent. Therefore, BLM is temporarily closing to OHV [off-highway vehicle] use the sand dunes north and west of an existing allotment fence with the exception of a portion of a dry lake bed and designated OHV access routes which will remain open. The three designated OHV access routes are located as follows: (1) Sand Spring; (2) the dry lake bed east of the Yellowjacket Road[;] and (3) the Hancock Road near the Ponderosa Grove Campground.

BLM is also concerned that vehicle routes may be forming in other portions of the WSA. Therefore, the non[-]sand dune portion of the WSA will also be temporarily closed with the exception of the following designated routes that will remain open: the Sand Spring Road, South Fork Indian Canyon Petroglyph Road, the Moquith Mountain Loop, Hell Drive and Lamb's Point routes.

63 FR 37587 (July 13, 1998) (emphasis added).

Additionally, as stated, the Vermilion MFP was amended in August 2000. Among other things, that plan amendment states:

In approximately * * * 95 percent of the WSA, motorized access has either been closed or limited to designated routes. About 10 miles of routes on Moquith Mountain and 730 acres of sand dunes adjacent to the [Coral Pink Sand Dunes] State Park will remain open to motorized use. BLM has determined that motorized use on this five percent of the

WSA will not impair wilderness values or constrain Congress's prerogative [to preserve the land] as wilderness.

Motorized use will be restricted in or through islands of vegetation located within the area that will remain open to OHV use. * * *

The portion of the WSA remaining open to motorized use will be monitored to insure that no new routes will develop and the character of existing routes will not change. The entire WSA will be monitored on a regular basis for potential impairment of wilderness values. If monitoring indicates that impairment may be occurring, then additional management actions will be implemented to protect wilderness values. Potential actions could include restricting the number of visitors or expanding the OHV closure.

(August 18, 2000, Decision Record approving the Vermilion MFP Plan Amendment at 2-3 (emphasis added).) Thus, we reject the assertion that there is nothing that shows that BLM ever addressed the non-impairment standard in its decisionmaking. To the extent that SUWA wishes to dispute the adequacy of BLM's assessment of the non-impairment standard underlying the documents cited above, the time for doing so likewise passed long ago.

SUWA also contends that BLM failed to take a hard look at the route in the Parunuweap WSA, "which is located in and near the east Fork of the Virgin River."^{8/} (SUWA Reply at 6.) SUWA maintains that BLM should not permit tours on this route at all, as the activity will likely result in "unnecessary and undue degradation" of the WSA, contrary to FLPMA's requirements. *Id.* In framing wetland/riparian zones as an issue to be analyzed therein, the PEA acknowledges BLM's commitment to the objectives of its URMP,^{9/} but also states that, although travel is to be confined to established routes, the Parunuweap Canyon route is not well-defined and runs parallel to and through riparian areas, so that vehicles and people could damage both vegetation and the streambank. (PEA at 1-2.) The PEA acknowledges that "the

^{8/} According to information provided in the PEA and the map depicting routes in Parunuweap Canyon, this is the route BLM calls "Elephant Cove Way."

^{9/} Among other things, the URMP provides for regular monitoring of riparian areas and was issued as Utah State Office Instruction Memorandum (IM) No. 93-93 on Mar. 11, 1993. It expired on Sept. 30, 1994. It is not clear whether that policy has been reissued or extended. See also BLM Manual, 1737.2 (Rel. 1-1611, (12/10/92)) (pertaining to wetlands/riparian management).

Elephant Cove Road within Parunuweap WSA [is] currently receiving considerable use by the general public,” but concludes that limiting group size to 12 people or under and prohibiting unsupervised client-operated ATV and mountain bike tours on the routes will lessen disturbance. *Id.* at 19-20. SUWA argues that, “[a]s there is no basis in the [P]EA to support the contention that travel through the East Fork of the Virgin River, through the Parunuweap WSA is necessary, BLM ***must take steps to prevent, not merely minimize, this unnecessary degradation.*** BLM did not even consider prohibiting motorized trips along this portion of the route.” (Reply at 6; emphasis in original).

As an initial matter, we do not accept SUWA’s reasoning that, absent a showing that the Elephant Cove way is “necessary,” it is therefore unnecessary, and therefore unnecessarily and unduly degrades the environment. We are not aware of any principle or provision that imposes an obligation to first affirmatively demonstrate that an established travel way is “necessary,” lacking which BLM cannot even consider whether a kind of use should be permitted, and SUWA has cited none.^{10/}

SUWA recognizes that Alternative C, the agency-preferred alternative adopted by BLM, will produce fewer and less severe impacts than Alternative A: Alternative C represents an effort to avoid the impacts associated with concentrated visitor use by

^{10/} SUWA relies on provisions in Part 1737 of the BLM Manual to support its arguments:

“B. Visitor Sites. Locate recreation visitor-use facilities, including campgrounds, picnic areas, interpretative sites, parking areas, roads, and trails, and sewage disposal facilities to cause minimal or no adverse impact upon the quality and quantity of riparian-wetland areas.

