

Editor's note: appeal filed sub nom. Pardee Construction Co. et al. v. Lujan, Civ.No. S-92-978-LDG, RDH (D. Nev. Nov. 20, 1992); dismissed, (land sale changed to exchange with different party) (March 15, 1994)

SIERRA CLUB LEGAL DEFENSE FUND, INC.
CITIZEN ALERT

IBLA 91-229, 91-230

Decided September 30, 1992

Appeals from a decision of the Stateline Resource Area, Las Vegas District Office, Bureau of Land Management, approving a direct sale of over 7,500 acres of public land based on a finding that no significant environmental impacts would result from the sale. N-53110, EA No. NV-054-91-27.

Set aside and remanded.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements-- National Environmental Policy Act of 1969: Finding of No Significant Impact

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, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the 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 proposed action. The ultimate burden of proof is on the challenging party, and such burden must be met by objective proof. Mere differences of opinion provide no basis for reversal.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements-- National Environmental Policy Act of 1969: Finding of No Significant Impact

The reasonableness of a finding of no significant impact will be upheld where the agency (1) has taken a hard look at the environmental consequences of the

proposed action; (2) has identified the relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When the environmental assessment prepared for a proposed action identifies significant environmental impacts and suggests mitigating measures designed to minimize those impacts, but BLM's decision record/finding of no significant impact fails to incorporate the identified mitigating measures into the proposed action, BLM's decision will be set aside.

APPEARANCES: Laurens H. Silver, Esq., San Francisco, California, for Sierra Club Legal Defense Fund, Inc., and Citizen Alert; Thomas L. Leeds, Esq., North Las Vegas, Nevada, for the City of North Las Vegas; Hugh Hewitt, Esq., Irvine, California, for intervenor Pardee Construction Company.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Sierra Club Legal Defense Fund, Inc. (Sierra Club), and Citizen Alert have appealed from a decision record/finding of no significant impact (DR/FONSI) signed on February 14, 1991, by the Stateline Resource Area Manager and concurred in on February 15, 1991, by the Las Vegas District Manager, Bureau of Land Management (BLM), approving a proposed direct sale of 7,534.27 acres of undeveloped public land to the City of North Las Vegas, Nevada (CNLV or the City), pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1988). 1/

By letter dated March 11, 1988, CNLV informed BLM that the City wanted to acquire approximately 7,500 acres of public land located in secs. 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, and 24, T. 19 S., R. 61 E., and secs. 18, 19, and 20, T. 19 S., R. 62 E., Mount Diablo Meridian, Clark County, Nevada. CNLV stated that the acquisition of these lands, which lie within the city limits, was essential to its orderly growth and development. CNLV proposed to use the lands for master-planned residential developments and mixed-use thematic commercial, entertainment, recreation, and tourism industry developments, and intended to sell or lease designated tracts of the land to prequalified developers under the terms of negotiated developer participation agreements.

In order to satisfy the procedural requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended,

1/ Although Sierra Club and Citizen Alert filed separate notices of appeal from the BLM decision, they are represented by the same counsel who has filed joint pleadings on behalf of both appellants. Accordingly, we consolidate the two appeals.

42 U.S.C. § 4332(2)(C) (1988), BLM entered into a July 1989 memorandum of understanding with CNLV, whereby CNLV contracted with Dames & Moore to prepare an environmental assessment (EA) for the proposed sale. Public scoping meetings were held, a draft EA was prepared and circulated for public review and comment, and portions of the EA were revised in response to the comments received. Both Sierra Club and Citizen Alert submitted comments on the draft EA.

Because the sale area embraced desert tortoise habitat, in October 1990 BLM and CNLV signed an agreement for desert tortoise conservation and mitigation. BLM also requested formal consultation with the U.S. Fish and Wildlife Service (FWS), pursuant to section 7 of the Endangered Species Act, as amended, 16 U.S.C. § 1536 (1988), concerning the effects the sale might have on the desert tortoise, a federally listed threatened species. On November 9, 1990, FWS issued a biological opinion concluding that the sale would not be likely to jeopardize the continued existence of the desert tortoise and imposing additional terms and conditions as onsite mitigation measures. FWS further stated that if Clark County adopted a comprehensive desert tortoise habitat conservation plan, the terms of that plan would supercede the terms and conditions of the biological opinion.

