

LEGAL AND SAFETY EMPLOYER RESEARCH INC. ET AL.

IBLA 97-229, 97-251,
97-252, 97-253

Decided February 28, 2001

Consolidated appeals from a record of decision of the Acting District Manager, Winnemucca, Nevada, District Office, Bureau of Land Management, approving mining plan of operations for the Twin Creeks Mine consolidation and expansion. N26-86-005P.

Appeals dismissed in part; decision affirmed.

1. Administrative Procedure: Administrative Review--Rules of Practice: Appeals: Standing to Appeal

To have standing to appeal a decision to the Board of Land Appeals, under 43 C.F.R. § 4.410, a party must both be adversely affected by the decision and be a "party to the case" by having participated in BLM decision-making leading to the decision sought to be reviewed.

2. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements

BLM's approval of a plan of operations for open pit gold mining will be affirmed where BLM has taken a hard look in an EIS at the significant environmental consequences of mining operations and reasonable alternatives, and where the record supports BLM's conclusion that the plan, as modified, will not result in unnecessary or undue degradation of the public lands.

3. Environmental Quality: Environmental Statements--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements

An EIS is not rendered invalid by the fact that it is prepared by consultants approved by BLM instead of by BLM personnel.

4. Mining Claims: Plan of Operations

BLM's approval of a plan of operations for open pit gold mining will not be disturbed on account of the fact it authorizes operations on lands not owned by the operator at the time of the issuance of the approval, where BLM's record of decision contains a stipulation allowing commencement of operations on those lands only upon the filing of a document "demonstrating the right" of the operator to use them. The stipulation is not rendered defective because it is broad enough to cover the transfer of the right to use the lands to the operator via State eminent domain authority.

5. Mining and Reclamation Plan: Generally--National Historic Preservation Act: Applicability

In approving a mining and reclamation plan, BLM must comply with section 106 of the National Historic Preservation Act of 1966 on both Federal and non-Federal lands involved in the project. However, it was not error for BLM to consult with the plan applicant instead of the current owner of lands containing an historic site regarding measures to protect the site where it was contemplated that ownership of those lands would be transferred to the applicant, and where mining near the site would not proceed if the lands were not in fact transferred.

APPEARANCES: Jim Wilson, Gridley, California, for Laser, Inc.; Tom Myers, Reno, Nevada, for Great Basin Mine Watch; Randy L. Parcel, Esq., et al., Denver, Colorado, for Getchell Gold Corporation; James Paiva, Tribal Chairman, for Shoshone-Paiute Tribes of the Duck Valley Indian Reservation; John F. Shepherd, Esq., Denver, Colorado, and Richie D. Haddock, Esq., Reno, Nevada, for Santa Fe Pacific Gold Corporation; Ron Wenker, District Manager, Winnemucca District, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Legal and Safety Employer Research, Inc. (LASER), and others 1/ have appealed from the January 22, 1997, Record of Decision (ROD) of

1/ LASER's appeal was docketed at IBLA 97-229. Other Appellants and their respective docket numbers are: Great Basin Mine Watch (GBMW), IBLA 97-251; Getchell Gold Corporation (Getchell), IBLA 97-252; and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation (the Tribes), IBLA 97-253.

Although the Sierra Club (Toiyabe Chapter) and Western Shoshone Resources, Inc., signed and purported to adopt GBMW's SOR, they had filed

the Winnemucca (Nevada) District Office, Bureau of Land Management (BLM), approving as amended a mining plan of operations (MPO) filed by Santa Fe Pacific Gold Corporation (SFPG) for the Twin Creeks Mine in Humboldt County, Nevada. These appeals have been consolidated, and SFPG has entered an appearance as Respondent.

The Twin Creeks Mine is located approximately 35 miles northeast of Winnemucca in Humboldt County, in North Central Nevada. This appeal involves expansion of an existing mine, comprised of two mines at Twin Creeks that were previously consolidated in large part in 1993. ^{2/} The proposed action will complete the process of consolidating and expanding those mines.

One of the existing mines is the former Chimney Creek mine. This mine, which another mining company (Gold Fields) began in 1986, is located on public lands managed by BLM. SFPG acquired the Chimney Creek mine in 1993. (Final Environmental Impact Statement (FEIS) at 2-1.) The other existing mine is the former Rabbit Creek mine, which SFPG began in 1989. *Id.* at 2-9. That mine is located on private lands owned or controlled by SFPG through a railroad land grant issued to a predecessor of the Atchison, Topeka, and Santa Fe Railway Company. SFPG's existing mine operations include three open pits (the Vista, West, and South pits), four overburden and interburden storage areas, five heap leaching facilities, and two milling and tailing storage facilities. *Id.* at 2-1. The existing facilities encompass over 5,000 acres of surface disturbance, on a combination of Federal and SFPG lands.

SFPG's current permits already authorize some expansion of the existing operations. (FEIS at 2-10.) These permits cover an additional 3,136 acres of surface disturbance (2,286 acres of SFPG lands and 850 acres of Federal lands); open pit expansion (the South and Vista pits), additional overburden and interburden storage areas; Phase I of the Sage Mill; additional tailings disposal areas; additional heap leaching facilities; a limestone storage area; increased dewatering and related facilities; reinfiltration basins; new haul and access roads; and a bioremediation site. Because these activities are currently authorized by BLM and State of Nevada permits and are therefore not authorized by BLM's current action, they are discussed as part of the "no action" alternative in the FEIS. *Id.* at 2-10 to 2-20. Under the no action alternative, total surface disturbance is 8,230 acres.

fn. 1 (continued)

no notices of appeal. Accordingly, as we noted in our Order dated Apr. 30, 1997, we do not recognize those parties as Appellants.

We note that the Tribes are apparently not the same party as the Duck Valley Indian Reservation. (BLM Motion to Dismiss filed Apr. 14, 1997, at 3.)

^{2/} The following statement of facts is based on that appearing in SFPG's Answer in IBLA 97-229 and IBLA 97-251 at 2-7, which is not contradicted and is supported by the record.

We shall refer to SFPG's Answer in IBLA 97-229 and IBLA 97-251 as "SFPG Answer." We shall refer to SFPG's Answer in IBLA 97-252 and IBLA 97-253 as "SFPG Answer II."

In 1994, SFPG began the process to seek BLM approval to consolidate and further expand the former Chimney Creek and Rabbit Creek mines. It submitted a plan of operations and a reclamation plan to BLM in September 1994, which it updated in September 1995 (FEIS at 2-22) and revised in November 1996 to conform to changes identified in the EIS process. SFPG's proposed expansion is the "proposed action" described in the FEIS at 2-22 to 2-51. The expansion comprises disturbance of an additional 5,217 acres of surface (FEIS at 2-3); expanding and deepening South Pit (FEIS at 2-22); creation of additional overburden and interburden storage areas to handle additional ore mined (FEIS at 2-27); establishing additional milling, flotation circuit, and tailing facilities, including Phase 2 of the Sage Mill (FEIS at 2-29); creating additional heap leaching and processing facilities (FEIS at 2-32); and additional dewatering facilities. (FEIS at 2-33.) Under the proposed action, mining operations would be extended an additional 11 years through the year 2011. (FEIS at 2-27.) The average daily mining rate would increase from about 330,000 tons per day to about 400,000 tons per day, with daily maximums up to 550,000 tons per day. Id.

The dewatering rate would increase from the no action range of 5,000 to 8,000 gallons per minute (gpm) (FEIS at 2-19) to a range of 5,300 to 12,300 gpm. (FEIS at 2-33.) Approximately 4,300 gpm would be consumed in the mining and milling process, with the remaining 1,000 to 8,000 gpm treated and discharged to Rabbit Creek and infiltration basins. Id. By comparison, currently (as described in the no-action alternative) SFPG discharges excess mine water at about 700 to 3,700 gpm. Id. at 2-19.

