MISSOURI COALITION FOR THE ENVIRONMENT
HEARTWOOD

172 IBLA 226 Decided September 5, 2007

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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Arlington, VA 22203

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HEARTWOOD

IBLA 2003-184 Decided September 5, 2007

Appeal from a decision to issue seven prospecting permits for lead and other minerals on acquired lands in the Mark Twain National Forest. MOES-48105, MOES-48114, MOES-49253 through 49256, MOES-49344.

Intervention granted; decision affirmed.

1. Administrative Procedure: Standing–Appeals: Standing–Rules of Practice: Appeals: Standing to Appeal

   An appellant must establish that he will, or is substantially likely to, suffer injury or harm to a legally cognizable interest in order to be adversely affected by a BLM decision. The interest need not be an economic or a property interest and, generally, it is sufficient that an organization show that its members use the public land in question. Stipulations and mitigation measures added to a permit may serve to minimize environmental impacts or prevent significant environmental impacts from occurring, but do not mean that the action approved will have no effect on the land, waters, or wildlife of the area and, therefore, do not preclude an appellant from being adversely affected by a decision to issue a permit to undertake the action.

2. 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, relevant environmental concerns have been identified, and the final

determination is reasonable in light of the environmental analysis. The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of significance to the action for which the analysis was prepared.

3. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements

Section 102(2)(E) of the National Environmental Policy Act of 1969, *as amended,* 42 U.S.C. § 4332(2)(E) (2000), requires consideration of a reasonable range of alternatives to a proposed action, including a no-action alternative. Appropriate alternatives are those that would accomplish the intended purpose of the proposed action, are technically and economically feasible, and will avoid or minimize adverse effects. A "rule of reason" governs the selection of alternatives, both as to which alternatives an agency must discuss and the extent to which it must discuss them.

4. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements

NEPA and the regulatory concepts of "cumulative effects," "connected actions" or "similar actions" do not require that an environmental assessment address the potential environmental impact of mining under any lease which might later be issued as a result of exploration. BLM may properly defer any assessment of the environmental consequences of mineral development until after discovery of a valuable mineral deposit and prior to issuance of a lease.

5. Environmental Quality: Environmental Statements–Mineral Lands: Environment–Mineral Leasing Act: Environment–National Environmental Policy Act of 1969: Environmental Statements–National Environmental Policy Act of 1969: Finding of No Significant Impact

No error is shown where a decision to approve issuance of mineral prospecting permits is based on an Environmental Assessment/Finding of No Significant Impact that comply

with NEPA and require the adoption of the stipulations and mitigation measures on which the FONSI is predicated.

6. Endangered Species Act of 1973: Section 9: Take

A BLM decision approving the issuance of hardrock mineral prospecting permits does not violate the prohibition of a "take" of section 9 of the Endangered Species Act, *as amended*, 16 U.S.C. § 1538(a)(1)(B) (2000), where the decision requires compliance with the reasonable and prudent measures considered necessary and appropriate to minimize the risk of an incidental take of a listed species, which measures were specified by the U. S. Fish and Wildlife Service in an Incidental Take Statement prepared in connection with an earlier programmatic biological opinion, and carried forward in a site-specific biological opinion prepared with respect to the prospecting permits.

APPEARANCES: Edward J. Heisel, Esq., St. Louis, Missouri, for the Missouri Coalition for the Environment; Jim Bensman, Wood River, Illinois, for Heartwood; Barbara B. Fugate, Esq., and Kendra Nitta, Esq., Office of the Solicitor, for the Bureau of Land Management; Louis J. Marucheau, Esq., St. Louis, Missouri, for Intervenor, The Doe Run Resources Corporation.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

I. Background

The Missouri Coalition for the Environment (Coalition) and Heartwood have jointly appealed a March 5, 2003, decision (Decision) by the Acting Deputy State Director, Division of Resources Planning, Use and Protection, Eastern States Office, Bureau of Land Management (BLM), to issue to The Doe Run Resources Corporation, d/b/a Doe Run Company (Doe Run), seven hardrock mineral prospecting permits [1] for lead and other minerals under the surface of the Salem and Potosi/Fredericktown Ranger Districts of the Mark Twain National Forest in southern Missouri.[2] Doe Run

[1] The permits are identified as MOES-48105, MOES-48114, MOES-49253 through 49256, and MOES-49344.

[2] The land was acquired by the United States for forest purposes pursuant to the Act (continued...)

filed the seven applications to conduct exploratory drilling for lead, zinc, copper, iron, and related minerals on a total of approximately 8,756 acres on June 17 and July 5, 1996, November 26, 1997, and February 3, 1998, pursuant to 43 C.F.R. Subpart 3505.[3] BLM approved the permits, based on its January 2003 "Finding of No Significant Impact/Decision Record" (FONSI/DR), contingent on several stipulations and conditions imposed by BLM and the Forest Service. Appellants challenge BLM's decision, alleging various violations of the Forest Service Appeals Reform Act, 16 U.S.C. § 1612 (2000), the National Environmental Policy Act of 1969 (NEPA), *as amended,* 42 U.S.C. §§ 4321-4370b (2000), and the Endangered Species Act of 1973 (ESA), *as amended*, 16 U.S.C. §§ 1531-1544 (2000).

A. The Environmental Assessment

In order to assess the potential environmental impacts of exploratory drilling, the Forest Service and BLM jointly prepared an environmental assessment (EA) dated October 2001. The EA considered, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), whether prospecting would significantly affect the quality of the human environment, and thus necessitate the preparation of an environmental impact statement (EIS) under

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[2] (...continued)
of Mar. 1, 1911, also known as the Weeks Act, ch. 186, 36 Stat. 961 (1911), *codified in part at* 16 U.S.C. §§ 515-519 (2000). The surface is administered by the United States Forest Service, Department of Agriculture (Forest Service), but the minerals are managed by BLM pursuant to Reorganization Plan No. 3 of 1946. 60 Stat. 402, 1097, 1099; *see* 16 U.S.C. § 520 (2000). The project area was opened to prospecting activities, subject to certain conditions, by the Mark Twain National Forest Land and Resource Management Plan.

[3] The regulations governing prospecting permits explain that "a prospecting permit gives you the exclusive right to prospect on and explore lands available for leasing under this part to determine if a valuable deposit exists of: (1) Phosphate; (2) Sodium; (3) Potassium; (4) Sulphur; (5) Gilsonite; or (6) A hardrock mineral." 43 C.F.R. § 3505.10(a). The permit holder is authorized to "remove only material needed to demonstrate the existence of a valuable mineral deposit." 43 C.F.R. § 3505.10(b). After BLM has initially reviewed a permit application but before it has issued a prospecting permit, the applicant must submit a bond and an exploration plan, showing how the applicant intends to determine the existence and workability of a valuable deposit and describing the environment that the plan may affect. 43 C.F.R. § 3505.40; § 3505.45. An exploration permit is distinguished from an exploration license which allows the licensee "to explore known, unleased mineral deposits to obtain geologic, environmental and other pertinent date concerning such deposits." 43 C.F.R. § 3506.10.

the Council on Environmental Quality (CEQ) regulations at 40 C.F.R. §§ 1501.4(b) and 1508.9.

The EA is tiered to an earlier final environmental impact statement (FEIS):

> The 1986 FEIS that accompanied the programmatic *Mark Twain National Forest Land and Resource Management Plan (Forest Plan*) discloses the effects of mineral development in a forest-wide context (pgs I-12-13, IV-42-44). The site-specific effects of exploratory drilling are not disclosed in the *Forest Plan* FEIS. This analysis discloses the site-specific effects of implementing the proposed Doe Run Company Prospecting Permits Project, and is tiered to the *Forest Plan* FEIS.

EA at 3.[4]

The EA describes the decision that each agency must make, based on the analysis in the joint EA, before exploratory drilling is authorized. First, the Mark Twain National Forest Supervisor must decide whether or not to consent to issuance of the prospecting permits and what stipulations designed to protect resources would be required. Then the Deputy State Director of BLM's Eastern States Office must decide whether to issue the prospecting permits and, again, what additional stipulations would be required. *Id.* at 6. The EA explains that "[t]he decision whether to issue prospecting permits does not automatically suggest we would authorize mining. If the Doe Run Company decides to apply for a permit for mineral development, a new and separate environmental analysis would be required to analyze the effects of that proposal." *Id.*[5]

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[4] The FEIS is part of the record before the Board. The *Forest Plan* is not.

[5] Elsewhere, addressing a consistent concern raised during scoping, the EA elaborates on this point:

> Before mining can be considered, an ore body must be located and defined. Exploratory drilling, such as the proposed project, is done to determine if an ore body exists and if so, the extent and location of ores. It provides information that would be used in the evaluation of any lease applications. If the company identifies that sufficient mineralization exists to prove a valuable discovery, they could submit a mine plan and apply to BLM for a Preference Right Lease (PRL). At that point, a new and separate environmental analysis of the company's mine plan would be made and documented in an environmental analysis that would disclose the potential effects of mineral development on resources. The Forest Service would issue a decision to

(continued...)

