

UINTAH MOUNTAIN CLUB ET AL.

IBLA 89-409

Decided October 22, 1990

Appeal from a decision of the Utah State Director finding no significant impact, approving prospecting permit application U-29567, and approving in part prospecting application U-26545.

Affirmed.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--Prospecting Permit Applications

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 the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the 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.

APPEARANCES: Will Durant, Vernal, Utah, for appellants; David K. Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Uintah Mountain Club, et al. ^{1/} have appealed a Decision Record and Finding of No Significant Impact (FONSI), issued by the Utah State

^{1/} The other appellants (organizations whose representatives signed the notice of appeal) are Dry Fork Coalition, Maeser Water Board, Taylor Mountain Grazing Association, Uintah Basin Archeology Club, Concerned Citizens for Management of Public Lands, and Ashley Valley Water District.

Director, Bureau of Land Management (BLM), on March 31, 1989. The decision approved phosphate prospecting permit application U-29567, and partially approved prospecting permit application U-26545, which were filed by J. D. and Elizabeth Archer on March 5, 1975, and June 12, 1974, respectively.

The areas embraced by the applications are located approximately 8 miles north of Vernal, Utah. The decision approved U-29567 for 80 acres in T. 3 S., R. 21 E., Salt Lake Meridian. It approved U-26545 as to 1,720.39 acres in Ts. 2 and 3 S., R. 21 E., Salt Lake Meridian. ^{2/} The subject lands are administered by BLM and the Vernal Ranger District of the Ashley National Forest.

BLM's decision was based on environmental assessment (EA) No. 1988-61, dated October 31, 1988. The EA analyzed the effects of issuance of the permits and mining impacts based on a preliminary mining plan developed by BLM. Having reviewed the EA, the State Director determined that approval of the permit applications subject to certain mitigation measures would not have any significant impact on the human environment and that an environmental impact statement (EIS) was not required.

Appellants contend that significant impacts and environmental consequences identified in the EA require the preparation of an EIS. In the alternative, appellants contend that the prospecting permit applications should have been rejected.

[1] The National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321-4335 (1988), requires Federal agencies to prepare an EIS for all major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1988). Thus, a FONSI is BLM's determination that an EIS is not required to be prepared as there is no identified "significant impact." As we have observed in previous appeals from decisions of BLM officials determining that an EIS was not needed, a FONSI will be affirmed 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 that no significant impact will occur is reasonable in light of the environmental analysis. See, e.g., Hoosier Environmental Council, 109 IBLA 160, 172-73 (1989); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). A party challenging a FONSI determination must show that it was premised on a clear error of law or 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. Hoosier Environmental Council, supra; United States v. Husman, 81 IBLA 271, 273-74 (1984). Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal. Glacier-Two Medicine Alliance, supra at 141.

^{2/} The State Director rejected in its entirety a third prospecting permit application (U-26730), encompassing 639.18 acres in T. 3 S., R. 20 E., Salt Lake Meridian, because of potential unacceptable impacts.

Appellants argue that in accordance with the Ashley Creek Management Framework Plan (MFP), the "no action" alternative should have been selected. Citing the Council on Environmental Quality regulations at 40 CFR Part 1508, appellants contend that the issuance of a prospecting permit, the issuance of a preference-right lease, and the development of a mining operation are "connected actions" which must be discussed in the same impact statement. Appellants are concerned that once mining would begin, subsequent to issuance of a preference right lease, the opportunity for a "no action" alternative would be foreclosed.

BLM points out that it was only the Archers' proposed activity which was found inconsistent with the MFP. However, the proposals were not approved as applied for; they were approved subject to environmental stipulations. BLM states that if a valuable mineral deposit were discovered, lease issuance would be subject to NEPA, and no mining would be permitted in the absence of a showing that it could be done in an environmentally acceptable manner.

The decision appealed from states in part that prospecting permits were denied in "Areas A, B, C, and part of D because potential lease development impacts analyzed in the EA were in conflict with the approved land use plan, and were unacceptable." These areas embraced the lands rejected in U-26730 and partially rejected in U-26545. Thus, as to the rejected areas, the "no action" alternative was, in fact, the option selected by BLM (Decision at 2; Decision Record, Attachment 3). As we noted in Hoosier, supra at 173-74, the "no action" alternative would almost always result in the least adverse effects on the environment. However, the fact that one alternative may result in more negative impacts than another does not require rejection of that alternative. NEPA contains no structural bias in favor of the "no action" alternative. It "is designed to assure that the decision maker will be fully aware of the environmental consequences attendant upon a proposed course of action so as to make the election to proceed or not to proceed with a proposal the product of an informed choice." Id. As BLM's decision points out, with respect to the approved areas, protective stipulations formulated from the mitigating measures recited in the EA "will be incorporated in the permits."

According to the EA, the intent of the Ashley Creek MFP is that phosphate leasing be subservient to other important resource values, and to allow phosphate leasing only in areas where that mineral is economically recoverable and where other critical resource values would not be impacted (EA at 27). Thus, the MFP does not preclude phosphate leasing or compel the no action alternative.