The proposed action includes a comprehensive reclamation plan (FEIS at 2-37 to 2-52), the goal of which is to achieve post-mining land uses similar to premining uses. Id. at 2-38. The entire mine area will be reclaimed, except for the open pits and the main access road right-of-way, which will remain in place for maintenance purposes and access to surrounding ranches. Id. at 2-49.

A revised MPO was submitted to BLM in November 1996, proposing the disturbance of an additional 5,217 acres (4,866 acres of public and 351 acres of private land) and mining and ore processing continuing through the year 2011. The affected public lands are within the existing SFPG permit boundary. Facilities that would be developed include the South Pit expansion (FEIS at 2-22); overburden and interburden storage areas (Id. at 2-27); additional milling, flotation, and tailings facilities (Id. at 2-29); additional heap leaching and processing facilities (Id. at 2-32); expanded dewatering system and water disposal facilities (Id. at 2-33); diversion of Rabbit Creek and tributaries (Id. at 2-34); utility corridors (Id. at 2-36); ancillary facilities (Id. at 2-36); and relocation of a Humboldt County road (Id. at 2-36). Approximately 150 people would be employed for 12 months to construct Phase 2 of the Sage sulfide mill, tailings, and heap leach facilities, but no additional workers would be needed to operate the proposed mine, mill, tailings, and heap leach facilities above the current operations work force of 1,409 (including contractors). Id. at 2-36 to 2-37.

Because of the potential for the proposed project to result in significant environmental impacts, on July 26, 1994, BLM published a notice

of intent to prepare an EIS for the Twin Creeks Mine in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994). 59 Fed. Reg. 37988 (1994). The notice explained that the EIS would be prepared by third party contractors and funded by SFPG.

As it happened, the ROD was issued after preparation of both a draft environmental impact statement (DEIS) and FEIS for the mine expansion project. BLM issued its DEIS on July 5, 1996, describing pro-posed action (DEIS at 2-10 to 2-20) and no action (Id. at 2-20 to 2-49) alternatives. The DEIS also stated that BLM had considered in detail three more alternatives: Partial Vista Pit Backfill (Id. at 2-49 to 2-51); Selective Handling of Overburden and Interburden (Id. at 2-51 to 2-52); and Overburden and Interburden Area Reclamation Area. Id. at 2-52.

On December 20, 1996, BLM filed the FEIS with the Environmental Protection Agency (EPA) addressing the comments received on the DEIS and setting out mandatory monitoring measures and measures to mitigate potential adverse impacts. The FEIS also described two alternatives not considered in the DEIS: The West Side alternative, which was a reconfiguration of the Overburden and Interburden alternative (FEIS at 2-54 to 2-56), and the East Side stormwater control system. Id. at 2-56. ^{3/}

The FEIS includes extensive discussion of the impact of the preferred alternative and the no action alternative on the affected environment including the impact on surface water, ground water, soils, vegetation, wildlife and fisheries resources, range resources, paleontological resources, cultural resources, air quality, and social and economic values. For each aspect of the affected environment, the FEIS analyzes in detail short- and long-term impacts (out to 100 years), including residual adverse effects. It also contains extensive discussion of mitigation and monitoring measures for each impact and a discussion of public participation and involvement; comment letters on the DEIS and BLM's responses are included in Appendix F.

On January 24, 1997, BLM approved the MPO. In its ROD, BLM found that the MPO, as amended to mitigate environmental effects, would not cause undue or unnecessary degradation of the public lands. (ROD at 1.) The ROD set forth amendatory stipulations and incorporated mitigation and monitoring requirements that were mandated in the FEIS. Id. at 3. The approved plan would allow SFPG to consolidate and expand existing operations onto private and Federal lands and construct new facilities at the Twin Creeks Mine.

[1] Before considering the merits of these appeals, we address the standing of the various appellants.

^{3/} The FEIS contains brief descriptions of alternatives considered but alternatives eliminated from detailed analysis were also included. (FEIS at 2-52 to 2-62.)

In order for a party to have standing to appeal from a BLM decision under 43 C.F.R. § 4.410(a), it must be both a party to the case and have a legally cognizable interest that is adversely impacted by that decision. Blue Mountains Biodiversity Project, 139 IBLA 258, 260 (1997); Laser, Inc., 136 IBLA 271, 273 (1996); Stanley Energy, Inc., 122 IBLA 118, 120 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). If either of these two requirements is not met, an appeal must be dismissed for lack of standing. See National Wildlife Federation v. BLM, 129 IBLA 124, 125 (1994); Mark S. Altman, 93 IBLA 265, 266 (1986). To be a "party to a case" a person must have actively participated in the decisionmaking process regarding the subject matter of the appeal. Sharon Long, 83 IBLA 304, 307 (1984).

GBMW meets both of these standards and therefore has standing to appeal.

However, SFPG notes that, although the Tribes were part of the National Historic Preservation Act (NHPA) consultation process (discussed below), they did not submit comments on the DEIS. (SFPG Answer II at 6.) BLM confirms that fact. (BLM Memorandum dated Mar. 12, 1997.) Thus, the Tribes lack standing to appeal. Western Shoshone National Council, 130 IBLA 69, 70 (1994); Timbisha Shoshone Tribe of Death Valley, 136 IBLA 35, 37 (1996). Their appeal, IBLA 97-253, is accordingly dismissed.

The issue here is not whether LASER is a "party to a case": It clearly participated in the decision-making process resulting in this decision, and its concerns were considered by BLM. (BLM Memorandum dated Mar. 10, 1997, at 1.) The issue is whether it is "adversely affected" by the decision under appeal. To be adversely affected, the interest allegedly affected by the decision under review must be a legally cognizable interest and the allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. National Wildlife Federation v. BLM, *supra* at 127; Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). The interest need not be an economic or property interest; however, a deep concern for a problem will not suffice. Robert M. Sayre, 131 IBLA 337 (1994). We have recognized that the use of the land involved or ownership of adjacent property may constitute a sufficient interest. Southern Utah Wilderness Alliance, 127 IBLA 325, 327 (1993); The Wilderness Society, 110 IBLA 67, 70 (1989). Nonetheless, the threat of injury and its effect on a party appellant must be more than hypothetical. Missouri Coalition for the Environment, 124 IBLA 211, 216 (1992); George Schultz, 94 IBLA 173, 178 (1986). Standing will only be recognized where the threat of injury is real and immediate. Laser, Inc., 136 IBLA at 274; Salmon River Concerned Citizens, 114 IBLA 344, 350 (1990).

LASER identifies itself in its notice of appeal as "a non-profit group that reviews many large industrial projects throughout the Western United States, including many mines." It contends that "its members and supporters will be exposed to human health harms" as a result of the project. (Request for Stay at 3.) It also avers that many members and supporters of LASER frequent the area in and near the mine for recreational activity, including hunting, so that they would be harmed because game would be driven off, causing a loss of hunting opportunities. *Id.* at 4.

We conclude that LASER has not identified specific facts showing that its members are adversely affected by BLM's decision here. LASER has not identified any specific members of its organization who will be harmed or explained how they will be exposed to toxic materials. Nor has LASER identified any individuals who actually use the particular lands in question for hunting or identified any other type of recreational activity its members enjoy on the land. LASER's assertions do not amount to a colorable allegation of real and immediate injury that would grant it standing to appeal this matter. See Laser, Inc., 136 IBLA at 274. Thus, we conclude that LASER's appeal must be dismissed for lack of standing.

We deny SFPG's motion to dismiss Getchell's appeal for lack of standing. Like LASER, Getchell became a "party to the case" by providing its views to BLM on the proposed plan. (Letter dated Aug. 15, 1996 (Ex. M to Getchell SOR).) Getchell commented on the DEIS. (FEIS at F-107, Letter 16.) The record shows that Getchell owns or controls land adjacent to the mine. The determination of the existence of an historic site and mitigation measures for the site may have adverse effects on its land, and Stipulation 9 involves the potential loss of the land by eminent domain. That is sufficient to show that it is adversely affected by BLM's decision. Therefore, we conclude that Getchell has standing.

