LYNN CANAL CONSERVATION, INC.

167 IBLA 136 Decided October 19, 2005

* Editors note:
Decision clarified. see, Lynn Canal Converation, Inc, 169 IBLA 1

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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Arlington, VA 22203

LYNN CANAL CONSERVATION, INC.

IBLA 2002-401 Decided October 19, 2005

Appeal from a decision by the Anchorage Field Office, Bureau of Land Management, authorizing the issuance of special recreation permits to conduct helicopter assisted commercially guided alpine skiing trips on glaciers on BLM administered land. AA-81641, AA-83491, AA-83537.

Set aside and remanded.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Findings of No Significant Impact

   An EA must take a hard look at the environmental consequences, as opposed to reaching bald conclusions, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are insignificant in order to support a conclusion that an EIS is not required. A party challenging a FONSI must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action.

2. National Environmental Policy Act of 1969: Environmental Statements

   Failure to provide notice of the availability of a draft environmental assessment to the general public, including interested and affected members of the public and organizations, and allow a period for comment, or alternatively to provide notice of the completed EA and proposed pending decision with time to provide written comments, violates 40 CFR 1506.6.

APPEARANCES: Scott Carey, Haines, Alaska, for Lynn Canal Conservation, Inc.; Joseph D. Darnell, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Lynn Canal Conservation, Inc. (LCC), has appealed a May 1, 2002, decision by the Anchorage Field Office, Bureau of Land Management (BLM), authorizing the issuance of special recreation permits with 5-year terms to Out of Bounds Adventures (AA-81641) and to Southeast Alaska Backcountry Adventures L.L.C. (SEABA) (AA-83491). (Decision Record and Finding of No Significant Impact (DR/FONSI) at 1.) The permits allow the organizations to conduct helicopter assisted, commercially guided alpine skiing trips on glaciers on BLM administered land. Id. [1/]

All three authorizations were based "on the analysis and evaluation" in environmental assessment (EA) No. AK-040-02-EA-011 dated April 25, 2002, and included "the mitigation measures adopted as stipulations in EA-AK-040-95-015" as well as additional stipulations. [2/] Id. The mitigation measures were developed as stipulations following preparation of an EA in 1995 to review applications for special recreation use permits to land helicopters on glaciers during the summer tourist season. See Haines Borough Assembly, 145 IBLA 14, 15-17 (1998).

The 2002 EA examines two alternatives. The first, the proposed action, purports to describe the operations the companies proposed to conduct in their applications. It states that Out of Bounds Adventures had requested approval of 400 user days between March 1 and April 30 using both the Haines airport and a

[1/] BLM authorized issuance of a 3-year land use permit to Teton Gravity Research (TGR), allowing the company to film skiers and snow boarders, and to conduct reconnaissance flights. Id. However, as stated in a May 3, 2002, memorandum in case file AA-083537, the environmental assessment (EA) reviewing the proposals was not completed in time to issue a permit to TGR for March and April as it had requested, and because the company had completed its filming using State of Alaska lands, no permit would be issued. Accordingly, any issues pertaining to TGR's permit have become moot.

[2/] LCC notes that its statement of reasons (SOR) refers to a version of the EA dated Apr. 24, 2002, which had been sent to it. It states that immediately prior to mailing the document it discovered that there was a version dated Apr. 25. That version is cited in this decision. The Board requested BLM to provide a copy of EA AK-040-95-015, and one was submitted in electronic format. The electronic copy does not include the title page.

private facility at mile 33 of the Haines highway. (EA at 5.) Depending upon demand, one or two helicopters would be used per day, each carrying up to two groups of five skiers for a maximum of 20 skiers a day, plus guides. Id. Clients and guides are to be dropped off at selected sites on glaciers, picked up at the end of the ski run, and returned to the top of the glacier or to another glacier. Id. The routine would be repeated five or six times for each group of skiers, resulting in 10 or 12 helicopter landings per day for each group and 40 to 48 landings per day for four groups. Id. at 5-6. Hours of operation are to be 8:00 a.m. to 6:00 p.m. Id. at 6. [3/] Helicopter flights operated by SEABA would originate and terminate at the same locations with a slightly longer season of February 15 through April 30 and a lower estimate of 150 user days. Id. [4/] The second alternative reviewed in the EA is a "no action alternative" which would "continue present management and not authorize increased commercial heliskiing and filming on BLM administered lands," but "would allow established historical use to continue" on Federal lands. Id. at 8.

LCC's statement of reasons (SOR) presents a variety of arguments in support of its claim that BLM failed to satisfy section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000). Briefly stated, LCC contends (1) that the procedure BLM followed in issuing the EA and DR/FONSI violated the letter and spirit of NEPA by failing to make information available to the public and provide public involvement; (2) that the EA does not include a reasonable range of alternatives; (3) that the EA fails to analyze various direct and indirect effects of the proposed action; (4) that the EA suffers from a variety of other

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[3/] The applications filed for 2002 using the "Special Recreation Application and Permit" form do not provide the information described in the EA. The description of the proposed action for Out of Bounds Adventures appears to have been adapted from that used in EA's AK-040-99-006 and AK-040-00-08, copies of which are in case file AA-81641, but the source of information on the specific terms of the permit for the 2002 and subsequent seasons is not clear. For example, the form for Out of Bounds Adventures identifies its season as Mar. 1 through May 15 and the hours of operation as 8:00 a.m. to sunset.

[4/] The Operation Plan in the case file for SEABA (AA-083491) states at page 5 that the company planned to operate "roughly Feb. 15 through the middle of May" and estimates that there would be around 200 user days "of helicopter skiing in the alpine/glaciated terrain on BLM properties in North Lynn Canal." The next page identifies "suggested dates" of Feb. 1 through May 7 for the "commercial season." SEABA's "Special Recreation Application and Permit" form dated Oct. 12, 2001, identifies the period of operation as 8:00 a.m. to 5:00 p.m. beginning Jan. 15, 2002, extending to May 15, 2002, with operations until 10:00 p.m.

deficiencies; and (5) that the FONSI is not supported by the EA and an environmental impact statement (EIS) is required. BLM filed an answer which will be discussed along with LCC's related arguments.

NEPA requires Federal agencies to take environmental considerations into account when making decisions and to prepare an EIS if approval of a proposed action would constitute a "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000). In most cases, the determination of whether to write an EIS is made by preparing an EA. See 40 CFR 1501.3, 1501.4(b), 1508.9, 1508.27. An EA is a "concise" document which briefly provides sufficient evidence and analysis of relevant issues to determine whether to prepare an EIS, and, if not, to support a finding of no significant impact. 40 CFR 1508.9(a)(1), see 40 CFR 1508.13; Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985).

[1] The standard by which the Board reviews an EA has been set forth in numerous decisions. Most basically, an EA must (1) take a hard look at the environmental consequences, as opposed to reaching bald conclusions, (2) identify the relevant areas of environmental concern, and (3) make a convincing case that environmental impacts are insignificant in order to support a conclusion that an EIS is not required. Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994); Southern Utah Wilderness Alliance, 123 IBLA 302, 308 (1992), and cases cited. A party challenging a FONSI must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. Oregon Natural Resources Council, 131 IBLA 180, 186 (1994). In this case, we do not reach the arguments presented by LCC which assert deficiencies in the EA's content because we agree that BLM failed to allow public participation in its environmental decision-making as required by NEPA. Accordingly, we will set aside its decision to approve the applications and remand the matter for compliance with 40 CFR 1506.6.

As explained by LCC and documented in the case files on appeal, on October 2, 2001, the voters of Haines Borough, excluding those within the boundaries of the City of Haines, created a Commercial Helicopter Flight-Seeing Area to be administered by the Helicopter Service Area Board (HSAB) with authority to regulate and permit commercial helicopter flight-seeing tours. After the HSAB's initial meeting on December 27, 2001, the corresponding secretary sent a letter to BLM dated January 4, 2002, notifying it of the Board's creation and requesting that

it be sent all helicopter landing permit applications for the Borough. [5/] LCC claims that BLM was working on two permit applications at the time and that its failure to respond to the request violated 40 CFR 1506.6(a) and (b)(1). (SOR at 3.) [6/] In addition, LCC asserts that BLM did not "inform the general public that an EA was in progress" (SOR at 2), and that the HSAB learned that the EA was being prepared only through a telephone call. (SOR at 3.) [7/] LCC argues that the partial EA which the HSBA received on February 15, 2002, cannot be regarded as providing the "high quality" information called for by 40 CFR 1500.1(b) because it lacked a number of the sections included in the final document. Id. at 3-4. It further asserts that the release of the decision on May 1 after the end of the 2002 heli-ski season was unnecessary and had the effect of excluding the HSAB and the general public from participating in the NEPA process. Id. at 4. BLM had time, LCC contends, to provide the high quality information and the opportunity to participate which 40 CFR 1506.6 requires. "The end result," LCC maintains, "would have been a better environmental document" for the 2003 heli-ski season rather than "an inadequate document fast-tracked for no apparent reason." Id.

LCC also charges BLM with violating the policy found at 40 CFR 1500.2(d) to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." Id. Instead of public involvement, LCC asserts, "BLM created a long list of consultants which makes it appear they had indeed involved the public." Id. In particular, LCC objects to the use of its name as a consultant when it "was never consulted regarding the 2002 EA." Id. LCC states that it "commented extensively on the 1995 EA, which only dealt with summer helicopter tours, did not include the entire area being evaluated in 2002, and had absolutely nothing to do with winter recreation." Id. It also acknowledges commenting in 1999 "on a heli-skiing proposal based in Skagway," but "objected to BLM fast-tracking the permit because BLM would not have sufficient time to do an adequate analysis and because LCC did not have sufficient time to make extensive comments (see Mar. 12, 1999,

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[5/] The letter refers to Ordinance 01-18, a copy of which is in two of the case files, as are copies of Ordinance 01-15. The latter, but not the former, bears the signature of the borough clerk, but the differences in the wording of the documents are minimal and are not of consequence to the appeal.

[6/] LCC's SOR is unpaginated, and we have supplied page numbers beginning with LCC's cover letter as page 1.

[7/] LCC also states that the caller was informed "that no public comment would be taken." (SOR at 3.) BLM rejects the statement as an "unsubstantiated allegation." (Answer at 11 n.20.)

letter)." Id. "Thus," LCC concludes, it "has never made comments on winter recreation issues." Id.

In response, BLM asserts that the record does not support LCC's position. (Answer at 6-7). It argues that BLM is not required to "conduct a formal public hearing during the scoping process" and maintains that it benefitted from the "extensive scoping process" undertaken during preparation of the 1995 EA for summertime landing tours. Id. at 7. [8/] BLM points out that it participated as a panelist at a June 27, 2001, heli-skiing meeting, and that a BLM wildlife biologist not only spoke at that meeting but made a second presentation in Haines to members of the public on March 13, 2002. Id. BLM also lists its response to numerous recommendations made by the HSBA. Id. at 8-11. BLM concludes that it did make "a concerted effort to involve the public in its scoping process through both accepting comments and making them part of the record, keeping interested members of the public informed through public presentations as the process proceeded, and by incorporating many of the recommendations received from the public." Id. at 11.

Upon review, the Board finds that LCC raises several legitimate points about the process by which the EA was issued. Its assertion that "BLM has never come to Haines to assess the community's concerns about heli-skiing" appears to be correct. (SOR at 2.) BLM does not dispute LCC's statement that the January 27, 2000, "open house" scheduled to discuss the heli-skiing applications was cancelled due to weather and never rescheduled. Id.; see "Open House Brief" dated Jan. 14, 2000, attached to SOR. Nor does BLM indicate why no meeting was scheduled during the next two years. BLM relies upon the scoping process undertaken for the 1995 EA, but the subject of heli-skiing does not appear to have been considered at the time. As described in the 1995 EA, none of the applications pending before either the U.S. Forest Service or BLM sought to land on glaciers for skiing during the winter months, and no mention of skiing appears in the description of the scoping process. (EA AK-040-95-015 at 1-4 through 1-7; see Haines Borough Assembly, 145 IBLA at 16 (permits allow glacier landings early May through late September).)

The 2002 EA refers to "meetings held in Haines in 2001," but the only meeting identified in the record is the June 2001 heli-skiing forum. As described by the BLM outdoor recreation planner who participated (along with LCC), the meeting consisted

[8/] "Scope" is defined in 40 CFR 1508.25 as consisting "of the range of actions, alternatives, and impacts to be considered in an environmental impact statement." "Scoping" is used more generally to refer to the process used by an agency to communicate and consult with interested parties about the scope of an EA or EIS.

of "panel members discussing their point of view, current projects or findings." (Memorandum of June 27, 2001.) The panel included a representative from SEABA, whose presentation appears to have been the basis for the planner's description: "The heli-skiing industry let everyone know what their operation plan was for the next several years." Id. LCC claims that audience members were allowed to ask questions, but were not "given an opportunity to give comments to BLM regarding heli-skiing on BLM lands." (SOR at 2). The memorandum does not mention whether the audience asked questions or made comments and refers to its participation only in regard to a show of hands in support of heli-skiing operations.

BLM also relies upon the meeting its wildlife biologist held in Haines during his March 11-15, 2002, visit "to conduct mountain goat winter distribution and habitat use surveys in response to new heli-skiing proposals received by this office." (Memorandum of Mar. 18, 2002, at 1.) The memorandum he wrote afterwards states that he received telephone calls from the "Helicopter Use Board," the local advisory committee of the Alaska Department of Fish and Game, and local outfitters, but that their concern was "a deadline to present comments and recommendations to a State land use planning effort in regard to high intensity helicopter supported commercial recreation in sensitive mountain habitats." Id. On March 13, he conducted "an informal informational meeting regarding wildlife potential impacts and basic biological responses to activity and what trends 7 years of monitoring was indicating." Id. Notably, however, he does not mention that he provided copies of the draft EA then in preparation or directly discussed either its content or the pending applications.

It is apparent that BLM did not undertake the kind of scoping process in this case which it has used in others, in particular the notification of interested parties by mail. See, e.g., Rocky Mountain Pipeline Trades Council, 149 IBLA 388, 393 (1999); Headwaters, 146 IBLA 230, 231 (1998); Haines Borough Assembly, 145 IBLA at 28; Committee for Idaho's High Desert, 137 IBLA 92, 95 (1996); Western Shoshone National Council, 130 IBLA 69, 70 (1994); Powder River Basin Resource Council , 124 IBLA 83, 85-86 (1992); Owen Severance, 118 IBLA 381, 383 (1991). There is no indication in the record that BLM notified the public about the pending applications, issued a scoping notice or other release informing the public that it would be preparing an EA, or issued a notice for comment on the draft EA. The only comments in the record specifically directed at the EA are those from the HSAB. In addition, two individuals submitted letters, as did Alaska Cross Country Guiding, a business in Haines which conducts cross-country ski and hunting guiding trips. [9/] The letters

[9/] Alaska Cross Country Guiding identified specific areas where it requested that (continued...)

were written after the portion of the EA had been sent to the HSAB, and it appears, as LCC suggests, that the writers learned about the pending applications from the HSAB or its Board members. See SOR at 4 ("a few individuals who heard through the grapevine BLM was doing an EA"). [10/] More significantly, the record does not show that BLM notified any of the "persons and agencies consulted," including LCC, about the applications or preparation of the EA, sent them a draft of the EA, received written comments from them, or even sent them a copy of the final EA and DR/FONSI. See EA at 17.

Several decisions of this Board have been critical of practices which limit public participation. For example, in Southern Utah Wilderness Alliance, 122 IBLA 334, 341 (1992), the Board stated that "NEPA and its regulations do not explicitly require a Federal agency to allow public comment on every EA." [11/] However, the Board went on to affirm that NEPA's statutory scheme "clearly envisions active public involvement in the NEPA process" and noted, as does LCC, that 40 CFR 1500.2(d) requires "all Federal agencies, including BLM, 'to the fullest extent possible * * * [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.'" 122 IBLA at 341. After discussing provisions of the Departmental Manual, the Board concluded: "Because the statutory and regulatory scheme heavily favors public participation, such participation must be the norm, and BLM must have a compelling reason for not providing any public comment period

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[9/] (...continued)
BLM not issue heli-ski permits. Otherwise, the record does not support the EA's statement that "specific areas were identified by the public where the impact of aircraft noise could adversely affect recreationists, primarily back country skiers seeking solitude." (2002 EA at 10; see SOR at 11.)

[10/] A memorandum dated June 5, 2002, in case file AA-81641 states that one of the letter writers called BLM, and reports that he "was disappointed that he did not receive a copy of the EA and was not informed or aware that there was an appeal period * * *." It also states that the BLM employee explained that the HSAB "has sold themselves as the people's representative on the helicopter issue," and that "during the construction of the EA, this office had numerous discussions with representatives of the [HSAB] to best incorporate their concerns."

[11/] The decision cited 40 CFR 1501.4(e)(2) and in a footnote stated: "At least one U.S. Court of Appeals * * * has held that public participation is required in the preparation of an EA under NEPA. Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) [on appeal following second remand, 484 F.2d 448 2d Cir. 1973), cert. denied, 416 U.S. 936 (1974)]." More recent case law is discussed infra.

during the EA process." Id. at 342. It determined that, in the circumstances of the case, BLM should have provided a public comment period, and having already concluded that the EA was deficient and the decision on appeal was to be remanded, the Board required BLM to "provide a public comment period on the revised EA prepared for this project." Id.

In Fort Belknap Community Council, 144 IBLA 92, 101-102 (1998), the Board stated, citing Southern Utah Wilderness Alliance, that "BLM's failure to provide notice of the availability of the EA to the public generally, or even to interested or affected members of the public, and to solicit any information from the public generally before taking action" had been a "technical violation" of 40 CFR 1506.6(b) and (d), but determined that the violation had been de minimis given the procedure BLM had in fact followed in the case.

In Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 121-22 (2000), the Board concluded that neither 40 CFR 1501.4(e)(2) nor BLM's NEPA Handbook requires a period for public review and comment before BLM may make a final determination on the proposed action, but it quoted Southern Utah Wilderness Alliance to the effect that NEPA requires BLM to encourage and facilitate public involvement, and concluded that "[t]herefore BLM should demonstrate a 'compelling reason for not providing any public comment period during the EA process.'" Although the Board agreed that the appellant "and other members of the public were not afforded the opportunity to comment on the final EA prior to the DR/FONSI decision," it found that "the objective of encouraging and facilitating public involvement in the NEPA process was satisfied by BLM's solicitation of comments during the scoping period." 153 IBLA at 122; see also Haines Borough Assembly, 145 IBLA at 28 ("informal meetings met all relevant legal requirements"). Similarly, the Board noted in Haines Borough Assembly that BLM had failed to "provide a copy of the draft or final EA to interested members of the public and solicit comments for a specific period of time, prior to issuing its ROD [record of decision]," but held that the failure was not fatal due to the solicitation of public input prior to preparation of the EA, and the fact that the ROD had been "widely distributed, and interested members of the public have had an opportunity to dispute it before the Board." 145 IBLA at 29. [12/] The same cannot be said in this case.

[12/] In Sierra Club, Inc., 92 IBLA 290, 299 n. 5 (1986), the Board determined that BLM had "clearly failed to comply with" 40 CFR 1501.4(e)(1) and 40 CFR 1506.6(b) prior to issuing a right-of-way grant, but it declined to overturn the decision because the appellants had participated to some degree in the review of the project before various agencies, had previously made their views known to BLM, and had an

(continued...)

[2] It has frequently been pointed out that NEPA is essentially procedural in nature, designed to insure that Federal agencies make fully informed and considered decisions. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). Its purposes cannot be met when, as in this case, there has been little or no public involvement. The Board holds that BLM's failure to provide notice of the availability of the draft EA to the general public, including interested and affected members of the public and organizations and allow a period for comment, or alternatively to provide notice of the EA and proposed pending decision with time to provide written comments, violated 40 CFR 1506.6(a), (b), and (d). Stated in another manner, the requirement in 40 CFR 1501.4(b) that an agency involve the public "to the extent practicable" in preparing an EA, the requirement in 40 CFR 1501.4(e)(1) that a FONSI be made available to the public, the requirement of 40 CFR 1506.6(a) that Federal agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," the requirement of 40 CFR 1506.6(b) that environmental documents be made available, and the requirement of 40 CFR 1506.6(d) that an agency solicit information from the public would be diminished or rendered meaningless if an agency can, as in this case, complete an EA and FONSI without any notice to the public calculated to allow participation and an opportunity to challenge the decision. Presumably the instruction of 516 DM 3.3.A (May 27, 2004) that "[t]he public must be provided notice of the availability of EAs" means documents upon which comments can be made, not documents and decisions which are fait accompli.

The Board's ruling is supported, if not required, by recent court decisions. Most notably, the Ninth Circuit has concluded that 40 CFR 1506.6 requires that "[t]he public must be given an opportunity to comment on draft EAs and EISs * * *." Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002), amended, 350 F.3d 816, 830 (2003), second amendment, 371 F.3d 475, 487 (2004). [13/] Although the Ninth Circuit has "not established a minimum level of public comment and

[12/] (...continued)
opportunity to have their concerns addressed by the Board.

[13/] The First Circuit has declined to follow the Ninth Circuit, finding that in the case before it the Government had involved the public "to the extent practicable" by issuing public notice of the application, providing a comment period, holding two public hearings, and responding to the comments received in the EA. Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army, 398 F.3d 105, 114-15 (1st Cir. 2005). BLM took no such steps in this case.

participation required by the regulations governing the EA and FONSI process," it has held that "a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, as was the case here, violates these regulations." Citizens for Better Forestry v. U.S. Department of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003); see Montana Wilderness Association v. Fry, 310 F. Supp. 2d 1127, 1147-48 (D. Mont. 2004); The Fund for Animals v. Norton, 281 F. Supp. 2d 209, 226-27 (D.D.C. 2003) (two weeks was insufficient time to comment); Strahan v. Linnon, 581 F. Supp. 581, 630 (D. Mass. 1997) (citing 40 CFR 1506.6 to state that concerning preparation of an EA "the public must be involved in the Coast Guard's efforts to comply with NEPA"); Wroncy v. Bureau of Land Management, 777 F. Supp. 1546, 1549 (D.Or. 1991); see also Hanly v. Kleindienst, 471 F.2d at 836 ("before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision").

We agree with LCC that had BLM followed 40 CFR 1506.6(b), "those organizations and individuals who were interested or affected, could have participated." (SOR at 4.) LCC's suggestions, which are reflected in the regulation, appear reasonable:

> Since the effects are "primarily of local concern" (40 CFR 1506.6(b)(3)), public involvement would have been served by publication in a local paper (40 CFR 1506.6(b)(3)(iv)), sending notice to interested organizations (40 CFR 1506.6(b)(3)(vi)), and particularly mailing notice to those property owners who have been impacted by this decision (40 CFR 1506.6(b)(3)(viii)) but who had no mechanism with which to influence the process.

Id.

BLM does not dispute LCC's assertions that HSAB learned about the preparation of the EA only when HSAB's chair-person phoned BLM, that the in-progress EA was faxed to HSAB on February 15, 2002, with a deadline of March 1, 2002, by which to respond, and that the version of the EA sent to HSAB was abbreviated, or "incomplete," to use LCC's term. (SOR at 3-4.) BLM catalogues a number of instances when HSAB's comments were adopted in the EA. See Answer at 7-11. However, the record simply fails to support BLM's claim to have "made a concerted effort to involve the public in its scoping process through both accepting comments and making them part of the record, keeping interested members of the public informed through public presentations as the process proceeded, and by

incorporating many of the recommendations received from the public." Id. at 11. On remand, BLM's actions should be calculated to achieve those objectives.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 1, 2002, decision of the Acting Field Manager is set aside and the case is remanded for compliance with 40 CFR 1506.6.

James F. Roberts
Administrative Judge

I concur:

David L. Hughes
Administrative Judge