

SOUTHWEST RESOURCE COUNCIL, INC.
NATIONAL AND ARIZONA WILDLIFE FEDERATIONS

IBLA 83-355

Decided May 11, 1983

Appeals from a decision of the Arizona Strip District, Bureau of Land Management, approving a proposed plan of operation to explore for uranium in a wilderness study area, concluding that the action will be nonimpairing as a whole and will result in no significant impacts to the human environment. AS-010-82-29-P.

Affirmed.

1. Administrative Procedure: Administrative Review -- Appeals -- Federal Land Policy and Management Act of 1976: Wilderness

An appellant seeking reversal of a decision involving lands in a wilderness study area must show that the decision appealed was premised either on a clear error of law or a demonstrable error of fact.

2. Administrative Procedure: Administrative Review -- Appeals -- Environmental Policy Act -- Environmental Quality: Generally

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes that a hard look at environmental problems has been taken, relevant areas of environmental concern have been identified, and the determination is the reasonable result of the environmental analysis.

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

Where an administrative decision is made that a proposed action is not a major

Federal action which will significantly affect the quality of the human environment, so that no environmental impact statement need be filed, that decision will be affirmed on review if it appears to have been made by an authorized officer in good faith, based upon a proper and sufficient record compiled in accordance with established environmental analysis procedures, and is the reasonable result of the study of such record.

4. Endangered Species Act of 1973: Section 7: Consultation

If a Federal agency decides that its actions will not affect endangered or threatened species or their habitat, the agency is not required to consult the Fish and Wildlife Service unless requested by the Service. 50 CFR 402.04(a)(2).

APPEARANCES: Jane Whalen, president, Southwest Resource Council, Inc., for that appellant; Robert J. Golten, Esq., Boulder, Colorado, for National and Arizona Wildlife Federations, appellants; James K. Aronstein, Esq., Randy L. Parcel, Esq., Gerald W. Grandey, Esq., Brad L. Doores, Esq., Denver, Colorado, for Energy Fuels Nuclear, Inc.; William H. Swan, Esq., Department Counsel, Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Energy Fuels Nuclear, Inc. (EFN) submitted to the Bureau of Land Management (BLM) on June 3, 1982, a proposal to drill an 8-foot diameter, 1,000-foot deep shaft on the rim of Kanab Creek Canyon in secs. 17 and 20, T. 38 N., R. 3 W., Gila and Salt River meridian, Mohave County, Arizona, to explore and delineate a uranium deposit. The proposed project, AS-010-82-29P, also known as Kanab North Project (Drill Site #9), is situated within the Kanab Creek wilderness study area (WSA), AZ-010-31, in the Arizona Strip District, BLM. Although this WSA was identified in the District's management framework plan as unsuitable for wilderness designation, all activities within the Kanab Creek WSA must be consistent with the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), Department of the Interior (1979). See also, 44 FR 72013 (Dec. 12, 1979). The proposed exploration is projected to last 2 years, and 2,000 to 10,000 tons of ore is expected to be removed. A 6.3-acre project yard and rock disposal area will be located next to the shaft opening. At the base of the shaft, a ventilation adit is to be driven 800 feet to a portal located in a small side canyon of Kanab Canyon approximately 1,100 feet above the canyon bottom. An existing 3-mile access road to the project area will be maintained, but no powerline or road building is planned.

BLM prepared a draft environmental assessment for the project and accepted comments on it beginning in October 1982. On December 10, 1982, BLM issued the final environmental assessment (EA), AZ-010-83-322, for the project as proposed. Based on this EA, BLM issued a decision dated December 14, 1982, approving EFN's plan of operations as supplemented by mitigating measures or stipulations. BLM concluded that the proposed activities after reclamation would not impair the WSA as a whole and would result in no significant impacts to the human environment, negating the need for an environmental impact statement (EIS).