[2] We now review the merits of the appeal. It is well established that the adequacy of an EIS must be judged by whether it constitutes a "detailed statement" that takes a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (1994); Colorado Environmental Coalition (CEC), 142 IBLA 49, 52 (1997), and cases cited. In general, an EIS must fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove mining operations, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. §§ 1500.1(b) and (c); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987).

In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed as to its extent:

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978). The critical question is

whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)). BLM is required to rigorously explore and objectively evaluate all reasonable alternatives to a proposed action that will accomplish its intended purpose, are technically and economically feasible, and yet have lesser (or no) impacts. 40 C.F.R. §§ 1501.2, 1502.1, and 1502.14; Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180 (9th Cir. 1990).

Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or a court (in the event of judicial review). See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227! 28 (1980), and cases cited. As we said in Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1990):

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

It is established that, in order to overcome BLM's decision to approve a plan of operations, an appellant bears the burden of demonstrating by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. See CEC, 142 IBLA at 52.

GBMW's arguments raise, both directly and indirectly, the question whether BLM's actions comply with section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), which provides: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the land." 43 U.S.C. § 1732(b) (1994). The surface management regulations define "unnecessary or undue degradation" to mean

surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. *
* * Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.

43 C.F.R. § 3809.0-5(k) (1999); see 43 C.F.R. § 3809.2-2 (1999); Island Mountain Protectors, 144 IBLA 168, 202 (1998); Charles S. Stoll, 137 IBLA

116, 125 (1996). Like NEPA, the provisions of section 302(b) of FLPMA require BLM to consider the nature and extent of surface disturbances resulting from a proposed operation and environmental impacts on resources and lands outside the area of operations. Kendall's Concerned Area Residents, 129 IBLA 130, 140-41 (1994); Nez Perce Tribal Executive Committee, 120 IBLA 34, 36 (1991); see Sierra Club v. Hodel, 848 F.2d 1068, 1091 (10th Cir. 1988). Accordingly, BLM's action here must be weighed against those provisions as well.

GBMW argues that the FEIS improperly ignored reasonable alternatives in violation of NEPA requirements at 40 C.F.R. § 1502.14, but specifies only one alternative that should have been considered but was not, *viz.*, the complete refilling of the pit with soil and rock. (GBMW SOR at 2.) It argues that alternative would have the benefit of decreasing the water deficit in the Humboldt River, Little Humboldt River, and Kelley Creek, as well as eliminating evaporation. GBMW acknowledges that section 2.5.1 (Alternatives Considered in Detail) of the FEIS addressed partial backfilling and a few alternative diking systems, but argues that analysis of complete backfilling would include analysis of the hydrological benefits of not creating most of the deficit in the local basin and not evaporating 1,200 acre-feet a year of water in perpetuity. *Id.* GBMW contends that the EIS' 4-page section, describing three alternatives but providing no substantial substantive or cost/benefit analysis, does not fulfill the NEPA requirements for alternative analysis.

SFPG responds that the complete or partial refilling of the South pit was in fact considered by BLM but eliminated from detailed analysis due to its monetary cost and environmental disadvantages. (SFPG Answer at 9-10.)

The record confirms that BLM considered other alternatives but eliminated them from detailed analysis because they were not found to be reasonable. It determined that there would be a number of adverse impacts from backfilling the South Pit including the cost, potential ground water outflow from the pit, delayed reclamation of storage areas from which material would be hauled to the pit, and continued air quality impacts during the period of back-filling. (FEIS at 2-56, 2-62, F-58, Response to Comments 11-2.) While GBMW asserts that complete or partial refilling of the pit would decrease the water deficit in the Humboldt River, Little Humboldt River, and Kelley Creek, no reduction in the baseflow of the Humboldt River in the hydrologic study area was predicted for either the no action alternative or proposed action alternative. *Id.* at 3-72, 3-98, F-58, Response to Comments 11-5.

It is established that BLM may eliminate an alternative with obvious disadvantages from detailed consideration. Sierra Club (on Judicial Remand), 80 IBLA 251, 265 (1984). As to the adequacy of BLM analysis of the alternatives described in section 2.5.1., we agree with SFPG that GBMW overlooks the discussion of the alternatives in Chapter 3 of the FEIS. Further, far from disregarding the alternatives, BLM actually selected all but one of those alternatives in its ROD. (SFPG Answer at 10.) We find no reason to fault BLM's treatment of this issue.

GBMW argues that the "FEIS contains numerous inconsistencies, improper and incorrect descriptions of impacts, and insufficient mitigation measures." It claims that "subsequent permit applications by Twin Creeks Mine demonstrate" that the mine "is not correctly described in the FEIS" in violation of 40 C.F.R. § 1502.15. (GBMW SOR at 2-3.) GBMW identifies differences between figures for the proposed action's disturbances for: air emissions of nitrogen dioxide (NO_x) and PM¹⁰ (fine particulates) (Id. at 3); use of groundwater reinfiltration (the plan) versus use of deep well injection (State application); the size of the area of surface disturbance shown in the plan (13,447 acres, as set out at FEIS Table 2-1) is greater than the size of the area described in a State application (8,916 acres) (Id. at 4); and discrepancies between the description in the FEIS "no action" alternative of acreage (totaling 723 acres) disturbed for open pits, exploration, ancillary facilities, bioremediation, limestone stockpiling, and well pads and the terms of current Nevada Department of Environmental Protection (NDEP) permits (where no acreage is authorized for those activities). Id. at 5-7. GBMW concludes that, "[a]pparently, there is far more surface disturbance proposed in the EIS than is currently permitted by the [NDEP] permit," adding that, since it "does not appear that the surface disturbance proposed in the EIS for either the 'no action [alternative]' or the 'preferred alternative' is currently permitted," a supplemental EIS should be prepared under 40 C.F.R. § 1502.9. Id. at 7-8. 4/

BLM responds that there are no grounds for preparing a supplemental EIS because GBMW has failed "to show or provide hard evidence that air emissions are significantly different than what was disclosed in the FEIS," so that the associated impacts would not be any different than what was set out in the FEIS. (BLM Answer in IBLA 97-251 (BLM Answer) at 4.) It argues that the differences between the project description in the FEIS and the State air quality permit modification request by Twin Creeks are not significant enough to warrant readdressing their impacts in a supplemental EIS, noting that air quality emissions are less than those previously cited for nitrogen dioxide and only 4 percent higher for particulate matter as stated in the FEIS (FEIS at 3-229, Table 3-42), which is below the ambient air quality standard. (BLM Answer at 3.) It also submits that the FEIS discussed the cumulative impacts, including ambient conditions, and that they are less than 25 percent of the standard. Id. at 12, citing FEIS sec. 3.9.2, at 3-230.

4/ That section provides:

"Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so. (3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists. (4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council."
40 C.F.R. § 1502.9(c).

SFPG explains that the air emissions rates contained in the NDEP application cited by GBMW are not, in fact, based on SFPG's estimates of emissions, but are based on an administrative assumption by NDEP that no air pollution control device would be used at the site. It appears the NDEP made this assumption as a penalty for SFPG's failure to quantify the emissions for its equipment. SFPG withdrew that application and filed a replacement that, as required by NDEP, quantified the total emissions. That amended application actually showed lower NO_x rates, and only 4% higher PM⁻¹⁰ emissions, than predicted in the FEIS. (SFPG Answer at 10; Response to Laser's Request for Stay at 4-6.)

As to whether use of injection wells was considered, SFPG points out the FEIS expressly noted:

Degradation of groundwater quality resulting from dissolution of naturally occurring salts in the vadose zone would be mitigated as required by the [NDEP] and may include implementing one or more of the following measures:

- injecting excess dewatering water directly into the saturation zone using injection wells.

(FEIS at 3-119, WR-8.) Thus, GBMW is simply in error in asserting that the FEIS and the NDEP application are at variance on this question. It is clear that BLM was aware of the possibility that SFPG might seek permission from NDEP to use injection wells, and that its decision to issue the ROD was made with knowledge of that fact. SFPG also points out that there are known environmental benefits to their use. (SFPG Response to Laser's Request for Stay at 8.)

