Appeal from a decision of the Area Manager, Alturas Resource Area, California, Bureau of Land Management, dismissing a protest to the issuance of right-of-way CA 17114 and simultaneously issuing this right-of-way.

Affirmed.


   No violation of the nonimpairment policy set forth in sec. 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), is established by BLM's grant of a right-of-way across public lands adjacent to a wilderness study area where the right-of-way will permit the developer of a hydroelectric concern to convey water diverted from a river entering the wilderness study area.


   A finding that the grant of a right-of-way does not constitute a major Federal action significantly affecting the quality of the human environment will be upheld where the agency has identified and considered 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 such impact.

APPEARANCES: Jim Eaton, Executive Director, California Wilderness Coalition, Davis, California, for appellants; Peter D. Dickson, Esq., Jessica S. Lefevre, Esq., Bruce S. Deming, Esq., Washington, D.C., for Malacha Power Project, Inc., and David E. Lindgren, Esq., and Lynn M. Cox, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The California Wilderness Coalition (CWC), Friends of the River, Sierra Club California, and the Wilderness Society have appealed from a decision of the Area Manager, Alturas Resource Area, California, Bureau of Land Management
(BLM), dated February 13, 1987, dismissing a protest to the issuance of right-of-way CA 17114 and simultaneously issuing this right-of-way. 1/ The grantee of right-of-way CA 17114 is Malacha Power Project, Inc. (Malacha), which seeks the lands at issue in connection with its development of the Muck Valley Hydroelectric Project. This project, located on the Pit River in Lassen County, California, requires the right-of-way to divert water from the Pit River to a downstream powerhouse.

A protest to the grant of right-of-way CA 17114 was filed on November 3, 1986, by CWC, questioning the impacts of the Muck Valley Hydroelectric Project on the nearby Pit River Canyon Wilderness Study Area (WSA) and further questioning whether BLM could grant a right-of-way that would result in a loss of wilderness values in the WSA. If BLM could legally consider this project, CWC stated, BLM would be required to prepare an environmental impact statement (EIS). A protest by the Wilderness Society was received by BLM on the same day contending that the diversion of water by the project would affect fishery resources of the Pit River by reducing the amount of water in the river, thereby causing increased water temperatures, decreasing the levels of dissolved oxygen, and jeopardizing the area's wilderness values. The Wilderness Society also contended that an environmental assessment (EA) prepared by Ott Engineering was inadequate to describe the project's potential impacts on riparian habitat in the Pit River Canyon.

BLM's response to the protests of CWC and the Wilderness Society is the decision on appeal. The decision begins by noting that the Muck Valley Hydroelectric Project is located on the Pit River and is adjacent to, but outside of, the Pit River Canyon WSA. Diversion of water occurs outside the WSA and causes no surface disturbance within the WSA, BLM states, but does alter a "previously manipulated flow regime" of the river. Id. at 1. The decision further indicates that the primary components of the project are on private land, but that some 1-3/4 miles of public land are crossed by portions of the project, including part of an underground water-diversion tunnel, a portal structure, part of a partially buried penstock, and three-fourths of a mile of transmission lines.

Upstream of the project area, 336 adjudicated instream diversions had been reported in 1982. Decision at 3. The net effect of these diversions, BLM states, is that the Pit River is "essentially a 100-percent adjudicated stream in which no continuous flow occurs through the agricultural diversion season (July through September) and a significantly reduced flow occurs during the storage season." Id. at 3-4.

The decision further states that the California Department of Fish and Game has established that a minimum instream flow of 50 cubic feet per second (cfs) must be maintained in the river. 2/ Because the project requires 30 cfs of water as its operating minimum, the project would not operate at flows

1/ Right-of-way CA 17114 was issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and the regulations set forth at 43 CFR Part 2800.
2/ This requirement is set forth at section 402 of the license granted to Malacha by the Federal Energy Regulatory Commission (FERC) on Dec. 2, 1986.

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below 80 cfs.  Id. at 1.  Accordingly, during the agricultural diversion season in which the mean monthly flows are 65 cfs, 10 cfs, and 33 cfs, stream flow and water quality will not vary from ambient conditions.  Id. at 4.

Responding to the protests directly, BLM concluded that the project would not impair the wilderness characteristics of the Pit River Canyon WSA.  In support, the Area Manager pointed to the minimum 50-cfs flow prescribed by the California Department of Fish and Game.  At 50 cfs, the riverbed would contain a continuous flow covering the entire channel and providing a visually aesthetic experience. Decision at 6.  This flow renders substantially unnoticeable any effects that water diversion may have on the area's naturalness qualities, the Area Manager stated, and does not impair the area's opportunities for recreation, such as warm-water fishing or solitude.  Id. at 6-7.  Had the project existed at the time BLM performed its intensive wilderness inventory, the impacts of the project would not have disqualified the adjacent area as a WSA.  Id. at 7.

Addressing the concerns of the Wilderness Society, the Area Manager acknowledged that during autumn, winter, and spring, the project would decrease flows through the bypassed reach of the river by as much as 600-700 cfs.  The effects of such decreased flow, as described by the Area Manager, are these:

[D]issolved oxygen concentrations will not be adversely affected, because the project is required to maintain a minimum instream flow release of 50 cfs.  A 50 cfs release will provide sufficiently deep flows through the steep, rocky bypassed reach to aerate the water and to maintain dissolved oxygen concentrations at saturation.  This minimum flow release would also maintain ambient water temperatures in the bypassed reach during project operation.  This minimum instream flow will also provide sufficient moisture to maintain riparian/botanical vegetation, particularly within the braided channel section of the bypassed reach, where the better-developed herbaceous riparian species occur.  (See FERC EA, pages 10 thru 15; Project Exhibit E, pages 3-22 thru 3-23.)

In their first argument on appeal, appellants contend that BLM's issuance of right-of-way CA 17114 violates section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1982), requiring the Secretary to manage WSA's so as not to impair their suitability for preservation as wilderness. 3/  In support of this argument, appellants

3/  Section 603(c) states in part:

"During the period of review of such areas [as, e.g., a WSA] and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." (Emphasis added.)
look to BLM's Interim Management Policy (IMP). 44 FR 72014 (Dec. 12, 1979). Therein at pages 72023-72024, the criteria for determining whether an activity is nonimpairing are set forth. 4/ Appellants contend that BLM's grant of right-of-way CA 17114 is impairing because this act is not temporary in nature. In the alternative, appellants contend that the grant violates the IMP's direction that BLM, before approving a proposed activity generally identified as nonimpairing, first ensure that the proposed action conforms to the existing management framework plan (MFP), if one has been prepared.

Counsel for BLM contends that lands outside the WSA and no longer under wilderness review, like the right-of-way lands at issue, are not subject to the IMP. Because we find that BLM's grant of right-of-way CA 17114 did not violate the IMP, assuming the applicability of these standards, we need not now address counsel's argument.

The record reveals that Malacha was issued a license by FERC authorizing it to construct, operate, and maintain the Muck Valley Hydroelectric Project for a period of 50 years. Because BLM lands are a part of this long-term project it is clear, as appellants charge, that BLM's action is not temporary in nature. This fact, however, does not establish a violation of section 603(c), nor, upon closer inspection, does it establish a violation of the IMP.

[1] In their statement of reasons, appellants fail to identify any wilderness characteristic, e.g., unit size, naturalness, or outstanding opportunities for solitude or a primitive and unconfined type of recreation, so diminished by BLM's action as to impair the unit's suitability for preservation as wilderness. Thus, no violation of section 603(c) is supported by the pleadings.

Moreover, a careful reading of the IMP reveals that the long-term nature of BLM's right-of-way does not, by itself, cause the right-of-way to be impairing. In reciting that a nonimpairing activity must be temporary in nature, inter alia, the IMP states:

4/ An activity will be considered nonimpairing if BLM finds:
   (a) It is temporary;
   (b) Any temporary impacts caused by the activity must, at a minimum, be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole by the time the Secretary of the Interior is scheduled to send his recommendations on that area to the President, and the operator will be required to reclaim the impacts to that standard by that date; and
   (c) When the activity is terminated, and after any needed reclamation is complete, the area's wilderness values must not have been degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness.
a. It is temporary. This means that the use or activity may continue until the time when it must be terminated in order to meet the reclamation requirement of paragraphs (b) and (c) below. 5/ A temporary use that creates no new surface disturbance may continue unless Congress designates the area as wilderness, so long as it can easily and immediately be terminated at that time, if necessary to management of the area as wilderness. [Emphasis added.]

Id. at 72023. The concluding phrase, "if necessary to management of the area as wilderness," implies that a long-term action (as here) can be nonimpairing if it does not affect management of the area as wilderness. This interpretation offers a common sense approach to identifying a nonimpairing action and provides an adequate answer to appellants' contrary contention. It is also consistent with the language of FLPMA section 603(c) which requires only that the Secretary manage WSA lands so as not to impair their suitability for preservation as wilderness.

As to appellants' argument that BLM's action does not conform to an MFP, we observe that appellants have not alleged that such a document even exists. The record does reveal that BLM prepared a Resource Management Plan (RMP) and EIS in 1983, prior to Malacha's application for a FERC license. Counsel for BLM points out that the RMP neither identifies hydroelectric development as a special management issue nor proscribes such development, a statement that appellants do not dispute. In light of this statement, we find that appellants have not shown a violation of the IMP in this regard.

Appellants' final argument on appeal charges that an EIS describing the impacts of the project is needed for three reasons: first, BLM's 1983 EIS for the Alturas Resource Area does not consider the project; second, the project EA does not adequately consider the effect caused by a reduction of instream flows on fisheries, recreation, wilderness qualities, riparian zones, botanical values, and wildlife resources; and finally, the project is highly controversial.

BLM's response to this final argument impliedly acknowledges that the 1983 EIS does not specifically address Malacha's project. This fact by itself, however, does not demonstrate error in BLM's action. Section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1982), directs all agencies of the Federal Government to, inter alia, include in every recommendation or report on proposals for "major Federal actions significantly affecting the quality of the human environment" a detailed statement on the environmental impact of the proposed action. In order to determine whether to prepare an EIS, regulation 40 CFR 1501.4 directs the agency to prepare an EA.

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5/ The substance of paragraphs (b) and (c) is set forth in note 4. Reclamation is appropriate for temporary uses that cause "physical or aesthetic impacts." 44 FR at 72016. Appellants have identified no physical or aesthetic impacts that would require reclamation.
The record reveals that an EA, dated October 6, 1986, was prepared by FERC addressing the Muck Valley Hydroelectric Project. An earlier EA, prepared by Ott Water Engineers, Inc., in June 1985 is also part of the record. As noted by counsel for Malacha, appellants' concerns are addressed in both the FERC EA and Ott EA. 6/ See, e.g., the discussion of impacts to fisheries at pages 3-1 through 3-10, 3-19 through 3-20, and 3-23 through 3-24 in the Ott EA and pages 8-13 in the FERC EA; to recreation at pages 7-1 through 7-7 (Ott) and pages 20-21 and 25 (FERC); to wilderness qualities at pages 8-1 through 8-7 (Ott) and page 4 (FERC); and to riparian zones, botanical values, and wildlife (including raptor) resources at pages 3-1 through 3-25 (Ott) and pages 8-10, 13-19, and 23-25 (FERC). The FERC EA concludes by stating that issuance of a license to Malacha does not constitute a major Federal action significantly affecting the quality of the human environment. This conclusion was accepted by the Area Manager after his review of relevant documents. 7/

[2] In Tulkisarmute Native Community Counsil, 88 IBLA 210 (1985), the Board set forth a standard for determining the adequacy of an EA. At page 216, we said:

The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered 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 such impact. Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd as modified, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980). In such circumstances, we will affirm a finding of no significant impact. John A. Nejedly, 80 IBLA 14 (1984).

Appellants' challenge to the EA's consists of a single sentence describing the "EA" 8/ as inadequate in analyzing the project's impacts on fisheries, recreation, wilderness qualities, riparian zones, botanical values, and wildlife resources. The record reveals, however, that these concerns

6/ The Ott EA became part of the FERC license application. See exhibit E of volume entitled "Application for License for Major Unconstructed Project, Muck Valley Hydro Project, FERC Project No. 8296-000," and further identified in the record as part 3 of 3.
7/ Decision at 8. Cooperation between Federal agencies in analyzing the impacts of a proposed action is encouraged by regulation. See, e.g., 40 CFR 1501.1(b) and 1501.6. Regulation 40 CFR 1506.3 provides that a "cooperating agency" may adopt the EIS of a "lead agency" when, after an independent review of the EIS, the cooperating agency concludes that its comments and suggestions have been satisfied. See also Natural Resources Defense Council v. Callaway, 524 F.2d 79, 86 (2nd Cir. 1975).
8/ Two EA's having been prepared, it is difficult to discern which EA appellants complain of.
were identified and addressed in two EA's. Appellants fail to identify any environmental problem or concern that the EA's did not address. On the basis of this fact and the record before us, we find no basis for upsetting the agency determination that the project is not a major Federal action significantly affecting the quality of the human environment. In light of this finding, no cause exists to prepare an EIS. See 40 U.S.C. § 4332 (1982).

Appellants' argument that an EIS is necessary because the project is regarded as "controversial" was also addressed in Tulkisarmute, supra. Therein at page 219, we said:

[T]he suggestion that the word "controversial" means "opposition" has been rejected. River Road Alliance, Inc. v. Corps of Engineers, [764 F.2d 445 (7th Cir. 1985)]; Town of Orangetown v. Gorsuch, 718 F.2d 29, 39 (2d Cir. 1983); Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973). The existence of public opposition cannot be the element to topple the balance in favor of preparing an EIS. River Road Alliance, Inc. v. Corps of Engineers, supra. Rather, the term "controversial" refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Rucker v. Willis, supra.

Appellants have failed to demonstrate that any dispute exists as to the size, nature, or effect of the project. This argument, therefore, does not persuade us that an EIS is necessary.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alturas Resource Area Manager is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anita Vogt
Administrative Judge
Alternate Member.

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