In February 1991, the final EA (EA No. NV-054-91-27) was issued. The EA discussed the need for the proposed action, highlighting CNLV's desire to influence and direct the City's inevitable growth in a rational and controlled manner, and noting that nearly all of the large parcels of undeveloped land in the Las Vegas Valley fall within the jurisdiction of the Federal Government. The EA also indicated that the proposed sale was consistent with BLM's current Clark County Management Framework Plan (MFP), dated September 1983, which categorized the requested land as urban land slated for disposal. The EA acknowledged, however, that BLM considered this MFP to be inadequate and had begun preparation of a resource management plan and environmental impact statement (RMP/EIS) for the Stateline Resource Area, Las Vegas District.

The EA's description of the proposed action included a discussion of CNLV's basic development goals for the property which envisioned utilizing approximately 6,900 acres for master-planned residential community projects and the remaining 600 acres for commercial development and which anticipated approximately 27,500 new dwelling units and 71,500 new residents over the 25-year development period. The EA also addressed CNLV's implementation strategies for furthering its master plan's objectives concerning land use, transportation, municipal facilities, utilities, and environmental quality and conservation.

The EA identified three alternatives to the proposed action: the no-action alternative; selling the land by a competitive bidding process directly to the private sector; and selling the land noncompetitively to another local government or to a conservation organization. The EA concluded that retaining the land in Federal ownership would not meet the objectives of the MFP and would deny CNLV "the opportunity to provide and implement planned growth on a large section of undeveloped land and assure

that environmental mitigation measures are implemented" (EA at 2-6). According to the EA, the no-action alternative would reduce the rate of growth and associated indirect and cumulative impacts within CNLV, but would not significantly affect the overall rate of growth in the Las Vegas Valley.

The EA found that the competitive bidding alternative, while effectuating BLM's goal of disposing of urban land in the Valley, would increase the administrative load on BLM and would create substantial management difficulties and inefficiencies for BLM, as well as inhibiting CNLV's ability to implement its master plan. The EA indicated that the alternative of selling the land directly to an organization such as the Nature Conservancy which could then resell the land and use the proceeds to purchase environmentally sensitive lands in Nevada for preservation as a mitigation measure was raised at a scoping meeting. Since no such organization had made an offer to purchase the lands, the EA determined this alternative was speculative and would not be considered further, noting that the environmental impacts or benefits of this alternative could not be analyzed without identification of a specific purchaser or the properties which would be purchased as a mitigation measure. The EA similarly rejected the alternative of selling the land to another governmental entity.

The EA examined the environment affected by the proposed sale, including geology, soils, and seismicity; hydrology and water quality; air quality; acoustics; biology; cultural and paleontologic resources; land use; transportation; aesthetics and visual resources; socioeconomics; and utilities, and evaluated the impacts the proposed action and alternatives would have on these environmental resources. While acknowledging that in some cases, additional, more specific information would be needed to fully assess the effects of the proposed action, the EA, nevertheless, identified potentially significant direct, indirect, and cumulative impacts, especially to water quality and water supply, air quality, the desert tortoise, and the adjacent wilderness study area (WSA) if the WSA was designated as wilderness. The EA further proposed various mitigation measures designed to reduce these potentially significant impacts to insignificant levels.

In its DR/FONSI, although BLM recognized that the proposed sale potentially could have significant adverse effects on the water supply and air quality of the Las Vegas Valley, it characterized these impacts as "only part of the cumulative impacts on the Las Vegas Valley due to major developments in progress or proposed to accommodate exploding population growth" (DR/FONSI at 3). BLM admitted that lack of specific details for the planned development and potential changes in technology and Federal and state environmental and energy standards rendered impossible the exact quantification of water supply and air quality impacts. BLM asserted that dealing with these impacts was the responsibility of CNLV, the City of Las Vegas, Clark County, and the developers, as was the obligation to resolve the legal, scientific, and economic aspects of development, including compliance with the Clean Air Act, the Endangered Species Act, NEPA, and State water laws.

In describing mitigation measures and residual impacts, BLM noted that the EA identified various mitigation measures for the proposed action. BLM concluded, however, that there were "no effective mitigation measures pertinent to this site in relation to the complete change from a natural to an urban environment" (DR/FONSI at 4). BLM further stated that the EA indicated that the Las Vegas Valley area was facing major environmental and socioeconomic limiting factors relative to water supplies and air quality requirements which would affect the area's development.