It is hardly surprising that the acreage under NDEP application is less than that considered in the FEIS. Plainly, the FEIS considers lands that will come under NDEP application in the future. While GBMW has noted minor discrepancies between project descriptions in the FEIS and issued State permits, only the project as approved by BLM is at issue. BLM approved the plan of operations as described and reviewed in the FEIS, with additional stipulations and mitigation measures. There is nothing in the record before the Board to indicate that SFPG intends to operate the mine in any way but that approved by BLM. Additional state permits are required. If such permits require changes in the plan of operations, then BLM will determine whether the new circumstances requires preparation of a supplemental EIS. Stipulation 2 of the ROD specifies that SFPG must follow the operating plan as outlined and Stipulation 5 states that "changes to the operation from the current [Plan of Operations (POO)] will require that SFPG submit an amendment to the current POO or submit a new POO for review to ensure compliance with NEPA." (ROD at 3.)

BLM confirms that SFPG is only allowed to operate the mine as provided in the agency alternative and in accordance with the stipulations and mitigation measures defined in the ROD, and that any significant deviation requires an amendment to the Plan of Operations and, if warranted,

subsequent NEPA documentation. Thus, if a state permit requires a significant adjustment to operating procedures, including the acreage of surface disturbance, the plan will be amended. (BLM Answer at 2.) What is under review in the present appeal is the MPO as approved by BLM and the adequacy of BLM's consideration of the environmental effects of that MPO. We accept BLM's assurances that it will subject any amended plans to additional review, including preparation of additional environmental impact studies as required.

As it stands in the present matter, we agree with SFPG that these differences are de minimis and do not justify the preparation of a supplemental EIS. Based on the record before us, there has of yet been no "substantial change" here. See 40 C.F.R. § 1502.9(c)(i). Nor do these minor inconsistencies prove or even suggest that BLM's conclusion that the project would not result in unnecessary or undue degradation of Federal lands was incorrect.

GBMW attacks the sufficiency of the FEIS' conclusions, asserting that they are based on "erroneous modeling, hydrological analysis, assumptions, and risk assessment." (GBMW SOR at 9.) Specifically, GBMW challenges the groundwater model, which, it asserts, "is improperly calibrated and represents an inadequate analysis of the water resources in the subbasin around the project." Id. It claims that the modeling documentation shows "calibration well levels as much as 100 feet in variance with the observed." It also states that "simple analytical calculations suggest that the model provides estimates that are far from correct." Finally, it asserts that "the amount of recharge to make up the deficit to the pit and the drawdown in the alluvium is overestimated." Id. at 9-10.

SFPG reports that GBMW's argument is based on figures (GBMW SOR at 9 n.3) appearing in the draft groundwater monitoring report done in February 1996, which figures were revised "based on changes to the calibration." (SFPG Answer at 12.) SFPG points out that GBMW's "hydrological consultant" does "not purport to be an expert in groundwater modeling" and that its representatives, who prepared and oversaw the modeling, are experts. Id., citing FEIS at F-66, Response to Comment 11-24. Further, SFPG asserts that the consultant that developed and ran the groundwater model has performed similar analyses in Montana, and the code for the model was developed by a principal of the consulting firm while employed by the U.S. Geological Survey. Id.

BLM confirms that additional calibration was completed between the draft report cited by GBMW and the final report in May 1996. It "acknowledges that the final calibrated model does not necessarily match the observed hydraulic head (or water levels) in all observation wells." (BLM Answer at 5.) BLM points out that such variations are not surprising, given the approximately 640-square-mile area the model is designed to represent:

The majority of the hydrographs indicate that the water-level changes calculated by the model compare favorably with measured water-level changes. Of the 30 wells used for the transient

calibration, the measured water-levels in three bedrock wells (MO19-8, MO-10, and MO-12) were significantly different than those predicted by the model. At these three wells, the differences probably reflect localized heterogeneity in the bedrock complex that is not specified in the numerical model. These errors are neither surprising nor unusual, compared to other regional models in similar settings and considering the complex bedrock stratigraphy and structure located in the vicinity of the pit. Since these three wells represent localized conditions within the bedrock complex and only represent a fraction of the bedrock system, localized errors of calculated head in these isolated areas should not significantly influence the ground water predictions over the hydrological study area. Therefore, the BLM believes that the model is a reasonable tool for evaluating the potential mine-induced drawdown of the ground water levels within the hydrological study area.

(BLM Answer at 5.) BLM points out that apparent deviations here are random, with no apparent bias. It defends the use of the root mean square error method used here, rather than the sum of squares procedure advocated by GBMW in its SOR.

GBMW disagrees (GBMW SOR at 12) with the FEIS' prediction of no or little reduction in base flow to the Humboldt River (FEIS at 3-98). It points to three different factors in support of that disagreement:

1. The predicted decrease in Little Humboldt River flows[;]
2. Simple water balance of the Twin Creek subbasin, [suggesting] that something is incorrect in the presentation of the results and [that] the flow to the Humboldt River is not correctly analyzed[; and]
3. Dewatering and pit construction causes a drawdown cone and deficit which must be at least partially replenished as the lake is infilling.

(GBMW SOR at 12.) GBMW argues that BLM has not sufficiently studied the "cumulative impacts on the Humboldt River Basin of the entire deficit created by mining throughout the basin." Id. at 13-14.

SFPG points out that GBMW acknowledges that its calculation of impact on the Humboldt River (about 838 acre feet per year) "is not a substantial impact to the flow in the Humboldt River." (SFPG Answer at 13, citing GBMW SOR at 13.) Further, SFPG notes GBMW's acknowledgment that the surface water in the Little Humboldt River rarely reaches the Humboldt River because of agricultural diversions and infiltration in Paradise Valley (Id., citing FEIS at F-69 to F-70), as well as the fact that BLM took into account subsurface flow in determining the effect of mining operations on the Humboldt River. Id.

BLM supports SFPG's assertion that the Little Humboldt River is not a significant source of water for the Humboldt River (except possibly during large flood events), so that changes in flow to the former will not affect the latter. ^{5/} (BLM Answer at 8.) BLM notes that "no published studies or technical reports are cited by" GBMW to support its claim that there is subsurface contribution to flow in the Humboldt River, and that this claim is "purely speculative." *Id.* BLM notes that GBMW applied Darcy's Law to calculate groundwater flow reduction based on head decreases attributed to "other, unrelated mining activities and agricultural irrigation as well as dewatering at Twin Creeks," (*Id.*) rendering baseless its conclusions as to the effects of the mine operations there. BLM also points out that the question of whether there will be a groundwater "deficit" was provided in section 3.2.3 and in Table 3-20 of the FEIS. It condemns GBMW's assertions about cumulative effects on the Humboldt River Basin as "filled with unsubstantiated numbers, conflicting percentages, and claims that are simply false." Most significantly, BLM points out the absence of verification of GBMW's assertions that the cumulative deficit to the basin is 4 million acre feet, and that the project contributes either 16.5% or 25% of the entire deficit.

It is enough to note, as SFPG points out, that

[i]n analyzing cumulative impacts to water resources, the EIS identified a "hydrologic study area" of about 645 square miles. *See* [FEIS] at 3-34 (Figure 3-11) and 3-111. BLM found no hydrological effects outside of this area, and thus declined to expand the study area to include the whole Humboldt River basin. *Id.* at F-71 (Response to Comment 11-32).

(SFPG Answer at 14.) We agree that GBMW has not met its burden of showing error in the conclusions set out in the FEIS.