Southwest Resource Council, Inc. (SRC) filed a notice of appeal on January 12, 1983, and National and Arizona Wildlife Federations (NWF) filed a notice on January 26, 1983, challenging the December 14, 1982, decision on the grounds that (1) BLM fails to impose appropriate stipulations to prevent "undue and unnecessary" degradation as mandated under section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), and "impairment" of wilderness values as mandated under section 603(c), FLPMA; (2) proposed reclamation efforts are inadequate to restore the operation site to appropriate conditions; (3) the EA is inadequate because it does not consider the cumulative, or aggregate, effect of all uranium mining activities in the district; (4) the project may have a significant impact on the environment for which an EIS should be prepared, and (5) BLM ignores serious impacts to endangered and threatened species of animal and plant life. Appellants also allege inadequate treatment of bond assurances, radiation exposure, and alternative actions. SRC and NWF argue that, based on these reasons, BLM's decision was unsupported by the record and therefore arbitrary and capricious and an abuse of BLM's authority. Both appellants provided comments on the proposed activities subsequent to the draft EA, some of which were included in the final EA, and have claimed that they are "adversely affected" by the decision. Subsequent pleadings have been received from all parties involved. 1/

1/ In an order dated Feb. 28, 1983, this Board denied appellants' respective requests for an extension of time to file a statement of reasons and granted to and including Mar. 7, 1983, in which to file their statements of reasons for their appeals. Subsequent to filing their statements, EFN and BLM filed separate answers. On Apr. 1, 1983, SRC filed a reply to those answers. Both EFN and BLM have filed separate motions to strike SRC's reply on the basis that 43 CFR Part 4, Subparts B and F, which governs appeals to this Board, and the Feb. 28, 1983, order do not provide for such reply.

The entire purpose of the appellate system in this Department is to afford aggrieved parties a forum in which their grievances can be adjudicated at the Department level. Until the Board acts on behalf of the Secretary himself, there is no decision for the Department and the Board has the right to expect as complete a record as the parties can provide. In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6 (1983). We deny BLM and EFN's motions, noting the right of this Board to accept pleadings during the predecision period when the merits of appeal are being considered.

[1] The fundamental issue presented by these consolidated appeals is whether BLM has made a decision which is reasonable, supported by the record, and in accord with the statutes and regulations. Appellants allege that the decision is without support in law or fact and is an abuse of BLM's authority.

To render a decision such as has been made here, BLM must conduct investigative studies and analysis regarding environmental effects and related consequences. BLM's evaluations of the research data assembled are necessarily subjective and judgmental. Its efforts are guided by established procedures and criteria, and conducted by teams of personnel who are often specialists in their respective fields of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ. Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981). As we observed in Rosita Trujillo, 21 IBLA 289 (1975):

Appellant's contentions * * * represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of compelling reasons for modification or reversal.

Id. at 291. Thus, expressing disagreement with BLM's actions is not enough for an appellant to succeed on appeal. An appellant seeking reversal of a decision involving lands in a WSA must show that it was premised either on a clear error of law or a demonstrable error of fact. See John W. Black, 63 IBLA 165 (1982); Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981). However, where an appellant can specifically and convincingly show that there is sufficient reason to change the result, we must resolve the issue in its favor. See Save the Glades Committee, 54 IBLA 215 (1981). Appellants allege both error of law and error of fact.

Nonimpairment of WSA

[2] SRC and NWF allege that BLM erroneously decided that EFN's proposed plan of operations would be nonimpairing. 43 CFR Subpart 3802, regulating exploration and mining activities under wilderness consideration, permits mining operations conducted "in a manner that will not impair the suitability of an area for inclusion in the wilderness system." 43 CFR 3802.0-2. See 43 U.S.C. § 1782(c) (1976); IMP at 6-7. Impairment of suitability for inclusion in the wilderness system means:

[T]aking actions that cause impacts, that cannot be reclaimed to the point of being substantially unnoticed as a whole by the time the Secretary is scheduled to make a recommendation to the President on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System or have degraded

wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation.

43 CFR 3802.0-5(d). The IMP recognizes "nonimpairment criteria" as follows:

- (1) The activity must be temporary.
- (2) The impacts must, at a minimum, be capable of being reclaimed to a condition of being substantially unnoticeable in the WSA as a whole by the time the Secretary is scheduled to send his recommendations to the President.
- (3) The area's wilderness values must not have been degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation or nonsuitability for wilderness preservation.

IMP at 15. Appellants allege that the wilderness suitability of the Kanab Creek WSA will be impaired by the impacts of the proposed activities because unallowable major imprints which are substantially noticeable will be present in 1987 when the Secretary is scheduled to make his recommendation concerning the suitability of this WSA as wilderness. Intensive inventory and review of wilderness study lands will cease in 1991. The issue over which the parties involved disagree is whether the proposed activities can be reclaimed "to the point of being substantially unnoticed as a whole" within the scheduled time limitations.

The IMP clarifies "substantially unnoticeable" as referring to "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering, or biological change" (IMP, Appendix F at 32).

The EA estimated that the projected and existing cumulative disturbances in the Kanab Creek WSA would amount to 19.5 acres of uranium exploration activities and 60.8 acres of other intrusions, or a combined .205 percent of the land. The EA noted that, save the extracted uranium ore, no resources would be irreversibly or irretrievably committed (EA at 24). Thus, reclamation or rehabilitation of the area affected becomes the major issue in a discussion of nonimpairment. BLM concluded in its decision that after rehabilitation, the area disturbed by EFN's operations, 9.3 acres or .023 percent of the WSA, would not be substantially noticeable to the average visitor. However, the EA stated that the disturbances under the proposed plan would be substantially noticeable in the unit as a whole in 1987, and, therefore, the plan fails to meet the nonimpairment standard (EA at 19-21). E.g., "[a]fter rehabilitation efforts in 1987 the proposed operations site would still be noticeable from two areas along Gunsight Road and from about

3,400 acres [or about 18 percent] within the WSA" (EA at 19). BLM accounts for this previous finding of substantial impact through its explanation that the original EA study was based on EFN's plan before its recommended rehabilitation, or mitigation, measures were recommended for acceptance as part of the proposed operations. BLM added to the EA study these statements found in the included public comments and responses:

10. * * * The proposed action and the cumulative impacts on the WSA led the interdisciplinary team to conclude that the proposal as described would not meet the non-impairment and substantially unnoticeable standards.

* * * * *

24. The EA's function is to identify mitigating measures that could reduce or eliminate negative impacts. In this case the interdisciplinary team feels intensive reclamation could allow the operation to meet the substantially unnoticeable and non-impairment standards. The reclamation would include placement of topsoil, plantings, and supplementary irrigation.

* * * * *

29. The EA process requires reading to the end of the document. By doing this the reader can determine the result of possible mitigating measures in the residual impacts section. In this case, if the possible mitigating measures were imposed the action would meet the nonimpairment and substantially unnoticeable standards. Required mitigation and resulting stipulations will be specified in a Record of Decision should the proposal be approved.

(EA, Written Comments). Thus, BLM's position is that the project as originally proposed would not meet the pertinent standards, but through adding mitigation measures as outlined in the EA as stipulations in the decision these standards would be met.

Appellants assert that the stipulations contained in the decision are not significantly different from the reclamation methods considered in the EA which concluded that the visual impacts will be unacceptable for 1987 and 1991. Comparison of the rehabilitation proposed by EFN (EA at 4) and the mitigation measures identified in the EA study team (EA at 22-23) with the stipulations in the decision (Decision at 3-6) reveal that the latter encompasses the intentions of the former two.

The visual resource management (VRM) contrast rating for the project site is presently class II, the appropriate level for a WSA, but will be downgraded to a class V during the projected activities (EA at 19). Although the reclaimed area might still be visible at the project site in 1987, BLM concluded that class II requirements should be met and the disturbances will be restored so that they will not be noticeable to the average visitor as being manmade or man-caused.

Appellant SRC discounts BLM's conclusion on the basis of a lack of study documents, arguing that the fatal gap in BLM's approach in its treatment of access roads, soil color difference, visible degradation, rehabilitation potential, etc., is that there is no evidence or analysis to support the conclusions reached by BLM. SRC charges that nowhere does BLM document its conclusion with an analysis of the likelihood of failure, assumptions as to conditions, or time factors. It asserts that in order for rehabilitation measures to be considered in the decision process, it must be documented that either enough is known about the rehabilitation potential of a given situation to reasonably predict its success, or that natural rehabilitation has been established to the point where rehabilitation is certain. The regulations under National Environmental Policy Act (NEPA) pertinent to an environmental study read:

Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork -- even excellent paperwork -- but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

40 CFR 1500.1(c). The EA and the Visual Contrast Rating Worksheet demonstrate that BLM considered the various factors, disturbances, and reclamation measures in its analysis.

The criteria for review of a BLM decision declaring the activities in question as nonimpairing and having no significant impact on the environment are: (1) Did BLM take a hard look at the problem, as opposed to setting forth bald conclusions?; (2) Did BLM identify the relevant areas of environmental concern?; and (3) Does BLM make a convincing case that environmental impact is insignificant? Citizens for Glenwood Canyon, 64 IBLA 346 (1982); Sierra Club, 57 IBLA 79 (1981). See Maryland Capitol Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029, 1040 (D.C. Cir. 1973). If the criteria are satisfied, the decision will be affirmed on appeal.

BLM prepared the EA in which a team of specialists considered EFN's proposed plan. As noted, the proposal initially was rejected as unacceptable under the applicable standards. However, BLM accepted the plan as modified by mitigation measures which the EA contemplated as compensating for potential adverse impacts on the environment. The record reflects that BLM intensively reviewed the proposed project and identified the environmental concerns posed by EFN's plans. As discussed, BLM convincingly responds to the relevant areas of concern while concluding that the proposed activities would be nonimpairing.

Reclamation Process

As evident, rehabilitation is a key consideration in BLM's analytical process. While appellants claim that reclamation measures may not be considered in determining the impact of proposed activities, substantial portions of the IMP and the Departmental regulations regarding this issue are devoted

to rehabilitation analysis. As recognized above, impairment of suitability means actions causing impacts "that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make a recommendation." (Emphasis added.) 43 CFR 3802.0-5(d). Information required by the IMP in the EA preparation process includes: "c. Analysis of reclamation * * * If a reclamation plan is not available or is inadequate, assess what measures would be needed to return the disturbed areas to the required reclamation levels" (EA at 15-16). Thus, mitigation measures, or rehabilitation, may be considered in environmental discussions concerning the significance of projected disturbances in a WSA. See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

Appellants allege that rehabilitation efforts are inadequate to meet the requisite standards, and that the effect of the proposed activities will be noticeable in 1987 from significant areas within the WSA. They also charge that proposed reclamation must be at least reasonably certain, based on evaluation of all factors affecting the probability of success, before the reclamation plan may be accepted. Appellants assert that a detailed reclamation plan incorporating methods which have been scientifically tested under similar conditions is a prerequisite. BLM, in its decision, allows EFN until May 15, 1985, to comply with reclamation stipulations and rehabilitation must be achieved by 1987. The mitigation measures imposed were a result of BLM experience with rehabilitation (EA at 15). The EA cites the "Shelly Sinkhole Study" as supportive of reclamation achievements in the area (EA at 15-16). Appellants charge that BLM has provided no documentation supporting its conclusion that reclamation can be achieved in 1-1/2 years and claim that the study relied upon is indicative of the probability of failure. It is argued that BLM improperly failed to consider major limiting factors other than water. SRC also provides the conclusions of its expert consultant who opines that the proposed reclamation measures are inadequate to assure that the nonimpairment standard will be achieved.