“C. Visitor Use. Plan and control visitor use to avoid adverse impacts of concentrated visitor use upon the quality of riparian-wetland areas.” BLM Manual, section 1737.44.B and C (Rel. 1-1611 (12/10/92)).

We observe that section 1737.44.B generally describes a level of construction that would not be allowed in a WSA under the non-impairment standard, and it is not at all clear whether and to what extent the section is relevant to an existing, designated way. Insofar as these provisions fairly may be said to apply to an existing way, 1737.44.B specifically allows for “minimal” impacts, and the focus of 1737.44.C is avoiding the “adverse impacts of concentrated visitor use.” More fundamentally, it seems to us that the essence of SUWA’s complaint is that the PEA failed to consider an adequate range of alternatives under NEPA. However, the question of whether to prohibit all motorized use was precisely what was analyzed in the August 2000 MFP amendment, and that alternative was rejected. SUWA’s objection accordingly is neither timely nor well-founded.

imposing various conditions, ranging from requiring motorized travel only on designated ways; to requiring travel by foot off of designated routes; retaining the discretion to reduce visitor numbers or close an area to visitation when resource damage occurs; retaining the discretion to disapprove camping after considering resource impacts relative to a particular application; prohibiting parking off designated routes; seasonal closures; individual use of ATV's or mountain bikes; to prohibiting camping within a quarter mile of perennial water sources, and limiting group size. In our view, the PEA contains a reasonably thorough discussion of most aspects of the probable environmental consequences of guided motorized touring.

[2] With respect to the route through Parunuweap Canyon, however, as SUWA notes, the difficulty is that the PEA presents no specific information or monitoring data regarding the present condition of the East Fork of the Virgin River, and nothing regarding “recommended visitor numbers/carrying capacity,” the impacts on “numerous other riparian areas that will be open for vehicle travel,” SOR at 14, or the impacts of vehicle emissions on water quality in riparian/wetland areas, *id.* at 16-17. BLM has acknowledged that the riparian area on the Parunuweap Canyon route is “of concern” (PEA at 18), that the route runs “through and parallel to” riparian areas, *id.* at 1-2, and public use is influenced by the lack of a clearly defined route, *id.* at 1-2. The PEA states that vehicular and foot traffic can damage riparian areas and streambanks, and implicitly recognizes that the addition of tour traffic on the Canyon route will also cause environmental damage. While preparation of the PEA apparently was prompted by the receipt of only two applications, BLM also stated that interest in guided touring has “increased dramatically in the past few years.” *Id.* at 1. Nowhere does the PEA quantify that dramatic increase, or state what is projected over any stated period of time. The record contains KFO review team comments on an early version of the PEA. One comment offered alternative language on the riparian/wetland topic:

There are specialized areas with in [sic] the Sandy Creek, Threemile Creek, Parunuweap Canyon, and Asey Creek[;] these areas are set up in perminate Riparian Studies[.] [T]hese areas should be avoided to prevent impacts to trend studies. Maintain travel to existing roads and tr[ai]ls to prevent riparian damage with travel thru wetlands and riparian areas wher[e] these studies exist. Avoid areas which are fenced for riparian protection.

(June 12, 2000, BLM Review Comments on draft PEA at unnumbered p. 7.)

We are unable to ascertain the extent to which these “specialized areas” are imperiled by increased traffic on the Elephant Cove route, what measures are in place

or will be put in place to protect them, or what areas have or will be fenced to mitigate impacts. Indeed, we find nothing in the PEA that responded to the problem of better defining the Canyon route so that BLM could be more certain that travel in fact will be confined to the existing way to minimize riparian impacts, a key mitigation measure. Other KFO team comments offered language that might have addressed our concerns, but it was not accepted for reasons that do not appear in the record.^{11/} Other public comments on the PEA squarely questioned the basis for BLM's conclusions regarding riparian/wetland zones, and this should have prompted an explanation in either the PEA or the DR/FONSI.^{12/} The issue SUWA thus probes is how BLM could reach any conclusion regarding the significance or insignificance of the added impacts of guided touring in Parunuweap Canyon. On appeal, BLM responds that there are no impacts on designated travel routes because no new routes were designated, and travel is to be limited to existing roads, ways, and trails. (Response to Stay and SOR at unnumbered p. 3.) That reasoning simply will not suffice when the way or route in question admittedly crosses and parallels riparian/wetland zones. It may be that BLM possesses the necessary information and has taken steps to better manage traffic on the Parunuweap Canyon route, but ultimately, the fact remains that neither the PEA nor the underlying administrative record discloses the reasons why BLM determined that the added impacts of the tour traffic will be insignificant. We are persuaded that SUWA has carried its burden on this point, and the FONSI is set aside to that extent and the case will be remanded for appropriate action.