GBMW argues that permitting the establishment of the pit lake at the mine site violates Nevada regulations (Nevada Administrative Code (NAC) 445.24352) restricting impoundments that have the potential to degrade the ground waters of the state or to affect adversely the health of human, terrestrial, or avian life. (GBMW SOR at 14-17.) It notes that the lake "will almost certainly adversely affect the health of terrestrial and avian life," arguing that the "combination of arsenic and antimony in the pit lake is of sufficient magnitude that toxic responses are probable," and that "this lake unambiguously has the 'potential' to affect adversely the health of terrestrial and avian life." *Id.* at 14. GBMW faults BLM for relying on "indicator species" of animals in assessing the effects of the pit lake, specifically for measuring effects of sheep, when exposure to antimony in the pits will "probably cause bats * * * to live shorter

^{5/} BLM explains that changes in the groundwater would affect the surface flow of the Little Humboldt River only where it is a "gaining reach" or "gaining stream," and that the Little Humboldt River is in fact a "losing reach" from its confluence with the Humboldt River to at least 30 miles upstream. (BLM Answer at 7-8.)

lives," which, it argues, constitutes "an adverse impact on life" under the Nevada regulations. It also asserts that, "[i]n the absence of evidence to the contrary, the toxicity of [antimony and arsenic] should be considered as additive and the risk assessment should reflect that additive effect" (Id. at 15) and that "the concentration of antimony in the * * * pit lake exceeds the benchmark values established by the Nevada State Director, [BLM,] for exotoxicological risk assessments." GBMW also asserts that the FEIS should also have addressed mitigation to prevent leachate from entering the pit lake from exposed pit walls. (GBMW SOR at 23.)

BLM notes that the applicable law has, since 1992, been NAC 445A.429, and that the Twin Lakes Mine is under valid NDEP water pollution control permits. Although some impacts from pit lake water would occur, those impacts are presented and summarized in the FEIS in Appendices C and D, along with a pit lake geochemistry prediction at Table 3-18. (BLM Answer at 9-10.) BLM notes its disagreement that impacts will violate Nevada State laws, based on the facts that the site is currently in compliance and that monitoring/mitigation measures will ensure compliance in the future. See Id. at 10.

SFPG points out that GBMW's argument runs directly counter to the express findings in the EIS that, based on risk assessments, the pit lake will not adversely affect human, terrestrial, or avian life. (SFPG Answer at 32, citing FEIS at Appdx. C at C-11 and Appdx. D at D-5.) Further, the FEIS "contains an extensive analysis of pit lake water quality, including the contribution of pit rock." Id. at 24, citing FEIS at 3-67 to 3-71; 3-71; 3-78 to 3-83; and 3-99 to 3-105. It notes that "[w]ater quality in the pit lake is predicted to exceed drinking water standards for some constituents." Id., citing FEIS at 3-103. Beyond that, it notes that "a risk assessment for the lake identified 'no impacts to aquatic or terrestrial wildlife species from acute or chronic exposure to future pit lake water.'" Id. at 25, citing FEIS Appdx. C at C-11.

Moreover, SFPG argues that the pit lake complies with Nevada law. GBMW's criticism of BLM's methodology in concluding that there would be no adverse affects proceeds, SFPG asserts, "without showing any experience or expertise in risk assessments." (SFPG Answer at 32.) SFPG also responds to GBMW's assertion that the risk assessment should not have relied on a study involving sheep to evaluate impacts to bats. It notes that the FEIS explained that "because of the higher ingestion rate, slower metabolic rate, and slower clearance rate of heavier animals, a toxicity reference value protective of a larger animal, such as a ewe, is likely to be very protective of a smaller animal, such as a bat or bird." Id. at 32, citing FEIS at F-26, response 1-54. SFPG states that BLM, the U.S. Fish and Wildlife Service, NDEP, and the Nevada Division of Wildlife all actively participated in developing and approving the risk assessment analysis. Id. at 33-34, citing FEIS at F-80, Response to Comment 11-44. It asserts these are all expert regulatory agencies, whereas GBMW has failed to show any experience or expertise in risk assessment.

We agree that GBMW has failed to meet its burden of showing error in BLM's decision with regard to water quality. Under 43 C.F.R. § 3809.2-2

(1999), there must be compliance with Federal and State water quality laws. The site was apparently in compliance as of the date of BLM's decision and, owing to the monitoring measures imposed by BLM, any lack of compliance can be detected. We also find that BLM has met its burden under 40 C.F.R. § 1502.1 to discuss and consider alternatives to minimize the environmental impacts of the pit.

Discharge of excess mine water and impacts of water quality from the mine's effluent discharges (GBMW SOR at 16-17) were also adequately addressed in the FEIS (FEIS at 3-86 to 3-88 and 3-107 to 3-108), as were mitigation measures. Id. at 3-119, WR-8 and WR-9. Again, as BLM points out, jurisdiction over the discharge of effluent to Rabbit Creek lies with the NDEP. BLM met its burden of considering and discussing the environmental effects of such discharge, and also imposed monitoring and mitigation measures.

In addition to asserting that the FEIS contains inconsistencies concerning water quality (as considered above), GBMW also complains that the FEIS analysis of air quality impacts is incomplete and erroneous. (GBMW SOR at 17 and 18.) Specifically, it claims that paving of the main haul road should have been discussed in the EIS. Id. at 17. GBMW asserts that the EIS did not consider the potential impact from emission into the air of toxic and hazardous materials present in the ore and soils, such as arsenic, silica, and mercury, and that it contains no modeling of the potential airborne concentrations of mercury. Id. at 18. GBMW contends that impacts on air quality might be "significant" even if the air quality did not violate national air quality standards, as the national standard is under review. Id. at 17-18. GBMW states that air emission predictions in the EIS may be low, since the mine has (it asserts) violated its air quality permit "at least three times during 1995-6." Id. at 18.

We note that some of GBMW's objections here simply reiterated earlier comments about the DEIS, and that many of its concerns were fully addressed in the FEIS. As SFPG points out, BLM's responses in the FEIS (FEIS Responses to Comment 13-8 and 13-11) explain amply that there is no need to pave roads to control fugitive or arsenic dust. (SFPG Answer at 17.) SFPG also notes that the Twin Creeks PM₁₀ (particulate matter less than 10 microns in size) emissions are so far below current standards that no legitimate issue is presented, even if the standard were to be tightened. See Id. at 17. That is confirmed by BLM. (BLM Answer at 12.) Of course, BLM concedes that, if the standard were to change, SFPG would be required to submit a plan amendment. Id. at 11. GBMW has not proven that reports of air emissions are incorrect.

We find no basis in GBMW's assertions regarding air quality considerations to upset BLM's decision here.

GBMW attacks the adequacy of the discussion of reclamation in the FEIS and asserts that reasonable mitigation measures were not presented. It claims that final slope angles are unacceptable and riparian restoration is insufficient. (GBMW SOR at 19-21.) GBMW also challenges the decision

because it degrades or destroys considerable amounts of low and big sagebrush habitat, which, it submits, is a significant adverse impact. Additionally, it contends that there is a cumulative impact due to similar impacts from other large scale mines in northern Nevada. Id. at 19. GBMW challenges the decision to reseed the area with non-Native species, specifically crested wheatgrass.

Both SFPG and BLM point out errors in GBMW's presentation of acreage totals. (SFPG Answer at 18; BLM Answer at 12.) BLM convincingly replies that, in fact, much of the seed to be planted in reclaimed areas is Native species, and that its decision to use a small percentage of non-Native species in revegetation greatly improves the likelihood of success. In any event, the reclamation does include reintroduction of sagebrush (SFPG Answer at 18, citing FEIS at 2-44), and sagebrush habitat will likely restore itself in the area. (BLM Answer at 12-13.)

GBMW suggests only that slopes of 2.5 horizontal to 1 vertical for overburden storage areas "may be too steep and may produce excessive erosion." (GBMW SOR at 20.) It points to another mine where the Montana State Office, BLM, required 3.0 to 1 slopes. It asserts that a "less severe slope should have been discussed and presented as [a] practicable alternative project design," and that failure of reclamation should have been addressed, since reclamation is less likely on steeper slope. Id.