The agencies reviewed three alternatives in the EA. In addition to the required "no action" alternative (Alternative A) under which no new prospecting would be authorized, the EA examined Alternative B under which Doe Run would be allowed to drill an initial 19 holes "at locations identified in the permit applications" and, based upon the core information obtained from them, "drill up to 232 total holes within the proposed drilling areas, after on-site inspections and approval of each specific location and access route by the District Ranger." EA at 10-11. Alternative B also would allow Doe Run to construct five temporary roads totaling 0.82 miles which at a 10-foot width would require clearing approximately 1 acre. *Id.* at 11. Upon completion of approved activities, the roads would be closed and revegetated. *Id*. In addition, Alternative B would require Doe Run to accept a set of standard stipulations which have been developed by the Forest Service (FSM 2820). *Id.* at 10, referring to Appendix C. They include a special stipulation the Forest Service uses in hardrock exploration permits that provides that:

> no mineral development of any type is authorized hereby, and consent to the issuance of this prospecting permit as required by law and regulation (43 CFR Sec 3500.9-1(b)) [[6]] is given subject to the express stipulation that no mineral lease may be issued for the land under permit without the prior approval of the USDA Forest Service and the proper rendition of an environmental analysis in accordance with the National Environmental Policy Act of 1969, the findings of which shall determine whether or not and under what terms and conditions the lease may be issued.

Id. at 10 (*quoting* form R9-2800-6).

Under the third alternative, Alternative C, Doe Run also would be allowed to drill 19 initial holes and potentially up to 232 total holes "after on-site inspections and approval of each specific location and access route by the District Ranger," but 2 of the 19 would be relocated "to more level locations to reduce impacts [to] soil and water." *Id*. at 11-12. The EA describes Alternative C as similar to Alternative B

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[5] (...continued)

> consent or deny authorization for mineral development and the BLM would decide whether or not to issue the PRL based on that analysis.

EA at 8.

[6] Effective Nov. 1, 1999, the regulation was replaced by 43 C.F.R. § 3503.20(b). 64 FR 53512, 53516 (Oct. 1, 1999). The change was part of a general revision of the regulations governing the leasing of solid minerals other than coal and oil shale. Except when a difference in wording affects an issue, citations will be to the current regulations.

in requiring approval of the prospecting permits with the same standard and special stipulations, but in addition it provides "protection for surface water quality by prohibiting drill sites on slopes greater than 35%, in the filter strip, and requiring drilling effluent to be confined to on-site pits." *Id*. at 11. As described in the EA, the "filter strip" is a minimum 100-foot buffer to protect intermittent streams, increasing as the percent slope above the drainage increases. *Id.* at 14. Apparently due to the relocation of the two drill sites, the five temporary roads authorized under Alternative C would have a combined length of 0.77 miles and require clearing only 0.93 acres. *Id*. at 12, 33. The restrictions and altered drill site locations were the result of BLM's examination of the sites for the 19 initial drill holes as staked out by Doe Run. *See* EA at 12; Petition for Stay, Ex. N at 2-3. One proposed hole for permit MOES-048144 was "located approximately 20 feet from a large existing wash that feeds into the head of a drainage," which created the potential for fluid discharge to cause erosion and sediment loading in the drainage basin. EA at 24, 32. Another proposed hole for permit MOES-049344 was "located on a steep slope, which may lend itself to erosion problems and increased runoff." *Id*. at 24, 32.

In regard to the issue of water quality, the EA notes that "[t]he Salem and Potosi/Fredericktown Ranger Districts have 116 known caves, [and] numerous sinks and springs." One cave is within the boundaries for permit application MOES-48105, there are two sinks within the boundaries of permit application MOES-049255, and the permit area for MOES-048144 has one known sink, but there are no known springs within the boundaries of any of the proposed permit areas. *Id*. at 19. The EA also acknowledges that in "the karst terrain of the area it is possible that drilling may intersect unknown cavern systems." *Id*. at 20. Under both Alternatives B and C, if a drill hole intersects a cavern, a mitigation measure calls for drilling to immediately cease and the drill hole to be "plugged above the cavity to prevent surface contaminants from flowing into the drill hole and the cavity." *Id*. at 15, 20. In addition, because Alternative C prohibits drilling in filter strips, the EA finds that there would be a reduced risk of "intersecting losing streams or other karst features." *Id*. at 20.

Although the EA finds that the discharge of drilling effluents would not degrade ground water quality under either alternative because the discharge of effluents into surface waters in sufficient amounts is prohibited by Missouri law, it also states that "Alternative C provides more protection for water quality." *Id*. at 23.[7] In addition, the EA distinguishes between Alternative B, which would observe the *Forest Plan* standard of a 100-foot buffer around springs, fens, and seeps, but "would

[7] Alternative C apparently provides more protection for water quality, calls for effluent pits at all drill sites (which would serve to reduce erosion and sedimentation), and prohibits drilling in steep slope areas. EA at 15, 24-25, 33.

limit drilling in the buffer zone to only dry or frozen ground conditions," and Alternative C, which would also prohibit drill sites in the buffer zones surrounding fens and seeps and would provide "further protection by prohibiting drill sites from being located in these buffer zones surrounding fens and seeps." *Id*. at 23-24.

The analysis of the impacts on visual resources indicates that Alternatives B and C vary only in that the drill site on permit MOES-049344 would be moved, placing it "out of the visual foreground of the Ozark Trail." *Id*. at 37. In other respects, the impacts of Alternatives B and C are fundamentally the same.

B. The Decision on Appeal

On February 14, 2002, Randy Moore, the Forest Supervisor of the Mark Twain National Forest issued a "Decision Notice and Finding of No Significant Impact" (DN/FONSI), "consent[ing] to seven prospecting permits for up to 232 drill holes with standard and special permit stipulations, additional mitigations, and modifications" identified in Attachment A of the decision. DN/FONSI at 2. Attachment A includes both the Forest Service's standard stipulations (FSM 2820) and a set of mitigation measures set forth in the EA. *See* EA at 12-15. The Forest Supervisor specified that each drill site would be approximately 1/4-acre in size and that any drilling within the prospecting permit areas would be approved only after on-site inspection and approval of each specific location and access route. *Id.* at 3. He stated that "Alternative C provides protection for surface water quality by prohibiting drill sites on slopes greater than 35%, in filter strips, and requiring drilling effluent to be confined to on-site pits." *Id.* at 6-7. Finding that the EA had "considered areas of potential impact and created mitigation measures and special stipulations that provide ample resource protection," the Forest Supervisor concluded that the project was not a major Federal action and would not significantly affect the quality of the human environment. *Id.* at 8.

Several parties, including the Coalition, appealed the Forest Service decision that was affirmed by decisions dated May 14, 2002, and signed by M. Ruth Voltz, apparently on behalf of Randy Moore, who had become the Eastern Regional Forester. Thereafter, by letter dated September 6, 2002, the Deputy Regional Forester, Eastern Region, informed BLM that the Forest Service consented to issuance of the prospecting permits.

BLM's FONSI/DR, signed on January 15, 2003, identifies the documents by which the Forest Service had consented to issuance of the permits, notes that site-specific effects of exploratory drilling are addressed in the EA, which is tiered to the Forest Plan FEIS, and states that "[d]rilling would occur only after each site was inspected and the District Ranger approved each specific location." *Id.* The Field Manager concluded, based on the analyses in the referenced environmental

documents, that the decision to issue the permits "will not result in any significant environmental impacts to the environment." *Id.* at 2. The Deputy State Director approved issuance of the permits with the Forest Service's and BLM's stipulations, reasoning that the decision "will not result in any undue or unnecessary environmental degradation" and that "[f]urther, mineral exploration may help determine the presence or absence of mineral resources within the permit area." *Id*.

On the basis of its FONSI/DR, BLM issued its Decision, dated March 5, 2003. The Decision, entitled "Permits Held for Issuance/Additional Requirements to be Met," instructs Doe Run to sign and date the enclosed Forest Service and BLM stipulations and return them within 30 days, failing which the applications would be rejected.[8]

C. Procedural History

Appellants sought a stay of the decision pending review of their appeal. By order dated June 23, 2003, the Board denied the request.[9] On March 10, 2006, the Board issued an order requesting the return of the record, which had been sent back to BLM to facilitate issuance of the permits. On March 29, 2006, the Board received the case files for the applications.