SUWA argues that the failure to include a specific monitoring plan for WSA's and riparian areas in the PEA renders it suspect, but we are not persuaded that this demonstrates that BLM failed to meet its obligations under NEPA. According to the PEA, BLM will continue to monitor WSA's and wilderness inventory areas to assess impacts on wilderness character. (PEA at 27 ¶ 14.)^{13/} We have no reason to doubt that BLM will monitor use in accordance with existing monitoring plans to ascertain whether impairment or unnecessary and undue degradation is occurring as the result

^{11/} The proffered text stated, with reference to uncontrolled vehicle use in riparian and wetland zones: "These problems have been mitigated to some extent through signing, trail scarification and restoration efforts." (P. 12 of "Doug's Copy" of the PEA.) See also e-mail dated Dec. 9, 1999, from E. Owens to L. Church. We point to this comment only to illustrate the questions that are raised by a somewhat conflicting record.

^{12/} See letters submitted by SUWA dated Sept. 11, 2001, at 2-3, and Warren C. Foote's letter of Sept. 10, 2001.

^{13/} The IMP also requires monitoring within WSA's. (IMP at 25-27.)

of any tours. We similarly are confident that BLM will monitor its permittees for compliance with stipulations, terms, and conditions, and that BLM is prepared to respond to incidents of non-compliance. See BLM Manual, H-8372-1, VII-1 through VII-4.

We likewise reject SUWA's argument that the PEA's analysis of impacts on sensitive species is inadequate because BLM did not conduct a new inventory of sensitive wildlife and plant species. (SOR at 11-12.) Appellant has neither shown that existing inventories are inadequate by pointing to specific deficiencies nor identified any species or information regarding species that should have been included in existing inventories but was not. Moreover, SUWA has not acknowledged the practical measures specified in the PEA that are designed to limit or exclude tours from sensitive plant and wildlife habitats to mitigate impacts. See, e.g., PEA at 2, 6, 7, and 8-10.

Regarding impacts to air quality, SUWA argues that BLM was required to provide an analysis of current vehicle use and projected use as the result of the guided tours, in order to ascertain whether vehicular emissions would significantly impact air quality. (SOR at 15-17; Reply at 8-10.) More specifically, SUWA argues that BLM should have provided information with respect to the number of vehicles that travel on the routes at issue and the expected increase in numbers. Lastly, SUWA maintains that the PEA should have stated applicable air quality standards to which projections of increased emissions could be compared. (SOR at 15.) We first observe that no one, not even SUWA, raised any question about air quality in submitting comments on the PEA. Second, the record shows that two outfitters or guides who expressed an interest in offering tours submitted comments. One stated that they would conduct tours on some routes once a month, and perhaps as often as once a week on other routes; the other stated that he would offer tours less than three times a month, on an infrequent basis. In these circumstances, we believe the record adequately supports BLM's conclusion that impacts on air quality will not be significant. Although it clearly has a view regarding how it would have prepared this part of the PEA, SUWA has not submitted or proffered any information showing that the conclusion is in error.

SUWA further argues that the DR/FONSI and its underlying PEA violate section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000). SUWA alleges that BLM failed to consult with Native American Tribes during development of the PEA (SOR at 19-21), and contends that BLM failed to comply with the Utah "State Protocol Agreement" entered into between the Utah State Office, BLM, and the SHPO, for purposes of implementing section 106 of NHPA. Id. at 21-25.

We reject SUWA's claim that Native American Tribes were not provided opportunity to comment on the draft PEA. The record includes a master list of individuals and organizations. Some entries were highlighted in yellow. These included 18 Native American tribal affiliates, individuals, and tribal historic preservation offices, as well as the Historic Preservation Office at Window Rock, Arizona. The record therefore supports the conclusion that this list documents the individuals and organizations who were informed of the draft PEA. There is no indication that the Utah SHPO was provided with a copy of the Draft PEA. However, as will be explained below, the PEA does not serve to issue any SRP, and therefore involvement of the SHPO at this juncture would be premature.