SFPG clarifies that the 2.5-1 slopes are intermediate slopes, with the final configuration to be determined based on factors such as testplot results and long-term stability. (FEIS at 2-45.) BLM confirms that "[f]ailure of 2.5 to 1 slopes to remain stable throughout the monitoring period will require the operator to readdress slope configuration and to correct problem areas." (BLM Answer at 13.) SFPG notes as well that those are intermediate slopes which are designed to collect and convey runoff from the slopes and reduce erosion, but that the overall slopes will be 3:1. (SFPG Answer at 20, citing FEIS at 2-15 Fig. 2-4, 2-16, and 2-45.) SFPG also reports that test plots have shown no substantial signs of erosion even on steeper 2:1 slopes. (Answer at 21, citing FEIS at 3-131.) Finally, SFPG points out that the adopted approach is consistent with the BLM Manual Handbook, H-3042-1 on solid mineral reclamation.

Based on the foregoing, we find no error in BLM's decision regarding allowable slopes for overburden storage areas.

GBMW argues that the FEIS improperly suggested that riparian lands be replaced at a ratio of 1 acre replaced for each acre lost, or a 1 to 1 replacement ratio, pointing to a pipeline project in northwest Nevada where that was done. (GBMW SOR at 20-21.) It also asserts that mitigation for the moving of Rabbit Creek should have been discussed.

BLM responds that GBMW is merely expressing an opinion as to the riparian replacement ratio and does not identify any violation of law or regulation. (BLM Answer at 13.) BLM also submits that Rabbit Creek is an ephemeral drainage, such that intermittent flow within its channel is not sufficient to create any surface water bodies, and that there was

no wetland-type riparian area there. (BLM Answer at 13-14.) SFPG adds that BLM discussed in the FEIS and implemented mitigation measures for riparian areas affected by mining operations. (SFPG Answer at 21, citing FEIS at 3-190 (TW-3 and TW-4).) It points out that BLM stated in the FEIS that "significant aquatic habitat or riparian vegetation does not presently occur along the ephemeral Rabbit Creek channel." Id. at 22, citing FEIS at F-65, Response to Comment 11-20.

We are persuaded that BLM did not err either by establishing a 1 to 1 replacement ratio for riparian lands or by its treatment of the Rabbit Creek drainage.

GBMW asserts that BLM is allowing heaps to exist which are likely to become long-term sources of contamination (including weak-acid dissociable cyanide solution, arsenic, selenium, fluoride, sulfate, mercury, and other heavy metals) to the public lands, and to degrade water resources. (GBMW SOR at 21.) It disagrees with BLM's statement that primary drinking water standards would be met, asserting that no heap of the size of the larger SFPG heap has been decommissioned in the United States and produced water which meets drinking water standards. GBMW contends BLM should at least require that a proven technology, such as reverse osmosis, be implemented as a fall-back position. Id. at 21. Noting that the regulations require an EIS to consider whether a project "threatens a violation of Federal, State or local law and requirements imposed for the protection of the environment" (40 C.F.R. § 1508.27(b)(10)), GBMW argues that the Twin Creeks mine adversely affects surface waters with its discharge of effluent and that the DEIS should have evaluated the potential impacts on water quality from the mine's effluent discharges, even if its permit limits are obeyed. Id. at 16.

We note that the FEIS considered and disclosed SFPG's reclamation of the heap leach pads. (FEIS at 2-45 to 2-46.) Those plans include steps to ensure that the pads will remain stable upon decommissioning. The cleansing of the pads by circulating and recirculating water through them upon decommissioning is expected to achieve, among other criteria, return water that will meet or exceed primary drinking water standards (Id. at 3-85 to 3-86), a possibility GBMW discounts as unlikely. If, as suggested by GBMW, recirculation does not meet that criterion, that would indicate that dangerous levels of toxic substances remain in the leach pads subject to being dissolved out by rainwater. In those circumstances, the FEIS contemplates preparation by NDEP of an as yet undefined alternative method (Id. at 3-86), which appears at best to be an uncertain solution.

However, it is significant here that the pads will be isolated from the surrounding environment upon decommissioning:

[C]losure of the heap leach facilities is not anticipated to have significant impact on water quality because the facilities are designed to operate at zero discharge by incorporating

diversion channels, soil liners, drainage collection sites and leak detection.

Id. at 3-86 and 3-107. ^{6/}

Although we share GBMW's concern that heaps not be abandoned in such a manner as to allow hazardous substances to migrate out of the pads, based on the representations in the record, this will not occur if the site is completed as planned. In other words, there will be no unnecessary or undue degradation in those circumstances, and we may not (as GBMW urges) presume that compliance will not occur. If it turns out that the plan criteria are not met and NDEP does have to develop an alternative plan, the environmental effects of that plan must be addressed at that time.

We have long held that the Department is entitled to rely on the reasoned analysis of its experts in matters within their realm of expertise. Navajo Refining Co., 149 IBLA 14, 20 (1999); West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); Kings Meadow Ranches, 126 IBLA 339, 342 (1993). An appellant must show by a preponderance of the evidence that BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, and not simply that a different interpretation is available and supported by the evidence. Animal Protection Institute of America, 118 IBLA 63, 76 (1991). GBMW makes no such showing here in any of the above-considered questions.

GBMW has not carried its burden to demonstrate, with objective proof, that BLM failed to consider or to adequately consider a substantial environmental problem of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. See CEC, 142 IBLA at 52. The fact that Appellant has a differing opinion about likely significant environmental impacts or prefers that BLM take another course of action does not establish that BLM violated the procedural requirements of NEPA. See San Juan Citizens Alliance, 129 IBLA 1, 14 (1994).

[3] GBMW charges that the EIS was developed primarily by consultants who answer directly to the mining proponent and are not responsive to the public needs and argues that these consultants are beholden to the mine for past, present, and future work. (GBMW SOR at 8-9.) It also maintains that BLM does not have the independent capacity to adequately review and evaluate the accuracy and performance of these consultants and that BLM admits that the mine consultants and SFPG developed the original responses to comments on the DEIS. Id. at 8, citing FEIS at F-62. GBMW also claims that BLM allows mine proponents to exclude consultants who may wish to bid on developing the EIS. GBMW does not contend that the consultants fabricated information, but that the consultant only has to select the outcome that meets the minimum standards. Thus, it submits that the EIS is highly suspect and should be rewritten from the beginning. Id. at 8.

^{6/} The FEIS also points out (less assuringly) that, if leakage did occur, naturally occurring conditions at the site would limit the migration of any hazardous materials. (FEIS at 3-86.)

SFPG explains that it and BLM entered into a memorandum of agreement (MOA) under which they agreed on their respective responsibilities regarding preparation of the EIS, including guidelines for selection of a consultant to prepare the EIS, including disclosure by prospective consultants of any legal interest in SFPG or previous contracts with SFPG or its corporate affiliates. (SFPG Answer at Ex. 2-2.) The MOA allowed SFPG to comment on which consultant should be selected, but gave BLM the authority not to accept those comments. Id. at Ex. 2-3.

SFPG gave BLM a list of 10 possible consultants for preparation of the EIS, evidently selected from a list of contractors provided by BLM's environmental coordinator. (SFPG Answer at Ex. 3.) BLM subsequently solicited bids from 18 consultants, including the 10 from the list SFPG submitted to BLM and 8 other consultants. Seven bids were received. BLM, after rating "the proposals for ten different criteria relating to the consultant's technical and logistical ability to prepare the EIS," selected Riverside Technologies, which had not been on the list of 10 consultants SFPG gave BLM. Id. at Ex. 4. SFPG did concur with the recommendation. Id. at Ex. 5. SFPG then, as provided by the MOA (Id. at Ex. 2-4) entered into a "payment facility agreement" with Riverside, which states that the "consultant specifically acknowledges that it is employed solely by the BLM and that it takes all instructions from the BLM with respect to the development and preparation of the EIS." Id. at Ex. 6-2. Like BLM, SFPG also points out that GBMW has failed to show that the consultant's work was biased or incorrect or that BLM failed to independently evaluate the consultant's work. Id. at 28.

