

SIERRA CLUB, INC., ET AL.

IBLA 85-266

Decided June 26, 1986

Appeal from a decision of the Carson City District Office, Nevada, Bureau of Land Management, granting a right-of-way for a reservoir site and water diversion pipeline. CA-13255.

Affirmed as modified.

1. Environmental Quality: Environmental Statements -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Applications

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

2. Administrative Procedure: Administrative Review -- Environmental Quality: Environmental Statements -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Applications -- Rights-of-Way: Conditions and Limitations

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to

mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

APPEARANCES: Timonthy W. Pemberton, Esq., South Lake Tahoe, California, for appellants; John C. Weidman, Esq., Placerville, California, for intervenor South Tahoe Public Utility District; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Sierra Club, Inc., Citizens for Sewage Quality Initiative, Washoe Tribal Council of California and Nevada, Pat Banks, Wayne Martin, and Jerome Sprout have appealed from a decision of the Carson City District Office, Nevada, Bureau of Land Management (BLM), dated December 21, 1984, granting a 30-year right-of-way to the South Tahoe Public Utility District (STPUD) for a reservoir site and water diversion pipeline, totalling 268.32 acres, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982). 1/

The subject right-of-way, situated in secs. 3 and 4, T. 10 N., R. 20 E., Mount Diablo Meridian, Alpine County, California, north of the Indian Creek Reservoir (ICR) in the Diamond Valley area of the Carson River Basin, authorizes the construction of two dams, a concrete spillway and a portion of a reservoir on 266.25 acres of public land and the placement of an underground water pipeline, 3,000 feet long, on 2.07 acres of public land. The remainder of the reservoir, known as the Harvey Place Reservoir (HPR), would be constructed on private land. The right-of-way was requested by STPUD as part of its plan to convert its wastewater treatment plant, serving the residential area south of Lake Tahoe in northeastern California, from tertiary to secondary wastewater treatment. Under secondary treatment more nitrogen and phosphorus remains in the effluent. The tertiary-treated wastewater, which is safe for nonbody-contact recreation, is presently being pumped from the plant 27 miles over Luther Pass and stored at the ICR, which has evolved into a recreational site, to be used in the irrigation of nearby agricultural lands during the summer. Under STPUD's plan, the secondary-treated wastewater, which is not safe for water-contact recreational use, would be pumped from the plant and stored at the HPR, also to be used in the irrigation of nearby agricultural lands. The recreational value of ICR would be improved by substituting runoff and water from Indian Creek, which would be diverted via the proposed Upper Dressler ditch, passing under a BLM campground (Indian Creek campground) by means of the proposed water pipeline. The ICR would discharge to Indian Creek by means of a pipeline running under the HPR.

Issuance of the subject right-of-way was based on a BLM Land Report, dated November 14, 1984, which, in assessing the environmental impact of the right-of-way, largely incorporated by reference a Final Environmental Impact

1/ By order dated Apr. 18, 1985, the Board granted STPUD's motion to intervene in this proceeding.

Report (FEIR), dated March 1979, and a Final Supplemental Environmental Impact Report (FSEIR), dated March 1983, both prepared by Jones and Stokes Associates, Inc., for STPUD. The land report also included two staff reports prepared by BLM with respect to hydrology and minerals. In light of these environmental impact documents, BLM concluded in the Land Report, at page 4, that "[n]o environmental assessment is necessary." The Land Report, at page 2, also included a finding of no significant impact (FONSI), thereby obviating the need for preparation of an environmental impact statement (EIS) pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1982).

Construction of a new reservoir to replace the ICR was proposed by Culp/Wesner/Culp (CWC), consultants to STPUD, in a Draft Report on Facilities Planning for Modifications to Advanced Wastewater Treatment Plant (Facility Plan), dated May 1978. The Facility Plan was prepared because of the perceived need to reassess the operation and capacity of STPUD's wastewater treatment plant and export pipeline, which had been in service since 1968, (Facility Plan I-1) and, specifically, because of certain operational difficulties which had resulted in periodic diminution of the recreational value of ICR by water level fluctuations and excessive algae blooms.

The Facility Plan initially considered 13 alternative management schemes, including a no project alternative. After evaluating each of the 13 alternatives, the Facility Plan selected four for further consideration, two of which involved continued discharges to the ICR after either denitrification or nitrogen removal. However, recognizing that the ICR would not have sufficient storage capacity for projected wastewater flows, the two alternatives involving the ICR were modified to incorporate an additional storage reservoir.

The Facility Plan considered all four alternatives in terms of their cost effectiveness and ability to achieve minimum water quality standards, concluding that all of the alternatives "are considered equal in terms of the quality produced at the point where the wastewater ultimately leaves the treatment plant-storage-irrigation components which comprise the overall wastewater treatment system," due to treatment "by the soil." Facility Plan at IX-9. However, primarily because of the substantially lower costs involved, the Facility Plan selected as the preferred alternative discharging secondary-treated wastewater to two new storage reservoirs, the Heise and Pocket Ranch reservoirs, for agricultural reuse.