[3] Section 101 of NHPA, as amended, 16 U.S.C. § 470a (a)(1)(A) (2000), provides that the Secretary "is authorized to expand and maintain a National Register of Historic Places composed of * * * sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." Section 106 of NHPA, 16 U.S.C. § 470f (2000), provides that "[t]he head of any Federal agency * * * having authority to license any undertaking shall, * * * prior to the issuance of any license, * * * take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, * * * [and] shall afford the Advisory Council on Historic Preservation * * * a reasonable opportunity to comment with regard to such undertaking." Regulation 36 CFR 800.1(a) states that a purpose of the section 106 process is "to accommodate historic preservation concerns with the needs of Federal undertakings * * * ." "Undertaking" is defined, in relevant part, as "a project, activity, or program * * * including * * * those requiring a Federal permit, license or approval." 36 CFR 800.16(y).

The State Protocol Agreement between the Utah State Director, BLM, and the Utah SHPO provides that BLM will request SHPO review of "undertakings affecting National Register eligible or listed properties." (SOR Ex. 8 (State Protocol Agreement), at 4.) BLM will not request SHPO review when there is a "No Potential to Effect"^{14/} determination by qualified BLM staff. Id. Regulation 36 CFR 800.1(c) provides that "[t]he agency official must complete the section 106 process 'prior to * * * the issuance of any license.'" The regulation continues:

^{14/} An "effect" is defined by regulation as an "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 CFR 800.16(i).

This does not prohibit agency official[s] from conducting or authorizing non-destructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

In this case, the PEA recognizes that guided vehicle tours may be offered specifically for the purpose of viewing cultural resources. The PEA states that a "large number of archeological sites, which encompass a wide variety of site types, occur on lands managed by the Kanab Field Office." (PEA at 11.) Further,

[s]ite types range from low visibility artifact scatters of chipped stone tools and ceramic sherds to highly visible standing masonry structures. Rock art, both pictographs and petroglyphs, are a particularly popular type of site for visitors. Site locations are generally not disclosed to the public. At present, the only site that the public is encouraged to visit is the fenced pictograph panel in South Fork Indian Canyon.

Id. The PEA acknowledges that "[a]uthorizing guided vehicle tours would result in visitors being taken into the project area to view cultural resources, [which] could result in damage to these resources." Id. at 2. Specifically, the PEA recognizes that "with an increase in people going into areas, there is the possibility of damage to sites and theft of artifacts. There is a concern that noise, vibration, and/or exhaust may cause damage to sites. There is also a concern that oils from human skin may damage rock art panels if they are touched." Id. at 18.

BLM has taken steps to ensure that the issuance of an SRP, if it occurs before the SHPO review, will not restrict "the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 CFR 800.1(c). To minimize the potential for damage, all SRP applicants would be required to identify archaeological or historic sites they wish to visit. BLM would then determine whether the sites are appropriate for visitation, the maximum group size desirable, and the best means of access to the site. "After appropriate archaeological sites have been identified, * * * BLM [will] develop a monitoring plan to determine if the resource is undergoing damage as a result of visitation." (PEA at 18.) The PEA proposes that "[i]f a site is being degraded, management options include development of a mitigation plan, a reduction in visitor numbers, or outright closure of the site to visitation." Id. BLM has also provided for protection of cultural resources in the stipulations to be included in all permits. In addition to reserving the right to alter terms, conditions, and stipulations or to reduce visitor numbers or close sites to prevent resource damage, id. at 24 ¶ 5, 25 ¶ 24, 26 ¶ 7, other stipulations prohibit

flash photography at rock art sites and touching rock art panels, *id.* at 27, and require guides to identify all sites to be visited at the time of their application.

The PEA provides general information concerning potential impacts to cultural resources, as well as protective stipulations to preserve them. The DR/FONSI adopts the general terms, conditions, and stipulations under which BLM will, in the future, issue permits for guided tour visits to areas possessed of cultural resources, but it does not serve to issue an SRP to any particular tour guide or outfitter. Therefore, at this juncture, there is no “undertaking” for SHPO review. We presume that BLM will discharge at the appropriate time any responsibilities arising under the NHPA with regard to issuance of particular SRP’s.

To the extent that any of appellant’s contentions have not been specifically addressed in this decision, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside to the extent that it pertains to impacts on riparian/wetland zones on the Parunuweap Canyon route and remanded to BLM for further action in light of the concerns expressed herein, and is affirmed in all other respects.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge