

GLACIER-TWO MEDICINE ALLIANCE ET AL.

IBLA 85-445

Decided August 9, 1985

Appeals from a decision of the Great Falls, Montana, Area Manager, Bureau of Land Management, approving an application for permit to drill and finding no significant environmental impact.

Dismissed in part; set aside and remanded.

1. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is reason to believe the proposed action might pose a threat to a threatened or endangered species.

2. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

3. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

4. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

5. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

6. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action

must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA will be completed prior to a decision to take such action.

7. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

8. Endangered Species Act of 1973: Generally -- Endangered Species Act of 1973: Section 7: Generally -- Endangered Species Act of 1973: Critical Habitat -- Endangered Species Act of 1973: Mitigation -- Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

9. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Oil and Gas Leases: Drilling

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered

species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

APPEARANCES: Donald R. Marble, Esq., Chester, Montana, for the Glacier-Two Medicine Alliance, Inc.; Philip E. Roy, Esq., Browning, Montana, for the Blackfeet Tribe of the Blackfeet Indian Nation; Rachel Glazer, Missoula, Montana, for the Rocky Mountain Front Advisory Council; Lance Olsen, Missoula, Montana, president, the Great Bear Foundation; Thomas M. France, Esq., Missoula, Montana, for the National Wildlife Federation; Elaine Snyder, Helena, Montana, vice-president, Montana Wilderness Association; Steven Kelly, Swan Lake, Montana, for Flathead Defenders of Wilderness; Keith J. Hammer, Kalispell, Montana, pro se; Susan Reevis, Browning, Montana, pro se; Bill Stewart, East Glacier Park, Montana, pro se; Zane and Gloria Zell, Shelby, Montana, pro sese; Clyde O. Martz, Esq., and Charles L. Kaiser, Esq., Denver, Colorado, for American Petrofina of Texas, intervenor; Roger W. Thomas, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On January 31, 1985, the Great Falls, Montana, Area Manager, Bureau of Land Management (BLM), issued a decision approving an application for permit to drill (APD) and a finding of no significant environmental impact that would require the preparation of an environmental impact statement (EIS) pursuant to section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1982). These findings were based on an environmental assessment (EA) prepared by the U.S. Forest Service (FS), the surface management agency. The APD had been filed by American Petrofina Company of Texas (Petrofina) in contemplation of drilling an exploratory oil and gas well on Federal lands subject to oil and gas lease M-53323, located in the Lewis and Clark National Forest, Glacier County, Montana. The BLM decision designated the operating season as commencing July 1, 1985.

A number of organizations and individuals filed notices of appeal from BLM's decision. 1/ By order dated April 10, 1985, the Board suspended the

1/ Appellants include the Glacier-Two Medicine Alliance, Inc., the Blackfeet Tribe of the Blackfeet Indian Nation, the Rocky Mountain Front Advisory Council, the Great Bear Foundation, the National Wildlife Federation, the Flathead Defenders of Wilderness, the Montana Wilderness Association, Keith J. Hammer, Susan Reevis, Bill Stewart, and Zane and Gloria Zell. BLM and Petrofina, an intervenor, have filed answers.

APD and granted expedited consideration. Following the order certain appellants withdrew. ^{2/}

Background

Federal oil and gas lease M-53323 was issued on May 24, 1982, and subsequently assigned to Petrofina. On November 18, 1983, Petrofina filed its APD. The proposal contemplates drilling a 13,510-foot exploratory well to test and evaluate oil and gas potential on a portion of the lease situated on a geologic structure known as the Overthrust Belt.

The area affected by the proposal is located in the northern portion of the Rocky Mountain Division, Lewis and Clark National Forest, generally in the northern Rocky Mountain Front adjacent to Glacier National Park on the north and the Great Bear Wilderness Area on the west. On the east the area adjoins the Blackfeet Indian Reservation. The proposed drillsite is approximately 2 miles southeast of U.S. Highway 2 and 9 miles southwest of East Glacier, Montana. The area in the general vicinity of the proposal is designated by FS as a roaded area, has been subject to multiple use management, ^{3/} and has been designated as not suitable for wilderness study. The area was designated as suitable for oil and gas development in the Forest Service Plan (Forest Service Plan at 4-4).

Following submission of the APD, an EA of the impact of the proposed drilling operation was undertaken. Except as mentioned below, the EA did not include the assessment of the impact of possible production activities or future drilling activities, as no production activities were proposed ^{4/} and no future drilling activities were included due to a lack of data regarding the existence of an oil or gas reservoir (EA at 6).

An interdisciplinary team of resource specialists from FS, BLM, and the Montana Department of Fish, Wildlife and Parks (MDFWP) was organized to undertake the environmental analysis. A systematic, interdisciplinary method of analysis was used to identify issues and concerns, analyze the affected area, formulate alternatives, estimate environmental effects, evaluate and compare the alternatives considered, and recommend a preferred course of action. FS acted as the lead agency.

^{2/} A copy of an order dated Apr. 10, 1985, was served upon appellant Susan Reefis at her address of record but was returned unclaimed. Furthermore, she filed no statement of reasons and we dismiss her appeal for that reason. See 43 CFR 4.402.

The Great Bear Foundation also filed no statement of reasons with the Board. The record contains a copy of a letter from Lance Olsen, the foundation's president, to the United States Fish and Wildlife Service (FWS) stating the foundation would not pursue its option to appeal BLM's decision. Accordingly, the appeal of the Great Bear Foundation is also dismissed.

^{3/} The area is within a grazing allotment and is used for motorized recreation.

^{4/} The EA specifically provides that, prior to any production activities, an additional EA, and, if necessary, an EIS must be prepared (EA at 6.)

