

WESTERN EXPLORATION INC. & DOBY GEORGE LLC

IBLA 2004-134

Decided August 23, 2006

Appeal from a Record of Decision approving a modification to a mining plan of operations. N26-88-005P/N-65034.

Affirmed.

1. Environmental Policy Act--Environmental Quality:  
Environmental Statements--National Environmental  
Policy Act of 1969: Generally

An EIS prepared to evaluate the environmental impacts of a modification of a mining plan of operations complies with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), when it shows that BLM has taken a “hard look” at potential environmental consequences of the proposed action and reasonable alternatives thereto, considering relevant matters of environmental concern. To successfully challenge a decision based on an EIS, an appellant must demonstrate by a preponderance of the evidence and with objective proof that BLM failed adequately to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2) of NEPA.

2. Environmental Policy Act--Environmental Quality:  
Environmental Statements--National Environmental  
Policy Act of 1969: Generally

In the preparation of an EIS, BLM is obligated to assess alternatives to a proposed action, including the no-action alternative and reasonable alternatives which are feasible, will accomplish the intended purpose, and will avoid or minimize the adverse impacts of the action upon the

environment. A proposed modification to a mining plan of operations will be upheld where an appellant fails to identify an alternative that will accomplish the intended purpose of the proposed action, is technically and economically feasible, and has a lesser impact that BLM failed to consider.

3. Federal Land Policy and Management Act of 1976: Land Use Planning--Federal Land Policy and Management Act of 1976: Surface Management

Section 302(b) of the Federal Land Policy and Management Act of 1976 requires the Secretary to “prevent unnecessary or undue degradation of the public lands.” The statutory provision does not impose a standard for treatment of private lands independent of requirements imposed by other laws, nor does it establish a cause of action by a private party for what it believes to be tortious conduct. By rule BLM defines this term “unnecessary or undue degradation” to mean, inter alia, “conditions, activities, or practices that \* \* \* [f]ail to comply with \* \* \* performance standards in [43 CFR] 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources,” or are not “‘reasonably incident’ to prospecting, mining, or processing operations as defined in 43 CFR 3715.0-5.” 43 CFR 3809.5. The existence of a mining facility in a location opposed by a nearby landowner does not, ipso facto, constitute unnecessary or undue degradation by virtue of the fact that the opponent believes it can be relocated.

APPEARANCES: Richard H. Bryan, Esq., Linda M. Bullen, Esq., Las Vegas, Nevada, for appellants; R. Timothy McCrum, Esq., David P. Ross, Esq., Washington, D.C, for intervenor; Nancy S. Zahedi, Esq., Sacramento, California, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEMMER

Western Exploration Inc. and Doby George LLC (WEDG) appeal from a February 4, 2004, Record of Decision (ROD) of the Acting Field Manager,

Winnemucca, Nevada, Field Office, Bureau of Land Management (BLM), approving a modification to a mining plan of operations. The ROD authorized the Glamis Marigold Mining Company (GMMC) to proceed with the “Millennium Expansion Project” at the Marigold Mine northwest of Battle Mountain, Nevada. The Acting Field Manager issued a February 5, 2004, Decision formally approving the Expansion Project. Together the ROD and Decision ensured that the Project could not proceed until the Nevada Division of Environmental Protection, Bureau of Mining Regulation and Reclamation (NDEP), approved, *inter alia*, associated amendments to GMMC’s Mine Reclamation Permit and Water Pollution Control Permit, and until BLM accepted a revised reclamation cost estimate and associated financial surety. (ROD, Stipulations 3, 7, and 9; Decision dated Feb. 5, 2004, at 1.)

The Marigold Mine began operations in 1988 in T. 33 N., R. 43 E., and sec. 6, T. 32 N., R. 43 E., Mount Diablo Meridian, Humboldt County, Nevada. Along with co-owner Barrick Gold Corporation, GMMC, a subsidiary of Glamis Gold Ltd., acquired its interest in the ongoing Marigold Mine in 1999, operating under Plan of Operations No. N26-88-005P/N-65034 and Nevada State Reclamation Permit No. 0108. After the acquisition, GMMC and Barrick proposed an expansion of the mine and BLM prepared a Final Environmental Impact Statement for this project in 2001. (Final Environmental Impact Statement Marigold Mine Expansion Project, FLM/WN/PL-01/009+1610 (FEIS), Mar. 9, 2001.) The mine, with an authorized disturbance of 1,831 acres, was operating pursuant to an associated ROD dated September 19, 2001, when the facts giving rise to this appeal began.

GMMC proposed the Millennium Expansion Project in 2002. Based upon a Completeness Review, BLM demanded preparation of a Supplemental Environmental Impact Statement (SEIS). See 40 CFR 1502.9 (describing supplemental environmental statements). As ultimately conceived, the Project proposes to expand two existing open pits (Top Zone and Red Rock); develop five new open pits (Mackay, Target No. 1, Target No. 2, Antler, and Basalt); expand the existing Old Marigold waste rock storage area and an existing heap leach processing facility in Section 17; and construct two new heap leach processing facilities in Section 16 and Section 30, three new waste rock storage areas identified as the North, South, and West Waste Rock Storage Areas, roads, and other ancillary facilities. The Expansion Project would disturb an additional 1,474 acres, 807 acres of public land and 667 acres of private land, in secs. 7-9, 16-20, 30, and 31, T. 33 N., R. 43 E., and sec. 6, T. 32 N., R. 43 E. The goal of the project is to increase the production of gold at the Mine and extend its active life from 2007 through 2013.

The potential environmental consequences of a “proposed project” and three alternatives thereto were considered by BLM in an April 4, 2003, Draft and a December 5, 2003, Final SEIS. Alternative 1, “Trout Creek Diversion Realignment,” involved partially realigning an existing diversion of Trout Creek which runs to the

west of the project area, in addition to the proposed action. The diversion of Trout Creek had previously been analyzed and approved in the Resort Environmental Assessment No. N26-88-005P, apparently associated with, *inter alia*, the Resort Waste Rock Storage Area, and the 2001 FEIS. Alternative 1 proposed to create a new diversion channel to avoid concerns created by the west highwall of the Red Rock/Terry Zone Pit in Sections 18 and 19. Alternative 2, "Expanded Red Rock Pit Stabilization," was proposed to address the same concerns but envisioned stabilizing the west highwall of the Red Rock/Terry Zone Pit with a buttress which would increase the stability of the west highwall against potential failures. Alternative 3 was the "no action" alternative.

The February 2004 ROD selected Alternative 2. BLM concluded that the Expansion Project conformed with the applicable land-use plan (Sonoma-Gerlach Management Framework Plan), which provided for making public lands and mineral resources available for exploration and development. BLM found that the implementation of Alternative 2 would not, given mitigation, monitoring measures, and stipulations, result in unnecessary or undue degradation of public lands.

Western Energy Inc. and Doby George LLC claim an interest in this case by virtue of ownership of private land in the immediate vicinity of or adjacent to the proposed mine expansion. Doby George LLC has an almost 80-percent ownership interest in Western Exploration Inc. WEDG claims that Doby George LLC owns the private land at issue, while Western Exploration Inc. owns the mineral rights on the private land. Ascertaining the precise land ownership claimed by WEDG is difficult. The only pleading purporting to identify WEDG's interests giving rise to this appeal is WEDG's Reply to Oppositions submitted March 30, 2004, which attaches the Affidavit of Land Surveyor William F. Price (Price Affidavit). Price identifies two WEDG property interests in plainly erroneous land descriptions.

A WEDG letter in the record provided by BLM appears to contain the relevant statement of WEDG's land interests. There, WEDG claims to own land in secs. 16 and 30, T. 33 N., R. 43 E., and sec. 6, T. 32. N., R. 43 E. (Aug. 15, 2002, letter from Western Energy to BLM.) By this letter, WEDG also claims that it owns water rights on Trout Creek, Ames Springs, and Mud Springs. *Id.* Trout Creek runs north/south through sec. 30, T. 33 N., R. 43 E., and sec. 6, T. 32. N., R. 43 E. According to maps in the record, Ames Springs is located in sec. 16, T. 33 N., R. 43 E. and Mud Springs is located in sec. 20, T. 33 N., R. 43 E.

The Price Affidavit identifies only two of these parcels. The first is the 80-acre parcel located, according to the record, in sec. 30, T. 33 N., R. 43 E., directly to the west of the Section 30 heap leach facility proposed by the Expansion Project. This parcel is also northwest of the North Waste Rock Storage Area proposed for

Sections 30 and 31. Trout Creek runs through Section 30 and WEDG's parcel. Price also identifies a parcel in a site which would correctly be identified as sec. 6, T. 32 N., R. 43 E. WEDG submits nothing else to verify any land ownership in this appeal. According to the 2002 letter described above, however, and the record, WEDG has consistently objected to the Section 16 heap leach facility based upon ownership of land there, though it does not identify this property interest in this appeal.<sup>1/</sup>

WEDG appealed the ROD and Decision and submitted a request for a stay of the implementation of the Expansion Project on March 3, 2004. GMMC moved to intervene in the appeal and to oppose the request for stay on March 15, 2004. BLM opposed the motion and submitted a record containing over 1,000 documents related to the process leading from GMMC's notification to BLM that it intended to expand the mine to issuance of the final ROD and Decision, as well as a box containing studies prepared for the purpose of preparation of the SEIS. By order dated April 16, 2004, this Board denied the request for stay and granted the motion to intervene.

The parties proceeded to submit an extensive set of contentious and often extraneous pleadings extending through August 5, 2005. First, BLM, GMMC, and WEDG submitted multiple responses to each other dealing with the SOR. Subsequently, the parties filed various motions, requests and arguments regarding inferences WEDG asks the Board to draw from subsequent actions of GMMC and BLM. The following is a list of pleadings by the date submitted to IBLA:

- (1) March 3, 2004, WEDG Statement of Standing, Statement of Reasons and Request for Stay of Implementation of the Record of Decision for the [GMMC] Millennium Expansion Project (SOR);
- (2) March 15, 2004, Motion of [GMMC] to Intervene in Opposition to the [SOR] and Petition for Stay of the [ROD] for the Millennium Expansion Project (GMMC Opposition);
- (3) March 22, 2004, BLM Response to Stay Petition, Response to [SOR] and Opposition to Request for Hearing (BLM Response);
- (4) March 30, 2004, WEDG Reply to Oppositions of the BLM and GMMC to the Petition for Stay of the [ROD] for the Millennium Expansion Project (WEDG Reply/Stay);

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<sup>1/</sup> WEDG first mentions its land interest in Section 16 in a belated response to a BLM pleading regarding events post-dating issues in this appeal, where WEDG argues that it "would still oppose the placement of heap leach pads in Section 16." (WEDG's Response to [GMMC's] Reply in Support of Motion for Summary Dismissal of Appeal, submitted Jan. 31, 2005.)

- (5) April 6, 2004, [GMMC's] Limited Response to Appellants' Reply and Petition for Stay (GMMC Response);
- (6) April 19, 2004, WEDG Reply to Oppositions of the BLM and GMMC to the [SOR] in WEDG's Appeal of GMMC's Millennium Expansion Project (WEDG Reply/SOR);
- (7) April 20, 2004, GMMC Notice;
- (8) May 5, 2004, GMMC Supplemental Notice;
- (9) May 7, 2004, BLM Limited Response to Appellants' Reply to Oppositions of the BLM and GMMC to Appellants' [SOR] (BLM Reply/SOR);
- (10) July 15, 2004, copy of July 13, 2004, WEDG Comments to NDEP Regarding Water Pollution Control Permit NEV88040 (July 13, 2004, WEDG Comments to NDEP);
- (11) December 2, 2004, BLM Motion for Confirmation of BLM's Authority to Act on the West Marigold Expansion Project Pending Ongoing Appeal of the Millennium Expansion Project and Request for Expedited Ruling (BLM Motion for Confirmation and BLM Request for Expedited Ruling);
- (12) December 8, 2004, Response of [GMMC] Concurring with Motion for Confirmation of BLM's Authority, and Further Motion for Summary Dismissal of the Appeal (GMMC Motion for Summary Dismissal);
- (13) December 20, 2004, Response to BLM's Motion For Confirmation of BLM's Authority and [GMMC's] Motion for Summary Dismissal of Appeal (WEDG Response/Dismissal);
- (14) January 5, 2005, Reply of [GMMC] to WEDG Response (GMMC Reply/Dismissal);
- (15) January 31, 2005, WEDG's Response to [GMMC's] Reply in Support of Motion for Summary Dismissal of Appeal (WEDG Response to Reply/Dismissal);
- (16) February 22, 2005, WEDG's Addendum to WEDG's [SOR] and Request for Stay of Implementation of the [ROD] for the [GMMC] Millennium Expansion Project (WEDG Addendum);

- (17) February 25, 2005, WEDG Errata to Addendum, Exhibit 1;
- (18) March 3, 2005, Response of GMMC to WEDG Addendum (GMMC Response/Addendum);
- (19) July 5, 2005, WEDG Supplemental Response to [GMMC's] Reply in Support of Motion for Summary Dismissal of Appeal (WEDG Supp. Resp./Dismissal);
- (20) July 15, 2005, Response of [GMMC] to WEDG's Supplemental Response to Motion for Summary Dismissal (GMMC Resp./Supp. Resp.); and
- (21) August 5, 2005, BLM Response to WEDG's Supplemental Response to [GMMC's] Reply in Support of Motion for Summary Dismissal of Appeal (BLM Resp./Supp. Resp.);

The following briefly describes WEDG's claims in this highly charged debate. We then address the various motions and briefs of the parties submitted beginning December 2004 (pleading 12, above) after the initial briefing was completed (pleading 11, above). We turn to the more particularized contentions of all parties, to the extent relevant to our consideration, in analyzing merits-based arguments.

WEDG contends that BLM violated section 302(b) of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. § 1732(b) (2000), and implementing regulations at 43 CFR Part 3809, which require the Secretary of the Interior to prevent unnecessary or undue degradation of the public lands. WEDG also complains that BLM violated section 102(2)(C) and (E) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) and (E) (2000), and implementing regulations of the Council on Environmental Quality at 40 CFR Part 1500 in the course of preparing the SEIS. WEDG makes specific assertions regarding the sufficiency of the SEIS and contends that BLM failed to consider alternative locations for the heap leach and waste rock storage facilities so as to buffer WEDG from potential impacts of the Expansion Project.

WEDG purports to broadly challenge all aspects of Alternative 2 and its alleged impacts on its own and also public lands. WEDG nonetheless asserts that it does not actually wish to stop the Millennium Expansion Project altogether. As we understand WEDG's goal, it is to stop the project until such time as BLM and/or GMMC devise alternative locations for the heap leach facilities and waste rock storage areas that, as currently planned, are located near WEDG's private interests. Alternatives which would relocate project facilities to sites further away from WEDG's properties would apparently satisfy WEDG's goal of protecting the public lands. (SOR at 3 ("WEDG's

Objective in this Appeal”) and 15 (“Conclusion”).) There, WEDG claims that it is “seeking only a thorough examination of potential alternate locations for the heap leach facilities and waste rock dumps, which, in their current locations, will inevitably result in serious contamination of WEDG and public lands.” *Id.* at 3. WEDG states that it is “not suggesting \* \* \* wholesale rejection” of the Expansion Project, but rather seeks a “selected alternative [that would] eliminate construction of mineral processing, heap leach facilities, and waste rock dumps immediately adjacent to Trout Creek drainage and WEDG private lands.” *Id.* at 15.

Though it claims a desire to protect public lands, WEDG does not, in its request for relief or in its arguments, specifically identify any land it is attempting to protect separate from its own private interests. In its January 31, 2005, pleading, for example, WEDG explains that it

does not now and has never objected to the location of a heap leach pad in Section 17. What WEDG has adamantly and consistently opposed throughout the Millennium Expansion Project is the placement of heap leach units in Section 30. \* \* \* If GMMC should abandon its stated intent to place heap leach units in Section 30, \* \* \* WEDG would still oppose the placement of heap leach pads in Section 16.

(Jan. 31, 2005, WEDG Response to Reply/Dismissal at 2.) In its comments regarding GMMC’s application for a modification to the water pollution control permit, WEDG argues that “[r]elocation of the waste rock dumps to an area *not subject to seasonal high water flows and more distant* from WEDG lands would eliminate the inevitable contamination of WEDG and public property and public waters \* \* \*.” (July 13, 2004, WEDG Comments to NDEP (italics WEDG’s).) WEDG’s references to public land are based on the syllogism that protecting WEDG’s interests is tantamount to protecting the public lands. As WEDG points out, the Expansion Project is a large project covering a number of land sections. Considering WEDG’s request for relief, piecing together its various contentions regarding what it does and “has never” opposed, and considering the record, we construe WEDG’s appeal to challenge the Section 16 and Section 30 heap leach pads, and the North Waste Rock Storage Areas in Sections 30, 31, all within T. 33 N., R. 43 E., and the South Waste Rock Storage Area in sec. 6, T. 32 N., R. 43 E (the Section 6 area). If WEDG wished to protect other interests than this in the name of the “public lands,” it was incumbent upon it to identify them.

Before considering the merits, we address arguments raised subsequent to the initial briefing in this appeal. In its December 2, 2004, BLM Motion for Confirmation, BLM advises the Board that GMMC is seeking another expansion of the Marigold Mine -- the “West Marigold Expansion.” It asks the Board to confirm that BLM may consider that project expansion without violating the rule that, once a case is on

appeal to the Board, BLM loses jurisdiction of matters related to the appeal. GMMC supports BLM's motion. (Dec. 8, 2004, GMMC Motion for Summary Dismissal.) WEDG asserts that it "does not oppose the confirmation \* \* \* but reserves the right to object to the proposed amendment as additional information becomes available to it." (Dec. 20, 2004, WEDG Response/Dismissal at 2.)

The unusually styled "Motion for Confirmation" is a request that the Board undertake management of the appeal directly as a result, we think, of confusion deriving directly from the lack of specificity in WEDG's appeal. The West Marigold Expansion Project maps relate to Trout Creek and, in small measure, land sections which are the subject of the Millennium Expansion. See Dec. 2, 2004, BLM Motion for Confirmation, attached maps. The West Marigold Expansion Project, however, does not relate to lands adjacent to the private land interests asserted by WEDG. Thus, confusion over the extent to which WEDG challenges the entire Millennium Expansion Project as opposed to those elements of it that are adjacent to WEDG's privately held lands presumably led BLM to query whether BLM had jurisdiction to move forward to act with respect to other lands. Having construed the appeal to challenge Alternative 2 to the extent it affects WEDG's private lands, we find BLM's Motion for Confirmation to be a request that the Board assert jurisdiction over issues not on appeal to us. In any event, we deny the motion, as well as BLM's December 2, 2004, Request for Expedited Ruling, as moot. This holding is consistent with WEDG's assertion that it "does not oppose confirmation." We note, however, that to the extent WEDG seeks to "reserve the right to object to the proposed [West Marigold] amendment as additional information becomes available to [WEDG]," such a reservation can only reflect WEDG's general right to appeal another land decision, subject to appropriate party status under 43 CFR 4.410. WEDG has no right to reserve arguments to raise in an appeal at a later time. See California Association of Four-Wheel Drive Clubs, Inc., 60 IBLA 240, 244 (1981) (Board disfavors "the offer to provide information on a piecemeal basis in support of an appeal").

After full briefing of the case, GMMC has moved for summary dismissal of the appeal. (Dec. 8, 2004, GMMC Motion for Summary Dismissal.) GMMC argues that the "pendency of the appeal in this matter is creating uncertainties and impediments" to its mining operations. It asks for "summary adoption" of the Board's April 16, 2004, order denying the request for stay. Id. at 2. GMMC asserts that "it is in the interest of justice to dismiss this pending appeal to avoid future recurring questions about BLM's authority and to avoid burdening the Board with multiple motions during the pendency of the appeal." Id. at 3.

We agree with WEDG (Dec. 20, 2004, WEDG Response/Dismissal at 2) that GMMC's request is unsupported by rules or precedent governing Board procedure. Summary dismissal is appropriate when actions of an appellant are such that it has not attempted to show error in a decision. E.g., In re Mill Creek Salvage Timber Sale,

121 IBLA 360, 362 (1991) (summary dismissal granted where “appellant has not attempted to show any error in the decision”); 43 CFR 4.412(c) (failure to submit an SOR subjects an appeal to summary dismissal). The convenience of the opponent of an appeal has no place in determining whether summary dismissal is appropriate. Nor does the Board dismiss an appeal because it may wish to avoid motions by the parties. Adoption of a stay order considering arguments pending full consideration of the merits of the appeal is not an appropriate substitute for that consideration. GMMC’s request is denied.

In its pleadings filed subsequent to the initial briefing, WEDG submits documents to support inferences it asks the Board to adopt. With its December 20, 2004, WEDG Response/Dismissal, WEDG submits as Exhibit A an August 9, 2004, NDEP Notice of Decision granting GMMC a Water Pollution Control Permit for the Expansion Project. The August 9, 2004, NDEP Decision indicates that GMMC did not submit with its permit application plans for a heap leach facility in Section 30. See Exhibit A; see also Exhibit B. Because GMMC proceeded with its plans for a heap leach facility in Section 17, WEDG infers that the Section 17 heap leach facility is a newly chosen “alternative” to the one planned for Section 30. WEDG reasons that “feasible alternatives to the proposed heap leach facility [in Section 30] *did exist*” and that all feasible alternatives clearly were not explored in the Final SEIS. (Dec. 20, 2004, WEDG Response/Dismissal at 3 (italics WEDG’s).) In its February 22, 2005, WEDG Addendum, and February 25, 2005, WEDG Errata to Addendum, Exhibit 1, WEDG submits a February 10, 2005, Glamis Gold Ltd. News Release which asserts, at 2, that high-grade intercepts were found in drilling the “Section 30 area.” WEDG concludes: “GMMC has been expanding its Section 17 heap leach facilities because it located its minerals on Section 30.” (Feb. 22, 2005, WEDG Addendum at 2.)

We agree with GMMC (Mar. 3, 2005, GMMC Response/Addendum) that WEDG’s construction of facts is unsupported; we cannot adopt WEDG’s inferences as probative or as facts of record. WEDG presumes that GMMC has abandoned its desire for a heap leach facility in section 30. GMMC denies this (Mar. 3, 2005, GMMC Response/Addendum at 2), and no meaning WEDG insinuates from GMMC’s documents can constitute a waiver by GMMC of its authorized plans. In rendering a decision, we have no basis for presuming that GMMC will not proceed with its plans, nor do we know whether the pendency of the appeal had some impact on GMMC’s sequencing of events at the mine. WEDG presumes that GMMC has substituted a heap leach facility in Section 17 for the one authorized in Section 30. As noted above, however, the 2001 FEIS identified leach pads in Section 17. See Final SEIS at 1-5, Figure 1-3 (Marigold Mine Existing Facilities). The Expansion Project explicitly included expansion of the heap leach processing facility in Section 17. Id. at 2-27, Figure 2-7 (Millennium Expansion Project Process Areas). WEDG presumes that GMMC’s news release report that drill hole data shows positive values in Section 30

proves that GMMC will necessarily abandon a heap leach facility there. The proposed heap leach facility comprises only a portion of the entire land included within Section 30; we cannot leap to WEDG's conclusion. The premise for WEDG's argument that this collected information demonstrates that the alternatives analysis forming the basis for the Draft and Final SEIS was insufficient is that GMMC has substituted a newly found alternative for the Section 30 facility. No such fact of record exists. Moreover, the only probative effect such a conclusion would have on this appeal is that it would moot WEDG's argument against a facility there.

WEDG submits photographs into the record which it states demonstrate environmental contamination of Trout Creek directly as a result of "culverts (as documented in Exhibits A through H) which in fact *carry water from the waste dumps, through the berms and directly into Trout Creek.* \* \* \* GMMC's activities have resulted in the environmental contamination which WEDG predicted and which it has been concerned about since the inception of this action." (July 5, 2005, WEDG Supp. Resp./Dismissal at 2-3, photographs at Exhibits A-H (italics WEDG's).) GMMC objects to this filing in the strongest terms, calling it "unwarranted and irresponsible," "misleading," and "patently false." GMMC claims that the pictures do not depict the Expansion Project Waste Rock Storage Areas, as WEDG suggests, but rather they depict stormwater drain outlets from sediment basins constructed along a haul road as required by NDEP and its Water Pollution Control Permit. (July 15, 2005, GMMC Resp./Supp. Resp.) BLM agrees that WEDG has mislabeled water runoff culverts as relating to waste rock storage areas. BLM asserts that it inspected the site and consulted with mine personnel in July 2005 to investigate WEDG's allegations. BLM concludes that WEDG's contentions "are without merit and mischaracterize the purpose of the berms and drainage pipes described." (Aug. 5, 2005, BLM Resp./Supp. Resp. at 2.) BLM explains that WEDG has photographed features designed to handle runoff and storm water "from areas other than stored, unreclaimed rock." *Id.*

WEDG has not responded. Therefore, based on BLM's inspections of the site, we consider WEDG's July 15, 2005, filing no further.

[1] Turning to the merits, it is important to set the stage for our consideration of this appeal under NEPA. NEPA is a procedural statute designed to "insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). NEPA does "not require agencies to elevate environmental concerns over other appropriate considerations." Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). It requires only a "hard look" at environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). NEPA does not bar actions which affect the environment, even adversely. Rather the process assures that decision-makers are fully apprised of the likely effects of

alternative courses of action so that the selection of an action represents a fully informed decision. In re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995).

NEPA does not mandate particular results, but simply prescribes the necessary process. \* \* \* If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values may outweigh environmental costs. \* \* \* Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (emphasis added, citations and footnote omitted).

To satisfy NEPA section 102(2)(C), an EIS is judged by whether it constitutes a “detailed statement” that takes a “hard look” at the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. Southwest Center for Biological Diversity, 154 IBLA 231, 236 (2001); Legal and Safety Employer Research, Inc., 154 IBLA 167, 173 (2001); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987); see 40 CFR 1502.2(a). An EIS must contain a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action and alternatives. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982), quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). Impacts, even significant ones, are to be expected when an agency goes forward with an EIS. See 40 CFR 1502.16 (EIS must include discussion of “adverse environmental effects which cannot be avoided”).

WEDG is laboring under a misimpression as to the sort of review it can obtain from this Board under NEPA. The appellant challenging an EIS must do more than identify significant impacts on the environment from a project to show that the agency was wrong in choosing to approve it. Instead, the appellant must demonstrate by a preponderance of the evidence and with objective proof that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. Rural Alliance for Military Accountability, 163 IBLA 131, 134-35 (2004); Center for Biological Diversity, 162 IBLA 268, 284 (2004). That heap leach gold mining has significant impacts on the environment is neither surprising nor inherently a violation of NEPA. This is true even if those impacts may ultimately be felt in some manner by adjacent landowners.

We have read every document in this record and, while we could disagree with opinions rendered or choices made, WEDG faces an uphill battle in showing a failure

on BLM's part to consider a significant or relevant environmental issue. The record reveals a deliberate, diligent, and detailed analysis of the complicated issues raised by the Expansion Project. BLM engaged in a scoping process whereby hundreds of interested parties were consulted. In response to legal requirements imposed by Federal and State agencies including BLM and NDEP, GMMC prepared or commissioned and considered numerous studies for the purpose of preparing the Draft SEIS. *E.g.*, 2002 Draft and Final "Conceptual Stormwater Management Plan for Trout Creek and Associated Tributary Areas for the Proposed Mining Expansions at the Glamis Marigold Property"; November 2002 "Infiltration Modeling of the Leach Pad, Mine Waste Rock and Pit Backfill Cover Systems for the Marigold Mine"; September 2002 "Glamis Marigold Mine Millenium Expansion, Supplemental Water Characterization Report"; September 2003 "Amendment No. 1 Final Permanent Closure Plan on the Marigold Mine Site"; April 2003 "Results of Water Transport Modelling Using Hydrus-2D." Development of the Draft SEIS consumed months during which the record reflects regular meetings and communications among project participants. Meeting minutes reflect a serious and professional approach towards answering questions surrounding the project.

After the Draft was issued in April 2003, the same process ensued to respond to critiques and arguments raised in comments during the public participation process. According to the record, review of the Draft SEIS "generated 300 staff comments" from BLM alone. (Document 760 (internal BLM notes).) Participants were in daily electronic, telephonic, or personal communication about project specifics on topics identifiable through chains of detailed consideration. BLM required articulated, science-based responses to every point individually enumerated in every single comment letter to the DEIS. BLM persevered with its demands even when faced with objection by GMMC to a need to reconsider certain issues. *E.g.*, Aug. 18, 2003, Meeting Minutes (documenting dispute between BLM and GMMC); Aug. 29, 2003, Letter from GMMC to Nevada State Director, BLM; Sept. 30, 2003, Letter from Nevada State Director, BLM, to Senior Vice President, GMMC ("One issue that arose in our discussions was the thickness of the heap leach cap. Although Glamis provided detailed models that demonstrate the effectiveness of a one-foot cap, the models do not address the long-term impacts from weathering, associated erosion and potential surface use that could damage the cap."). BLM was unrelenting in its insistence on data supplementation and responses to comments. *E.g.*, Sept. 19, 2003, BLM Letter to GMMC. Where GMMC objected to considering heap leach pad closure issues, BLM gave GMMC the option of going forward with full NEPA consideration or deferring NEPA consideration of heap leach closure issues for a later date. *Id.* GMMC's choice to finish the NEPA process on heap leach closure led to preparation of studies and further supplementation of the record. *E.g.*, September 2003 "Screening-Level Ecological Risk Assessment for Closure of the Glamis Marigold Mine Heap Leach Facilities." BLM refused to sign off on the process until water, air, and wildlife studies and modelling were completed. *E.g.*, Oct. 1, 2003, Telesto Technical

Memorandum, “Draindown Sensitivity Analysis for Glamis Marigold Mine Heap Leach Facilities”; Oct. 8, 2003, Letter from BLM to GMMC “Comments on Millennium Additional Information”; Oct. 6, 2003 (Meeting Minutes noting BLM requirements for augmenting studies); Sept. 22, 2003, Technical Memorandum, “Heap Material Properties”; Sept. 16, 2003, “Response to Comments on Millennium EIS Risk Assessment Scope of Work”; Sept. 12, 2003, Letter from BLM to GMMC (setting forth technical demands for “additional needed information” and “results of a BLM review of A Draft Work Plan for Heap Leach Draindown Analysis and a Statement of Work for a Millennium Heap Leach Closure Mass Balance/Screening Level Risk Assessment”). BLM adopted WEDG’s arguments and presented them to GMMC, obtaining agreement by GMMC to move the heap leach pads back from WEDG’s property in Sections 30 and 16, and doubling the width of heap leach covers.

Undoubtedly, the record reflects that the data available was imperfect. Many conclusions were based on modeling, a lack of data, questions regarding water draw down from the nearby Lone Tree Mine and uncertain results. Nonetheless, project participants attempted professionally and scientifically to use data available and to gather more. Fundamentally, this is what they were required to do because NEPA permits development to go forward even if all effects are unknown. “If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.” Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975), citing Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973). Most importantly, the record reflects clarity and purpose in looking at what could be addressed; we find nothing in it to support speculation that BLM sought to gloss over an issue or hide any environmental issue from review.

In the face of such a record and a full EIS, WEDG must show more than potential effects from the Expansion Project. In order to meet its burden of showing by a preponderance of the evidence and with objective proof that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, it must show that BLM was presented with information it chose to ignore or came up with verifiably wrong answers. WEDG does not meet its burden.

WEDG argues that the Expansion Project will “inevitably result in soil and surface and groundwater contamination of WEDG lands” as a consequence of the migration of contaminants from the heap leach processing facilities and waste rock storage areas on public lands adjacent to WEDG’s private lands, and thus adversely affect WEDG. (SOR at 3.) WEDG asserts that its private lands are hydrologically down gradient, both on the surface and underground, of the mine, and that water flowing through the Project area will inevitably transport contaminants from that area to WEDG’s private lands. WEDG argues that BLM violated section 102(2)(C) of

NEPA by failing to provide adequate measures to prevent such contaminated runoff, because BLM's choice of closure mechanisms for the waste rock storage areas and heap leach facilities "present serious, long term threats to the environment." "The respective six-inch and twelve-inch covers are clearly inadequate, and, if implemented, have a significant likelihood of future failure." (SOR at 10.) WEDG complains that BLM did not sufficiently mitigate these effects. *Id.* WEDG challenges the conclusions in the Final SEIS that the composition of the waste rock material in the storage facility is unlikely to produce leachate that will harm WEDG's private lands or Trout Creek; WEDG supplied confidential geochemical data which it claims "demonstrates that the waste rock has a high potential to be toxic." *Id.* at 11. WEDG complains that BLM did not sufficiently defer to WEDG's data and that, if BLM had difficulties with that data, it should have pursued further consultation with WEDG. (Mar. 30, 2004, WEDG Reply/Stay at 13 (italics WEDG's).) WEDG objects to the characterizations in the SEIS regarding Trout Creek which it asserts "clearly contains *water* and it does, indeed, contain *trout*, and it indisputably flows first through GMMC property, and then immediately onto WEDG lands." *Id.* at 8 (italics WEDG's).