We find nothing improper in the manner in which the EIS was prepared. BLM explains that, given its staffing, workload, and funding, the only way it can comply with the requirements of NEPA and its own regulations at 43 C.F.R. Subpart 3809 is to rely on outside consultants to prepare the EIS as well as provide the baseline and supporting documentation. BLM states that the NEPA handbook, H-1790-1, Appendix 7, sets forth the provisions for using third-party contractors and establishes that BLM is responsible for controlling the document at every step of the process. BLM asserts that it takes into account all comments and concerns when evaluating an EIS and the public concerns and that it is BLM that decides the issues. Moreover, it points out that GBMW has offered no proof or example of any ecotoxicological analysis being poorly analyzed in the EIS. (BLM Answer at 4.)

GBMW's challenge to the use of a third party consultant to prepare the DEIS and FEIS must be rejected. The use of third party consultants to prepare an EIS is permitted by BLM's NEPA Handbook H-1790-1, Appendix 7, as well as the regulations of the Council on Environmental Quality, 40 C.F.R. § 1506.5(c). Contrary to GBMW's assertion, SFPG did not eliminate any potential consultants from consideration.

While initial responses to comments on the DEIS may have been prepared by the consultant, BLM asserts that each "response was critically and independently reviewed by the technical specialists on the BLM interdisciplinary team." (FEIS at F-62, response 11-9.) There is nothing in the record to indicate any undue influence on the preparation of the DEIS or FEIS or any failure of BLM to independently evaluate the consultant's work,

nor has GBMW provided any proof or example of bias in the consultant's work. See Northern Alaska Environmental Center, 153 IBLA 253, 258 (2000).

[4] Getchell has appealed, but does not challenge the adequacy of the FEIS or seek to have the entire ROD set aside. It has made two distinct arguments regarding BLM's approval of the plan and its effect on Getchell's land. The first is a challenge to the language of Stipulation 9 of the ROD.

Getchell owns and operates the Getchell Mine west of the Twin Creeks Mine and, as part of its landholding, it "owns in fee simple all surface and subsurface properties and minerals in Sections 13 and 25[,] T. 39 N., R. 42 E." Getchell also states that it controls sec. 36, T. 39 N., R. 42 E. (Getchell SOR at 2.) It notes that, although SFPG does not have and never has had any ownership interest or right of access to enter Getchell's lands, the POO, as approved by BLM, places Overburden and Interburden Storage Areas M and F on its lands. Getchell acknowledges that BLM is aware of this fact, and that BLM has conditioned its approval of the POO on SFPG's securing title, but challenges BLM's imposition of Stipulation 9 governing the question of whether SFPG has secured title from Getchell. (Getchell SOR at 1-2; 15-16.)

Stipulation 9 provides:

SFPG will provide to the BLM Winnemucca District Office a copy of any document demonstrating the right to use lands in Sections 13, 25[,] and 36, in T. 39 N., R. 42 E. None of the proposed actions for these three sections are authorized until this document is received.

(ROD at 3, Stipulation 9.)

The record shows that, throughout the application review process, BLM anticipated that SFPG would acquire the disputed lands from Getchell, either by purchase or by eminent domain. BLM notes that the parties have been negotiating a transfer, but SFPG may be able to secure title even if it cannot reach agreement with Getchell. SFPG explains that Nevada law gives mining companies the right of eminent domain, citing NRS 37.010 (1995). (SFPG Answer II at 2; Ex. 1.) Stipulation 9, by its generality concerning the transfer, plainly recognizes that fact.

Getchell seeks to have the stipulation "revised to provide that SFPG's expansion of its operations onto Getchell's lands will be contingent upon SFPG obtaining Getchell's approval or an agreement with Getchell." (Getchell SOR at 1.) It asserts that, although the FEIS and various versions of the operating plan in 1994, 1995, and November 1996, required that SFPG obtain an agreement from Getchell to use its land, Stipulation 9 requires only a "document demonstrating the right" to use Getchell's lands. Id. at 1-2. It thus appears that Getchell seeks protection from an involuntary transfer of ownership to SFPG, presumably by State eminent domain proceedings.

BLM responds that it was not implying that it was authorizing any actions on private land and that Stipulation 9 was intended to protect Getchell's interest by requiring as a condition of SFPG's use of the area a binding agreement between Getchell and SFPG (or a "legally binding" decision) allowing the right to use the land. (BLM Answer in IBLA 97-252 (BLM Answer II) at 5.) BLM submits that it conducted the EIS project under the assumption that SFPG and Getchell were striving to resolve the issue of ownership. *Id.* at 6. BLM recognizes that "this stipulation covers not only a direct agreement with [Getchell], but could also include court orders and other judicial decisions," (*Id.* at 5), presumably including eminent domain orders.

SFPG responds that Stipulation 9, if read reasonably, is not vague and in fact requires SFPG to obtain a legal right to enter upon Getchell's land. (SFPG Answer II at 2.) ^{7/}

We find no merit in Getchell's argument that Stipulation 9 creates an ambiguous condition on which Getchell and the rest of the public had no opportunity to comment. It is true that the prior language required a land agreement with Getchell, whereas Stipulation 9 would simply permit submission of any document demonstrating the right to use the land, which perforce would include a court order. However, we agree with SFPG that it is not up to BLM to determine or limit how SFPG acquires the right to use the land. If State law permits the use of eminent domain to acquire the site, BLM cannot prevent that through the language of a stipulation. While the language of Stipulation 9 might differ from that in earlier documents, the end result for mining operations is the same. Of course, if any agreement with Getchell were to result in changes to the mining plan, SFPG would have to amend the plan.

^{7/} Somewhat ambiguously, SFPG states that the language of Stipulation 9 "does not include the types of documents that appear to concern Getchell." However, SFPG immediately clarifies that it believes Stipulation 9 would cover a court-order eminent domain taking.

SFPG stated that, to resolve any question about the scope of the language, it would stipulate that the stipulation covered (1) an agreement or deed whereby Getchell conveyed the lands or otherwise created the right to use those lands, or (2) a final, nonappealable court order giving SFPG (or any successors) the right to use those lands in connection with mining activities. (SFPG Answer II at 2.)

Getchell strenuously opposed such change, contending that it was an unexplained change which evidences *ex parte* communication between BLM and SFPG after completion of the public comment period. It also claimed that SFPG's clarification of the stipulation which mentions the possibility of condemnation is a new action on which it and the public had no opportunity to comment. (Getchell Reply at 4.) Thus, it contends, Stipulation 9, as interpreted by SFPG, is a significant and unexplained departure from the administrative record.

As we affirm Stipulation 9 as originally implemented, it is unnecessary to consider the effects of SFPG's proffered stipulation.

Getchell asserts that the EIS failed to analyze reasonably foreseeable environmental impacts resulting from delays in SFPG's acquiring the land or its failure to acquire the land. However, if SFPG fails to acquire the land it cannot proceed in accordance with the approved plan. If a delay in acquiring the right to use the land results in changes to the mining plan or an inability to proceed as approved then SFPG would be required by 43 C.F.R. § 3809.1-7(b) (1999) and stipulation 5 to submit a modified plan which BLM would review. That review would include a determination as to whether additional environmental assessment is required. Stipulation 9 merely requires that SFPG demonstrate that it has the legal right to use the land, and until then none of its proposed actions on that land are authorized.

[5] In a related argument, Getchell complains that BLM refused to consult with it with respect to the designation of potential cultural resources on Getchell's lands and measures to mitigate the adverse effects on such resources, as assertedly required by section 106 of NHPA, 16 U.S.C. §§ 470-470w-6 (1994). Getchell accordingly seeks to have the ROD set aside and remanded for revision to include a stipulation providing that expansion onto Getchell's land may occur only after BLM consultation with it. (Getchell SOR at 1, 8, 9-14.)

The record shows that, in November 1996, BLM entered into an MOA with the Nevada State Historic Preservation Office apparently designating a site (enumerated therein variously as CrNV-21-5543 and CrNV-22-5543, and described as "the Shoshone Mike Massacre Site") as "a property eligible to the National Register of Historic Places," and establishing protective stipulations. (Getchell SOR at Ex. 7.)^{8/} The MOA does not provide any signature line for Getchell to signify its acceptance thereof. *Id.* Although we are unable to locate a copy of the MOA that SFPG signed, that failure appears irrelevant, as Stipulations CR-3 and CR-4 of the ROD expressly require SFPG to comply with the stipulations contained in the MOA.