BLM also addressed cumulative impacts, including water supply, air quality, the desert tortoise, and mineral resources. BLM acknowledged that full development would place additional demand on the available water supply for southern Nevada and projected that, at the current rate of growth, 100 percent of Nevada's consumptive use allotment of Colorado River water could be utilized as early as 1993-95 unless return flow credits were increased, water conservation measures were instituted, or additional water sources were identified and made available. BLM pointed out that local governments were working to discover feasible solutions to the water supply problem and that the Las Vegas Valley Water District had proposed a major ground water importation program to identify and secure substantial new supply sources.

BLM acknowledged that the Las Vegas Valley failed to meet air quality standards for carbon monoxide and particulate matter and that the Valley's attainment status for ozone was being jeopardized by the Valley's rapid growth. According to BLM, the Clark County Board of Commissioners had proposed and endorsed a comprehensive clean air action plan, the success of which would depend on local intergovernmental cooperation and the achievement of mutual air quality improvement goals involving industrial and commercial sources, motor vehicle and fueling stations, fugitive dust control, and other source controls. BLM noted that CNLV was an integral component of the air quality improvement process and had begun to review the county plan.

BLM stated that in response to its formal consultation with FWS concerning the protected desert tortoise, FWS had issued a biological opinion concluding that the sale would not likely jeopardize the continued existence of the desert tortoise provided stipulated mitigation and conservation provisions were executed. BLM estimated that 7,550 acres of low and very low density desert tortoise habitat would be lost and 135 tortoises and 16 nests might be taken as a result of the proposed sale. 2/

BLM concluded that based on the analysis contained in the EA, the impacts of the proposed sale were "insignificant relative to the total

2/ BLM also noted that the sale area contained substantial deposits of silt, sand, and gravel, and that sale of these deposits would place disposition decisions and the management role for these resources with CNLV.

We note that the mineral report prepared for the proposed sale determined that the portions of the sale area containing these deposits were not suitable for disposal under FLPMA. See EA, Appendix F at 2. BLM nevertheless included these lands in the approved sale area.

impacts to the environment due to rapid population growth in the Las Vegas area" (DR/FONSI at 7). It, therefore, determined to proceed with the sale subject to the FWS biological opinion and the associated desert tortoise conservation and mitigation agreement between CNLV and BLM which were incorporated by reference into the DR/FONSI. BLM explained its rationale as follows:

Sale and subsequent development of the subject lands does not jeopardize the desert tortoise - based on the findings of the [FWS] Section 7 Biological Opinion; puts responsibility for resolving complex water, air quality, and infrastructure issues with local entities; and is not a precipitator of total immediate development. The planned unit development approach of the CNLV is the most appropriate means of complying with the terms and intent of the [EA]. Retention of the land in BLM ownership would not significantly influence the magnitude of cumulative impacts on the desert tortoise, water supply, and air quality. Alternative sale processes were found to be inappropriate.

(DR/FONSI at 7).

BLM further concluded that, as to compliance and monitoring:

Sale of the land to CNLV severs BLM responsibility for monitoring and enforcement of the Biological Opinion and all other aspects of management, environmental mitigation, monitoring and compliance, except for reserved [leasable] minerals and the desert tortoise conservation/mitigation agreement. Compliance and monitoring become a local government, developer and citizen responsibility.

(DR/FONSI at 8).

In their statement of reasons (SOR) for appeal, appellants dispute BLM's determination that the proposed sale of over 7,500 acres of undeveloped public land to CNLV will not have a significant effect on the environment, and assert that BLM's claim that growth-inducing effects will occur even without the sale does not render the impacts of the sale insignificant. Appellants contend that, contrary to BLM's conclusion, the proposed sale and development will likely significantly affect air quality, water supply, and adjacent public lands, and the proposed mitigation measures identified in the EA will not reduce these impacts to insignificance. Accordingly, appellants argue that NEPA mandates that BLM prepare an environmental impact statement (EIS) because the proposed sale is a major Federal action significantly affecting the quality of the human environment.