We resist inserting into this opinion a full restatement of the consideration of these issues in the Final SEIS. BLM responded in detail to the points raised by WEDG in its comment letter on these topics and specifically considered the potential impacts of authorizing the placement of heap leach processing facilities and waste rock storage areas in the vicinity of Trout Creek and WEDG's private lands. (Final SEIS at 6-23 through 6-36.) BLM provided for constructing berms along the edge of Waste Rock Storage Areas, in order to prevent migration of leachate from the storage areas into the creek; covering the storage areas with a minimum of 6 inches of cover, in order to promote vegetative growth and thus eliminate or substantially reduce the infiltration of meteoric water into the waste rock; and periodically monitoring the storage areas and remedying any adverse effects to surface or ground water attributable to any seepage from such areas during the course of ongoing mining and ore processing operations. It provided for locating heap leach processing facilities situated near WEDG's private land 200 and 100 feet from the property line; constructing berms along the edge of heap facilities; converting existing processing ponds into evapotranspiration basins in order to contain drainage water and its constituents, leaving the reclaimed ore within the existing lined containment system; and increasing the minimum growth medium cover to 24 inches. BLM required periodic monitoring of heap leach processing facilities and remedying any adverse effects to surface or ground water attributable to any leakage from such facilities during the course of ongoing mining and ore processing operations. BLM provided for future establishment of a Trust Fund, under 43 CFR 3809.552(c), to address post-reclamation issues. (ROD at 10.) BLM provided for mitigating any negative impacts of such facilities and storage areas to the creek and WEDG's adjacent private lands, concluding that the likelihood of impacts was low, given the non-acid-

generating geochemical make-up of the mineralized ore and waste rock. (Final SEIS at 2-23 to 2-50, 3-27, 3-47, 3-50 to 3-58; ROD at 4-8.) <sup>2/</sup>

The complaints raised by WEDG reflect disagreements rather than a lack of consideration by BLM. <sup>3/</sup> For example, it is clear from the record that BLM set forth detailed information regarding Trout Creek, its drainage, its hydrogeologic setting and impacts on the area from the nearby dewatering at Lone Tree Mine. Id. at 3-28 through 3-33; see also at 3-39 (Figure 3-13 (depicting flow)) and 3-45 to 3-46 (groundwater). More information can be found in the December 9, 2002, study, Marigold Mine Hydrologic and Geochemical Evaluation, at 26-27. During the period of preparation of the SEIS, WEDG objected to BLM's discussion and submitted its own data. Frequently, WEDG could not sustain its own contentions. WEDG asserted that Trout Creek was a perennial stream, e.g., May 29, 2003, WEDG Letter to BLM, a fact it later had to concede was error given that the creek is seasonal, running only during winter/spring runoff events. E.g., Dec. 9, 2002, Marigold Mine Hydrologic and Geochemical Evaluation at 27; Final SEIS at 3-28, 3-87, 6-24. WEDG contended that the Creek near its property contained cutthroat trout; BLM later confirmed with the Nevada Division of Wildlife (NDOW) that this was not so. (July 23, 2003, NDOW letter to BLM; see also Aug. 4, 2003, BLM Conversation Record (question whether cutthroat trout had been "illegally transported and placed into stream").) <sup>4/</sup>

By letter dated September 18, 2003, WEDG sent BLM over 450 pages of drill hole and other data in support of its contention that the waste rock likely to fill the Sections 30-31 and Section 6 Waste Rock Storage Areas would be more toxic than was reflected in the Draft SEIS or the data on which GMMC was basing its toxicity conclusions. BLM analyzed the data and noted that some of the geology and critical information was missing. (Sept. 26, 2003, Memorandum from Holzel regarding WEDG Data.) More importantly, BLM concluded that the WEDG data was taken from locations that were outside the area to be mined as part of the Expansion Project and that "testing was not directed specifically at determining the long term geochemical

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<sup>2/</sup> The record documents a leak beginning in 1994 in "Cell 7" of a heap leach pad or facility. NDEP and BLM demanded remediation and ultimately the area was closed. Nothing in the record suggests that these efforts were unsuccessful at protecting adjacent lands.

<sup>3/</sup> WEDG has added in its appeal a challenge to BLM for failure to ensure that contamination will not occur during operations. (Mar. 30, 2004, Reply/Stay at 18.) We have no basis for concluding that conditions described above would likely prevent contamination after closure but not during operations and address this somewhat illogical argument no further.

<sup>4/</sup> The record reflects a number of objections by WEDG to BLM's assertions regarding the direction of water flow. Figure 3-14 of the SEIS verifies topography of the area.

behavior of the material. Much of the data was [based] \* \* \* on visual estimates of the concentration of sulfide materials.” (Mar. 22, 2004, BLM Response, Exhibit 1, Affidavit of Charles G. Johnson at ¶ 10, relying on attached Sept. 26, 2003, Johnson analysis of WEDG data.) BLM reasonably chose to rely on the waste rock analysis prepared using material associated with the mine and presented in the Final SEIS at Appendix C. See also Final SEIS at 3-45 through 3-51.

The issue of the cover materials for the heap leach pad was the subject of considerable, intense analysis as reflected in the record. BLM and GMMC undertook this analysis based not only on concerns expressed by WEDG but also by NDEP and NDOW. As a result of concerns expressed, the ROD chose, contrary to WEDG’s assertions, a requirement that “growth media cover on the heap leach pads \* \* \* are to be a minimum of two feet thick \* \* \*.” (ROD at 5.) Contrary to WEDG’s arguments that no mitigation of impacts was required, the ROD required monitoring of waste rock dumps for surface seepage and of groundwater levels, and set forth requirements for response to potential water problems. Id.

This commentary is hardly an exhaustive restatement of the agency’s consideration of the issues raised by WEDG. Rather, we cite it to demonstrate that BLM complied with the procedural aspects of NEPA, and undertook the requisite “hard look” at environmental issues and informed decisionmaking required by law. WEDG submitted its comments on multiple occasions, often providing erroneous information that had to be clarified. We will not fault BLM’s failure to dig deeper into WEDG’s arguments than it already has. That WEDG disagrees with the outcome of this analysis, or that the chosen project will generate environmental consequences, is not proof of a NEPA violation.

[2] WEDG’s argument about alternatives is its central NEPA argument and the linchpin of its request for relief. WEDG asserts that BLM had an obligation, over and above the obligation to consider Alternatives 1-3 addressed in the Draft and Final SEISs, to consider expressly enumerated alternatives to locating the heap leach processing facilities in Sections 30 and 16, and the North and South Waste Rock Storage Areas along the Trout Creek drainage in Sections 30-31 and Section 6 near WEDG’s private lands. WEDG argues that BLM’s failure to expressly identify such alternatives constitutes a violation of NEPA section 102(2)(E), 42 U.S.C. § 4332(2)(E) (2000), and implementing regulations at 40 CFR 1502.14. WEDG asserts that BLM failed to articulate a rational basis for its decision not to relocate the heap leach processing facilities and waste rock storage areas away from WEDG’s private lands, and thus acted arbitrarily and capriciously. (SOR at 8-9, 12.)<sup>5/</sup>

<sup>5/</sup> WEDG argues that BLM’s failure to consider alternate locations for the heap leach processing facilities and waste rock storage areas stems from BLM’s erroneous belief

(continued...)

WEDG asks the Board to set aside the ROD and remand the case to BLM for “thorough examination” of alternate sites for processing facilities and storage areas:

[G]iven the extraordinarily large size of the project area and the flexibility of locating heap leach facilities and waste rock dumps, WEDG is confident that a full examination of the alternatives will result in discovery of one or more technologically and economically feasible and environmentally preferable sites for the heap leach facilities and waste rock dumps within the project area.

(SOR/Request at 3-4.) WEDG examines the project area, which it claims encompasses 29 square miles, and proposes that relocation of the heap leach and waste storage areas proposed for Sections 30, 31, 16, and 6, be evaluated instead within secs. 4, 5, 9, 10, and 16, T. 33 N., R. 43 E. (SOR at 7.)

BLM and GMMC respond that the Draft and Final SEISs did consider alternative placement of waste storage and heap facilities, but that consideration of other locations was constrained by such factors as the hydrogeology of the area, geography, location of minerals, and land-use patterns in a checkerboard fashion. See generally Mar. 22, 2004, BLM Response at 18-23; Mar. 15, 2004, GMMC Opposition at 16-23. WEDG replies variously that BLM did not sufficiently explore what it contends are “environmentally superior” alternative sites (Apr. 19, 2004, Reply/SOR at 9); refused to consider alternatives that had longer haul routes because of cost, id.; gave cursory consideration, id. at 10; failed to conduct rigorous and objective evaluation as required in 40 CFR 1502.14 or a “true examination” (Apr. 19, 2004, Reply/SOR at 10-11); and should have considered “at least one or more alternatives on GMMC property not subject to seasonal high water flow,” id. at 11. <sup>6/</sup>

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<sup>5/</sup> (...continued)

that it was “reasonably foreseeable” that GMMC and WEDG would reach agreement regarding expansion of the mine onto WEDG’s adjacent private lands, thus obviating the environmental concerns raised by WEDG. (SOR at 11-12.) We find no evidence in the record that BLM or GMMC chose those locations based on such assumptions. BLM considered expansion onto WEDG lands in the context of considering reasonably foreseeable cumulative impacts of proposed mine expansion, recognizing that such action ultimately required agreement by WEDG. (Final SEIS at 4-5, 6-35; BLM Answer at 27-28.) WEDG later complains that BLM considered such a possibility as a potential “cumulative impact.” (SOR at 11; see also 40 CFR 1508.7 (cumulative impacts defined).) We find no basis for criticizing BLM for considering as a potential cumulative or foreseeable impact an option -- purchase by GMMC of WEDG’s lands -- actually discussed by those two parties, as documented in the record.

<sup>6/</sup> GMMC refutes WEDG’s suggestion that it could find a preferable location for the

(continued...)

WEDG is wrong to assume that the alternatives requirement in section 102(2)(E) of NEPA provides a basis for it to demand another and more satisfying review process to find something better by way of “appropriate alternatives” to a proposed action. We have considered this issue on multiple occasions. Escalante Wilderness Project, 163 IBLA 235 (2004); see 40 CFR 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Friends of the Clearwater, 163 IBLA 1, 12 (2004); Larry Thompson, 151 IBLA 208, 219 (1999). BLM need only consider reasonable alternatives which accomplish the intended purpose of the proposed action, are technically and economically feasible, and have a lesser impact. 40 CFR 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); Friends of the Clearwater, 163 IBLA at 12; see also 43 CFR 1501.2, 1502.14, 1508.9. To demonstrate a failure to consider sufficient alternatives, an appellant bears the burden of showing an alternative that would meet the test described above. Great Basin Mine Watch, 159 IBLA 324, 354 (2003). Difference of opinion as to the proper alternative does not establish error in BLM’s choice of alternatives. Id.

We recognize that BLM did not consider specific alternative locations to placement of GMMC’s heap leach or waste storage areas as one of the specific enumerated alternatives in the Draft or Final SEIS, and that this seeming facial failure is a source of frustration to WEDG, given the location of some of the facilities of the Expansion Project near WEDG’s land. We find, however, that BLM and GMMC are correct to note that the record documents that the development of the Draft SEIS included consideration of alternative facility placement and the Final SEIS included consideration of WEDG’s specific comments. The Draft SEIS points out alternatives considered but eliminated from detailed consideration, noting that “various environmental constraints [limited] placement and construction of facilities. These constraints included locations of known cultural sites, surface water locations, visual contrasts, depth to groundwater, and wildlife resources. In addition to environmental constraints, GMMC also had to consider land status and operational constraints.” (Draft SEIS at 2-58.) The Draft SEIS identified such options as placing a waste rock storage area west of Trout Creek in Section 31; configuring such storage onto adjacent mining properties; merging the Section 16 and 30 heap leach facilities; placing heap leach pads over backfilled pits; eliminating a Section 30 processing pond; and using tailings impoundments as “alternatives to leach fields or evaporation basins for long-term heap leach drain down solutions.” (Draft SEIS at 2-58, 2-69.) WEDG is wrong to suggest that BLM did not examine alternative placement of the

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<sup>5/</sup> (...continued)

sites in areas not subject to “seasonal high water flow,” given the prevalence of other drainages in the Project area. (Response to WEDG’s Reply at 12.) The FEIS discusses Cottonwood Creek and Trout Creek drainages, as well as the unnamed eastern drainage lying to the east of Trout Creek. (FEIS at 3-28; Figure 3-12.)

leach pads and storage facilities merely because the SEIS did not separately enumerate such options under the “alternatives” heading.<sup>7/</sup>

Moreover, BLM and GMMC considered WEDG’s comments about alternatives to the extent WEDG made them in commenting on the Draft SEIS. See Final SEIS at 6-23 through 6-36. (Contrary to WEDG’s assertions before this Board, WEDG did not give specific suggestions for alternative locations that BLM should consider. Id.) More importantly, the communications in the record make clear that BLM insisted that GMMC consider WEDG’s views, move the facilities some 100 and 200 feet back from the edge of WEDG’s land, and undertake significant environmental analysis of hydrogeologic issues as a result of WEDG’s (and others’) comments.