II. Analysis

A. Appellants Have Standing to Maintain the Appeal

Prior to discussing appellants' arguments on appeal, it is necessary to address BLM's contention that appellants lack standing to bring the appeal because they have not established that they are adversely affected by the decision. The Board has long

[8] The Forest Supervisor decided to implement Alternative C and consented to issuance of the prospecting permits with the "standard and special permit stipulations, additional mitigations, and modifications" identified in Attachment A of his decision. DN/FONSI at 2. The Attachment includes the stipulations as well as the mitigation measures, upon which the selection of Alternative C was based, as identified in the EA. DN/FONSI at 13-19.

[9] On Apr. 14, 2003, Doe Run filed a notice of entry of appearance and subsequently submitted both a response to the appellants' petition for a stay and an answer to their statement of reasons (SOR) for appeal. The June 23, 2003, order did not address Doe Run's status. As the proponent of the action approved by BLM, Doe Run is a party to the case and will be affected by any decision by the Board in this appeal. Accordingly, the company must be permitted to intervene.

followed a rule that, in order to have standing to appeal, an appellant must have been both a party to the case and adversely affected by that decision. 43 C.F.R. § 4.410(a); *Colorado Environmental Coalition,* 171 IBLA 256, 260 (2007); *Kendall's Concerned Area Residents*, 129 IBLA 130*,* 136 (1994); *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992).

BLM acknowledges that appellants are parties to the case because they participated in the decision-making process by submitting comments on the EA and the proposed action. BLM Answer at 5. However, BLM claims that appellants have failed to establish that they are adversely affected by issuance of the prospecting permits. BLM asserts that much of the injury that appellants allege in their stay petition is the result of past mining operations. *Id.* at 6. In addition, BLM argues that they fail to show that drilling, as conducted in accord with "the permit stipulations and current legal and regulatory environmental standards," will result in harm. *Id.* BLM points to provisions which it claims require Doe Run to revegetate and recontour drill sites, prohibit drilling mud from flowing into streams and sinkholes, forbid drilling in buffer zones for streams, springs, and wetlands, and prohibit surface disturbing activities in endangered species habitat and over caves. *Id.* at 7. "These measures," BLM argues, "ensure that environmental effects will be minimized and, thus, any alleged diminution of Appellants' enjoyment of the Mark Twain Forest will be minimal and of short duration." *Id.* BLM also suggests that "in the event that Doe Run fails to comply with the permit stipulations, any harm resulting from that failure will not be the result of the issuance of the permits, but the company's failure to comply with its legal obligations under the permit." *Id.*

[1] When determining whether a party is adversely affected within the meaning of 43 C.F.R. § 4.410, the Board does not require the kind of merits-based showing BLM describes. Although it is well settled that an appellant must establish that it will, or is substantially likely to, suffer some sort of injury or harm to a legally cognizable interest in order to be adversely affected, that interest need not be an economic or a property interest, and, generally, it is sufficient that an organization shows that its members use the public lands in question. 43 C.F.R. § 4.410(d); *Coalition for Concerned National Park [Service] Retirees*, 165 IBLA 79, 83-87 (2005); *Southern Utah Wilderness Alliance*, 164 IBLA 1, 5 (2004); *William E. Love*, 151 IBLA 309, 319-20 (2000); *Storm Master Owners*, 103 IBLA 162, 177 (1986); *National Wildlife Federation*, 82 IBLA 303, 308 (1984). In this case appellants state that many of their members

> use the Mark Twain National Forest, including the areas in and around the prospecting permit locations, for birdwatching, nature study and other purposes. In addition, Appellants' members frequently travel on the roads adjacent to the proposed project and take pleasure in viewing

> the forests and wildlife where the prospecting would take place. The BLM's decision to approve the prospecting permits has caused and will continue to cause injury to Appellants' members, in part, by allowing for the destruction of up to 112 acres of forest through the preparation of drill sites and roads, the contamination of surface water and groundwater, the elimination of important wildlife habitat and the impairment of the aesthetic beauty of the area.

Petition for Stay at 2. The statement is supported by the declarations of Tyler S. Harris, a member of the Coalition, and Jim Bensman, an employee of Heartwood, which describe their uses of the area. *See also* Petition at 7-8 (harm to the parties). On their face, the documents provide sufficient allegations to establish standing. *See Southern Utah Wilderness Alliance*, 159 IBLA at 232; *Defenders of Wildlife*, 152 IBLA 1, 3-4 (2000); *Craig M. Weaver*, 141 IBLA 276, 281 (1997).

The fact that the stipulations and mitigation measures to which BLM points may serve to minimize or prevent significant environmental impacts does not mean that drilling the exploration holes will have no effect on the land, waters, or wildlife of the area. *Cf. River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445, 452 (7th Cir. 1985), *cert. denied,* 475 U.S. 1075 (1986) ("nonsignificant impact does not equal no impact").[10] At best, as BLM recognizes, the stipulations and mitigation measures will only reduce the extent and duration of environmental effects. In some respects, they will have no consequence at all. For example, appellants assert that "[c]amping, hiking and the enjoyment of solitude will be significantly impaired by the noise and appearance of heavy equipment and industrial activities on the Mark Twain" and that "[t]he noise of drilling disturbs peaceful enjoyment of the forest." Petition for Stay at 8. The stipulations and mitigation measures do not address these effects. Therefore, they do not preclude appellants from being adversely affected.

We find that appellants have standing to bring this appeal pursuant to 43 C.F.R. § 4.410.

B. *The Board Does Not Have Jurisdiction to Adjudicate an Issue Arising Under the Forest Service Appeals Reform Act*

Appellants contend that the fact that Moore, as Regional Forester, approved the decision he had made as Mark Twain Forest Supervisor, violates the Forest Service Appeals Reform Act of 1992. Pub. L. No. 102-381, § 322, 106 Stat. 1374,

[10] However, it should not be assumed that, in considering an appellant's standing, we have reached any conclusion regarding BLM's substantive position with respect to compliance with the statute challenged, in this case, NEPA.

1419 (Oct. 5, 1992). SOR at 3, 23-24. BLM has provided a copy of a May 13, 2002, memorandum from Moore to Donald L. Meyer and M. Ruth Voltz recusing himself from participating in matters he had acted upon as Forest Supervisor and stating that they should consider and resolve any administrative appeals. BLM Answer, Ex. B. As noted, the decision on appeal was signed by M. Ruth Voltz, apparently on behalf of Randy Moore as Regional Forester.

Whether the Forest Service Appeals Reform Act was violated is not an issue within the jurisdiction of this Board. The Office of Hearings and Appeals exercises only the authority of the Secretary of the Interior to hear, consider, and decide matters within the Department involving the review functions of the Secretary. 43 C.F.R. § 4.1; *Exxon Co., U.S.A.*, 15 IBLA 345, 352-53 (1974). As BLM correctly points out, under 43 C.F.R. § 4.410, the Board has jurisdiction only over appeals by parties who are adversely affected "by a decision of an officer of [BLM] or of an administrative law judge or certain instances when lands are claimed under the Alaska Native Claims Settlement Act." The Board thus has neither the jurisdiction to adjudicate the issue of whether the Forest Service violated the Forest Service Appeals Reform Act, nor the authority to grant appellants' request to order a remand to the Forest Service "for a full and fair review process." SOR at 24; *see Wilogene Simpson*, 110 IBLA 271, 275 (1989).

C. *The Permit Applications Are Sufficient*

Appellants claim that Doe Run's prospecting permit applications were incomplete because the applicants did not submit either a statement of need for additional production as called for in instruction 1 of Form 3510-1, or certain corporate information, required in instruction 7b. SOR at 4. Appellants also allege that Doe Run did not provide a statement of its acreage holdings as called for by 43 C.F.R. § 3502.30(d). *Id.* Arguing that the information was "essential to a full review of the company's applications" and was in the public interest "due to the shaky financial status of Doe Run and the implications this has for future environmental compliance and cleanups," they ask the Board to remand BLM's decision. *Id*. at 4-5.

BLM counters that Doe Run provided a statement of need by letter dated January 15, 2003,[11] and provided the corporate information satisfying special

[11] In a letter to the Director of the BLM Eastern States Office, Doe Run stated that it "is searching for additional ore within the Viburnum Mining district because the current proven and probable ore reserves will provide for about four to fifteen years of mining" and "[t]he ore that may be available in the seven prospecting permit areas is vital to the continuing operations of the Viburnum Trend Mining District."

instruction 7b by letter dated January 22, 2003.[12] BLM Answer at 9, 34. Doe Run points out additionally that its cover letters for its applications informed BLM of a change in corporate ownership and both the letter and the application forms identified the file number under which its sworn statement of qualification could be found. Doe Run Answer at 3; BLM Answer at 9; *see* 43 C.F.R. § 3502.25.

We note at the outset that, contrary to appellants' understanding, the regulations do not require a corporation to specify its acreage holdings. They require only that a corporation affirm that it does not exceed the acreage limitations in 43 C.F.R. § 3503.37. 43 C.F.R. § 3502.30(d).[13] Although appellants assert that information allegedly missing from the application was "essential to a full review of the company's applications, and some was of specific interest to the public"[14] (SOR at 4), Doe Run cured any deficiency in its statement of qualifications. Appellants have failed to show that, in light of the information Doe Run provided, any delay in submitting the information effected a meaningful deficiency, or tainted the environmental review, nor have they identified how their participation would have changed. Appellants fail to show any deficiency in the permit applications which provides sufficient basis for remanding BLM's decision to issue prospecting permits.

D. BLM Did Not Violate NEPA in Approving Issuance of the Permits

Appellants present a number of arguments challenging the adequacy of the EA. They assert that the NEPA analysis was flawed and that BLM's decision not to prepare an EIS was improper, alleging that failure to initially disclose the 19 known drilling sites voids the EA; that the purpose and need statement was inadequate; that

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[12] The document of incorporation is not in the casefiles submitted by BLM.

[13] As revised effective Nov. 1, 1999, the relevant provision is 43 C.F.R. § 3505.13(b) which calls for an application to provide "[a] statement of your qualifications and holdings (see subpart 3503 of this part)." 64 Fed. Reg. 53512 (Oct. 1, 1999). As stated, Doe Run's applications were filed during 1996-98 and the decision on appeal was issued in 2003. The requirements the appellants rely upon were previously found at 43 C.F.R. §§ 3502.2-4 and 3562.3-2(b) (1996). Under an earlier version of the regulations, the date that information was provided was critical in determining priority between competing applicants, but a deficiency was curable. *See Peter D. Van Der Jagt*, 65 IBLA 56 (1982); *Leon F. Scully, Jr.*, 50 IBLA 19 (1980); *see also* 43 C.F.R. §§ 3505.25 and 3505.26.

[14] BLM states that appellants' "bare statements are not enough to demonstrate that having this information would have made a material difference in the public's ability to comment on the proceedings," and points out that "the fact that Appellants did not even request a copy of the information before filing their SOR indicates how immaterial this information is." BLM Answer at 9.

the range of alternatives considered was not reasonable; that the exact location of all the individual drill holes should have been identified before BLM rendered its decision; that the EA improperly focused only on the effects of exploration and not mining development; that cumulative impacts were not adequately addressed; and that the EA did not properly consider impacts to wildlife. SOR at 5-23.

[2] A BLM decision approving an action based on an EA and FONSI generally will be affirmed if BLM has taken a "hard look" at the proposed action being addressed, and identified relevant areas of environmental concern so that it could make an informed determination as to whether the environmental impacts are insignificant or impacts will be reduced to insignificance by the adoption of appropriate mitigation measures. *Biodiversity Conservation Alliance*, 171 IBLA 218, 226 (2007); *Biodiversity Conservation Alliance*, 169 IBLA 321, 331 (2006); *National Wildlife Federation*, 169 IBLA 146, 154-55 (2006); *Southern Utah Wilderness Alliance*, 159 IBLA 220, 235 (2003), *citing Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997).

In determining whether BLM has taken a hard look at environmental consequences, the Board has indicated that it will be guided by a rule of reason. *Colorado Mountain Club*, 161 IBLA 371, 381 (2004). A party challenging BLM's decision has the burden of demonstrating with objective proof that the decision is 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. *Biodiversity Conservation Alliance*, 171 IBLA at 226; *Biodiversity Conservation Alliance,* 169 IBLA at 332*; National Wildlife Federation,* 169 IBLA at 155*; Southern Utah Wilderness Alliance,* 164 IBLA 33, 36 (2004)*; Great Basin Mine Watch,* 164 IBLA 340, 363-64 (2004), *citing Great Basin Mine Watch,* 159 IBLA 324, 352-53 (2003). The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. *Southern Utah Wilderness Alliance*, 163 IBLA 14, 28-29 (2004).

1. *The EA is not Invalidated for Failure to Initially Disclose the 19 Known Drilling Sites*

Appellants claim that the agencies improperly relied on a regulation no longer in effect to justify the decision not to release information pinpointing the exact location of 19 drilling sites. SOR at 2-3, 5. They allege that, although "[t]he company requested that the submitted drill hole locations be kept confidential, as allowed per 43 C.F.R. Part 3590.1-b" (EA at 4), there was no legal justification for the request because the regulation cited was removed, effective November 2, 1998. SOR at 6; Petition at 11; *see* 63 Fed. Reg. 52946, 52954 (Oct. 1, 1998). Appellants further argue that withholding that information violated the requirement that

agencies provide "detailed information" to the public, and even though Doe Run issued a press release identifying the drill hole sites on January 30, 2002, "the public was prevented from doing their own inspection of the drill sites, or from submitting preexisting knowledge about such sites" during the public comment period. Petition, Ex. C; SOR at 6-7.

BLM acknowledges that the Forest Service initially relied on a regulation that was no longer in effect to justify its decision not to identify known site locations in the EA. BLM Answer at 10. BLM argues, nonetheless, that appellants exaggerate the effect of not having the information, since the scoping letter, EA, decision notice, and attached maps, kept the public well informed of relevant information, including the boundaries for the seven permit application areas, where drilling could occur, how many of the initial 19 holes would be located within that permit area, the total number of drill holes anticipated for that permit area, the total acreage within each permit area, the caves, sinks, and springs found within the permit application area, and the areas to be avoided or protected by implementation of the special stipulations and mitigation measures. *Id.* at 11.

BLM added that the specificity of the review is reflected in the special stipulations and mitigation measures and is reflected in the EA, such as at page 24, which describes the geographic location of proposed drill hole 048144#1 as "approximately 20 feet from a large existing wash that feeds into the head of a drainage." *Id.* at 11. In its Answer, Doe Run points out that the interdisciplinary team that prepared the EA was provided the specific locations of the initial 19 drill sites, visited them, and conducted site-specific analyses in the EA. Doe Run Answer at 5.

Reliance on a former regulation to initially withhold the identification of the precise location of the 19 proposed drill sites was an error. Having reviewed the record, however, we find that the nondisclosure did not affect BLM's compliance under NEPA because the information that was provided was plainly sufficient to satisfy NEPA's twin goals of fostering informed decision-making and informed public participation. While appellants allude to "preexisting knowledge about such sites," we assume that anyone with any relevant information pertaining to the acreage would have raised it, and note that they have not submitted or identified any such preexisting knowledge, even though the sites are now known. Appellants have offered little to show that the substantial information provided through scoping, maps, and in the EA was inadequate to identify the affected environment and resources, to adequately disclose the environmental impacts of the prospecting permits, to allow for development of appropriate mitigation, or to provide the public the chance to participate in an informed and meaningful manner in the NEPA process.

2. *The EA Included a Reasonable Range of Alternatives*

Appellants assert in two paragraphs that the range of alternatives was inadequate because BLM failed to consider "alternatives to using such minerals," "the remaining life of existing mines and their ability to provide the minerals in question," and "many other feasible alternatives that would have avoided or reduced the environmental impacts," including "approving only known drilling locations, requiring that drilling wastes be hauled off-site and prohibiting drilling in endangered species habitat." SOR at 7-9. Notably, they make no effort to explain why these are feasible additional alternatives.

[3] Section 102(2)(E) of NEPA requires consideration of a reasonable range of alternatives to a proposed action, including a no-action alternative. CEQ regulations at 40 C.F.R. § 1508.9(b) provide that an EA "[s]hall include brief discussions of the need for the proposal, of alternatives . . ., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." Appropriate alternatives are those that will accomplish the intended purpose of the proposed action, are technically and economically feasible, and will avoid or minimize adverse effects. A "rule of reason" governs the selection of alternatives, both as to which alternatives an agency must discuss and the extent to which it must discuss them. *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *Biodiversity Conservation Alliance*, 171 IBLA 218, 235 (2007); *Great Basin Mine Watch*, 160 IBLA at 366-67; *Bales Ranch, Inc.,* 151 IBLA 353, 363 (2000); *see* 40 C.F.R. § 1508.9(b); 40 C.F.R. § 1500.2(e); 516 DM 3.4(A).

As previously described, in addition to the "no action" alternative (Alternative A), the EA examined Alternatives B and C. The two are similar, except that Alternative B calls for placing erosion control matting on the back slope of drilling pads on slopes over 35% and allows drilling fluid to flow until it is absorbed into the soil. EA at 24, 30. In contrast, Alternative C includes mitigation measures which prohibit drilling on slopes greater than 35%, define a "filter strip" in which drilling is not allowed, and require drilling effluent to be retained in on-site pits. EA at 11, 14-15. The EA chose Alternative C as the preferred alternative "because it would accomplish the purpose and need, but include more safeguards than the standard stipulations." EA at 17-18.

BLM asserts that it did not need to consider the appellants' suggested "alternatives" since those suggestions are not "alternatives" within the meaning of NEPA, "either because they do not fulfill the purpose and need of the proposed action; because they are not separate and distinct actions, but merely permutations of the existing alternatives; or because the decision to issue the permits did consider those provisions." BLM Answer at 18-19. Specifically, BLM contends that consideration of the life of existing mines and alternatives to using lead "would not

fulfill the purpose sought to be achieved by the proposed action," that the handling of drilling waste is "one of an endless range of potential changes that could have been made to the initial Doe Run request," and that "the agency's alternatives 'cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.'" *Id.* at 19-20, *quoting Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). Further, BLM also points out that one of appellants' suggestions—"prohibiting drilling in endangered species habitat"—is, in fact, one of the stipulations that is a condition of the permits. *Id.* at 20. Doe Run contends that since some of appellants' suggested alternatives pertain to mining, they are inappropriate because "[t]he project is for mineral prospecting, not mining," and the Board already has addressed this issue in *Missouri Coalition for the Environment*, 124 IBLA 211 (1992). Doe Run Answer at 8.

Having examined appellants' assertions, we cannot find that they have carried, or even attempted to carry, their burden of demonstrating that their preferred alternatives would achieve the intended purpose of the proposed Project at less cost to the environment and are technically and economically feasible in the particular circumstances of the present case. *See Biodiversity Conservation Alliance*, 171 IBLA at 235; *Great Basin Mine Watch*, 160 IBLA at 366-67. We find that the EA provided more than the "brief discussions . . . of the environmental impacts of the proposed action and alternatives" that 40 C.F.R. § 1508.9(b) requires. Appellants have presented nothing undermining the adequacy of the range of BLM's alternatives considered in the EA and nothing supporting their contention that NEPA requires consideration of the very general alternatives they have suggested. Their "mere disagreement or difference of opinions as to the proper alternative[s] does not suffice to establish error in BLM's choice of alternatives." *Great Basin Mine Watch*, 160 IBLA at 367. Accordingly, we are not persuaded that the range of alternatives was inadequate. We therefore find no violation of section 102(2)(E) of NEPA.

3. *The Decision to Grant a Permit for Exploratory Drilling of up to 213 Holes Did Not Violate NEPA*

Appellants criticize the decision to allow Doe Run to drill an additional 213 holes in locations that have yet to be selected, contending that "there will apparently be no allowance for additional public scrutiny or comment" and that such "piecemeal decision-making is not authorized by NEPA" because site-specific consequences must be considered when a decision makes an irreversible and irretrievable commitment of resources. SOR at 9-10. In addition, they argue that BLM was prohibited from issuing the permits without knowing the location of the additional drill holes by 43 C.F.R. §§ 3505.40 and 3505.45, which require an applicant to submit an exploration plan that includes, *inter alia*, topographic maps or aerial photographs showing "the proposed location of drill holes." SOR at 10. More generally, they

claim that NEPA's environmental disclosure requirements "forbid the BLM from failing to assess the impacts from such a large part of the overall project." *Id.*

Under Departmental regulations at 43 C.F.R. § 3505.45, an exploration plan shows how the miner "intend[s] to determine the existence and workability of a valuable mineral deposit." The plan must include "as much of the . . . information as possible," including topographic maps or aerial photographs showing "existing bodies of surface water, topographic, cultural and drainage features, and the proposed location of drill holes, trenches and roads." 43 C.F.R. § 3505.45. BLM asserts that "Doe Run submitted as much information as was possible at the time, considering that the exact location of any additional holes beyond [the] 19 initial drill locations will be based on data from the initial holes." BLM Answer at 21. The regulations recognize the need for flexibility. It was reasonable for BLM to approve issuance of the exploration permits based on as much information as was possible for Doe Run to provide at time of permit issuance.

In regard to appellants' argument about "piecemeal decision-making," BLM asserts that:

> The EA examined the exploration project as a whole, considering the environmental effects of drilling the maximum number of holes allowed under each permit in each of the seven areas of the forest designated in the permits. The EA analyzed Doe Run's exploration proposal based on the assumption that drilling could take place anywhere within each permit area unless otherwise prohibited by stipulations. The EA's analysis was based on the boundaries of each of the permit areas, the maximum number of holes per permit area, and the areas within the boundaries of each permit where drilling will not be allowed to occur, contrary to Appellants' claim that the agencies have "no idea" where the drilling locations will be.

Id. at 21-22.

Doe Run contends that "the Forest Service and BLM have analyzed the entire 8,756 acres for drilling impacts," made "a site-specific analysis of the permit areas with the location of the proposed action defined as reasonably as possible." Doe Run Answer at 6. Doe Run further states that "[t]he EA analyzed the area that could be impacted by the drilling activity, and identified sufficient mitigation to insure that all actions will have minimal environmental impact." *Id.* at 8.

Appellants respond that the Project's lack of specificity concerning the potential for future exploratory drill sites leads to violations of section 102 of NEPA, because there can be no adequate discussion of potential impacts if the areas

impacted by future drilling are not identified. A similar issue was raised by another appellant and answered by BLM and the operator in *Great Basin Mine Watch*,[15] where "[w]e rejected GBMW's contention that a lack of details of the operations for phases other than Phase 1 fatally taints BLM's NEPA compliance," finding that "BLM compensates for the omission of precise sites for future activities by analyzing the impacts of approximately 95.55 acres of additional surface disturbance *anywhere within the Project area* and imposing resource-specific stipulations and mitigation measures for all activities throughout the entire project area." 159 IBLA at 354 (emphasis added). Here, as in *Great Basin Mine Watch*, we find that appellants have "not shown error in BLM's evaluation of the impacts of [111 forested] acres of surface disturbance anywhere within the entire Project area or in BLM's conclusion that the Project-area wide stipulations and mitigation measures are sufficient to reduce any potential impacts to insignificance." *Id.*

Moreover, while the company clearly may decide to drill anywhere within the 8,756-acre Project area not restricted by permit stipulations, and BLM performed an environmental analysis assuming drilling anywhere within this area rather than focused on specific sites, we find nothing to indicate, nor do appellants offer any indication, that BLM has failed to identify the kind or degree of impacts that may occur with exploratory drilling. Clearly appellants have not alleged or identified any impact that could not be assessed at the project area level, or conversely, one that could only be analyzed at the drilling site level.

4. *NEPA Does Not Require that an EA for Prospecting Permits Include an Analysis of the Impacts from Mining*

Appellants claim that the CEQ regulations at 40 C.F.R. §§ 1508.7 and 1508.25(a)(2) regarding "cumulative effects," "connected actions," and "similar actions" require that an EA that analyzes the impacts of prospecting also analyze the impacts from mining. First, they assert that under NEPA the EA must address the cumulative effects of the mining that has occurred in the area, the cumulative impacts of exploration for lead, and the cumulative impacts of the drilling and related projects on wildlife.[16] SOR at 14-20.

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[15] That case involved a project area of 3,336 acres and an EA that evaluated the impacts of exploration activities on 4.45 acres and "up to 95.55 acres of additional surface disturbance" within the project area, including 10.75 acres of designated new and spur roads and 0.42 acres for drilling 12 initial sites. *Great Basin Mine Watch*, 159 IBLA at 327-28, 348. The drill sites were to be 70-feet by 40-feet, for a total of 33,600 square feet.

[16] A cumulative impact is:

(continued...)

In regard to mining, appellants consider it widely recognized that lead mining and smelting have impacted the environment and argue that 40 C.F.R. §§ 1508.7 and 1508.25(a)(2) require such cumulative impacts to be considered. Failure to do so, they allege, "is particularly egregious" in this case because "the proposed drilling is adjacent to existing mines and will likely extend the life of such mines," and there has not been a comprehensive review of the impacts of lead mining on the Mark Twain National Forest. SOR at 16.[17]

With regard to exploratory drilling, appellants point out that the EA acknowledges that forest areas will be cleared for drill sites and access roads, that soil also will be disturbed by pits to collect drill cuttings, and that toxic materials and 2,000 gallons of water will be used for each drill hole. *Id*. at 16. Based upon an estimated 10,000 previously drilled exploratory holes and using the EA's figures establishing that each drill site will require approximately 1/4-acre of clearing (100-feet by 100-feet) and 1/4-acre of road (EA at 47, 55), appellants argue that the 5,000 acres of forest previously cleared constitute "a significant impact on surface habitats that requires disclosure in the EA and preparation of an EIS." *Id*. at 17. They further claim that the EA is deficient because its discussion of drilling fluids states only that, due to the size of the aquifer, "it is unlikely that this fluid would reach groundwater discharge locations in significant concentrations" and fails to address the effect on the groundwater itself and possibly other aquifers, and the cumulative impacts of thousands of drill holes. SOR at 17-18.

In addition, appellants contend that the EA was required by 40 C.F.R.