Before discussing appellants' particular contentions, we will set forth the context in which BLM prepared its November 1984 Land Report and issued the right-of-way to STPUD. The FEIR and FSEIR, referred to in the Land Report, are documents which were prepared on behalf of STPUD in order to comply with the State of California environmental quality law, which is patterned after NEPA. As stated in the Draft EIR, at page 19, the objective of the EIR was "to identify significant environmental impacts" associated with STPUD's overall facility plan, including the treatment, exporting, impoundment, and ultimate discharge of treated wastewater. The Draft EIR analyzed in detail seven project alternatives and the required "no action" alternative. Four of the alternatives were actually sub-options of a single

treatment and reuse scheme; but because each had significant differences in terms of new storage facilities and therefore impacts on the environment, they were analyzed as separate alternatives in most of the report. The seven alternative plans were developed from an original list of 23 prepared by CWC, the District's facilities planning engineering consultant. These original 23 were subjected to reconnaissance-level environmental, economic, and engineering analyses by the project's consultants and technical steering committee and presented to the public at a workshop in September 1977. The alternatives considered in detail in the EIR and Facilities Plan were eventually selected from the list of 23.

The FEIR, at page 1, incorporated the draft EIR and, in addition, provided responses to written comments and oral comments received at a June 15, 1978, public hearing on the Draft EIR.

The alternative subsequently selected by STPUD for implementation was that recommended in the Facilities Plan. The basic features of this program alternative included:

- * Abandonment of advanced waste treatment facilities.
- * Construction of a system to achieve secondary treatment.

- * Storage of all treated wastewater in two new reservoirs in Alpine County.

- * Irrigation use of all effluent through flood irrigation.

- * Indian Creek Reservoir water requirements would be met by water rights exchanges and diversion of natural runoff from the West Fork of the Carson River.

Draft Supplemental Environmental Impact Report at 5.

In a Design Report dated March 1982, CWC described the preferred alternative, including the secondary treatment process with the addition of filtration, construction of the HPR, and diversion of Indian Creek to the ICR. The HPR, designed to have a capacity of approximately 3,700 acre-feet, would be constructed by placing four earth-filled embankments which would permit spillage from the ICR to enter the HPR but prevent spillage from the HPR from entering the nearby Stevens Lake. No wastewater would enter the ICR, which would receive water from the diversion of Indian Creek, formerly crossing the HPR, into the proposed Uppler Dressler ditch. The Design Report also provided for distribution of secondary-treated wastewater to irrigation facilities, which incorporate tailwater control facilities, and surface and groundwater monitoring. Irrigation would consist of sprinkler and flood irrigation.

As a result of these modifications in the preferred alternative of discharging secondary-treated wastewater to two new storage reservoirs for agricultural reuse, adopted in the Facility Plan, a Draft Supplemental EIR was prepared in February 1983. The primary modification was the decision to

construct the HPR in order to accommodate treated effluent and increased estimates of local surface water run-off. The Draft Supplemental EIR stated that the HPR's main embankment would have a clay core, with clay from a nearby area, and that a "glory hole" would be constructed to release stored wastewater to Indian Creek "during storms with an intensity of the 50-year return frequency storm or greater, assuming the reservoir was at its normal operating level at the onset of the storm" (Draft Supplemental EIR, at 10). The Draft Supplemental EIR also noted that two new areas had been proposed for irrigation with the treated wastewater and that the diversion structure on Indian Creek upstream of the HPR would divert flows above 30 cubic feet per second (cfs) to a renovated ditch which connects with Indian Creek downstream of the HPR and would divert flows below 30 cfs to the ICR. The Draft Supplemental EIR stated that although the area of the HPR had potentially active faults, recent trenching had led to the conclusion that "no fault lines are located under any of the proposed dam structures" and no active faults are predicted "within the project area." Id. at 16. However, it recommended proper design and construction of the reservoir and export pipeline should be undertaken to minimize structural damage due to ground shaking, liquefaction, and subsidence.

The Draft Supplemental EIR also assessed the hydrologic impact of diverting water from Indian Creek around the HPR and through the ICR, concluding that any changes in stream hydrology "should not require mitigation." Id. at 25. The Draft Supplemental EIR also considered the potential public health threat of sprinkler or flood irrigation in the two new areas and of spillage of treated wastewater from the HPR during peak storm situations. In the latter instance, the expected discharges are 43 cfs, 89 cfs, and 253 cfs during, respectively, the 50-year, 100-year, and 500-year storms, assuming a maximum level of storage in the HPR of 2,922 acre-feet. Id. at 30. These discharges would be diluted before reaching Indian Creek or the East Fork of the Carson River. The Draft Supplemental EIR concluded that the public health threat of these "infrequent discharges should be minor." Id. at 3. The Draft Supplemental EIR mentioned various mitigating measures with respect to the use of treated wastewater in irrigation which were "planned to be implemented by STPUD," including

construction of tailwater control facilities at wastewater irrigation sites;
 development of irrigation plans in consultation with the landowners and the [Soil Conservation Service]; continued monitoring of wells and groundwater in the vicinity of the irrigation sites; secondary treatment and thorough disinfection of all exported wastewater; posting of all irrigation areas and conveyance facilities with signs indicating the presence of reclaimed wastewater; and use of downward-pointing spray nozzles and wind-activated automatic shutoffs on sprinklers * * *." 2/

2/ The FSEIR, at page 22, also stated that STPUD would "provide an alternative water source at its expense," if any domestic well contamination occurred. An environmental assessment, dated May 14, 1985, prepared by Jones and Stokes Associates, Inc., states, at page 38, that STPUD's contract with Alpine County so provides.

Id. at 31. The Draft Supplemental EIR also noted that construction of the HPR would remove key winter forage for deer and suggested that STPUD consider mitigating measures in consultation with the California Department of Fish and Game. Id. at 33-35. The Draft Supplemental EIR, at page 37, recommended fencing or posting the Southern perimeter of the HPR to prevent public access from the ICR recreational area. The Draft Supplemental EIR, at pages 39-40, also assessed the aesthetic impact of the HPR. The impact on cultural resources of the STPUD wastewater facilities in Alpine County was addressed by the Draft Supplemental EIR, incorporating a January 26, 1983, report by Intermountain Research (IMR) entitled "An Archaeological Survey of Proposed Wastewater Reservoir Facilities, Diamond Valley, Alpine County, California." The IMR report identified 23 archaeological sites and 2 historic sites, with a total of 14 sites in the area of the proposed HPR. The IMR report concluded that six of the sites in the proposed reservoir "should be tested to determine their eligibility for inclusion in the National Register of Historic Places" (Draft Supplemental EIR, at 85).

The Final Supplemental EIR (FSEIR) incorporated the Draft Supplemental EIR, with additional mitigating measures and, in addition, responded to written comments received on the Draft Supplemental EIR. The FSEIR, at page 3, also summarized the potentially significant adverse environmental impacts of the "project modifications" and corresponding mitigating measures, concluding that "implementation of these mitigation measures will ensure that the potential environmental effects of the project will be reduced to less than significant levels." In particular, in order to ensure that the HPR has adequate capacity to accommodate the 100-year storm, in addition to all wastewater generated by STPUD's treatment plant, the FSEIR proposed diverting natural drainage to the HPR into the ICR and enlarging the ICR outlet pipeline.

With respect to wildlife, the FSEIR proposed that STPUD participate in a habitat evaluation and development of a mitigation plan in cooperation with the California Department of Fish and Game. In a response to a written comment, the FSEIR stated that STPUD had retained a qualified consultant and signed an agreement with the California Department of Fish and Game to evaluate the impact on wildlife habitat of construction and operation of the HPR and to develop a mitigation plan "capable of compensating for the habitat values lost." Id. at 10. Under the agreement, dated May 16, 1983, STPUD agreed "to provide wildlife habitat mitigation satisfactory to [the State department]" within 3 months of the start of construction on the HPR and to fund development, operation, and maintenance of the mitigation plan "for the life of the project." Id. at 76. Jones and Stokes Associates, Inc., subsequently prepared a draft habitat evaluation, dated October 1983, entitled "South Tahoe Public Utility District/California Department of Fish and Game Habitat Evaluation of Harvey Place Reservoir, Alpine County, California," and a final mitigation plan, dated March 1984, entitled "South Tahoe Public Utility District Harvey Place Reservoir Implementation Plan for Wildlife Management." By letter dated March 1, 1984, the California Department of Fish and Game approved the mitigation plan. By letter dated April 4, 1985, the Environmental Protection Agency (EPA) also approved the mitigation plan.

With respect to cultural resources, the FSEIR proposed that STPUD retain a professional archaeological firm to conduct test excavations at eight sites and to develop a mitigation plan in cooperation with the California Office of Historic Preservation (SHPO). In response to a written comment, the FSEIR stated that STPUD had contracted with IMR to evaluate the potential impact to cultural resources and to develop a mitigation plan and that a "work plan" had been submitted to SHPO for review and approval. Id. at 29. Moreover, the FSEIR stated that "STPUD will implement mitigation measures, if needed, to avoid significant impacts to archaeological sites in the project area prior to construction disturbance of the area." Id. 3/ The record indicates that test excavations at the eight sites were made and one site (CA-ALP-212) was deemed eligible for inclusion in the National Register of Historic Places. It was also determined that STPUD's activities would have an adverse effect on the eligible site, but both EPA and SHPO concluded that a data recovery program proposed by STPUD would negate the adverse effect. See Letter from Chief, California Branch, EPA, to Western Division of Project Review, Advisory Council on Historic Preservation, dated March 23, 1984; Letter from Acting Chief, SHPO, to State Water Resources Control Board (SWRCB), dated March 7, 1984.

The FSEIR concluded that diversion of Indian Creek "should not significantly affect [wildlife] habitat below the [HPR]" because flows would be maintained "at levels equivalent to flows upstream of the creek diversion." Id. at 24-25. The FSEIR also noted that, in order to minimize any odors drifting from the HPR to the Indian Creek campground, STPUD would operate an aeration system. Id. at 52. With respect to ensuring the structural integrity and earthquake resistance of the main embankment of the HPR, the FSEIR, at page 52, noted that the California Department of Water Resources, Division of Safety of Dams, would consider this in issuing a permit for reservoir construction and conducting annual inspections. The FSEIR stated that STPUD "does not propose to line [HPR]" with clay, but that a "relatively low seepage rate is anticipated from the dam foundation and embankment" due to the low permeability of the soils and the annual drawdown of the HPR. Id. at 53. However, the volume of seepage was "unknown." Id. at 23. In addition, the Soil Conservation Service did not classify the majority of lands underlying the HPR, i.e., with the exception of 40 acres, as having either a severe or moderate soil hazard rating. Id. at 51. The excepted acreage, with a moderate soil hazard rating, would be inundated only a "short period of time each year." Id. The FSEIR, at page 55, stated that STPUD had conducted a water quality monitoring program in Alpine County since July 1980 and would only use "interceptor wells" if monitoring wells "indicate that a water quality problem exists." 4/ With respect to surface run-off of treated wastewater

3/ Appendix B of the FSEIR contains correspondence directed to the Washoe Tribe of California and Nevada from IMR, in part inviting "Washoe input" on consideration of cultural resources. Id. at 81.

4/ The monitoring program consists of 8 surface water stations, 10 groundwater stations, and 9 soils stations "as recommended by the U.S. Soil Conservation Service," which are "designed to identify any changes in water quality and soil conditions as a result of the storage and reuse of wastewater in the area." Environmental Assessment, dated May 14, 1985, prepared by Jones and Stokes Associates, Inc., at 27.

used in irrigation, the FSEIR, at page 56, stated that STPUD had requested the Lahontan Regional Water Quality Control Board (RWQCB) to permit such discharges to Indian Creek but that, without such permission, "tailwater control systems will be utilized and there will be no direct discharge to the stream."