Appellants contend that the EA prepared for the sale fails both to adequately identify and evaluate the environmental effects of the sale and to provide enforceable mitigation measures to minimize the environmental impacts. Specifically, appellants first insist that the proposed sale will likely significantly affect air quality, and that the proposed mitigation

measures are inadequate to reduce these impacts. According to appellants, the EA recognizes that the additional vehicular and industrial emissions associated with the development of the sale area will contribute to existing and future exceedences of national ambient air quality standards for carbon monoxide, particulate matter, and ozone, and that these emission increases constitute adverse impacts. Appellants criticize the EA's failure to quantify particular impacts on air quality or show that such quantification is infeasible, and assert that the EA improperly leaves analysis of specific air quality impacts to be addressed later by CNLV in the course of any site-specific environmental review. Appellants maintain that the EA's failure to sufficiently assess the impact of the proposed sale and development on air quality deprives BLM of any basis upon which to ground its conclusion that the project's effects on air quality will be insignificant.

Appellants also challenge the EA's evaluation of the measures suggested to mitigate the air quality impacts, asserting that such measures must be project-related and, if they involve third-party action, must be supported by firm commitments to undertake the necessary compensatory actions. Appellants contend that several of the mitigation measures outlined in the EA are not project-related, but rather are actions which will occur even without the project, and that others are speculative absent CNLV's firm pledge to impose and enforce them. According to appellants, even those project-specific measures which the EA indicates that the City has programmed and will implement, fail to reach an acceptable level of specificity. Appellants also insist that the effect of project related mitigation measures cannot be evaluated since there has been no estimate of the incremental amount of emissions which will result from the sale and development of the sale area. Furthermore, appellants submit, BLM neglected to consider alternatives within its control, such as phasing the sale or imposing specific conditions on the sale, which would abate the project's effects on air quality. Thus, they conclude that the proposed sale, which threatens a continued violation of Federal air quality standards and may adversely affect human health, will have a significant effect on the environment and an EIS must be prepared.

Appellants next argue that the proposed sale will likely significantly affect water supply and that the discussed mitigation measures are inadequate to lessen this impact. Appellants note that the EA acknowledges that the increased demand for water occasioned by the sale and resulting development would create significant impacts on the limited water supply. Appellants assert that the EA's reliance on the Las Vegas Valley Water District's proposed ground water importation program as a feasible mitigation measure is unwarranted, given BLM's active opposition to the Water District's water appropriation applications on environmental grounds. They further contend that the success of any future efforts by CNLV to meet anticipated additional demand for water are uncertain, thus, the substantial increase in demand for water which will be generated by the sale is a significant impact which mandates preparation of an EIS.

The Nellis ABC WSA adjacent to the proposed sale site and a nearby Desert Wildlife Refuge administered by FWS will also probably be significantly affected by the sale, appellants argue, and these effects will not be reduced to insignificance by the contemplated mitigation measures. Appellants concede that BLM has recommended that the WSA be considered as nonsuitable for wilderness designation, and that if Congress concurs in this recommendation, the land in the WSA will be identified for disposal. However, appellants note the EA admits that if Congress does designate the WSA as wilderness, not only could the proposed sale potentially adversely affect the wilderness, but such designation could preclude the use of that area by utilities or rail services needed for the proposed development. Appellants further assert that the EA failed to consider the effects of the sale on the desert bighorn sheep located in the wildlife refuge which lies within the corporate limits of CNLV although not immediately adjacent to the project area, and that BLM neglected to consult with the refuge management on the effects of the sale on the refuge.

According to appellants, substantial questions exist regarding the efficacy of the suggested mitigation measures of signing and fencing along the boundaries of the sale area as means of minimizing the impacts to the WSA and refuge. Appellants also contend that the EA's failure to consider feasible mitigation alternatives, including reducing the size of the sale to create a buffer strip of public land between the development and the WSA renders the EA's evaluation of the effects of the sale on adjacent public land inadequate.

Appellants claim that the EA failed to satisfactorily address alternatives which would have effectively mitigated the substantial impacts ensuing from the proposed sale. Appellants assert that the EA erroneously summarily rejected as speculative the suggestion that BLM explore the possibility of acquiring environmentally sensitive land within Nevada to counteract some of the adverse impacts of the proposed sale by contacting a non-profit organization to assess that organization's interest in brokering the land sale. Appellants also insist that BLM should have considered the alternative of a phased, smaller scale transfer of the public land to CNLV which would have enabled BLM to better assess the environmental impacts at each stage of the transfer based on more accurate and adequate data, as well as allowing BLM to evaluate the success of various mitigation measures as each phase of the transfer progressed.