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[16] (...continued)

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

[17] Appellants contend that "the forest-wide effects of mineral development have never been assessed," and "[i]t was therefore inappropriate for the BLM and Forest Service to tier their EA to the Forest Plan FEIS." SOR at 14. They conclude that "BLM must prepare a comprehensive EIS that addresses the environmental damage occurring on the Mark Twain and in the Ozark region generally before it allows any additional mineral exploration or development." *Id*.

§ 1508.25(a)(1) and (a)(3) to examine the environmental impacts of mining any minerals discovered as a "connected action" and a "similar action."[18] SOR at 10-13. They contend that the prospecting permits are part of the "larger action" of mining in that Doe Run would not undertake prospecting unless it hoped to find minerals to mine and a prospecting permit is a necessary predicate to obtaining a lease to mine for lead. *Id*. at 11. They also argue that, not only is mining a "reasonably foreseeable" result of prospecting, but that environmental review of mining is necessary when reviewing the permit applications because they were filed prior to the amendment of the regulations in 1998 and "[i]t seems likely that Doe Run will argue at a later date that it is entitled to a preference right lease . . . if it discovers a valuable deposit." *Id*. at 12-13.

On the subject of cumulative impacts, BLM asserts that "there is no requirement under NEPA to provide a cumulative impacts analysis in an EA." BLM Answer at 27. Citing *Kern v. Bureau of Land Management,* 284 F.3d 1062, 1076 (9th Cir. 2002), BLM maintains that when courts have found that an agency has an obligation to analyze cumulative impacts it is "based on the foreseeability of other actions, as well as the complete lack of analysis of cumulative effects." *Id.*

BLM also contends that 40 C.F.R. § 1508.9(b)—the regulation describing the content of EAs (an EA "[s]hall include brief discussions . . . of the environmental impacts of the proposed action and alternatives")—does not require identification of "connected" and "similar" actions for an EA. According to BLM, even if NEPA does require such an analysis in an EA, the analysis as contemplated by appellants would not be appropriate here, because mining and exploration, though related, do not fit the definition of "connected actions" or "similar actions" under the CEQ regulations for many reasons, including that prospecting does not "automatically trigger" mining and mining is not a reasonably foreseeable result of prospecting. BLM's Answer at 22-26; *see* EA at 9.[19] Moreover, BLM notes, "even if there were a basis for viewing them as similar actions, the language of 40 C.F.R. § 1508.25(a)(3) is permissive, not mandatory, making the decision whether to analyze actions together a matter of BLM's discretion." BLM Answer at 26.

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[18] The CEQ regulations, which describe these terms in the context of determining the scope of an EIS, direct agencies to consider three types of actions in determining the scope: connected, cumulative and similar actions. *See* 40 C.F.R. § 1508.25.

[19] To the contrary, BLM argues, "the history of mining in the Mark Twain National Forest shows just the opposite," and points out that the Forest Service has indicated that in the past 23 years there had been 145 prospecting permits and only 3 leases issued. BLM Answer at 23, referring to DN/FONSI, App. I at 6.

In this case, the record clearly shows, as BLM claims, that the EA does in fact include numerous analyses of cumulative effects, including impacts from prior exploration. *See* BLM Answer at 27 (identifying relevant pages of the EA). And, in analyzing the potential effects of the possible drilling of 213 additional exploratory holes, the Forest Service acknowledged that "[t]he potential subsequent 213 drill holes are connected actions pursuant to 40 CFR 1508.25(a)(1)(iii)" and are addressed in the EA "because they are interdependent parts of a larger action." Forest Service DN/FONSI at 33.

[4] Quite properly, the EA did not analyze the potential environmental effects of mining. Appellants are mistaken in their belief that the EA was required to address the potential environmental impact of mining under any future lease which might be issued to Doe Run as a result of exploration, regardless of whether appellants regard those impacts as "cumulative" or the mining itself as a "connected" or "similar" action under 40 C.F.R. § 1508.25(a). When assessing reasonably foreseeable future actions, it was appropriate for BLM not to consider mine development, since "[d]evelopment does not necessarily follow exploration, . . . nor is it reasonably foreseeable to occur," given that the results of exploration, as well as other factors, may well determine that the company will never seek to develop a mine. *Concerned Citizens For Responsible Mining (On Reconsideration)*, 131 IBLA 257, 267 (1994) (plan of operations); *see id.* at 265-66 (mine exploration and development are not connected actions, as defined in 40 C.F.R. § 1508.25(a)(1), and therefore do not require consideration in a single EA); *see also National Wildlife Federation*, 145 IBLA 348, 376 (1998) ("[m]ine development is not a reasonably foreseeable result of exploration"); *Southern Utah Wilderness Alliance*, 122 IBLA 165, 168-70 (1992) (seismic survey and drilling a well); and *Uintah Mountain Club*, 116 IBLA 269, 271-72 (1990) (prospecting permits).

As both BLM and Doe Run point out, the Board rejected an argument similar to appellants' in *Missouri Coalition for the Environment,* 124 IBLA at 218. BLM Answer at 25; Doe Run Answer at 8-9.[20] In that case the Board stated: "BLM may properly defer any assessment of the environmental consequences of mineral development until after discovery of a valuable mineral deposit and prior to issuance of a lease." *Missouri Coalition for the Environment,* 124 IBLA at 218. That decision also noted that, under the EA and permits at issue in that case, a lease would not be issued automatically, but "[a]t the very least, issuance of a lease will be preceded by another environmental review" and "[i]n the course of deciding whether to issue a

[20] In addition, Doe Run notes that the regulations have since been changed to better define the differences between exploration permits and preference right leases. Doe Run Answer at 8-9, *citing* 43 C.F.R. Subpart 3507, 64 Fed. Reg. 53512, 53549 (Oct. 1, 1999).

lease, BLM will consider the environmental impact of mineral development." *Id.* at 124 IBLA at 217. Furthermore, the Board pointed out that the prospecting permits stated that "issuance of any lease . . . will be conditioned upon the prior rendition of an environmental impact assessment in accordance with [NEPA], the findings of which shall determine whether . . . the lease may issue." *Id.* at 218 (emphasis omitted). Such is also the case in the present appeal.

Importantly, the permits BLM approved in the case at hand included a stipulation that explicitly states that a mineral lease will not be issued without "the proper rendition of an environmental analysis in accordance with the National Environmental Policy Act of 1969, the findings of which shall determine whether or not and under what terms and conditions the lease may be issued." EA at 10. Such a stipulation is proper.

In sum, when assessing reasonably foreseeable future actions, it was appropriate for BLM not to consider mine development. Moreover, appellants have not identified any cumulative impacts, or connected or similar actions which BLM improperly failed to consider.

5. *The EA Adequately Considered Impacts to Wildlife*

Appellants allege, in cursory and vague fashion, that the EA "only performed a superficial assessment" of the impacts of the project on wildlife. SOR at 18-19. In supposed support, they cite FWS comments, discussing impacts from mining (not prospecting) found in a 1988 hardrock mining FEIS (which is not part of the record before us presumably because it relates to a different project in a different area of the Mark Twain National Forest), and rely on exhibits that fail to provide supporting evidence. In their argument, appellants either mischaracterize or ignore the EA's substantial discussion of impacts to wildlife, including listed species,[21] habitat, biological diversity, and ecosystem restoration. SOR at 18-20; *see* EA at 38-49, 57-72, D 1-69; Answer at 28-34, 37.

In its Opposition to Petition for Stay and Answer, BLM addresses, in considerable detail, each of appellants' general allegations, with specific references to the EA, appellants' exhibits, and the full text, provided by BLM, of one of appellants' exhibits.

Our own review of the EA convinces us that appellants have failed to substantiate their claim that the EA inadequately considers impacts to wildlife, as

[21] "Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-17.12." 50 C.F.R. § 402.02.

detailed in BLM's filings. Appellants simply have not presented any "evidence that BLM overlooked any likely impact or failed to appreciate the nature or magnitude of an impact, or that BLM's FONSI was otherwise erroneous or deficient" in the context of impacts to wildlife, including listed species, or any other related resource. *Biodiversity Conservation Alliance*, 171 IBLA at 228.

6. Appellants Have Not Demonstrated That an EIS was Required

Appellants argue that the Forest Service and BLM should have prepared an EIS rather than an EA, alleging that "there was a high degree of controversy about the impacts of this project and . . . the nature of the impacts on the environment is largely unknown." SOR at 20.[22] The argument arises under the regulations addressing the meaning of the term "significantly" as used in NEPA. *See* 40 C.F.R. § 1508.27. That rule states that, in NEPA, "significantly" requires considerations of both context and intensity, and that intensity "refers to the severity of impact." 40 C.F.R. § 1508.27(b). At issue here are 2 of the 10 factors officials should consider in evaluating intensity: "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" and "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."[23] 40 C.F.R. § 1508.27(b)(4) and (5).

As BLM correctly argues, the regulatory provisions identify only two of many matters that an agency "should" consider in determining the intensity or severity of the impact of the proposed action and this analysis is only one element of the determination of whether an action "significantly" affects the environment, "which is itself a component of the analysis of whether to prepare an EIS." Answer at 36. Indeed, the regulations appellants cite do not *require* an agency to prepare an EIS simply because the impacts of the proposed action are "highly controversial" or "largely unknown," and appellants have failed to proffer a legal analysis as to why, in this case, an EIS was necessary.

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[22] In this section appellants also incorporate by reference other arguments addressed elsewhere in the SOR which they believe justify preparation of an EIS, including allegations of unlawful tiering and failure to adequately address mineral-related activities.

[23] Whether a proposed action is "likely to be highly controversial" under 40 C.F.R. § 1508.27(b)(4) is not a question about the extent of public opposition, but, rather, about whether a substantial dispute exists as to its size, nature, or effect. *Oregon Natural Resources Council*, 116 IBLA 355, 362 (1990), *citing Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988); *Glacier-Two Medicine Alliance*, 88 IBLA 133, 143-44 (1985), *quoting Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

BLM determined, based on the analyses in the environmental documents, that the decision to approve issuance of the seven prospecting permits, with the conditions specified in the BLM and Forest Service stipulations, will not significantly impact the environment, and, therefore, that an EIS was not required. FONSI/DR at 2. Appellants have failed to show that BLM's determination was other than reasonable and supported by the record.

[5] No error is shown where a decision to approve issuance of mineral prospecting permits is based on an EA and FONSI that complies with NEPA and requires the adoption of the stipulations and mitigation measures on which the FONSI was predicated.

Appellants have not carried their burden of demonstrating, by a preponderance of the evidence with objective proof, that the decision is based on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Biodiversitiy Conservation Alliance*, 171 IBLA at 226; *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997). BLM's decision to approve the project did not violate section 102(2)(C) of NEPA.

E. *BLM's Decision Approving the Seven Prospecting Permits Did not Violate the Endangered Species Act*

Finally, appellants allege that BLM's decision violates the ESA, claiming that "the BLM and Forest Service have completely failed to undertake an adequate analysis of how Doe Run's drilling proposal will affect the Hine's emerald dragonfly," and failed to ensure compliance with the 1999 Biological Opinion's limitation on the total annual incidental take of Indiana bats. SOR at 21-23. As with its allegations regarding consideration of impacts to wildlife under NEPA, discussed above, here too appellants mischaracterize the record and fail to support their conclusory statements.

Section 7(a)(2) of the ESA, *as amended*, 16 U.S.C. § 1536(a)(2) (2000), imposes a substantive obligation on BLM to ensure that its actions are not likely to jeopardize the continued existence of listed species. *See, e.g., Southern Utah Wilderness Association v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997).

The various consultation mechanisms adopted in the regulations include early consultation, biological assessments (BAs), informal consultation, and formal consultation, to assist agencies in assessing a Federal action's impact on listed species and critical habitat. *Forest Guardians*, 170 IBLA 253, 259-61 (2006). If no listed species or critical habitat are within the action area, BLM need not prepare a BA and is not required to further consult. 50 C.F.R. § 402.12(d)(1). Where a listed species or critical habitat may be present, BLM must prepare a BA, which may occur as part

of a NEPA review, to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action," and whether formal consultation with FWS is required. 50 C.F.R. § 402.12(a); *see* 16 U.S.C. § 1536(c)(1) (2000); 50 C.F.R. § 402.12(f); *Enos v. Marsh*, 769 F.2d 1363, 1368 (9th Cir. 1985); *Native Ecosystems Council,* 160 IBLA 288, 298 (2004).

When the BA indicates that a proposed action may affect, and is likely to adversely affect, a listed species, BLM must formally consult with FWS, in order to ensure that the action is not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a) (2000); 50 C.F.R. § 402.14; *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998); *Enos v. Marsh*, 769 F.2d at 1368; *Umpqua Watersheds, Inc.*, 158 IBLA 62, 81 (2002). Formal consultation is not required, however, when BLM determines, with the concurrence of FWS, either through informal consultation or submission of a BA, that the proposed action may affect, but is not likely to adversely affect, a listed species. 50 C.F.R. § 402.12(k); 402.13(a), and 402.14(b)(1); *Natural Resources Defense Council v. Houston*, 146 F.3d at 1126; *In re Big Deal Timber Sale*, 165 IBLA 18, 32 (2005).

Formal consultation concludes with FWS' issuance of a Biological Opinion, which contains its determination of whether the proposed action is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. In the case of a jeopardy determination, the Biological Opinion may include "reasonable and prudent alternatives" to the proposed action that would not result in the likelihood of jeopardy to the species or the destruction or adverse modification of critical habitat and which can be taken by BLM or the applicant in implementing the agency action. 16 U.S.C. § 1536(b) (2000); 50 C.F.R. § 402.14(h) and (l).

Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), prohibits the "take" of any listed species in the United States. In 1982, Congress amended section 7 to allow the FWS to include within the biological opinion an Incidental Take Statement (ITS), which would exempt an action agency or applicant from any section 9 take claim relating to the species covered by the ITS, as long as the taking is incidental to the action, in accordance with the "terms and conditions" of the ITS, and neither the action nor the incidental take will violate section 7(a)(2). The action agency or applicant must comply with the terms and conditions in order to implement the "reasonable and prudent measures" (RPMs) which FWS determines are necessary to minimize the impact of the incidental taking.

As part of the environmental analysis it undertook in connection with the Doe Run prospecting project, the Forest Service prepared a Biological Evaluation (BE)

which identified the site-specific effects of the project on Federal proposed, threatened, and endangered species, as well as on species identified by the Forest Service as sensitive. EA, App. D. The BE compares the site-specific effects with those addressed in a biological assessment prepared in 1998 in connection with development of the Forest Plan, and evaluates the proposed project's compliance (under Alternatives A-C) with the 1999 Programmatic Biological Opinion for the Mark Twain National Forest Plan (Programmatic Biological Opinion).[24] It states that "exploration drilling was considered and analyzed in both the programmatic BA and the Biological Opinion" and that there "are no activities proposed in any alternative in the Doe Run [project area] that were not identified and discussed in the BA and [Programmatic Biological Opinion]." EA at D-17.[25]

In describing the earlier relevant consultations with the FWS, the BE explains that the Programmatic BA identified a need for formal consultation because of the potential for accidental take through disturbance of bat hibernacula or removal of bat roost trees from the several activities analyzed in the Forest Plan [26] and considered all adverse effects, "except the potential to remove an occupied roost tree," to be capable of elimination. *Id.* at D-17. Direct effects identified included removal of occupied roost trees and impacts from prescribed fire, and indirect effects identified included potential reduction in the forage base from water quality degradation and reduction of foraging habitat availability or suitability from activities that reduce forest canopy below 30 percent. Through development of the Programmatic BA, the Forest Service determined that Forest Plan activities may adversely affect four listed species, including the Indiana bat, and pursued consultation, which culminated in the Programmatic Biological Opinion.

The Programmatic Biological Opinion established a two-tier consultation process for the Forest Plan, beginning with Tier 1, issuance of the Programmatic Biological Opinion, followed by the Tier 2, site-specific project consultations. FWS would produce a tiered biological opinion if it determined that a site-specific project is likely to adversely affect listed species,[27] but consultation would be considered

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[24] The Programmatic Biological Opinion is not in the record before us.

[25] A table at D-22 identifies where in the Programmatic BA and Biological Opinion exploration drilling is evaluated.

[26] Activities analyzed in the Forest Plan, include timber harvest, recreation site management, road maintenance, firewood harvest, special uses, wildlife habitat management, range management and mineral exploration/development.

[27] As discussed below, appellants challenge the validity of the second tier of consultation undertaken for this project, which includes the BE and a second-tier biological opinion. Since the Programmatic Biological Opinion is not in the record,

(continued...)

complete in the event of a "may affect" but "not likely to adversely affect" determination at the subsequent stage. 2002 Biological Opinion at 1.

The Programmatic Biological Opinion concurred in the Forest Service's determination that the Forest Plan was "likely to adversely affect" four species, including the Indiana bat, and concluded that implementation of the terms and conditions associated with RPMs in the Programmatic Biological Opinion "will minimize any potential adverse effects to the Indiana bat by maintaining suitable roosting and foraging habitat." 2002 Biological Opinion at 2. Generally, those measures include: maintaining existing angle-iron gates at the two known hibernacula on the Mark Twain National Forest, increasing the area of old growth, maintaining potential roost trees, protecting any capture sites of reproductively active females, protecting any maternity roost colonies discovered on roost trees, maintaining an average minimum 23 suitable roost trees per forested acre, and monitoring bat populations and incidental take. The incidental take of Indiana bat habitat allowed by the Programmatic Biological Opinion is measured in forested acres and totals 50 acres per year.

The Forest Service undertook the second tier consultation envisioned by the Programmatic Biological Opinion by preparing the BE. Of the listed species considered, the BE determined that four have potential habitat or may be affected by activities in the project area. The BE found no evidence of the existence of the Hine's emerald dragonfly or suitable habitat in the project area and concluded that the project was not likely to affect the species.[28] EA at D-4; *see also* EA at 39, 41-42.

Regarding the Indiana bat, the BE describes mist-netting surveys and population counts that identified no bats in the project area, and described the seasonal habitat requirements of the species. EA at D-14 to D-16. It found that one

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[27] (...continued)
we rely on descriptions of it found in the BE and the letter, dated Jan. 9, 2002, from Charles M. Scott, Field Supervisor, Missouri Ecological Services Field Office, FWS, to Moore, Forest Supervisor (2002 Biological Opinion), included in the record as Ex. M attached to appellants' Petition for Stay.

[28] The BE notes that "[i]n August of 1999, a single specimen of Hine's emerald dragonfly . . . was legally collected at Grasshopper Hollow Fen (owned by The Nature Conservancy) . . . adjacent to Mark Twain National Forest. . . . Since its discovery in Missouri in 1999, additional searches have been done. To date, the species has been found again in the original location and at approximately 1.5 miles south and 2 miles southeast from the Doe Run Permit Project Area. There are no fens, calcareous seeps, or wetlands meeting the habitat requirements of this species within the Doe Run Prospecting Permit Project Area. None of the permit areas occurs within the recharge area of Grasshopper Hollow Fen or Barton Fen." EA at D-4.

permit (MOES-048144) is 3 miles north of the nearest documented occupied Indiana bat cave but that there is no winter habitat available in the project area (the nearest documented hibernaculum is within 3 miles of a proposed permit area), no documented summer male habitat closer than 3 miles of the project, and no summer maternity habitat within 30 miles. The BE found it unlikely that Indiana bats would be roosting or foraging in the project area, except possibly during migration in the spring and fall. *Id.* at D-16. A chart generated by a computerized BE program identified 5,997 acres of potential foraging habitat in the project area, no acres of reduced foraging habitat, and 216 acres of potential foraging habitat potentially affected but maintained under Alternative C. *Id.* at D-17. The analysis assumes that drilling would occur over a 2- to 6-year period and that the project area which is 98 percent forested would remain so under any alternative. Although drilling would create small temporary openings in the canopy, drilling would not impact the overall closure of the stands in which they are located. The analysis states that while drilling would remove some trees that might be suitable for summer roosting, 98 percent of the project area would not have any drilling activity, and all drilling must be undertaken in compliance with the terms and conditions of the Programmatic Biological Opinion (including maintenance of suitable roost trees). In conclusion, the BE finds it "highly unlikely" that there would be adverse direct or indirect impacts, any cumulative impacts, or direct or indirect take of Indiana bats by implementing the proposed activities. *Id.* at D-18 to D-19.

The Forest Service forwarded its BE to FWS for review. In its 2002 Biological Opinion, FWS concurred with the Forest Service's determination that "the only species that may occur within the project area are Indiana bat, gray bat, pink mucket pearly mussel, and bald eagle," finding that the project is likely to adversely affect the Indiana bat. 2002 Biological Opinion at 2.

The 2002 Biological Opinion looks at the status of the Indiana bat, and changes in the environmental baseline regarding trees that have occurred since the Programmatic Biological Opinion. It reviews the proposal to initially drill 19 drill sites with access roads, requiring 5.43 acres of clearing, use of temporary roads (1/4-acre per drill site), and clearing of temporary openings (approximately 1/4-acre per drill site), and reasons that if all additional 213 drill sites are requested, they would require an estimated 106.5 acres of clearing, representing 0.07 percent to 1.3 percent of the permit areas. The 2002 Biological Opinion requires adherence to the 50-forested-acre annual take allowed in the Programmatic Biological Opinion. It explains that the annual amount of impact will be counted toward the cumulative annual incidental take for the Indiana bat, as outlined in the Programmatic Biological Opinion, and takes into consideration the stipulations prohibiting surface disturbing activities within listed species habitat or on areas overlying known caves, and requiring compliance with the Programmatic Biological Opinion, including management recovery strategy for lands within the area of influence of any occupied

Indiana bat cave located on or near the Mark Twain National Forest. 2002 Biological Opinion at 2-4.

The 2002 Biological Opinion concludes that the project is likely to adversely affect the Indiana bat, but that the effects are consistent with those anticipated in the Tier 1 Programmatic Biological Opinion, and if the appropriate implementing terms and conditions associated with the RPMs are adhered to in the proposal any potential adverse effects to the Indiana bat will be minimized by maintaining suitable Indiana bat roosting and foraging habitat. It further determined that the action is not likely to jeopardize the continued existence of the Indiana bat and that the cumulative total of incidental take (50 forested acres annually) conforms with the ITS in the Programmatic Biological Opinion. 2002 Biological Opinion at 5.

Based on the BE and FWS findings in the 2002 Biological Opinion, the Forest Supervisor determined that the project "will have no additional effects beyond those identified in the 1998 Programmatic BA and June 23, 1999 . . . Biological Opinion." DN/FONSI at 10; *see* DN/FONSI, Conditions of Exploration Plan Approval, at 16.

In approving issuance of the prospecting permits, BLM relied on the environmental and biological analyses developed in connection with the proposed project. Appellants allege that it was unreasonable to do so. However, with regard to the Hine's emerald dragonfly, appellants have presented no evidence that the species exists in the project area and, as BLM states, "[t]he facts are that there is no habitat in the project area to be destroyed or degraded, no pesticides that will be used, and no possible run-off into the relevant wetlands because the permit areas" are not within suitable habitat areas. Answer at 37. On this basis, we agree with BLM that it was therefore reasonable for the BE and EA to conclude that approval of these exploration permits is not likely to affect the Hine's emerald dragonfly and reasonable for BLM to rely on those analyses. *Id*.

Regarding the Indiana bat, appellants allege that "BLM's approval of the prospecting permits is arbitrary and capricious" because of "erroneous assumptions the Forest Supervisor and [FWS] used to reach their conclusions that the current activity would not violate the [ESA]." SOR at 23. As a result, they contend that "BLM must reevaluate the project for compliance with the [ESA]." *Id.*

As discussed, the ITS authorized by FWS in its Programmatic Biological Opinion limits to 50 the number of forested acres that could be affected each year by mineral exploration and development. Appellants first challenged the findings of the Forest Supervisor and FWS that the project would comply with this limitation, claiming that "nothing prevent[ed] Doe Run from clearing the entire 122 acres in the

first year after it obtains the permits." Petition for Stay at 23. They chose not to reiterate that statement in their SOR.[29]

[7] In addressing appellants' argument, we focus on their claim that BLM's Decision approving the permits failed to ensure compliance with the ITS, rather than on their unsupported challenge to the conclusions reached by FWS in the 2002 Biological Opinion.[30] The record in this case and the terms and conditions of the permits convince us that BLM did not violate section 7(a)(2) of the ESA in approving the seven hardrock prospecting permits. Appellants have failed to show that BLM's approval of issuance of the permits will prevent compliance with the ITS in violation of the ESA. A BLM decision approving the issuance of hardrock mineral prospecting permits does not violate the prohibition of a "take" of section 9 of the ESA, where the decision requires compliance with RPMs specified by the FWS in an ITS prepared in connection with an earlier programmatic biological opinion, and carried forward in a site-specific biological opinion prepared with respect to the prospecting permits, and when appellant provides no evidence that BLM will not enforce such measures.

To the extent not explicitly addressed herein, appellants' arguments have been carefully and fully considered and rejected.

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[29] As BLM correctly responded, under the ITS, the Forest Service has no discretion to allow more than 50 forested acres to be affected each year by mineral exploration, and the permit conditions imposed by BLM require strict compliance with the Programmatic Biological Opinion. Opposition at 33; SOR at 39. Moreover, a special stipulation of the permit requires the permittee to obtain prior approval before undertaking any surface disturbing activities at any drill site or other use area.

[30] As prior Board decisions explain, "[t]he Department of the Interior has no authority to conduct administrative proceedings for purposes of considering challenges to decisions of a sister agency; likewise, the Secretary has not delegated authority to this Board to review the merits of biological opinions." *In Re Stratton Hog Timber Sale*, 160 IBLA 329, 339 (2004); *F. Duane Blake* v. BLM, 145 IBLA 154, 161-62 (1998), *reaff'd on reconsideration*, 156 IBLA 280, 281-82 (2002).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the March 5, 2003, Decision of the Acting Deputy State Director is affirmed.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
T. Britt Price
Administrative Judge