WEDG has not presented to us, any more than it presented to BLM, an alternative which will accomplish the intended purpose of the Expansion Project, is technically and economically feasible, and yet have a lesser impact. 40 CFR 1500.2(e). The alternatives analysis required by NEPA section 102(2)(E) is not a directive that agencies consider alternatives that avoid placement of facilities next to private property. Yet this is the premise for WEDG’s request that the Board direct BLM to go back to the drawing board simply to find a site somewhere in secs. 4, 5, 9, 10, and 16, T. 33 N., R. 43 E., that would better isolate WEDG’s private lands from the mine. Worse, given that NEPA provides no basis for the Board to direct BLM to engage in a random search for improvement, WEDG would have the Board act as land manager to find a preferable site for BLM to consider. While it is clear from the surface ownership map, Final SEIS at Figures 2-1, 2-3, that a location in one of those land Sections would move project facilities away from WEDG’s lands, no fact in this record supports any conclusion that such an alternative facility placement would be technically feasible or economically feasible, let alone have a lesser impact.<sup>8/</sup> Indeed, though WEDG bitterly contends that GMMC chose alternatives based on cost factors, the test for determining whether NEPA has been complied with expressly includes “economic feasibility.” Accordingly, for all of these reasons, we reject WEDG’s charge against the alternatives analysis in the SEIS.

[3] Finally, we address WEDG’s argument under section 302(b) of FLMPA, 43 U.S.C. § 1732(b) (2000), that the Expansion Project will cause unnecessary and undue degradation. WEDG asserts that the degradation which would be visited upon

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<sup>7/</sup> WEDG contends that the process of siting such facilities is “flexible” and cites the “ease with which heap leach facilities and waste rock dumps” can be relocated. Such characterizations are both self-serving and unsupported.

<sup>8/</sup> BLM is correct that the checkerboard land pattern makes it impossible for BLM or GMMC to place facilities that will not impact someone’s private interests. In fact, Sections 5 and 9, where WEDG would have us order GMMC to investigate alternative site placement, are privately owned.

the Trout Creek drainage and WEDG's adjacent private lands is "unnecessary" given that it could be completely avoided by relocating the heap leach processing facilities and waste rock storage areas away from the drainage and WEDG's private lands. (SOR at 7.) WEDG argues that such impacts are "excessive, improper and, most importantly, wholly *unwarranted*," *id.* at 6 (italics WEDG's), and thus violate the statutory prohibition, as recently interpreted by the U.S. District Court for the District of Columbia in Mineral Policy Center v. Norton, 292 F. Supp.2d 30 (D.D.C. 2003).

BLM's duty to prevent unnecessary or undue degradation within section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), extends only to management of the public lands. "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* As used in FLPMA, "public lands" refers to land "owned by the United States \* \* \* and administered by the Secretary of the Interior through [BLM] \* \* \*." 43 U.S.C. § 1702(e) (2000); see also 43 CFR 3809.5 (public lands defined). The statutory provision does not impose a standard for treatment of private lands independent of requirements proposed by other laws. Accordingly, we resist WEDG's invitation to convert section 302(b) into a cause of action for a private party based on what it perceives to be tortious conduct.

Moreover, WEDG misconstrues rules at 43 CFR Part 3809 defining "unnecessary and undue degradation of the public lands," as revised in a rulemaking on November 21, 2000. A purpose of the rules was to "prevent unnecessary or undue degradation of the public lands." BLM defined the term to mean:

conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources; [and]

(2) Are not "reasonably incident" to prospecting, mining, or processing operations as defined in § 3715.0-5 of this chapter \* \* \*.

43 CFR 3809.5.<sup>2/</sup> The cited rule, 43 CFR 3809.420, contains enumerated performance standards, while 43 CFR 3715 defines occupancies that are reasonably incident to mining.

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<sup>2/</sup> Subsection (3) discusses effects on particular land areas, such as National Monuments, governed by specific laws not relevant here and we address it no further.

WEDG construes the word “unnecessary” within FLPMA and the rule to define any operational facilities that can be relocated elsewhere. We will not interpret the rule to mean that any approved facility causes “unnecessary” or “undue” degradation simply by virtue of the fact that someone does not like it where it is and argues that it should be moved. Nor does the Mineral Policy Center case support WEDG’s construction. GMMC correctly points out that this decision upheld the cited rule as sufficiently ensuring prevention of both unnecessary degradation and undue degradation of the public lands. 292 F. Supp. at 43-46. The court noted that a reasonable interpretation of “unnecessary” is “that which is not necessary for mining.” 292 F. Supp. 2d at 43 n.17, citing Utah v. Andrus, 486 F.Supp. 995, 1005 n.13 (D. Utah 1979). While WEDG cites that case for the proposition that the placement of heap leach pads and waste storage areas is “unwarranted,” WEDG has done nothing to support any claim that the regulations at 43 CFR Part 3809 have been violated by GMMC’s placement of project facilities.

WEDG has believed from the beginning that placement of mine facilities anywhere but near WEDG’s land is environmentally preferable. The record reflects WEDG’s demands for a half-mile buffer around its interests and its insistence that no amount of technological improvement would satisfy its demand for a buffer. WEDG asserts that “no amount of preventative measures will adequately protect the environment and only relocation will be guaranteed to prevent contamination \* \* \*.” (Apr. 19, 2004, WEDG Reply/SOR.) This refrain is documented throughout the record in phone and in-person contacts and letters from WEDG. The FLPMA unnecessary and undue degradation standard does not provide a basis for WEDG to control or insist on its choice of site placement for a mine adjacent to its lands.

To the extent not specifically addressed herein, any other argument advanced by WEDG has been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the ROD and Decision are affirmed.

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Lisa Hemmer  
Administrative Judge

I concur:

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James F. Roberts  
Administrative Judge