Finally, appellants challenge the DR/FONSI on the ground that it is based on an outdated MFP. The EA recognizes that the current MFP is inadequate and that BLM has begun preparation of the Stateline RMP/EIS, appellants assert, yet BLM nevertheless based its decision to proceed with the sale on the admittedly inadequate plan. Appellants contend that BLM must base land use decisions on current plans, and that this sale, given its magnitude and many significant environmental impacts, requires the type of evaluation which will be provided by an updated RMP/EIS. Appellants conclude that BLM must prepare an EIS because the sale may cause significant environmental impacts, noting that the Federal government, as the major

landowner in the Las Vegas Valley, will exert significant influence on the growth of the area, and has an obligation to fulfill its NEPA mandate by making a well-informed analysis of the growth-inducing effects of the sale.

Although BLM has not responded to appellants' SOR, CNLV and Pardee Construction Company (Pardee) ^{3/} have filed answers to appellants' SOR. CNLV argues that BLM's decision not to prepare an EIS is a reasoned one which should be upheld. The City characterizes the DR/FONSI as resting upon the intertwined determinations that the Las Vegas area faces major environmental and socioeconomic limiting factors relating to air quality and water supply and that retaining the land in BLM ownership would not significantly affect the size of the cumulative impacts on the desert tortoise, air quality, and water supply. CNLV, therefore, asserts that BLM properly concluded that the environment in the Las Vegas area will develop or deteriorate to the same extent whether or not the sale occurs since growth in the area will be determined by factors independent of BLM's actions.

CNLV contends that the EA thoroughly discusses the project's impacts on air quality and the various mitigation measures, and that this analysis supports the conclusion that the cumulative impact of the sale, in the context of the growth pattern and control mechanisms of the area as a whole, will be insignificant. The City argues that the U.S. Supreme Court's decision in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-53 (1989), holds that NEPA does not require that an EIS contain a fully developed and adopted mitigation plan, and suggests that such a plan should not be required in an EA.

CNLV similarly argues that BLM's determination that impacts to the water supply are insignificant finds support in the EA. The City disputes appellants' classification of the Las Vegas Valley Water District's ground water importation plan as a mitigation measure, contending instead that the plan simply illustrates that area environmental limitations will control impacts whether the project proceeds or not. CNLV claims that since NEPA simply imposes required procedures but does not mandate specific results, the methodology utilized by BLM in evaluating the proposed sale fully complies with NEPA. Additionally, according to CNLV, BLM's analysis and conclusions concerning the project's impacts on the WSA and wildlife refuge and possible mitigation measures also fully satisfy its NEPA obligations, as does BLM's consideration of reasonable alternatives. In short, the City argues that the DR/FONSI finds ample support in the record and should be affirmed.

In its answer, Pardee challenges appellants' contention that an EIS should have been prepared for the sale, arguing that the transfer will not significantly affect the environment. Pardee submits that, even though

^{3/} By order dated Aug. 14, 1991, the Board granted Pardee's request to intervene in these proceedings.

development of the sale area will contribute to the decline of air quality, the mitigation measures outlined in the EA will reduce the impacts to insignificance. Pardee contends that the EA's discussion of the project's effects was sufficient despite the EA's failure to quantify particular impacts since the nature of those impacts is contingent on presently unknowable factors. Pardee further insists that the mitigation measures described in the EA are not speculative, and that, therefore, appellants have failed to demonstrate error in BLM's determination that these mitigation measures will decrease the impacts to insignificance.

According to Pardee, BLM correctly determined that the proposed transfer will not significantly affect the water supply in light of local government plans to secure additional future sources of water, and appellants have not shown that the increased demand cannot be effectively mitigated. Similarly, Pardee asserts that the sale will not have significant effects on the nearby WSA and wildlife refuge since the refuge is over 2 miles away from the sale area and fencing along the boundaries of the area will sufficiently reduce any impacts, nor will the sale significantly affect the desert tortoise and its habitat.

NEPA does not mandate consideration of remote or speculative alternatives, Pardee submits, and the EA's summary rejection of the alternative of brokering the sale through a non-profit corporation does not render inadequate its discussion of reasonable alternatives to the proposed sale since, absent a request by such an entity to broker the transfer, that alternative remains purely speculative. Pardee insists that discussion of the phased sale alternative in the EA is unnecessary because the EA contains ample analysis of reasons to decline that alternative. Finally, Pardee maintains that until the 1983 MFP is revised, that plan is the currently applicable land use plan, and BLM, therefore, properly based the DR/FONSI on the 1983 MFP.

Appellants have submitted replies to CNLV's and Pardee's answers. In response to the City's arguments, appellants contest CNLV's assertion that the EA supports BLM's conclusion that, in the context of the growth pattern of the area as a whole, the effects of the proposed sale will be insignificant, stressing that the EA concedes that the development planned for the sale area would contribute to existing and future exceedences of air quality standards. Appellants claim that the fact that the area already exceeds applicable ambient air quality standards does not render the proposed sale's impacts insignificant. Further, appellants reiterate, the lack of meaningful quantitative analysis of the impacts to air quality and water supply due to the want of specific details about the planned community make speculative any evaluation of the effectiveness of the proposed mitigation measures in diminishing the project's effects. Appellants also maintain that the sale will significantly degrade desert tortoise habitat and directly cause environmental harm to the WSA and nearby wildlife refuge.

In response to Pardee's answer, appellants contend that in the absence of legally adequate and enforceable mitigation measures, the direct and

cumulative effects of the proposed sale will inevitably cause significant adverse environmental impacts. Despite the EA's acknowledgement of the significant environmental consequences of the project, appellants emphasize that BLM refused to incorporate any mitigation measures into its DR/FONSI, except those imposed by the biological opinion and the desert tortoise mitigation and conservation agreement, and, in fact, explicitly stated that approval of the proposed sale severed BLM's responsibility for environmental mitigation and left those matters to CNLV, the developers, and the area's citizens. Thus, appellants argue, the extent to which the mitigation measures identified in the EA will be implemented, if at all, remain speculative, and cannot form the foundation for a conclusion that the sale's significant impacts will be minimized. According to appellants, since BLM did not adopt any of the EA's mitigation measures as conditions of the sale, the effects of the sale remain significant, and BLM's FONSI is unreasonable. Appellants additionally allege that the DR/FONSI fails to discuss the surface water runoff, flooding, and water quality problems and mitigation measures addressed in the EA.

As an initial matter, we find appellants' assertion that BLM based its decision on an outdated MFP unpersuasive. There is no dispute that the proposed sale partially implements the goals and objectives of the 1983 Clark County MFP. That MFP is the currently applicable land use plan for the area and will remain so until it is superseded upon completion of the Stateline RMP/EIS. Acceptance of appellants' position that once BLM has decided to prepare a new land use plan for an area, it must suspend action in conformance with the prevailing plan would seriously impair BLM's ability to perform its management responsibilities. We therefore reject this challenge to BLM's decision.

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(c) (1988), requires Federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." In order to determine whether a Federal action will have a significant environmental effect, an agency first prepares an EA. 40 CFR 1501.3, 1501.4(c).

[1] This Board has held numerous times that 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, all relevant areas of environmental concern have been identified, and the final determination that no significant effects will occur is reasonable in light of the environmental analysis. *See, e.g., Southern Utah Wilderness Alliance*, 122 IBLA 334, 338 (1992), and cases cited therein. The party challenging the 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 proposed action. *Id.*; *United States v. Husman*, 81 IBLA 271, 273-74 (1984). The ultimate burden of proof is on the challenging party, and such burden must be met by objective proof. Mere differences of opinion provide no basis for reversal. *Owen Severance*, 118 IBLA 381, 392 (1991), and cases cited

therein. Appellants essentially argue that BLM's DR/FONSI is unreasonable in light of the environmental analysis of the proposed sale and development. We agree.

[2] The criteria for evaluating the sufficiency of an EA to support a FONSI include whether the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified the relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project or mitigation measures have sufficiently minimized such impact. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Powder River Basin Resource Council, 120 IBLA 47, 56 (1991); Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991).