Getchell's argument centers on BLM's failure to consult with it, as landowner, concerning the designation of the so-called Shoshone Mike Massacre Site. It argues that, once BLM determined that the site constituted an historic property eligible for inclusion in the National Register and that the mining plan would affect the site, it was required to invite Getchell, as the owner of the affected lands, to participate as a consulting party in the section 106 process concerning the site. (Getchell SOR at 13-14.)

SFPG discounts Getchell's complaint that it was not consulted as part of the section 106 process. SFPG points out that the "section 106 clearance and mitigation measures deal with a scenario that exists only if Getchell is no longer the owner of the property and SFPG has the right to conduct activities in Sections 25 and 36." (SFPG Answer II at 3.) SFPG states that, although Getchell asserts that the mitigation measures do not reflect Getchell's views as owner of the land, the mitigation measures

^{8/} The record also shows that the MOA was accepted by the Advisory Council on Historic Preservation on Jan. 3, 1997.

only apply to SFPG activities and only if SFPG acquires the property from Getchell. Id. at 4. Therefore, SFPG maintains that it makes no sense to re-do the consultation that has resulted in a satisfactory compromise to protect the Shoshone Mike Site because the rationale for consulting the current owner does not apply. SFPG submits that BLM has not authorized any activities on the land so long as Getchell owns or controls it and that the EIS expressly recognizes that the Shoshone Mike site will be affected only if SFPG is allowed to conduct activities in secs. 25 or 36. Id. at 5, citing FEIS at 3-218 to 3-219.

BLM states that it was its understanding throughout the process that the plan could be implemented only if the land was owned by SFPG, so that there would be no impact if SFPG failed to gain ownership. (BLM Answer II at 5.) In support of this statement, BLM notes Getchell's letter from First Miss Gold, Inc. (Getchell's predecessor), to BLM informing BLM of discussions the company was having with SFPG in regard to the use or purchase of sec. 25. Id. at 2, citing Getchell SOR, Ex. F Att. 1. BLM points out the September 5, 1996, letter from the Shoshone-Bannock Tribes shows that the parties recognized that fact: "If negotiations between [SFPG] and [Getchell do] not conclude with [SFPG] acquiring the land, we would appreciate initiation of the negotiations with whoever controls the land and area around the Shoshone Mike Massacre/burial site." Id. at 2. However, BLM points out that, if negotiations failed between SFPG and Getchell, it would no longer be involved, since Getchell was not proposing any action and thus no activity would occur on the lands.

Section 106 of NHPA provides:

The head of any * * * department or independent 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 is eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation * * * a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f(1994). ^{9/} Regulation 36 C.F.R. § 800.1(b) states that the purposes of the section 106 process is "to accommodate historic

^{9/} We presume herein that, as Getchell asserts, approval of a mining plan qualifies as a "federal licensed undertaking" (Getchell SOR at 9); that 36 C.F.R. § 800.5(a) requires BLM to consider views of "interested persons" in determining whether the proposed undertaking will affect any historic properties in the affected area under 36 C.F.R. § 800.5(e)(1)(iii); that the owner of affected land must be invited to participate if it so requests; that 36 C.F.R. § 800.5(e)(6) encourages agencies to utilize the consultation process to the fullest extent possible; and that 36 C.F.R. § 800.5(e)(2) requires that, at a minimum, the agency official provide consulting parties with all documentation developed in the course of consultation. (Getchell SOR at 11.)

preservation concerns with the needs of Federal undertakings." The regulations identify consulting parties as the primary participants in the section 106 process. These consulting parties include agency officials with jurisdiction over the undertaking, the state historic preservation officer and the Advisory Council on Historic Preservation. 36 C.F.R. § 800.1(c). Consulting parties may also include "interested persons" who include "individuals that are concerned with the effects of an undertaking on historic properties" and Indian tribes. 36 C.F.R. § 800.1(c)(2). The regulations define "undertaking" to mean "any project, activity, or program that can result in changes in the character or use of historic properties." 36 C.F.R. § 800.2(o). The regulations state that "[i]nterested persons shall be invited to participate as consulting parties as follows when they so request: * * * (iii) Applicants for or holders of grants, permits, or licenses, and owners of affected lands." 36 C.F.R. § 800.5(e)(1).

In the circumstances presented herein, BLM adequately complied with those requirements. If Getchell retained ownership of the site, such that SFPG could not disturb the site, there would no "undertaking" affecting the property and, therefore, no "effect of the undertaking on any * * * site." Such effects would occur only if SFPG acquired the site, as contemplated. But, in that case, SFPG (not Getchell) would have the exclusive power to ameliorate the effects of its undertaking on the site. Plainly, the appropriate party for BLM to consult in those circumstances was SFPG. 10/

10/ Getchell argues that it had substantial interests in BLM's determinations concerning the site, "including (1) identification of boundaries for the site, (2) determination that the site is eligible for listing in the National Register, and (3) fashioning of mitigation measures for the site to offset expected mining operations" because those determinations might affect Getchell if it decided to develop the lands or adjoining lands to expand its own mining operations. (Getchell Reply at 5.) If Getchell decides to develop the site itself, it will presumably have to submit its own permit application, and BLM would then properly consult it as the owner of the site.

Getchell points out that it may elect to retain ownership of the site while allowing SFPG to use secs. 13, 25, and 36, and argues that, in that case, it would be faced with mitigation measures selected without its participation. (Getchell Reply at 5.) We are not troubled by that possibility, as BLM would still have negotiated with and bound the party (SFPG) having the power to regulate activities that would directly affect the site.

Getchell also claims that determinations made with respect to the Shoshone Mike Massacre Site will have a ripple effect on other lands it owns that SFPG does not seek to use. That allegation fails to show that there is any present harm presented here. Future adverse effects on other historic sites in the area may be addressed as they are identified.

To the extent that Getchell objects to the designation of the site itself, we would note that it is not a participant to the MOA that restricts use of the site. In the event that Getchell retains ownership of the site, it would appear incumbent on BLM to negotiate an MOA with Getchell.

The NHPA is essentially a procedural statute designed to ensure that cultural resources are identified and considered in the decision-making process. United States v. Jones, 106 IBLA 230, 251, 95 I.D. 314, 325 (1998). As SFPG points out, this is an unusual situation in that there will be no "undertaking" so long as Getchell owns or controls the land. ^{11/} The portion of the plan involving the use of the Shoshone Mike site is dependent upon SFPG's acquisition of the right to use the site. If SFPG is unable to acquire the right to use the site then it is not part of the plan and there is no undertaking "that can result in changes in the character or use of historic properties." 36 C.F.R. § 800.2(o). If SFPG acquires the right to use the site, then it is SFPG that must follow the mitigation measures. See ROD at 16-17 (Stipulations CR-2 and CR-3). If Getchell retains ownership or control of the land then the mitigation measures the SFPG agreed to do not apply. Thus, even though Getchell presently owns the land and might have been deemed an "interested person" it is SFPG that is the "interested person" within the meaning of the regulations and the purpose of the statute. BLM was not required to discuss mitigation measures with Getchell because if Getchell remains the landowner it is not affected by the measures. BLM complied with NHPA here.

Therefore, we conclude that the Acting District Manager's January 22, 1997, ROD approving SFPG's proposed Plan of Operations for the Twin Creeks Mine was appropriate. To the extent the various appellants have raised other arguments not specifically addressed herein, 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 C.F.R. § 4.1, the appeals of LASER and the Tribes are dismissed, and the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{11/} If, as discussed above, Getchell retains ownership and allows SFPG to mine, BLM will have negotiated with the right group. If Getchell either undertook mining on its own or authorized another party to mine on its behalf, effects of such action (including those reviewable under NHPA) would have to be considered anew.