In establishing a rehabilitation program, BLM must evaluate the probability for success of the proposed reclamation measures and find that they will be adequate based on conservative assumptions (IMP at 15). The IMP recognizes as rehabilitative the types of reclamation measures imposed in this case by BLM, viz., recontouring of cuts and fills to blend with the natural topography and the replacement of plant cover at least to a point where natural succession is occurring (IMP at 15). Regarding the proposed plan prior to adoption of the mitigation measures, the EA noted that: "The proposed rehabilitation methods and time limit (two growing seasons) are not sufficient to achieve reclamation so the area is 'substantially unnoticeable in the unit as a whole by 1987' using a 'conservative time table' as mentioned in the IMP" (EA, Written Comments, Comment 27). One of BLM's major concerns was recorded as being based on the contrast presented by the soil color and texture (see EA, Written Comments, Comment 31; Visual Contrast Rating Worksheets). These problems were addressed in the stipulations as thus: "c. 1. * * * f. upon completion: gravel or borrow material will be removed or covered with topsoil if color contrast with adjacent soil is significant. * * * 3. After project completion, recontour disturbed areas

to naturally blend into surrounding contours" (Decision at 3-4). A crucial element in BLM's approach to successful rehabilitation is plant revegetation. The EA states that "[b]y restoring topsoil and removing mine spoils, the native shrubs, forbs, and grasses would slowly return over time" (EA at 15). That study relied upon in the EA shows that natural succession will occur by 1987. To further aid revegetation, reseeding and replanting of important plant species will be done (Decision at 5, Stipulation 8). Irrigation and protective measures are also to be implemented (Decision at 5, Stipulations 9, 10). Therefore, the essential elements to rehabilitation appear relatively certain based on the discussion and information available in the EA and the decision.

Alternative Actions

Appellants complain that the possible alternatives to the proposed action were not fully discussed and analyzed in the EA and, thereby, BLM had no basis upon which to reject those alternatives, such as "the no action" option. NEPA mandates that alternatives be explored. 42 U.S.C. § 4332(c)(2) (1976). However, an environmental study need not analyze every remote alternative, only reasonable alternatives need be considered. NRDC v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972). All that is required in an environmental discussion is a reference which identifies options and permits a reasoned choice. Id. at 836.

It is claimed that BLM's treatment of the no action option was inadequate. The no action alternative might have been discussed in more detail, but such failure is not a basis for reversal of BLM's decision. An objective of this EA was to identify an acceptable approach by which the projected activities would not impair the area's suitability as a WSA. The no action option was identified and discussed. Failure to identify an acceptable approach to exploration activities would compel acceptance of the no action alternative. However, the identification of an acceptable approach would overrule that alternative. Therefore, implicit in the objective of the assessment was a no action analysis.

SRC also charges that the EA is inadequate because it fails to consider specific modifications to various aspects of the project, some of which it identifies. Alternatives should be geared to the entire project covered by the environment study and not necessarily to individual components within the project unless reason would dictate otherwise. It is certainly not reasonable to expect an agency to conceive of every alternative to every component in a project. Inman Park Restoration, Inc. v. UMTA, 414 F. Supp. 99, 115 (D. Ga. 1975), aff'd 576 F.2d 573 (5th Cir. 1978).

Cumulative Impacts

Appellants assert that BLM failed to assess the cumulative impacts of this proposed project. However, throughout the EA the cumulative impacts are discussed and analyzed. Furthermore, suggesting the need for inclusion of the area affected by this project in a total for disturbed lands in the WSA assumes that the project will not be rehabilitated at the time the Secretary makes his recommendation regarding the WSA's wilderness attributes.

Environmental Impact Statement (EIS)

[3] Appellants assert that the EA is inadequate to support either the decision to approve the project or the finding of no significant impact because it fails to address all of the relevant factors that a detailed EIS would, and they argue that an EIS is necessary. SRC claims that the unknown risks and lack of information posed by a decision based on modified plans are compelling evidence of the necessity for an EIS under 40 CFR 1508.27(b)(5). NWF argues that the "gross" impacts of the project prior to rehabilitation determine whether an EIS is required, and that the "gross" impacts projected here are sufficient to require an EIS.