The APD submitted by Petrofina contained three proposed access routes. The team identified and examined five land routes. In addition, a no-action alternative and access by helicopter were considered.

The interdisciplinary team first identified significant issues and sought public comment. Initially, 1,100 letters were sent to parties and organizations believed to have interest in the project or the area. Information and comment-gathering sessions were conducted and press releases issued. The responses were then analyzed and additional issues identified. Preparation of a draft EA was then undertaken.

In March 1984 the draft EA was issued. This draft included identification of alternatives studied, the effect of these alternatives on the human environment, and a conclusion that the APD could be approved if made subject to a number of stated stipulations imposed for the purpose of minimizing the environmental consequences of the proposed action. Public comment was solicited, with copies of the draft EA being sent to individuals and organizations who had previously participated. Notice that copies of the draft EA were available was distributed to the media. During the public comment period open houses were held and a tour of the project location was conducted.

Specific comment was sought from the National Park Service (NPS) and the United States Fish and Wildlife Service (FWS). As a result of this request, FWS rendered a biological opinion that the action described in the draft EA would jeopardize the grizzly bear and grey wolf. The bases for this opinion were (i) the proposed route would occupy important grizzly bear habitat, (ii) more information on the proposal and on the biological habitat was required before a non-jeopardy opinion could be rendered, and (iii) pioneering a road to the drill site would increase the likelihood of illegal take of grizzly bear. NPS submitted a letter on May 10, 1984, expressing similar concerns. The NPS and FWS letters are discussed in detail below.

As a result of the FWS opinion, additional discussions with FWS representatives and additional examinations were undertaken. During this period, Petrofina submitted a report demonstrating that use of remote sensory and monitoring systems during production was possible. The use of these systems would result in operations during the production phase with less environmental impact than that contemplated during the drilling stage. ^{5/} An additional proposed surface route designated to avoid critical bear habitat was examined (Proposal 7), additional restrictions as to the use of the proposed road were prepared, and the basis for an interagency law enforcement program was formulated.

^{5/} This showing is made necessary by the court determination in North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980), reversed on other grounds, 642 F.2d 589 (D.C. Cir. 1980), that there must be a reasonable likelihood the entire project will comply with section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1982), and a comprehensive biological opinion must be issued before completion of the project.

In January 1985 the team completed its final EA document. This document containing over 250 pages, analyzed the effect of each alternative studied ^{6/} on the air and water quality, fish and wildlife, soil and vegetation, recreation and visual resources, and other environmental and cultural resources. In addition the proposed mitigation stipulations to the APD were modified to reflect the comments received and concerns expressed by FWS. The team conclusion, as stated in the EA, was that the proposed project, as modified and limited by the proposed stipulations, could be approved, because it could be carried out without significant environmental impact.

Based upon the findings contained in the final EA and the mitigation measures contained therein, the FWS issued a "no-jeopardy" Biological Opinion on January 15, 1985. This opinion was specifically "contingent upon (1) the Forest Service's legal authority to close the roads and enforce the road management outlined under Alternative 7, and (2) the implementation of an active interagency law enforcement program" (EA at C3-13).

On January 31, 1985, BLM approved the Petrofina APD, imposing as permit stipulations the mitigation requirements specified in the EA. This decision specifies, based upon the EA and the FWS January 15, 1985, Biological Opinion, that approval of the APD is not a major Federal action having a significant effect upon the human environment, and that an EIS need not be prepared.

A number of appellants have challenged the approval on the grounds that it violates the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1982), the Endangered Species Act, 16 U.S.C. § 1531 (1982); the Historic and Archaeological Data Preservation Act, 16 U.S.C. § 469 (1982); and the Range Land Renewable Resources Planning Act, 16 U.S.C. § 1600 (1982). BLM asserts that its action is consistent with the requirements of these statutes.

Necessity for an EA and EIS

BLM and FS would be required to prepare an EIS if approval of Petrofina's APD constitutes a major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (1982). The volume of litigation over the past 15 years concerning the applicability of this requirement to a myriad of Federal actions establishes that the line separating significant impacts from insignificant ones is neither clear nor uniformly applied by the courts. In fact, it is a boundary that remains very much in dispute. However, the courts have recognized that, to the fullest extent possible, the line should be fixed by application of objective criteria; i.e., the significance of an environmental impact should not depend on the eye of the beholder.

To those who use and enjoy a particular area of land in a specific manner, any adverse impact may appear significant. On the other hand, those

^{6/} The use of helicopter mobilization was not analyzed in detail, as a threshold determination resulted in a finding that this method was not technically feasible. See Sierra Club, 80 IBLA 251 (1984) at page 261 for a discussion of very similar circumstances.

who seek to introduce new activities are not likely to regard the impact of their action as significant. Therefore, the interdisciplinary approach in planning and decisionmaking, required by 42 U.S.C. § 4332(2)(A) (1982), helps to eliminate the bias inherent in any single perspective when considering the significance of the environmental effects of Federal activities.

[1] Certain actions will almost always require the preparation of an EIS; others never will. In determining whether a proposed action calls for an EIS, it is helpful to consider first whether or not similar activities have been found to require an EIS, then determine how the proposal differs from the norm, and finally determine whether these differences are significant enough to warrant a different result.

In Colorado Open Space Council, 73 IBLA 226 (1983), we noted the Department had determined APD approval to be action categorically excluded from the NEPA process. Under 40 CFR 1501.4, the effect of a categorical exclusion is to eliminate the necessity for the preparation of an EA. Thus, the effects of drilling a well and associated activities are not per se significant. Only in exceptional circumstances do those impacts raise sufficient concern to warrant the preparation of an EA. The need for an EIS is still more exceptional.

Petrofina suggests BLM could have relied upon the categorical exclusion. This is not correct. Petrofina's application has raised issues pertinent to several exceptions to the categorical exclusion listed in our decision in Colorado Open Space Council, supra. Perhaps foremost among these concerns is the possibility that the action would pose a threat to grizzly bears and wolves. BLM properly concluded that preparation of an EA was appropriate.

As previously noted, an EIS is required if the action is found to have a significant effect upon the quality of the human environment. Factors relevant to the determination as to whether action should be found to be significant are found at 40 CFR 1508.27. In making the determination the "context" and "intensity" of the proposed action are to be considered.

With respect to the "context" of the proposed action, it is clear that the proposed action is within the category designated as "site-specific," and thus is dependent upon the effects in the local area. We find there has been no meritorious contention on the part of any of the appellants that the context of the action was improperly identified or addressed.

The provisions of 40 CFR 1508.27 identify 10 categories of factors to be considered in an analysis of the "intensity" or severity of the impact. While an examination of the various statements of reasons filed by the various appellants discloses an alleged failure to properly consider all 10 categories, a close examination of many of the allegations leads to a determination that, while a failure is alleged, the appellants have submitted little or no evidence in support of many of the allegations.

[2] A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if

the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable in light of the environmental analysis. Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. See generally id.; United States v. Albert O. Husman, 81 IBLA 271, 274 (1984); see also Curtin Mitchell, 82 IBLA 275 (1984); In re Otter Slide Timber Sale, 75 IBLA 380 (1983). Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and is supported by the record on appeal. See generally Oregon Shores Conservation Coalition, 83 IBLA 1 (1984).

The first category established by regulations of the Council on Environmental Quality (CEQ) which is to be considered in a determination of "intensity" is impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. 40 CFR 1508.27(b)(1). A review of the EA clearly indicates that some of the impacts are beneficial and others are adverse. An analysis of the impacts on each of the other nine regulatory categories established for environmental planning purposes is therefore necessary for a determination of the necessity of an EIS.

The second regulatory category is the degree to which the proposed action affects public health or safety. 40 CFR 1508.27(b)(2). While, as previously mentioned, allegations were made as to the sufficiency of the analysis of the category, no evidence of error or basis for a determination contrary to that found in the EA has been advanced by appellants.

[3] The third regulatory category is unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas. 40 CFR 1508.27(b)(3). As previously noted, the study area lies just to the south of Glacier National Park. The draft EA was presented to NPS and on May 10, 1984, the Park Superintendent submitted comments. Because of the nature of the NPS letter and conclusions stated therein, the body of the letter is quoted below in its entirety. The May 10, 1984, letter states:

The Forest Service/Bureau of Land Management interdisciplinary team is to be commended on the detail and thoroughness of the Hall Creek application for Permit to Drill Environmental Assessment. We feel the environmental assessment (EA) is good in detail but narrow in scope.

The geologic nature of the Overthrust Belt and previous exploratory operations suggest it is unlikely that this application for Permit to Drill (APD) will be the last in the South Fork Two Medicine River drainage on the Lewis & Clark National Forest. It is very probable that several or many others will be filed

regardless of the results of an initial exploratory well. Also, it seems unrealistic to assess only the impact of a dry hole rather than a producing well. If discovery is made and the scope of assessment then expanded to cover production, the assessment process would already have been compromised. We feel that production, multiple site drilling, and filed development are real issues that must be addressed to adequately assess total impact to the areas.

We agree that the Hall Creek Site specifically, and the South Fork Two Medicine River Basin in general, have high potential as wildlife habitat but are underutilized by grizzly bears and ungulates. Grazing, traffic on existing roads, and illegal hunting, of course, lower wildlife populations below what would be the natural carrying capacity. The South Fork Two Medicine Basin is in a strategic location to serve as a natural corridor for wildlife genetic exchange and population dispersal between Glacier National Park and the wilderness areas to the south. Such corridors are considered highly important to prevent genetic isolation and, due to incremental encroachment from all sides, are increasingly critical to the integrity of Glacier National Park as a natural ecosystem. The EA states the amount of effective habitat is now at a minimum required to maintain existing grizzly bear population and any reduction of spring range would be detrimental. Also stated is that all road alternatives would increase long-term human access to concentrated spring bear range. Therefore, it seems as though further development in the area will affect not only Glacier due to the close proximity, but also could significantly diminish the potential for the long term survivability of the grizzly bear in the Northern Continental Divide Grizzly Bear Ecosystem. A thorough discussion of the cumulative effects of a new developed use (Multiple Drill Sites and Roads) combined with all present man-induced activity will portray a more realistic assessment of future conditions. The cumulative effects of all of man's activities nearly always exceed the simple summation of each activity considered separately.

The favored optimum road alignment seems the best route to the site. It may well be that wildlife will be more protected during the drilling operation due to the road guard limiting access beyond the bridge. Conventional locks and gates do not fare well on nearby Park roads, and may be impossible to maintain here after drilling is completed. A temporary bridge across the South Fork, to be removed after drilling, would give greater protection to bear spring range and elk winter range. The river is probably most effective as a barrier during winter and spring conditions. Even if four wheel drive vehicle closure remains intact at the bridge after drilling ceases, the bridge will improve motorcycle and snowmobile winter and spring access and illegal hunting has been identified as a major impact on area wildlife. If possible, the reclaimed road prism should be returned to original grade. Also, biennial yellow sweet clover should be omitted from the revegetation seed list because it is a recognized bear attractant.

Sound food and garbage management at the drill site is very important to prevent conflicts with bears. Bears that become habituated to humans and conditioned to human-supplied food often have to be destroyed. The prohibition of weapons at the site and on the access road would also help protect the wildlife.