Appellants contend that the approval of the permits required an EIS, the preparation of which would likely involve an analysis of connected, interdependent, or possibly cumulative impacts. Citing 40 CFR 1508.25, appellants interpret the issuance of a preference-right lease and the subsequent development of a mining operation as domino effects triggered by

the approval of prospecting permits. ^{3/} This, however, is simply not the case. As the Decision Record states at page 2:

The approval of portions of the prospecting permits is based on the need for additional information to determine if a valuable deposit is present. This information will be used to identify effects of preference right lease (PRL) issuance and subsequent mining activities. No PRL upon application, will be issued until a technical report and a site specific environmental assessment, prepared in accordance with the National Environmental Policy Act of 1969, indicates the presence of a deposit which can be economically extracted without significant adverse effects in a manner compatible with the applicable BLM and U. S. Forest Service Land Use Plans. ^{4/}

All of appellants' concerns regarding various anticipated impacts of lease development will clearly be addressed if it turns out that a valuable deposit exists, that a lease will issue, and that development will occur. At the present stage, the goal of the approved action, exploration, is limited to establishing whether a deposit exists. The impacts and consequences of that activity are fully evaluated in the Decision Record and EA. Moreover, the exploration operations are subject to numerous detailed specifications designed to minimize its impacts and safeguard the environment (see Attachment 3, Environmental Stipulations).

Appellants cite 40 CFR 1508.27 which states that the term "significantly," as used in NEPA, requires consideration of both context and intensity. Appellants cite numerous concerns which they allege are significant but have been inadequately addressed or ignored in the EA. Appellants speculate, for example, that water needs of a mining operation may adversely impact ranching needs and community water appropriation, especially in times of drought. They assert repeatedly that "significance" was avoided by failing to consider cumulative impacts, impacts on ecologically sensitive areas, and by assuming that all impacts can be mitigated. Again, appellants stress that an EIS "needs to be done to determine if, in fact, mining should be allowed," and that an EA was not the proper tool "to apply stipulations and develop a mining plan." Appellants criticize the EA for failing to assess the impacts on recreation and future economic options for the community.

^{3/} Under 40 CFR 1508.25, "scope" is defined as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." (Emphasis supplied.)

^{4/} The Board has held that a prospecting permit may be allowed subject to the express condition that no preference right lease will issue "until and unless" an environmental impact analysis, in accordance with NEPA, indicates that the ore can be extracted without significant adverse environmental effects. Stanford R. Mahoney, 12 IBLA 382 (1973).

What appellants fail to show is that the impacts anticipated from exploration cannot be acceptably mitigated as foreseen in the EA and monitored by the environmental stipulations. Those stipulations cover drilling, soil erosion, water resources, wildlife, archeology, paleontology, reclamation, recreation, and visual resource management. A careful review of the stipulations reveals that they were diligently prepared to monitor every phase of the exploration process. As to water resources, the EA speaks of several possibilities. One is that "[t]he applicant would be responsible for finding a source of water and complying with State of Utah Water Laws" (EA at 12). Another possibility is the sale of water by the Uintah Water Conservancy District, which indicated its willingness to provide water for a mining operation. *Id.* Thus, water sources were initially considered in the EA, and appellants' concerns appear to be premature and speculative. Appellants have not shown that the impacts evaluated in the EA would significantly affect the quality of the human environment. Appellants' focus is almost entirely on the environmental consequences to be expected from a mining operation which, they urge, will significantly affect the quality of the human environment. Here again, appellants fail to distinguish between circumstances requiring an EA and those calling for an EIS. The Ninth Circuit Court stated in *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988):

Section 102(2)(C) of NEPA requires federal agencies to file an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 CFR § 1508.11 (1985). If the agency finds, based on a less formal and less rigorous "environmental assessment," that the proposed action will not significantly affect the environment, the agency can issue a Finding of No Significant Impact (FONSI) in lieu of the EIS. 40 CFR § 1508.13 (1985). We will uphold an agency decision that a particular project does not require an EIS unless that decision is unreasonable. [Citations omitted.]

As the court explained, an EIS must be prepared prior to any "irreversible and irretrievable commitment of resources." ^{5/} Though appellants have shown disagreement with BLM's determination they have not demonstrated that the decision is unreasonable or constitutes such a commitment. In fact, a further round of environmental study, including the preparation of further NEPA documents setting forth various alternatives, is specifically provided for in BLM's decision.

In summary, appellants have not demonstrated that the FONSI was unreasonable or premised on error of law or fact. Nor have they shown the analysis for the FONSI failed to consider any substantial environmental question

^{5/} In *Conner v. Burford*, *supra* at 1447-48, the court found that the issuance of oil and gas leases containing "no surface occupancy stipulations" gave the lessees a right of first refusal or a priority right, and therefore did not constitute an irretrievable commitment of resources.

of material significance. 6/ We therefore conclude BLM's Decision Record and FONSI issued March 31, 1989, should be affirmed.

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

John H. Kelly
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

6/ To the extent appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.