NEPA requires preparation of a EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1976). BLM is obligated under NEPA to develop a reviewable record reflecting consideration of all relevant factors. The EA prepared by BLM serves as a record of environmental discussion precedent to the threshold determination as to whether a full environmental impact statement should be prepared. Dolores M. Lisman, 67 IBLA 72 (1982); Southern California Motorcycle Club, Inc., 42 IBLA 164 (1979). An EA prepared by BLM should contain objective analysis which will support its environmental impact conclusions. See 516 DM 3.4D, found at 45 FR 27541, 27546 (Apr. 23, 1980).

Appellants assert that the proposed exploration is sufficient to require preparation of an EIS because the activities will constrain the Secretary's recommendation concerning the WSA by impairment of its wilderness value. However, an administrative decision that a proposed action is not a major Federal action that will significantly affect the quality of the human environment, so that an EIS need not be filed, will be affirmed where it appears that the decision was made by a proper authority, in good faith, based upon a proper and sufficient record compiled in accordance with established environmental analysis procedures, and is the reasonable result of such record. Sierra Club, supra; Citizens Committee to Save Our Public Lands, 29 IBLA 48 (1977); aff'd, C.C.T.S.O.P.L. v. Andrus, Civ. No. C-77-6335c(D.N.D. Calif., May 20, 1977). As discussed above, BLM has met these criteria in its preparation of the EA and the decision. Appellants have failed to show that the EA lacks sufficient detail to allow BLM to make an informed and reasoned decision under the circumstances. Furthermore, the EA is to consider "the area in its expected condition at the time the Secretary sends his recommendations to the President" (IMP at 16). (Emphasis added.) Contrary to SRC's argument that the proposed activities are highly uncertain and present unique and unknown risks, we are persuaded by a study of the record that the EA and the decision represent a reasoned conclusion made in good faith.

NEPA's EIS requirement is governed by the rule of reason, and an EIS must be prepared only when significant environmental impacts will affect the quality of the human environment as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required. Cabinet Mountains Wilderness v. Peterson, supra at 682.

NWF argues that BLM is obligated to consider cumulative environmental impacts not only in the WSA but also in the entire Arizona Strip District, suggesting a regional analysis on the scope of a regional EIS, before the proposed plan can be approved. BLM is not required to assess the significance of an impact on a wide scale area when it prepares an analysis of a specific project. The scope of the environmental study is to cover only those concerns that will be reasonably affected by the proposed actions. In the case of a site-specific action, significance of the action will usually depend on the effects in the locale rather than in the world as a whole. 40 CFR 1508.27(a). Failure to conduct a regional EIS will not invalidate the approval of a specific project determined to have no significant impacts on the human environment. Kleppe v. Sierra Club, 427 U.S. 390, 407 (1976); Peshlakai v. Duncan, 476 F. Supp. 1247, 1260 (D.D.C. 1979).

Endangered Species

SRC alleges that BLM ignores serious repercussions to recognized endangered and threatened species in violation of the Endangered Species Act, 16 U.S.C. § 1536 (1976), and the Bald Eagle Protection Act, 16 U.S.C. § 668 (1976), and claims that BLM has failed to provide specific information regarding protection for threatened or endangered plants and animals within the vicinity surrounding the project site. Particular species noted by appellants include peregrine falcon, bald eagle, golden eagle, and Pediocactus sileri.

[4] The Endangered Species Act requires that Federal agencies ensure that actions taken by them are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of habitat of such species which is determined * * * to be critical." 16 U.S.C. § 1536(a)(2) (Supp. V 1981). Although SRC asserts that BLM has a mandatory duty to consult with the Fish and Wildlife Service (FWS) precedent to authorizing EFN's plan, neither the Act nor the regulation requires consultation, unless requested by FWS, if BLM determines that its activities will not affect listed species or their habitat. 16 U.S.C. § 1536(a)(3) (Supp. V 1981); 50 CFR 402.04(a)(2).

Appellant particularly refers to the endangered peregrine falcon and bald eagle which migrate through the general vicinity during winter. However, no sightings have been reported in the WSA and no winter roost areas have been identified (EA at 7). The record on appeal documents that peregrine falcons have been sighted over 18 miles away. No bald eagle sightings have been documented. Reference to sightings, in the Cedar Knoll area about 15 miles from the project, was made in the EA (EA at 17). However, neither the species observed nor the frequency of sightings was specified. SRC claims that these sightings are consequential, citing the American Peregrine Falcon Recovery Plan, U.S.F.W.S. (1977). The recovery plan is based upon the existence of active eyeries and is projected upon an area within approximately 15 miles of such eyeries. If active eyeries do exist in the Cedar Knoll area, the proposed activities will be on the perimeter of potential habitat for the nesting peregrines. However, as noted in the EA, no peregrine falcons have been identified within the vicinity of the activities in question.

The endangered cactus identified and discussed does not exist on the project site, but is miles away and is not threatened by the proposed activities. The only real species of concern in the immediate area of the project is the golden eagle, a protected species. Golden eagles have been identified within the cliff habitat of Kanab Creek Canyon (EA at 7). Three nests were found 6 to 10 miles north of the project area in the 1979-1980 serial study. To avoid any impacts that may affect the golden eagle, the decision stipulates:

11. Ensure raptor habitat within the immediate drill site area (1.0 miles up and down the canyon) is surveyed for nesting golden eagles and threatened and endangered species by March 15, 1983. If nests are discovered within one-half mile of the project area BLM will require special mitigating measures to prevent nest abandonment.

(Decision at 5).

Appellants do not positively show that this stipulation is inadequate to ensure that the proposed activities will not harm or take away the habitat of endangered or threatened species. Although BLM's deliberative process may not always recognizably appear on record in an EA, the record here is adequate in the absence of contravailing evidence to justify the determination that endangered and threatened species may not be affected by the proposed project.

Bond

SRC argues that the determination of the amount of bond necessary to assure reclamation was not based on demonstrable evidence in which the deciding officer complied with this duty to consider "the estimated cost of stabilizing and reclaiming all areas disturbed by the operation" and that the present \$50,000 bond is insufficient to assure compliance with reclamation requirements. See 43 CFR 3802.2(a)(c). Currently, BLM holds a \$9,000 bond from EFN for certain exploration activities, which includes the Kanab North project, and another bond for \$50,000 for district-wide exploration activities.

The decision not to require further bonding is discretionary. An authorized officer may determine not to require a bond where mining operations would cause nominal environmental damage or the operator has an excellent past record for reclamation. 43 CFR 3802.2(a). The record reflects that EFN was considered to have evidenced the latter.

Radiation

SRC alleges that BLM did not adequately address the potential for radiation exposure and disregarded monitoring. However, to the contrary, the EA and the decision delineated monitoring requirements and addressed specific measures to eliminate significant exposure (EA at 18; Decision at 5).

It is the duty of this Board on review to ensure that, in preparing an EA, BLM has developed a reviewable record reflecting consideration of all relevant factors. Dolores M. Lisman, supra. Our discussion does not include every comment made by appellants. A review of the record, however, does convince us that BLM has examined, identified, and carefully considered the potential environmental disturbances presented by the proposed Kanab North project. The criteria for a positive review of a BLM decision declaring activities as nonimpairing and having no significant impact have been satisfied. Having considered appellants' arguments, we find that the decision has not been shown to be arbitrary and capricious. Appellants' statements of general conclusions and factual assertions are not supported by any detailed information which distinctly prove error in the decision. At best, they merely isolate areas of disagreement and reiterate factors which have been previously considered. As noted, for an appellant to succeed on appeal, it is not enough to express disagreement with BLM's actions. An appellant seeking reversal of a decision must show that the decision appealed from was premised either on a clear error of law or a demonstrable error of fact. Appellants have failed to meet this burden with regard to the issues presented by this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:
R. W. Mullen
Administrative Judge

Gail M. Frazier
Administrative Judge