Considering the potential for significant negative impact to the threatened grizzly bear and concomitant damage to the Glacier National Park ecosystem; the general sensitivity of critical wildlife habitat and migration corridors; and the potential for major development lead us to believe the approval of the permit to drill constitutes a major Federal action which should be thoroughly considered in an Environmental Impact Statement.

Although the comments regarding geologic nature of the Overthrust Belt and previous operations may be correct, we note that each APD in the general proximity of the park would, under the present law, trigger the preparation of an EA, and that each EA would necessarily take into consideration the effect of any previously granted APD's and operations thereunder (both completed and anticipated) as well as any other activity, whether related or unrelated to an APD. ^{7/} To the extent the Park Superintendent's May 10, 1984, letter is challenging the scope of the EA, this issue is discussed below with respect to the question of cumulative impacts and connected actions.

That portion of the May 10, 1984, letter addressing the effect on the grizzly bear is similar to comments submitted by FWS in its May 17, 1984, letter. As there has been no protest to the final EA by NPS, the modification of the EA as a result of the NPS and FWS letters may have resulted in NPS having no further objections. ^{8/} We also note documents submitted as exhibits to the Answer filed by BLM clearly indicate an ongoing participation by NPS in development of the law enforcement program. See, however, the further discussion of the law enforcement program below.

[4] The fourth category is the degree to which the effects on the quality of the human environment are likely to be highly controversial. 40 CFR 1508.27(b)(4).

The fact that appellants oppose granting the APD does not make that action "highly controversial" within the meaning of the regulation. In Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973) the court construed that phrase as follows:

We reject, however, the suggestion that "controversial" must necessarily be equated with opposition. The term should properly

^{7/} The cumulative effect of activities may well trigger the necessity for an EIS for production in this case or issuance of a future APD. However, not knowing the location, nature, or extent of future activity renders the analysis of these impacts speculative at this time.

^{8/} See the response to comments regarding impact of the proposal on Glacier National Park at page 137 of the EA.

refer to case where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use. Otherwise, to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be. Hanly v. Kleindienst, 471 F.2d 823, 830 (2nd Cir. 1972). See Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972).

The above construction was cited with approval in Foundation for North American Wild Sheep v. United States, 681 F. 2d 1172, 1182 (9th Cir. 1982), in which the court held that the criterion was met because a number of qualified authorities expressed disagreement with the conclusion in an EA that the reopening of a road directly passing through an area used as lambing grounds by one of the few remaining herds of Desert Bighorn sheep would have no significant impact on the sheep.

Turning now to the case at hand, certain of the facts and documents in the record would support a finding that the effect of the imposition of the proposed environmental stipulations upon treaty rights of the members of the Blackfoot Tribe of Indians is controversial. Notwithstanding this fact, we find a decision by this Board that an EIS is necessary would be premature. The reason for this finding is, while a proposed action may be controversial, mitigating measures or agreement between parties may result in settlement of the controversy. This matter is being remanded for further action, and, depending upon the course chosen, a supplemental EA may or may not be necessary. Even if a supplemental EA is deemed necessary, we are not now in a position to determine that the result of that assessment would indicate the continued existence of a controversy warranting an EIS. If it is necessary to make this determination, it will be made upon remand.

The fifth category established by the CEQ regulations is the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. 40 CFR 1508.27(b)(5). While certain appellants have attempted to raise an issue of unique or unknown risks, such as H₂S gas discharge, we do not find any such issue which has not been addressed in the EA, or that the appellants have expressed anything greater than an opinion that such risks may be present. Mere differences of opinion provide no basis for reversal if the decision is reasonable and supported by the record on appeal. See Oregon Shores Conservation Coalition, *supra*; Sierra Club, 80 IBLA 251, 266 (1984).

The sixth category established by regulation is the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration. 40 CFR 1508.27(b)(6). This issue relates to the proper scope of the environmental analysis required for the APD, a question raised both by appellants and by the May 10, 1984, letter of the Park Superintendent. The question is whether the environmental analysis must extend to consideration of (1) the impact of production from the well, and (2) the impact of potential drilling of and/or production from other wells in the vicinity.

[5, 6] The seventh category is whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terminating an action temporarily or by breaking it down into small component parts. 40 CFR 1508.27(b)(7). In Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), the court required FS to consider the combined effects of building a road and those of the timber sales which the road was designed to facilitate. The court noted:

Section 102(2)(C) of NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1982). While it is true that administrative agencies must be given considerable discretion in defining the scope of environmental impact statements, see Kleppe v. Sierra Club, 427 U.S. 390, 412-415, 96 S. Ct. 2718, 2731-2733, 49 L. Ed.2d 576 (1976), there are situations in which an agency is required to consider several related actions in a single EIS, see id. at 409-410, 96 S. Ct. at 2729-2730. Not to require this would permit dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact. See Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975).

Id. at 758. The court applied the criteria set forth at 40 CFR 1508.25(a)(1) that define "connected actions" for which the combined environmental effects must be analyzed as those which would:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Applying this analysis to the effects of the APD, it must be concluded that, in the event of discovery, production from the proposed exploratory well is a connected action necessarily contemplated by the APD. Clearly the road in this case would not be constructed and the enormous expense of a 13,000-foot well undertaken unless production was contemplated. The road and the associated development which are the subject of the APD have no independent utility in the absence of production from any commercially feasible discovery on the land and thus the scope of the EA would ordinarily include the potential effects of production from the permitted well. See Thomas v. Peterson, supra at 759. ^{9/}

^{9/} Some consideration of the effects of production appears in Appendix C to the EA, the biological evaluation. This analysis concludes that production

The contention of BLM that assessment of the effects of production is not required at this point is based on the ability of BLM, under the lease stipulations, to bar further surface impacting activities in the event of unacceptable adverse effects which cannot be mitigated. Indeed, the oil and gas lease at issue in this case contains a stipulation which provides in pertinent part as follows:

ENDANGERED OR THREATENED SPECIES - The Federal surface management agency is responsible for assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be in violation of the Endangered Species Act of 1973 by detrimentally affecting endangered or threatened species or their habitats.

This Board has previously recognized that environmental analysis is required prior to an irreversible commitment of resources to an action which will affect the environment. Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 92 I.D. 37 (1985). Hence, deferral of assessment of specific surface disturbing activities pending submission of a site specific plan of operations has been permitted where the Department has retained the authority to bar such activities if the impacts, even with mitigating measures, are unacceptable. Accordingly, as we held in Sierra Club, supra, regarding a similar regulation, we find that the regulation must be construed to authorize the Department to bar surface disturbing activity which would have an impact the Department is not legally permitted to authorize. Potential occupancy for purposes of any production having thus been conditioned, the EA for the APD is not required to analyze production activities.

With respect to analysis of field development, *i.e.*, effects of potential drilling of and/or production from other wells on other leases, we find that such activities are not connected actions and, hence, fall outside the scope of the EA. Potential development is neither dependent on this APD nor is it an automatic result of approving the APD. The exploration and potential development of this lease has an independent utility apart from development of other leaseholds. See Citizens For Glenwood Canyon, 64 IBLA 346, 351-352 (1982). The record does not disclose a proposal for a unit plan of development or operation, but rather an APD for a single well.

Appellants also challenge the failure of the EA to include the cumulative impacts of FS timber sales in the vicinity, asserting the FS has noted

fn. 9 (continued)

methods currently available could be used to reduce production side effects upon the natural environment to comply with 16 U.S.C. § 1536(a)(2). See App. C3-12. See also Petrofina production plan reproduced at App. C2B1-B7.

the need to retain the road to the drill-site as part of the forest transportation system for purposes of timber management. The court in Thomas v. Peterson, *supra*, determined that the contemplated timber sales 10/ were inextricably intertwined" with construction of the road. 753 F.2d at 759. This finding stands in sharp contrast to the facts raised by the instant appeal. The occurrence of the timber sales is still speculative and, although appellants assert that there may be some connections, they have presented no evidence which would indicate that the criteria cited above are met. The regulations also define "cumulative actions" as those "which when viewed with other proposed actions have cumulatively significant impacts." 40 CFR 1508.25(a)(2) (emphasis added). The cumulative effects of actions that have not been proposed need not be considered. We note, however, that in 1980 the FS had contemplated a timber sale in this area. See our further discussion of this matter under the subheading "Cumulative Effect of Proposed Timber Sale" below.

The eighth category of required analysis concerns the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources. 40 CFR 1508.27(b)(8). While the mitigation measures discussed below clearly overcome any challenge based on this regulatory category, see the discussion below under the subheading "Archeological Survey" regarding problems caused by the mitigation stipulations in case of the discovery of cultural resources.

The ninth regulatory category is the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973. 40 CFR 1508.27(b)(9). This category clearly is relevant to the case now before us and appellants have raised a substantial question with respect to this category. However, as discussed below under the heading "Mitigation Measures," the question is not whether a substantial impact exists, but is whether the mitigation proposed is sufficient to overcome the requirement for preparation of an EIS. Therefore, discussion of this category is deferred for detailed discussion later in this opinion.

The tenth, and last regulatory category is whether the action threatens a violation of Federal, state, or local law or requirements imposed for the protection of the environment. 40 CFR 1508.27(b)(10). We find appellants have not raised an issue with respect to this category.

In summary, a question was raised, both by the study team and appellants, regarding significant impact of the proposed action in 5 of the 10 regulatory categories. We will now examine the effect of proposed stipulations on these categories.

10/ At the time of the preparation of the EA in the Peterson case two of the proposed sales had been approved and were awaiting only the approval and construction of the road. Id. at 758, note 2.

Mitigation Measures

[7] Even if an action would have significant effects, the proposal may be modified to mitigate those effects to the point they are no longer significant. If the mitigation accomplishes this purpose, an EIS need not be prepared. See Cabinet Mountain Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982). However, the agency cannot approve a proposal without preparing an EIS unless the agency has the authority to impose the necessary mitigative measures at the time of such approval. See generally, Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983). Appellants contend the Department lacks authority to fully effect such necessary mitigative measures as closing the roads to the public. This contention is not without merit.

[8] Subsection 7(a)(2) of the Endangered Species Act, as amended, 16 U.S.C. § 1536(a)(2) (1982), provides in pertinent part:

Each Federal agency shall * * * insure that any action authorized, funded, or carried out by such agency * * * is 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 by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

In accordance with the above-quoted requirements the FWS was asked to prepare a biological opinion and found, on June 26, 1984, that the proposed action and related activities described in the draft EA are "likely to jeopardize the existence of the grizzly bear." It also found "it is unlikely for field development to occur without jeopardizing the grey wolf."

Inasmuch as a "no-jeopardy" biological opinion is essential for approval of the project, in December 1984, BLM submitted the preferred alternative described in the revised EA to FWS. The biological evaluation of the revised preferred route (Alternative 7) is set forth in the second biological report which was made a part of Appendix C to the final EA. The report found that, if certain mitigating actions are followed, no jeopardy would occur. The mitigative actions deemed to be necessary to validate the projected extent of anticipated effects are listed on pages C-33 through C-37 of the EA. Among the mitigative actions are: (1) closing the access road to, (a) all use during certain critical times of the year (EA at A1-22), (b) all use at certain times of the day (EA at A1-23); and (c) all use unrelated to the drilling activity (EA at A1-22); and (2) the implementation of a law enforcement program (EA at 141, C-33).

The Blackfeet Tribe of Indians have appealed from the BLM decision on the ground that closure of the roads would violate their rights under an agreement between the tribe and the United States ratified by the Act of

June 10, 1896, 29 Stat. 321, 354. Certain land crossed by the access road is subject to the following provision of that treaty: "Provided, That said Indians shall have, and do hereby reserve to themselves, the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States." (Emphasis added.) Inasmuch as approval of the APD is contingent upon a "no jeopardy" opinion, which is in turn contingent upon the legality of closure of the road to Blackfoot Indians, approval of the APD cannot be sustained if the Government lacks authority to close such roads. In determining whether an EIS is required a four-step analysis of the impact of the road must be undertaken: (1) the effect of being unable to close the road to use by the members of the Blackfoot Tribe during the time the road is open for drilling related use; (2) the effect of being unable to close the road to the members of the Blackfoot Tribe of Indians during the period the road is closed to all use; (3) the cumulative effect of (1) and (2); and (4) the effect of being able to close the road to all access by members of the Blackfoot Tribe unrelated to the drilling activity. The EA has analyzed the effect of the fourth factor, but not the first three.

Petrofina interprets the treaty as authorizing a right of entry only for the purposes of gathering wood or timber, hunting, or fishing. While this analysis may be correct, there has been no determination that it is, nor is there an agreement that the stipulation will be binding on the members of the Blackfoot Tribe. A clear possibility of a contrary interpretation exists, especially in light of judicial interpretation of similar treaties.

In Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 675-76 (1979), the Court set forth the general principles which govern construction of agreements such as the one before us. The Court noted a treaty is essentially a contract between two sovereign nations and when the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume they negotiated as equals at arm's length. The Court stated:

Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U.S. 1, 11.

In United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974), the court was called upon to construe the scope of the right of entry reserved to the Blackfoot under the agreement ratified by Congress in the Act of June 10, 1896, and dismissed a criminal action against a Blackfoot Indian who entered

Glacier National Park without paying the required fee. The park included lands ceded by the 1896 agreement. The court applied principles consistent with those elaborated by the Supreme Court, supra, and concluded that the scope of the provision was governed by the intent of the parties. In that case, the United States contended that the status of the land was no longer "public land" within the meaning of the treaty because it was included in a park. In that case, the court held that Indian rights can be diminished only by alienation of the land; not by changing the character of public ownership.

The scope of the right of entry reserved to the Indians under the 1896 agreement can be finally resolved only by a decision which is binding on the Blackfeet Tribe of Indians. No initial decision has been made by BLM and, until a binding determination is made, the "no jeopardy" opinion and the environmental analysis must be predicated on the Government's inability to close the roads to use by Blackfeet Indians.

The Blackfeet Tribe has also urged that the decision to approve the APD be reversed because it has not entered into an agreement implementing the contemplated interagency law enforcement program.

Reasons for Remand

We find four points of sufficient concern to remand this case for further consideration. These points are: (1) a determination of the necessity to assess the cumulative effect of the proposed action and contemplated logging activities in the area of the study; (2) the consideration of the possible effect of a discovery of an archaeological site on the location of the road; (3) action deemed necessary because the January 14, 1985, "no jeopardy" letter was contingent upon the ability to close the road to all but drilling related activity; and (4) action deemed necessary because the January 14, 1985, "no jeopardy" letter was contingent upon the implementation of an active interagency law enforcement program. Each of these concerns is discussed below.

Cumulative Effect of Proposed Timber Sale

The Revised Proposed Lewis and Clark National Forest Plan designates a portion of the North End geographic unit which was also within the EA study area as being commercial forest land. The plan proposes that no more than 1.0 million board feet of timber would be sold from this area each year. While no clearly defined designation of an area of timber harvest within the North End geographic unit is found in the general discussion of Management Area O management prescriptions, a designated harvest area is identified in the Environmental Assessment Oil and Gas Leasing, Nonwilderness Lands. In Appendix C to that document (Biological Evaluation - Biological Opinion), under the heading "Affected Environment" an area in secs. 2, 3, and 4, T. 29 N., R. 12 W. and secs. 33 and 34, T. 30 N., R. 12 W. was designated as being an area for planned timber sales during the period 1981-1986. This area is within the area of study with respect to the impact of the proposed drilling operation upon grizzly bear, wolf, and elk. However, the cumulative effect of the two proposed operations (drilling and timber harvest) within

the study area was not considered. We assume that, prior to commencement of the EA, the FS had decided to abandon the proposed timber sales because of the activities contemplated in the EA. If this is the case, it would obviously be more advisable to conduct an EA of the impact of any future timber sale, at some future date, when the impact of the prior drilling activity could be considered. However, without a clear statement of this decision, we must conclude that the assessment, without consideration of proposed logging activity, was inadequate. We therefore remand the case to BLM with instructions it seek clarification from the FS regarding proposed timber sales within the area. If FS states that the proposed timber sale has been abandoned for the duration of the drilling activity, no reassessment need take place as there has been no irreversible or irretrievable commitment to hold a timber sale or construct any facility in conjunction therewith. If, however, a sale during the stated period is contemplated, or if a sale has taken place, its effect should also be considered in the EA.

Archaeological Survey

[9] The stipulation to the oil and gas lease regarding cultural and paleontological resources provides:

CULTURAL AND PALEONTOLOGICAL RESOURCES -- The Federal surface management agency is responsible for assuring that the leased lands are examined to determine if cultural resources are present and to specify mitigation measures. Prior to undertaking any surface-disturbing activities on the lands covered by this lease, the lessee or operator, unless notified to the contrary by the authorized officer of the surface management agency, shall:

1. Engage the services of a qualified cultural resource specialist acceptable to the Federal surface management agency to conduct an intensive inventory for evidence of cultural resource values;
2. Submit a report acceptable to the authorized officer of the surface management agency and the District Engineer, Geological Survey; and
3. Implement mitigation measures required by the surface management agency to preserve or avoid destruction of cultural resource values. Mitigation may include relocation of proposed facilities, testing and salvage or other protective measures. All costs of the inventory and mitigation will be borne by the lessee or operator, and all data and materials salvaged will remain under the jurisdiction of the U.S. Government as appropriate.

The lessee or operator shall immediately bring to the attention of the District Engineer, Geological Survey, or the authorized officer of the Federal surface management agency any cultural or paleontological resources or any other objects of

scientific interest discovered as a result of surface operations under this lease, and shall leave such discoveries intact until directed to proceed by the District Engineer, Geological Survey.

As a result of the environmental analysis, the interdisciplinary team recommended the adoption of Alternative route 7 as the proposed action (EA at iv). The decision appealed from states at page 2:

2. The preferred alternative is consistent with lease stipulations and the approved APD shall utilize as stipulations all special and general conditions of approval as shown on Appendix A of this environmental assessment.

At Appendix A the following condition is stated at page A1-8:

11. (3) Current ground conditions preclude an archeological survey of the proposed access re-route at this time. In view of the negative results from the study done by Historical Research Associates for this project, it is unlikely that any cultural resources will be encountered by the proposed access re-route. However, a field survey will be undertaken when conditions permit and an addendum to the report will be filed.

As it now stands, the finding of no significant impact and the determination that the proposed action is not likely to jeopardize the grizzly bear and grey wolf are based upon the location of the road, as described in Alternative 7. However, the lease terms noted above provide that an available mitigation measure for the purpose of preserving or avoiding the destruction of cultural resource values is the relocation of the proposed road. In fact, this means of mitigation is not available. Therefore, in order to conform the conditions for issuance of an APD to the findings of no significant impact and the FWS determination, the stated condition must be amended by either: (a) conducting the survey and issuing a finding that no cultural resource values exist prior to the issuance of an APD, allowing construction along the route designated as Alternative 7; (b) addition of a statement in the decision to permit issuance of the APD that, as a condition for issuance, relocation is not a measure that can be taken in mitigation; or (c) a provision in exhibit A and the APD that, if cultural resource values are encountered which require the relocation of any facilities, a supplemental EA and significant impact determination study must be undertaken with respect to the relocated route, prior to commencement of any construction.

Site Access Restrictions

The finding of no significant impact and the "no-jeopardy" biological opinion were both predicated upon the closure of the road described in Alternative 7 to all traffic during certain periods of the year and certain times of the day. In addition the EA contemplates and requires the road to be closed to all but essential traffic (see EA at 35, 43-44, 48-50). As previously noted the opinion assumed this requirement would be applicable to members of the Blackfeet Indian Nation. The EA specifically states at

page 127: "Until such time as the interpretation [of treaty rights] is changed, it means members of the Blackfeet Tribe would be required to observe the road closures * * *." The EA is premised upon the ability to enforce road closure against the members of the Blackfeet Tribe of Indians, and no study was made of the effect of being unable to enforce road closures against this segment of the general public.

The Blackfeet Tribe of the Blackfeet Indian Nation has appealed from the decision. One of the bases for appeal is:

The right of members of the Blackfeet Tribe to enter upon these lands is based upon Article 1 of the Agreement with the Indians of the Blackfeet Indian Reservation in Montana, approved by Congress on June 10, 1896 (29 Stat. 321, 353):

Provided, That said Indians shall have, and do hereby reserve to themselves, the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States. . .

The Proclamation establishing the Lewis and Clark Forest Reserve in 1903 states that the rights and privileges reserved in the Agreement "are in no way infringed or modified" by reason of the lands being set apart as forest reservation (33 Stat. 2311).

* * * * *

The Environmental Assessment attempts to base such a road closure upon a federal regulation, 3 CFR 261.50, and a letter sent to the Blackfeet Tribe on November 29, 1979, by the Forest Supervisor. Both of these are insufficient as a matter of law to abrogate an Indian Treaty provision. The 1979 letter does not even address the right of entry. [Citation omitted; emphasis in original.]

Statement of Reasons at 1-2.

In its answer BLM contends:

This right of access reserved by the Blackfeet Tribe is not diminished by closure of the project road. The project road does not follow the route of a pre-existing road. The project road is a newly constructed road. With the subsequent closure of the project road, the Tribe's reserved rights are still equal to those existing before the special use road was built and have not been diminished. In addition, it is important to note that the road closure involves only the road itself. The area will not be closed to the Blackfeet Tribe. As such, they may exercise their reserved rights in the same manner as they have in the past. This continued use of the area by the Blackfeet Tribe was assumed in the Biological Evaluation which assessed impacts on the threatened

and endangered species. The reasonable use of the area is not contingent upon use of the project road. Also, access by means other than four-wheeled vehicles on the project road is permitted.

Appellants base their concern regarding the Forest Service's authority to close the project road to the Blackfeet Tribe on a legal opinion written by the Office of General Counsel, U.S. Department of Agriculture. However, the road closure authority cited above is consistent with the Indian right of access described in the legal opinion cited by appellants. The above discussion only amplifies and clarifies what has always been the legal opinion of the USDA and therefore provides no substantive support to appellants' contentions.

The effectiveness of the road closure program will be insured by the use of gates and the placement of barriers to prevent vehicles from driving around the closures. In addition, as a condition of APD, Petrofina is required to maintain a road guard at the closure point. (APD, Supplemental Conditions for Permit to Drill, Item 15).

This road closure program as identified is one of the conditions on which the USFWS "no jeopardy" opinion is based. As such, the implementation of the program will insure that no threatened or endangered species is likely to be jeopardized and that the impacts of the project are below the threshold of significant environmental effects requiring an EIS.

Answer of BLM at 37-38.

We agree with BLM that the road-closure program is one of the conditions on which the FWS "no jeopardy" opinion and subsequent no significant environmental impact decision are based. However, the EA does not address the impact of unlimited access by the members of the Blackfeet Tribe of Indians if there is a determination that the access cannot be denied by reason of the June 10, 1896, treaty.

No analysis of the effect of not being able to deny access to the members of the Blackfeet Tribe of Indians has been made a part of the EA, and a question remains as to the ability to deny this access. See United States v. Kipp, *supra*. Therefore, we find it necessary to remand the case for either: (a) an analysis of the impact of Indian access in the manner discussed above; (b) a BLM determination that access can be barred which has become final and binding; or (c) an agreement between the surface management agency and the Blackfeet Tribe of Indians limiting access by its members. 11/

11/ If the parties entered into an agreement limiting the rights of access, the contemplated analysis could be limited to the extent that access may be available, *i.e.*, if there was an agreement to bar access to tribal members at times that the road was closed to all parties, it would not be necessary to address this possibility.

Law Enforcement Program

A similar problem exists regarding the contemplated law enforcement program. During the course of the EA a primary cause of grizzly bear mortality was identified as illegal/uncontrolled hunting. In the course of this study it was determined that without some action to reduce this mortality, the proposed road would result in a jeopardy condition. An acceptable and necessary mitigation measure was the implementation of an active interagency law enforcement program. In fact the FWS no-jeopardy determination was specifically stated to be contingent upon "the implementation of an active interagency law enforcement program" (EA at C3-13). It was determined that, in order to assure the program achieves the degree of success deemed to be necessary, the law enforcement program "should be a cooperative effort among the FWS, USFS, BLM, MDFWP, BIA, National Park Service (NPS) and the Blackfoot Tribe." (Emphasis added; EA at C-33.) The record discloses that the respective agencies have not in fact established the program and it is not in place. The SOR filed by the Blackfoot Tribe of Indians specifically states that it has not entered into such agreement, and that BIA has yet to enter into negotiations which would lead to such agreement (SOR at 2). While the EA document addresses this issue, the APD should not be issued until there is an agreement among the respective agencies as to the nature and conduct of the law enforcement program.

Although we specifically find such a program to be necessary, we do not find it necessary to require an amendment of the EA to reflect the agreement terms and conditions. Prior to issuing the no-jeopardy letter, FWS had made an analysis of the program and had discussed the nature of the program, at least with FS, BLM, and MDFWP officials. Any final interagency document memorializing the understanding of the parties as to the program must include FWS, and until this agency is satisfied that the program is sufficient to achieve the stated goals, it need not agree to be bound by its terms. We hold that either the APD should not be approved until the interagency program has been established or the APD should be amended to provide that no on-the-ground work (other than the above-discussed cultural resource survey) should commence until after the law enforcement program has been established and all of the necessary agencies have agreed to the ways and means of its implementation.

Other

Appellants have raised many objections based upon the misconception that the area is roadless and expressing their desire to have the area remain roadless. The area clearly does not qualify as being roadless. In fact the selection of Alternative 7 results in the net reduction of the number of miles of road in the study area, and there is no place along the proposed route that is greater than one mile from an existing road. Therefore, if the area is considered to be "pristine and roadless" in the minds of appellants at this time, the proposed project will not adversely affect the nature of the area. We also find adequate safeguards in the APD to assure that air and water quality standards will be maintained (except for possible short term localized reduction during the initial construction stages.)

We find no failure to educate and inform the public of the proposed action. The success of this effort is evident by the number and nature of the responses during the comment period, the number of appeals filed, and the volume and detail of the appellants' documents. As stated in the SOR filed by the National Wildlife Federation, the document prepared is as voluminous as many adequate EIS documents (SOR at 16). The size of the document is reflective of the extent of the study, and many of the topics addressed and modification to the initial proposal were as a direct result of the comments received.

Many of the allegations advanced, such as the challenge by Glacier-Two Medicine Alliance to the analysis made by the study team of the current wolf population (SOR at 31-39), are merely argumentative. Some requested that the EA address and give great weight to issues perceived by the author to be substantial environmental impacts without submitting any evidence which would in any way indicate the proposed mitigation measures were insufficient to protect the environment at or near the well site, let alone many miles away, as suggested. See United States v. Albert O. Husman, supra.

Certain appellants have suggested the EA does not address the need for oil and gas at this time. This need was addressed at page 28 of the EA and the documents referred to therein. Appellants, on the other hand, submit no proof that oil and gas is not needed. Many appellants state the EA does not address the no-action alternative. This allegation raises the question of whether these appellants have, in fact, examined the EA. See discussion of the no-action alternative at pages 28-29, 51, 67-78, 81-82, 85-86, 88, 91, 94-98, 102, 105, 108-09, 114, 116-17, 121, 123, and 126.

Without further belaboring this decision with additional references to contentions of appellants regarding errors and omissions in the preparation of the EA, and other errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of Susan Reeves and the Great Bear Foundation are dismissed, the decision appealed from is set aside, and the case is remanded for further action consistent with directives contained under the heading "Reasons for Remand," as found in this opinion.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