By virtue of resolution No. 2292, adopted May 12, 1983, the Board of Directors of STPUD incorporated into the Facility Plan the mitigating measures summarized in the FEIR, at pages 109-12, and the FSEIR, at pages 4-5. On that date, the Board of Directors also adopted resolution No. 2293, providing that the mitigating measures set forth in the FEIR would be "incorporated in the construction contract documents" and mitigating measures set forth in the FSEIR would be required by an "amended" contract with Alpine County, the waste discharge requirements of the Lahontan RWQCB and the construction grant conditions of EPA and the SWRCB. By resolution No. 2294, also adopted May 12, 1983, the Board of Directors incorporated the mitigating measures "into said project."

On November 9, 1983, the Lahontan RWQCB adopted "Amendments to the Water Quality Control Plan for the North Lahontan Basin Concerning the West Fork Carson River and Indian Creek Watersheds," after preparation of environmental documentation and a public hearing. The "Amendments" set forth certain proposed waste discharge requirements which would regulate the storage and agricultural reuse of secondary-treated wastewater to ensure that water quality standards for the West Fork of the Carson River and Indian Creek are satisfied. The "Amendments" also noted that the original "Basin Plan" still required that facilities used for the collection, transport, or disposal of waste "shall be adequately protected against overflow or washout or flooding from a 100-year flood." The "Amendments" were approved by the SWRCB on December 15, 1983. On February 9, 1984, in Order No. 6-84-24, the Lahontan RWQCB adopted waste discharge requirements thereby implementing the "Amendments." The order prohibited discharges of effluent to the HPR in excess of certain water quality standards and provided that such discharges shall not alter in certain respects the water quality of ground and surface waters in the East Fork and/or West Fork of the Carson River hydrologic units. The order thereby regulated in part turbidity, dissolved oxygen concentration, and the presence of coliform organisms, nitrates, and toxic substances. In particular, the order provided that discharges shall not cause a nuisance by reason of odor or insect production in the HPR. The order also set forth certain general requirements, including provisions for tailwater controls for irrigation wastewaters and posting or restricting access to the HPR to prevent direct human contact. The order also required compliance with a monitoring program set forth in "Monitoring and Reporting Program No. 84-24," which required monitoring of water quality at eight surface water stations, nine groundwater stations, including the base of the HPR's main embankment, and six soil stations.

Citizens for Sewage Initiative Ordinance filed a petition with the SWRCB on March 8, 1984, challenging the Lahontan RWQCB's February 1984 order. In part, petitioner contended that failure to line the HPR with clay could have an adverse impact on groundwater. The SWRCB concluded: "[T]he waste discharge requirements require monitoring of groundwater at the base of

Harvey Place Dam and that the District provide mitigation in the event of threatened contamination or pollution. We find that these provisions provide adequate protection of groundwater underlying the Reservoir" (SWRCB Order No. WQ 84-4, dated June 21, 1984, at 7).

STPUD's wastewater treatment project has also been the subject of an October 1979 Draft Environmental Impact Statement (Draft EIS) and a May 1981 Final EIS (FEIS) prepared by EPA, in order to provide a basis of environmental impact analysis for deciding whether to fund the modification of STPUD's wastewater treatment facilities. These EIS's, however, focused on the environmental impact of anticipated growth in the Lake Tahoe and Upper Carson River basins due to the modified facilities. The FEIS, at page 6, stated that the Draft EIS "primarily documented the indirect effects of expanding the STPUD * * * sewage treatment facilities," because the direct effects of construction and operation of all of the facilities, including the effluent storage reservoir and associated facilities in Alpine County, were "covered" in the facility plan and companion environmental impact report.

On August 28, 1985, the Tahoe Regional Planning Agency (TRPA), after preparation of an EIS, granted STPUD a land use permit in order to allow modification of the wastewater treatment plant. The TRPA Draft EIS, dated April 1985, which was incorporated in the July 1985 FEIS and certified by TRPA, stated, in the "Executive Summary" at page 6, that the EIR, Supplemental EIR, and EPA's EIS had found no significant impacts with the "wastewater treatment plant modifications" that cannot be mitigated. The TRPA FEIS, at page 5-2, also responded to a written comment submitted by appellants' attorney, concluding that there was no substantial evidence submitted "that there may be significant effects as a result of the project." The TRPA FEIS also stated, at page 5-14, in particular that there was no substantial evidence that "significant groundwater impacts" would be caused by the project, given mitigating measures and sufficient data about soils and groundwater.

By letter dated August 20, 1984, the SWRCB, on behalf of EPA in accordance with 40 CFR 35.912, approved STPUD's project plans, including construction of the HPR and irrigation works, for issuance of a construction grant. EPA awarded a construction grant to STPUD on September 19, 1984, and the SWRCB awarded a matching grant on October 15, 1984. On June 20, 1984, the State Division of Safety of Dams approved application 1062-3 for construction of the main embankment of the HPR.

In conjunction with obtaining a permit from the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act, as amended, 33 U.S.C. § 1344 (1982), to place fill material in Indian Creek thereby diverting the creek around the HPR, Jones and Stokes Associates, Inc., prepared an environmental assessment (EA), dated May 14, 1985. In discussing the environmental impact of construction and operation of the project facilities in Alpine County, the EA relied largely on the EIR, Supplemental EIR, and EPA's EIS. The Corps prepared an environmental assessment, also relying on the prior environmental documentation, which assessed the environmental impact of the construction and operation of project facilities in Alpine

County. In a Finding of No Significant Impact, dated August 19, 1985, the Corps concluded that issuance of a permit "will not result in any significant impacts," due to STPUD's commitment to undertake mitigating measures, and accordingly issued permit 8753 effective August 19, 1985.

It is against the backdrop of this comprehensive environmental analysis and review by a number of state and Federal agencies, including BLM, that we consider appellants' objections to BLM's decision to grant a right-of-way to STPUD for a reservoir site and water diversion pipeline.

In their statement of reasons for appeal, appellants contend that there are "significant" adverse environmental impacts associated with issuance of the BLM right-of-way, including the "risk" of surface and groundwater contamination and its impact on human health, impacts due to loss of deer winter range, and impacts due to the land application of wastewater by means of sprinkler irrigation. Appellants state that, in view of these significant environmental impacts, BLM was required to prepare an EIS prior to issuing the right-of-way grant. Appellants place particular emphasis on the threat of groundwater contamination. Appellants note that in a report prepared for STPUD by the Soil Conservation Service, U.S. Department of Agriculture, dated November 1980, entitled "Impacts of Land Application of Domestic Wastewater, Alpine County, California" (SCS Report), the location of the HPR and proposed irrigation sites contain land with a soil hazard rating of moderate or severe, *i.e.*, unsuitable for the application or storage of "sewage." Appellants also refer to the staff report on hydrology included in the BLM Land Report which concluded that "[i]nfiltration into the groundwater system of some effluent stored in HPR would be likely" but that it was not possible to estimate the rate of seepage or the amount of purification. The report noted that the HPR was underlain by Millich series soil, which has a high clay content and slow permeability but might be underlain by fractured or faulted bedrock, and "gullied lands" with unknown characteristics. The report stated that the subsurface flow of water is to the northeast. Appellants argue that at best the evidence with respect to the impact on groundwater raises a substantial question whether there will be a significant impact, especially in view of the factual gaps in relevant information, thereby requiring preparation of an EIS, citing City & County of San Francisco v. United States, 615 F.2d 498 (9th Cir. 1980).

Appellants also contend that BLM improperly failed to give public notice of preparation of the Land Report, which included a finding of no significant impact and preceded issuance of the right-of-way. Appellants argue that BLM must conduct another environmental assessment after giving public notice thereof. 5/

5/ The record contains no evidence that BLM publicly disseminated the Land Report, and it issued STPUD's right-of-way grant not much more than 30 days after preparation of the Land Report. The applicable regulation, 40 CFR 1501.4 (e)(1), provides that a FONSI shall be made available to the affected public in accordance with 40 CFR 1506.6. In turn, 40 CFR 1506.6(b) provides that agencies shall provide public notice of the availability of environmental documents to interested or affected persons by such means as publication in local newspapers or the posting of notice in the case of matters

Finally, appellants contend that BLM failed to give any consideration to the environmental impacts associated with the diversion of Indian Creek, the disturbance of archaeological sites, and placement of the HPR adjacent to a BLM campground. Appellants state that the diversion of the creek is a "per se" significant environmental impact. Appellants also state that BLM failed to consider the environmental impacts to vegetation and the landscape due to construction of the HPR and, in general, social, economic, and seismic impacts. Appellants also argue that BLM failed to consider STPUD's ability to properly dispose of wastewater in view of past illegal discharges.

In a supplemental statement of reasons, appellants contend that BLM, in its Land Report, admittedly failed to consider the alternative of not issuing the right-of-way and alternative sites for the new storage reservoir and also failed to provide adequate mitigating measures.

[1] The first question to address concerns the necessary scope of BLM's environmental inquiry. Appellants assert that, in addition to the environmental impacts of construction and operation of the reservoir site and water diversion pipeline, BLM was required to assess the environmental impact of all of the actions of STPUD which were thereby "enable[d]," including the land application of the secondary-treated wastewater and diversion of Indian Creek. Statement of Reasons at 15. In their supplemental statement of reasons, appellants incorporate objections filed with respect to other aspects of STPUD's overall wastewater treatment project, thereby intimating that BLM was responsible for assessing the environmental impact of all aspects of the project, including modification and operation of the treatment plant and export pipeline facilities. We hold that BLM was primarily responsible for assessing the environmental impact of the facilities authorized by the BLM right-of-way and ensuring that no significant environmental impact occurs as a result of that authorization.

fn. 5 (continued)

"primarily of local concern." 40 CFR 1506.6(b)(3). BLM clearly failed to comply with these regulations at any time prior to issuance of the right-of-way grant. However, we conclude that this failure to provide public notice does not justify overturning the December 1984 BLM decision where the record shows appellants have participated to some degree in the review of STPUD's overall wastewater treatment project before various agencies; made their views in part known to BLM through counsel prior to the BLM decision (see letter to Walker Resource Area Manager, BLM, from Timothy W. Pemberton, dated Apr. 30, 1984) and, moreover, been afforded an opportunity to have their concerns addressed by this Board. See Santa Fe Pacific Railroad Co., 90 IBLA 200, 219 (1986). In particular, appellants' attorney submitted a lengthy comment with respect to the Draft Supplemental EIR, which was addressed in the FSEIR (see pages 43-64). Appellants also submitted comments to the Corps of Engineers with respect to STPUD's section 404 permit application and to the Tahoe Regional Planning Association in connection with preparation of its EIS and a petition to the State Water Resource Quality Control Board with respect to the Lahontan Water Resource Quality Control Board's waste discharge requirements. The record does not show that appellants were prejudiced in any way by the failure to provide notice prior to right-of-way issuance.

It is obvious the HPR and the pipeline are an integral part of STPUD's envisioned overall wastewater treatment project and that but for these facilities this project could not proceed. In this sense, construction and operation of the HPR and water diversion pipeline are "connected" with other aspects of the wastewater treatment project, such that, generally speaking, a Federal agency would be required to analyze the combined environmental effects thereof in a single environmental review document. 40 CFR 1508.25(a)(1); see Glacier-Two Medicine Alliance, 88 IBLA 133, 145 (1985).

It is also unquestioned that a Federal agency must consider the environmental consequences of the actions of non-Federal entities which are authorized by that agency and affect the environment. Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973). However, a Federal agency is not required to consider the environmental consequences of the actions of non-Federal entities which are merely "enabled" by Federal action. Rather, there must be sufficient Federal involvement in the private action, in the form of funding or authorization. See N.A.A.C.P. v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978); Idaho Natural Resources Legal Foundation, 88 IBLA 201 (1985). In the latter instance, the authorization must serve as a "legal precondition which authorizes the other party to proceed with action which will affect the environment." N.A.A.C.P. v. Medical Center, Inc., *supra* at 632. In effect, the Federal agency must be in a position "to prevent the environmental consequences of another's actions." *Id.* at 634. Only in such circumstances can the Federal government be held "accountable under NEPA for its actions." *Id.* at 631.

In the present case, by virtue of the extensive Federal involvement in the wastewater treatment project due to Federal funding and authorization by a number of Federal agencies, the entire project must be deemed to be "federalized." BLM, however, provides neither funding nor authorization for and has no control over aspects of the wastewater treatment project, other than granting the right-of-way. The other aspects of the project, including land application of the secondary-treated wastewater, diversion of Indian Creek, and modification and operation of the treatment plant and export pipeline, are subject to funding or authorization by other Federal agencies and SWRCB, and the record indicates that this other Federal action has already been subjected to environmental impact analysis, including an EIS by EPA which essentially incorporated the FEIR (see EPA's FEIS at 5-6). ^{6/} See 40 CFR

^{6/} In a memorandum to the files, dated Aug. 12, 1983, (STPUD's Exh. C), Annie Godfrey, California Branch, EPA, recognized that a supplemental EIR had been prepared in 1983 "to discuss the modifications which had been made since the 1979 EIR," but stated that, due to the fact that EPA was aware of these modifications at the time of the EIS, discussions between State and EPA staff had "led to the decision that the Final EIS adequately describes the project as it is now proposed" and that no additional finding of no significant impact was warranted. In essence, EPA concluded that the EIS, which incorporated the FEIR, was adequate to assess the environmental impact of the wastewater treatment project, including construction and operation of the HPR, diversion of Indian Creek and land application of secondary-treated wastewater.

1501.7(a)(3). Thus, BLM was only responsible for assessing the environmental impact of the right-of-way grant, not the entire project.

In Natural Resources Defense Council, Inc. v. Callaway, 389 F. Supp. 1263, 1272 n.31 (D. Conn. 1974), rev'd in part, 524 F.2d 79 (2nd Cir. 1975), the court recognized that, in many Federal projects, "different agencies may interact with one another and have partial responsibility for a project," and that "if NEPA does apply to a project as a whole it must apply to each of its parts." The court held that the agencies involved in a single project need not "separately" comply with each of NEPA's requirements, as long as there is a valid document "somewhere in the process." Id. However, this analysis does not preclude one agency from preparing an environmental impact analysis which complements such documents prepared by other agencies involved in the same project. See 40 CFR 1506.4. Clearly, the record would have been less complex if one lead agency had prepared a comprehensive environmental impact analysis. See 40 CFR 1501.5(a). However, the absence of such a comprehensive document is immaterial where the "purposes and policies behind NEPA [have been] fulfilled." Natural Resources Defense Council, Inc. v. Callaway, supra at 1273. Indeed, appellants have failed to identify any relevant area of environmental concern which was not identified and considered "somewhere in the process" of assessing the environmental impact of the entire wastewater treatment project, including construction and operation of the HPR and water diversion pipeline. While the responsibility for implementing the environmental review mandated by NEPA properly falls on the Department of the Interior when it takes the "first step" in a larger project involving other Federal agencies, Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972), the Department should not have to back track in its environmental review in order to cover those aspects of the project already fully considered by other Federal agencies, when its participation in the project comes somewhere after the initial step.

Appellant has also failed to present any evidence that the de facto segmentation of the environmental review resulted in the Federal Government overlooking any significant cumulative environmental impact which devolves from the project as a whole or portions of the project, including the BLM right-of-way. The Federal Government would not be permitted to evade its responsibility in this fashion. See City of Rochester v. United States Postal Service, 541 F.2d 967, 972 (2d Cir. 1976); John A. Nejedly, 80 IBLA 14, 18 (1984).

[2] We turn, therefore, to the question of the adequacy of the environmental review performed by BLM. Appellant's principal contention is that BLM is required to prepare an EIS because certain significant environmental impacts are attributable to the authorized right-of-way. Section 102(2)(C) of NEPA, supra, requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." A finding of no significant impact will be upheld where the agency has taken a hard look at the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized it. Como-Falcon Coalition, Inc. v. United States Department of

Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd on other grounds, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980). The burden of proof is on the party challenging the adequacy of a FONSI. See Township of Lower Alloways Creek v. Public Service Electric & Gas Company, 687 F.2d 732, 747 (3rd Cir. 1982).

The environmental review performed by BLM admittedly relied on the FEIR and FSEIR prepared by Jones and Stokes Associates, Inc. for STPUD. In the Land Report, at page 4, BLM essentially stated that in light of this environmental impact analysis, "[n]o environmental assessment is necessary." However, while BLM is entitled to rely on relevant environmental impact analysis prepared by others, BLM must independently review the analysis. See 40 CFR 1506.5(b); Sierra Club v. Alexander, 484 F. Supp. 455, 467 (N.D.N.Y. 1980), aff'd, 633 F.2d 206 (2nd Cir. 1980); Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975); see also Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975). It is unclear from the Land Report whether BLM engaged in the necessary independent review. However, STPUD has submitted the affidavit of John Matthiessen, Walker Resource Area Manager, Nevada, dated September 12, 1985, which indicates that the necessary independent review took place:

I have personal knowledge that either the staff supervised by me or District Staff in the Division of Resource Management independently reviewed and evaluated key documents relevant to the environmental impact of the right-of-way grant, including the Environmental Protection Agency EIS and the STPUD EIR and supplemental EIR. I have personal knowledge that this independent review and evaluation included review of impacts of the STPUD Harvey Place Reservoir project, alternatives to the project and mitigation measures.

I have personal knowledge that the independent review of the documents above, together with the BLM Land Report/Environmental Assessment served as the basis for the Finding of No Significant Impact contained in the November 11, 1984 Land Report, and the permit decision. In particular, BLM staff relied upon mitigation measures described in these documents to reduce potentially significant impacts of the STPUD Harvey Place Reservoir project to less-than-significant levels.

STPUD Brief, Exh. K. We, therefore, conclude in the absence of any evidence to the contrary that BLM engaged in the necessary independent environmental review.

The foremost significant environmental impact potentially attributable to BLM's grant of the right-of-way is the degradation of the groundwater underlying the HPR and thus, possibly, the local aquifer. Appellants contend that BLM has admitted that not enough is known about the geologic structures underlying the HPR and the potential for seepage of the secondary-treated wastewater for BLM to fully assess the potential environmental impact. In effect, appellants raise the question whether BLM should prepare a "worst

case analysis" (WCA). ^{7/} The applicable regulation implementing the procedural requirements of NEPA, 40 CFR 1502.22(b) (1985), provides that where the record discloses gaps in relevant information essential to a reasoned choice among alternatives, an agency must weigh the need for the action against the risk and severity of possible adverse impacts by means of a WCA coupled with an indication of the probability or improbability of its occurrence. However, a WCA is only required by 40 CFR 1502.22(b) (1985) where the relevant information is not known and either the costs of obtaining it are exorbitant or the means to obtain it are not known. Otherwise, an agency must "include" the relevant information in its environmental impact analysis. 40 CFR 1502.22(b) (1985); see Idaho Natural Resources Legal Foundation, supra.

In the staff report on hydrology included in the Land Report, BLM stated that the "potential for seepage of effluent into the groundwater system cannot be assessed without further field investigation." See EPA's FEIS, at 81. BLM essentially admitted to a gap in relevant information. However, there is no suggestion either that the costs of obtaining that information are exorbitant or that the means to obtain it are not known. Thus, no WCA would be required. However, BLM would be required to determine and disclose the unknown relevant information. Nevertheless, it was apparently BLM's conclusion in its FONSI, which relied on the EIR's that, given the known information regarding the potential for seepage and the mitigating measures to be undertaken by STPUD, any environmental impact to groundwater from the HPR would be less than significant. In effect, the mitigating measures would compensate for any lack of relevant information. We also note that the Soil Conservation Service recognized in its report, at page 74, that the fact that the impact on groundwater is unknown "can be mitigated by implementation of a monitoring program to study changes in water quality." We, therefore, do not dispute BLM's approach. BLM was not required to undertake an exhaustive analysis of the potential for seepage where, relying on work already done, enough was known about that potential that the adopted mitigating

^{7/} Effective May 27, 1986, the Council on Environmental Quality (CEQ) eliminated the requirement in 40 CFR 1502.22 to prepare a worst case analysis in the case of incomplete or unavailable information regarding significant adverse effects on the human environment. See 51 FR 15618 (Apr. 25, 1986). CEQ replaced the requirement to prepare a worst case analysis with a requirement to disclose that information is lacking, to indicate its relevance, to summarize "existing credible scientific evidence" relevant to evaluating impacts and to evaluate such impacts "based upon theoretical approaches and research methods generally accepted in the scientific community." 40 CFR 1502.22(b) (51 FR 15625 (Apr. 25, 1986)). CEQ, however, retained the requirement to "include" relevant information in an environmental impact analysis where the costs of obtaining it are not exorbitant or the means to obtain it are known. 40 CFR 1502.22(a) (51 FR 15625 (Apr. 25, 1986)). Finally, the regulatory requirements were made applicable only where the agency was concerned with "reasonably foreseeable" significant adverse effects on the human environment. 40 CFR 1502.22 (51 FR 15625 (Apr. 25, 1986)). The amended regulation was made applicable to environmental impact statements "for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986." 40 CFR 1502.22(c) (51 FR 15626 (Apr. 25, 1986)).

measures were adequate to ensure that any environmental impact would be rendered less than significant. Appellants have not provided any evidence to the contrary.

This is simply not an area where BLM is proceeding in the face of unknown consequences. Indeed, as the record points out, since July 1980 monitoring of groundwater to detect any seepage from the ICR, which has been operated since 1968, has failed to disclose any significant seepage or contamination of groundwater. See FSEIR, at 54; Letter to John C. Weidman, Esq., from Edward D. Schroeder, Ph.D., dated May 27, 1985; Letter to assemblyman Norman S. Waters, from John C. Weidman, Esq., dated April 10, 1985, Attachment No. 2; EA, dated May 14, 1985, at 37. Moreover, there is no suggestion in the record that the mitigating measures, including the monitoring program, will not be adequate to minimize any adverse effect of any undesirable substances seeping into the groundwater. Appellant has offered no evidence that proceeding with construction and operation of the HPR could lead to any irreversible degradation of the groundwater. See Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d at 90. We conclude that BLM had available to it that information reasonably necessary to evaluate the potential groundwater impact of construction and operation of the HPR.

As the court stated in Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d at 88, in the context of an EIS:

NEPA does not require [a Federal agency] to make a "crystal ball" inquiry, Natural Resources Defense Council, Inc. v. Morton, 148 U.S. App.D.C. 5, 458 F.2d 827, 837 (1972), and * * * an EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible, Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973). A government agency cannot be expected to wait until a perfect solution of environmental consequences of proposed action is devised before preparing and circulating an EIS.

Nevertheless, having concluded that BLM was not required to assess the threat of groundwater contamination in further detail, we are not persuaded that BLM has fully discharged its responsibility. In its right-of-way grant, BLM has not made the grant contingent on STPUD's compliance with the adopted mitigating measures, particularly the monitoring of groundwater and the usage of seepage control wells where necessary, as recommended in the BLM Hydrological Review. §/ It is not sufficient that STPUD has agreed to undertake

§/ STPUD, in adopting the mitigating measures set forth in the FEIR, agreed to either "[l]ine reservoirs with impervious materials or use seepage control wells." However, STPUD had apparently concluded prior to this commitment that lining a reservoir was not cost-effective. The evidence indicates that this would probably be the most effective alternative for protecting the

these measures or that the Lahontan RWQCB has required compliance in its waste discharge requirements. BLM is independently responsible for ensuring that its action in granting the right-of-way for the HPR does not result in a significant environmental impact. See 40 CFR 1505.3. We note that the BLM staff hydrologist who prepared the report appended to the Land Report recommended that STPUD "should be required" to develop a monitoring plan and a mitigation plan to deal with the threat of groundwater contamination "from the HPR." BLM should amend the right-of-way grant to include an appropriate stipulation to this effect.

The record also establishes that construction of the HPR will result in the loss of key winter forage for deer and that STPUD has agreed to implement a mitigation plan to compensate for the loss of wildlife habitat. BLM should also incorporate a stipulation in its right-of-way grant to ensure that STPUD complies with this mitigation plan where the aim is to protect wildlife which could be significantly affected by the grant.

Appellants have alleged the existence of other significant environmental impacts resulting from construction and operation of the HPR and water diversion pipeline. Based on a careful review of the record, we hold that appellants have not identified any environmental impact which was not either insignificant or rendered insignificant by applicable mitigating measures. Cf. Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

Appellants' argument that BLM erred in failing to consider the "no action" alternative and alternative sites for the new storage reservoir is rejected. Clearly, full consideration of a "no action" alternative would require identification of such an alternative and a discussion of why it is accepted or rejected. In this case, BLM stated in the Land Report: "Denial [of the application] is not considered since this project will be beneficial to the public." Thus, BLM did not identify "no action" as an alternative, and its explanation was directed toward justifying its decision not to consider a "no action" alternative. However, the rationale of a public benefit would be equally applicable to a decision to reject a "no action" alternative, and there is no reason to believe BLM would conclude otherwise in the face of its statement that the project is in the public interest and its ultimate conclusion that, as mitigated, it would have no significant effects on the environment. Under the circumstances, the failure of BLM to consider explicitly the "no action" alternative is not grounds for reversing the issuance of the right-of-way.

fn. 8 (continued)

groundwater. However, we hesitate to require BLM to impose a stipulation to that effect where seepage control wells are apparently equally adequate to ensure that groundwater quality is not impaired with an adverse effect on any users thereof. In its brief at page 31, STPUD states that the Lahontan RWQCB required in its waste discharge requirements that STPUD "line HPR if monitoring were to detect significant leakage." We cannot find this purported requirement. In any case, BLM may also want to consider such an alternative.

BLM's determination in its Land Report not to "look at" other sites on the basis of the limited amount of public land in Alpine County is justified. The record indicates BLM undertook independent review of the previously compiled environmental documents which included extensive analyses of alternatives. Awarding of the construction grants by EPA and SWRCB was based on the project alternative subsequently analyzed by BLM. Where comprehensive alternative analyses are performed by other agencies involved in a project, BLM's "obligation to independently investigate alternatives could reasonably be found to be much less substantial than might otherwise be the case." Sierra Club v. Alexander, supra at 469. Appellants have failed to offer any evidence that feasible, reasonably apparent, and substantially preferable alternatives were not adequately considered in the environmental documents relied upon by BLM. See Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency, 684 F.2d 1041, 1046-47 (1st Cir. 1982).

Accordingly, we conclude that appellants have failed to identify any significant environmental impacts which would require BLM to prepare an EIS in conjunction with issuing the right-of-way grant for the HPR and water diversion pipeline. Our review of the record establishes that a hard look has been taken at environmental problems associated with the right-of-way grant, relevant areas of environmental concern have been identified, and a convincing case has been made that no significant environmental impacts will result from granting the right-of-way.

Therefore, 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 as modified, and the case is remanded so that BLM may incorporate into the right-of-way grant the additional stipulations discussed herein.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge.