In the instant case, the EA identified potentially significant impacts to, inter alia, air quality and water supply, and suggested various mitigating measures designed to minimize those impacts. In its DR/FONSI, BLM declined to impose any of those suggested mitigating measures as conditions of approval of the proposed sale. ^{4/} Instead, BLM expressly stated that the sale severed its responsibility for any mitigating actions and shifted that responsibility to the local governments, developers, and citizens. BLM, however, remains independently responsible for ensuring that its approval of the sale will not result in significant environmental impacts. Sierra Club, 92 IBLA 290, 305-306 (1986). Additionally, BLM clearly has the authority to condition the sale on CNLV's agreement to implement necessary mitigation measures. See August & Mary Sobotka, 79 IBLA 340, 343 (1984). By failing to make the sale contingent on CNLV's compliance with the identified mitigation measures, BLM cannot rely on those measures as a basis for determining that the sale will not significantly affect the environment. Cf. C.A.R.E. Now, Inc. v. FAA, 844 F.2d 1569, 1575 (11th Cir. 1988) (court considered identified mitigation measures because they were imposed as conditions of agency approval); Owen Severance, 118 IBLA at 390 (mitigation measures which were predicate for the FONSI were incorporated as stipulations to the approved permit). ^{5/}

^{4/} BLM did incorporate the mitigation measures described in the FWS biological opinion and in the desert tortoise conservation and mitigation agreement between BLM and CNLV. Although appellants apparently challenge the adequacy of these measures, they have offered no proof that these measures are insufficient, and we affirm BLM's determination that the potential impacts to the desert tortoise have been suitably mitigated.

^{5/} We find Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), cited for the proposition that NEPA does not require that an EIS direct that mitigation measures be undertaken, is distinguishable from the case at hand. In Robertson the Forest Service had prepared an EIS prior to issuance of a special use permit for a ski area, and in the context of the Forest Service's compliance with the procedural requirements of NEPA and

We find that the record in this case does not support BLM's determination that the impacts of the proposed sale and development will be insignificant relative to the total impacts to the environment due to rapid population growth in the Las Vegas area. The EA recognizes that, absent implementation of various mitigation measures, the proposed sale will have significant direct and cumulative effects on various resources, including water supply and air quality. The EA acknowledges that nearly all of the currently undeveloped land in Clark County falls under BLM jurisdiction (EA at 1-3), and that retention of the land in Federal ownership would reduce the rate of growth in CNLV and its associated indirect and cumulative impacts (EA at 4-37). Thus, BLM's actions could directly impact the pace and effects of growth and development in the area. Accordingly, we conclude that BLM's DR/FONSI is unreasonable and must be set aside, and the case remanded for further environmental evaluation.

Appellants also contend that BLM erred in rejecting the alternative of brokering the sale and in failing to consider the alternative of phasing the sale to CNLV. NEPA requires that an EA consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(E) (1988); 40 CFR 1508.9(b); Howard B. Keck, 124 IBLA 44, 53 (1992), and cases cited therein. Accordingly, BLM must address alternatives that are feasible and reasonably related to the purpose of the proposed action, *i.e.*, alternatives which can be accomplished and which also achieve the goals sought to be fulfilled by the proposed action. Howard B. Keck, 124 IBLA at 53. Such consideration provides the agency with a choice of other germane courses of action having lesser or no environmental impact. Id.

We find that the EA adequately evaluated and properly rejected the brokered sale alternative. No entity has expressed any interest in brokering the sale, nor have appellants presented any evidence that any such organization wants to be involved in this proposed sale. In the absence of any such evidence, we conclude that this alternative is not a reasonable one in this particular situation. See National Wildlife Federation, 82 IBLA 303, 313 (1984).

The phased sale alternative, however, should be considered by BLM. In fact, by letter dated March 1, 1991, CNLV specifically stated that it now desired to purchase the 7,500 acre parcel in a phased manner. On remand, BLM should analyze the environmental effects of transferring the requested land to CNLV in such a phased fashion.

fn. 5 (continued)

preparation of an EIS, the Court held that it was not required to ensure that mitigation measures which were within the authority and jurisdiction of third-party agencies would be effectively implemented. The Forest Service was not relying on mitigation as a basis for making a FONSI and not preparing an EIS. If BLM attempts to avoid preparation of an EIS by claiming that the impacts of a proposal are insignificant because they will be effectively minimized by mitigating measures, BLM must ensure that those measures are imposed. See Powder River Basin Resource Council, 120 IBLA at 61-62.

We need not address appellants' other challenges to the sufficiency of the EA at this time. On remand, BLM will have the opportunity to consider appellants' concerns and to respond to them as it deems appropriate. While we do not now direct BLM to prepare an EIS for the proposed sale, we suggest that if BLM is unable to adequately quantify and analyze the significant effects of the sale and to convincingly establish that required mitigation measures will minimize those impacts, it should consider preparing an EIS.

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 set aside, and the case is remanded for further action consistent with this opinion.

John H. Kelly
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge