



SANTA FE NORTHWEST INFORMATION COUNCIL, INC., *ET AL.*

174 IBLA 93

Decided March 17, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

SANTA FE NORTHWEST INFORMATION COUNCIL, INC., *ET AL.*

IBLA 2005-27, 2005-28,
2005-29, and 2005-30

Decided March 17, 2008

Appeals from a decision of the Field Office Manager, Taos Field Office, New Mexico, Bureau of Land Management, authorizing access roads and utility lines in new and existing rights-of-way. NMNM-97059 and NMNM-95859.

Motion to dismiss appeals denied; decision affirmed.

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

In order to have standing to appeal a BLM decision, a person or organization must be a “party to a case” and must be “adversely affected” by the decision. 43 C.F.R. § 4.410(a). A party challenging a BLM decision to issue a right-of-way may show adverse effect through evidence of use of the lands in question. A party may also show adverse effect by setting forth a legally cognizable interest in lands affected by a right-of-way grant and showing how the decision has caused or is substantially likely to cause injury to that interest. 43 C.F.R. § 4.410(d).

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under section 501(a)(6) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(6) (2000), a decision to issue a right-of-way is discretionary and will be affirmed where the record shows the decision to be based on a reasoned analysis of the facts involved, made with due regard for the public interest, and where appellants fail to show error in the decision.

3. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-Way: Applications

BLM properly authorizes rights-of-way for access roads and utility lines across public lands to private lands, absent preparation of an EIS, where, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), it has taken a hard look at the environmental consequences of issuing the rights-of-way, considering all relevant matters of environmental concern, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. BLM's decision will be affirmed where the appellants fail to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by the statute.

APPEARANCES: Stephen Kirschenbaum, Santa Fe, New Mexico, for the Santa Fe Northwest Information Council, Inc.; Barbro Kirschenbaum, Santa Fe, New Mexico, for the Hacienda del Cerezo, Ltd.; Philip Saltz, Esq., Santa Fe, New Mexico, for Santa Fe Northwest Advisory Council, Inc.; Walter E. Stern, Esq., and Joan E. Drake, Esq., Albuquerque, New Mexico, for S. Zannie Hoyt; Stephen C. Ross, Esq., County Attorney, and Sophia Collaros, Esq., Assistant County Attorney, Office of the County Attorney, Santa Fe, New Mexico, for the County of Santa Fe, New Mexico; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Santa Fe Northwest Information Council, Inc. (SNIC), and others¹ have appealed from a September 16, 2004, Finding of No Significant Impact and Decision

¹ The four consolidated appeals subject to this opinion were docketed by the Board as follows: IBLA 2005-27 (SNIC); IBLA 2005-28 (Hacienda del Cerezo, Ltd. (HDC)); IBLA 2005-29 (Barbro Kirschenbaum); and IBLA 2005-30 (Santa Fe Northwest Advisory Council, Inc. (SNAC)). We dismissed appeals from the same decision filed by Tom Blog (IBLA 2005-31) and Anne Blog (IBLA 2005-32) by order dated Jan. 26, 2005.

Record (FONSI/DR) of the Field Office Manager, Taos Field Office, New Mexico, Bureau of Land Management (BLM). In this FONSI/DR, BLM selected the Proposed Action alternative, as analyzed in the El Monte Roads Right-of-Way Environmental Assessment (El Monte EA), and as described *infra*, authorizing utility lines within an existing right-of-way (ROW) (NMNM-97059), and access roads and utility lines in a new ROW (NMNM-95859), all crossing public lands situated in secs. 1, 3, 11 through 14, 20, 21, and 22, T. 18 N., R. 8 E., New Mexico Principal Meridian (NMPM), Santa Fe County, New Mexico, almost 10 miles northwest of downtown Santa Fe, New Mexico.

From the beginning of the lengthy process leading to preparation of the El Monte EA, BLM has sought to balance the competing and often conflicting interests inherent in structuring a project intended “to establish legal access for roads and utilities to four parcels of private land adjacent to the project area while minimizing new disturbance.” EA at 1. Moreover, in placing the subject appeals into perspective, it is important to bear in mind that the FONSI/DR approves a total of 4.67 miles of ROWs, the placement of utilities within an existing ROW, and a new ROW for additional utility placement. Of the total 4.67 miles of ROWs, only 0.43 miles of new gravel road would be constructed, and 4.24 miles of existing dirt roads would be improved to gravel roads. The ROWs generally would be 50 feet wide, with a 24-foot-wide driving surface.

I. BACKGROUND

These appeals arise out of several years of efforts by a number of private landowners to obtain access across public lands to their landlocked properties. These private landowners, notably the Ortiz and Garcia/Hoyt families, had been involved in a number of disputes over access to their properties. As BLM explained in the FONSI/DR, the proposed project area has long been used by members of the Ortiz and Garcia/Hoyt families, who comprise the El Monte Roads Association (Association), “to graze their cattle and to access their private properties.” They accessed their properties “by using a road that crossed land owned by the Horcado Ranch before traveling over BLM land to reach their properties.” However, “[i]n 1991, the road across the Horcado Ranch was closed off by new owners, Lawrence and Gabrielle Burke, and since then the Association members have used existing roads [jeep trails] on BLM land to reach their properties.” EA at 2.

BLM provided the following legal and factual background leading to preparation of the El Monte EA:

As a result of a dispute involving the closing off of access across the Horcado Ranch, the Burkes filed a civil action No. CIV 98-01110 SC/DJS-ACE in the United States District Court for the District of

New Mexico asserting certain claims against Suzanne and Eloy Garcia and seeking a decree quieting title to certain private property (Horcado Ranch lands). As a means of settling the dispute, a mediated settlement agreement (Agreement) between the Burkes, Garcias, and BLM was signed on April 3, 2000. The Agreement provided that the Burkes and Garcias would dismiss their claims against each other and that BLM would provide a right-of-way(s) for roads and utilities across BLM land to the Garcia family land as well as to lands belonging to the Ortiz families and La Luz Group. *The granting of rights-of-way by BLM would be subject to Federal regulations at 43 CFR 2800 and 40 CFR 1500.* The Agreement specifically identified routes across BLM land . . . that would provide legal access to the respective Association members' properties. These routes constitute the Proposed Action as described and analyzed in the environmental assessment (EA) for the project.^[2] There are eight other Action Alternatives or alternative routes that have been identified and analyzed in the EA as well as the No Action Alternative. If authorized, two rights-of-way would be issued to the Association. One right-of-way would be issued for the access roads and the other right-of-way would be issued for utilities. [Emphasis added.]

Id.

Subsequent to execution of the Settlement Agreement, Ortiz and Garcia/Hoyt adopted a Joint Road Maintenance Declaration to address the allocation of costs for construction and maintenance of the proposed roads, and to form the Association. AR 173, Attachment 3. Thereafter, the Association submitted an application to BLM for a 2.5 mile ROW. AR 173, Attachment 2. As explained by BLM, the ROWs are

² After the access dispute in 1991, Anthony Ortiz applied for 1.5 miles of ROW to their property. BLM brought to the attention of Ortiz the plans of Garcia/Hoyt for possible access routes in 1996, suggesting some combining of the ROWs. See Administrative Record (AR) 128. Although Ortiz was not a party to the quiet title litigation, BLM hosted a meeting that included Ortiz and Garcia/Hoyt in March of 2000, prior to consummation of the Settlement Agreement, to discuss the ROWs and BLM's requirements. See AR 125. Again, although Ortiz was not a party, the possible grant of an ROW to Ortiz is discussed in the Settlement Agreement in a way that makes it clear that BLM, together with Ortiz and the parties to the Agreement, were considering the requested ROWs as a single project. See AR 173, Attachment 5 (Settlement Agreement) ¶¶ 1, 3, 4, 5. Adding the requested 1.5 miles of ROW in the Ortiz application to the later El Monte application request of 2.5 miles of ROW constitutes the 4.0 miles of roads identified in the Settlement Agreement and corresponds generally with the 4.67 miles of ROW authorized by BLM in this FONSI. The ROW applications can be found in the Road Plan of Development, AR 173.

intended to allow members of El Monte “to use lands administered by BLM to construct a new road segment and improve existing roads to access the Association members’ properties, as well as authorize the placement of utilities.”³ FONSI/DR at 2 (emphasis omitted).

BLM made clear that its EA was intended to address only those issues associated with granting ROWs for use of public lands, and that it viewed matters concerning the potential development of the private properties owned by Association members as outside the scope of BLM’s jurisdiction. In its DR/FONSI, BLM defined the scope and nature of the project in the following terms:

Actions connected to this proposal but outside BLM’s jurisdiction include the potential development of the El Monte Road Association members’ private properties. Private property development within Santa Fe County is guided and controlled by the Santa Fe Land Development Code which determines, based on zoning and other factors, the type and level of development that is allowed. The potential for development of private properties for residential use is also subject to water availability and decisions on these matters rest with the New Mexico Office of the State Engineer and the County of Santa Fe BLM has no jurisdiction over roads on private land whether they be for private or public use or for roads that cross public lands not under the jurisdiction of BLM.

As discussed *infra*, BLM nevertheless included a discussion of the possible impacts to the public lands resulting from hypothetical levels of development of the private

³ The Association members who would be benefitted by the new and improved access roads and utility lines are Suzanne Hoyt (formerly Garcia), Paul G. Ortiz, Lillian Ortiz Walker, and the La Luz Group LLC (La Luz), which is composed of 8 members of the Ortiz family. The FONSI/DR states that these Association members own 4 parcels of private land to which the approved ROWs will provide access, containing a total of 1,678.82 acres in T. 18 N., R. 8 E., NMPM (1,280 acres in 3 adjoining parcels in secs. 10 (Ortiz and Walker) and 15 (La Luz), and 398.82 acres in a separate parcel in sec. 2 (Hoyt)). The EA “[a]nticipat[es] that a minimum of 11 lots (La Luz Group, L. Walker, P. Ortiz and eight heirs of S. “Zannie” Hoyt)” would be improved on the private lands once access is acquired” EA at 84. The Joint Road Maintenance Declaration identifies ownership of 11 separate lots, by legal description, whose owners are participants in the Declaration. AR 173, Attachment 3 Recitals. The Road Plan of Development, submitted by Ortiz and Garcia/Hoyt at BLM’s request, specifically identifies 11 “legally recognized lots” owned by 4 separate entities. Of the total of 11 lots, the Santa Fe Ranch consists of 8 separate lots owned by Zannie Garcia and her children. AR 173 Section 1.G.

lands, recognizing that whether the private parcels will be subdivided and developed, and at what level of density, depends upon a number of variables controlled by other State or county agencies, such as water availability and other zoning factors.

II. THE EL MONTE EA

In order to assess the potential environmental impacts of the Proposed Action and alternatives thereto, BLM retained SWCA Environmental Consultants (SWCA), a private environmental consulting firm, to prepare the El Monte EA, which BLM issued in September 2004. BLM considered eight action alternatives, the Proposed Action (Alternative A) and seven other alternatives (Alternatives B through H), each of which would provide an alternative configuration of the proposed permanent roads.⁴ Each proposed road system would begin at an existing road and dead-end at more than one (but not all) of the private-land parcels. BLM states that the private-land parcels are currently being used primarily for livestock grazing and other ranching purposes.

Six of the alternatives (Alternatives A, B, C, D, G, and H) would provide one or more road segments that would initially branch off the existing Horcado Ranch Road, near where it reaches the Mariah Ranch in sec. 13, T. 18 N., R. 8 E., NMPM.⁵ The Horcado Ranch Road is situated south of the public and private lands at issue. Four of these six alternatives would involve the construction of new roads (0.43 miles (A), 0.43 miles (B), 0.85 miles (G), and 0.46 miles (H)) and existing road improvements (4.24 miles (A), 3.65 miles (B), 2.62 miles (G), and 3.01 miles (H)), and the other two alternatives would only involve the improvement of existing roads (4.63 miles (C) and 4.04 miles (D)). The two remaining alternatives (Alternatives E and F) would provide one or more road segments that would initially branch off the existing

⁴ Each of the action alternatives provided for an ROW for new underground utility lines in sec. 3 and an amended ROW for new underground utility lines in secs. 20 and 21, all in T. 18 N., R. 8 E., NMPM, thereby extending existing utility service from the Buckman Road to the four private-land parcels at issue. There was no difference between these alternatives, so far as concerned utility lines. Under the No Action Alternative (Alternative I), no ROW would be granted or amended to accommodate any new utility lines.

⁵ The Horcado Ranch Road runs south from the vicinity of the Mariah Ranch in sec. 13, becoming the Paseo de la Tierra, which then intersects with the Camino Tierra, which continues on to State Route 599. This entire access route passes along or through three residential subdivisions which are in the process of being developed (La Tierra Nuevo, La Tierra, and Las Campanas).

Buckman Road in sec. 20, T. 18 N., R. 8 E., NMPM.⁶ Buckman Road is situated west of the public and private lands at issue. Each of these alternatives would involve new (0.71 miles (E) and 1.1 miles (F)) and existing road improvement (6.33 miles (E) and 4.56 miles (F)).

The ROWs would, in accordance with the Santa Fe County Land Development Code (Development Code) (AR 195), generally be 50 feet wide, encompassing a 24-foot-wide roadway with two driving lanes.⁷ The road surfaces would be graveled. The alternative road routes would vary in total length from 3.47 to 7.04 miles, and disturb a total of from 16.7 to 37.8 acres, during construction and improvement, and from 5.7 to 11.3 acres, during operation. The Proposed Action would itself provide for 7 road segments extending a total of 4.67 miles, and disturbing a total of 22.4 acres, during construction and improvement, and 7.4 acres, during operation. Road construction and improvement would generally take 1 year, except in the case of Alternatives E and F, which would require a bridge across the Calabasa Arroyo in sec. 22, T. 18 N., R. 8 E., NMPM.⁸

⁶ Buckman Road runs southwest from sec. 20, becoming the Camino Tierra where it intersects with the Paseo de la Tierra, and then continuing on to State Route 599. This entire access route also passes along or through the La Tierra Nuevo, La Tierra, and Las Campanas residential subdivisions. The Buckman Road is described as “an unpaved County maintained, rural road.” “The Buckman Roadway Study for the Buckman Water Diversion Project” (AR 174), dated August 2003, at I-1.

⁷ The ROW application submitted by the Association requests a 50-foot ROW (AR 173, Attachment 2), and the Road Plan of Development states that the width of the ROW will be 50 feet, except for a short section that will be 100 feet wide. AR 173, Section 1.C. The Settlement Agreement states that new construction will satisfy Santa Fe County standards (AR 173, Attachment 5 ¶ 5), as does the Joint Road Maintenance Declaration, with respect both to new construction and improvements (AR 173, Attachment 3, II.4). “Those standards call for a 50 foot right-of-way with a gravel base course driving surface of 24 feet.” EA, Appendix B (Comment Resolution) Response to Comment on Transportation Planning (23). The Development Code states that a local road is a gravel road with either a 20-foot or 24-foot-wide driving surface. AR 64, AR 195 Appendix 5-A. The need for a 50-foot-wide ROW was explained by BLM and is confirmed by the record. A short 210-foot-long section of the proposed ROWs would involve a 100-foot ROW where the road would cross a ridge in order to accommodate new road cuts. EA at 12.

⁸ BLM states that the bridge, which would be placed at the “narrowest crossing point” across the arroyo, would be 250 feet long and 24 feet wide with a 5-foot clearance over the arroyo. Memo to John R. Fox, Esq., from Clif Walbridge, C.R. Walbridge & Associates, LLC (AR 2), dated June 16, 2003; *see* EA at 28.

BLM also considered the No Action Alternative (Alternative I), under which no ROWs would be issued to the Association, no new roads would be constructed, and no existing roads would be improved across public lands. Rather, the Association would continue to obtain access to its private lands over existing jeep trails.⁹

The purpose of the EA was to allow BLM to determine whether any of the impacts from the authorized activity was likely to be significant, and requiring, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), preparation of an environmental impact statement (EIS). Based on the EA, the Field Office Manager issued his September 2004 FONSI/DR, adopting the Proposed Action alternative, subject to mitigation measures intended to minimize resource impacts. He also determined, in his FONSI, that the proposed action was not likely to significantly impact the environment and that BLM was not required to prepare an EIS.

Appellants appealed timely from the Field Office Manager's September 2004 FONSI/DR.¹⁰

III. APPELLANTS' ARGUMENTS ON APPEAL

In their SOR, appellants contend primarily that BLM's selection of the Proposed Action alternative violates section 102(2)(C) of NEPA because BLM failed to adequately consider the likely environmental impacts in the El Monte EA, and since such impacts are likely to be significant, to do so in an EIS. According to appellants, "[t]he project will have significant direct effects on the environment, and will also have significant indirect, growth-inducing[] effects because it will facilitate significant new development in the area." SOR at 4. They argue that BLM also violated NEPA by failing to consider reasonable alternatives to the proposed action.

⁹ In their Statement of Reasons (SOR), appellants state that access to the Association's private lands at issue is currently afforded over "jeep trails' that are negotiable with four-wheel drive vehicles, and vary in width from eight to ten feet." SOR at 1; *see* EA at 80; Memo to Field Solicitor from Field Office Manager, dated Jan. 13, 2004, at 2. Hoyt describes the trails as "primitive ranch roads[.]" Response to SOR (Response), dated May 11, 2005, at 12.

¹⁰ By orders dated May 3 and June 23, 2005, we permitted S. Zannie Hoyt, who is evidently also known as Suzanne Hoyt (Hoyt), to participate in the present proceeding as an intervenor, and the County of Santa Fe, New Mexico, to participate as an amicus curiae (County). By order dated July 13, 2005, we denied a motion to intervene by the Pueblo of Tesuque, Santa Fe County, New Mexico (Pueblo). The Pueblo did not seek reconsideration of our July 2005 order, and has made no further effort to participate in the proceeding.

They request the Board to reverse the Field Office Manager's September 2004 FONSI/DR and remand the case to BLM for preparation of an EIS or, at least, a new EA, and for reconsideration of the decision to approve the proposed action.¹¹

Appellants present their argument that in approving the subject ROWs BLM acted contrary to section 102(2)(C) of NEPA in the context of a view of the Association, acting in concert with BLM, as deeply involved in an effort to consciously mislead the public about their real motivation for seeking the ROWs, *i.e.*, to hide their plan for residential development of their private property. The appellants would require the Association to disclose a development plan that does not exist, thus holding BLM to a standard that is unrealistic under section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (2000), and section 102(2)(C) of NEPA. In reviewing the record in a balanced way, it is abundantly clear that BLM confronted a controversial and complex access dilemma, reviewed numerous alternatives, and, based upon all relevant factors, approved the one that will best serve the public interest. We conclude that the record amply supports BLM's decision.

IV. APPELLANTS HAVE STANDING TO APPEAL THE FONSI/DR

[1] In her response to appellants' SOR, Hoyt moves for dismissal of all four remaining appeals on the basis that appellants lack standing under 43 C.F.R. § 4.410(a) to appeal from the Field Office Manager's September 2004 FONSI/DR. She asserts that appellants have failed to demonstrate that they will be "adversely affected" by BLM's decision to authorize construction/improvement, operation, and maintenance of roads and utility lines across the public lands at issue, as required by 43 C.F.R. § 4.410(a).¹²

¹¹ Hoyt filed a May 11, 2005, response to appellants' SOR, in which she requests the Board to affirm BLM's September 2004 FONSI/DR. BLM also filed a response, dated Aug. 12, 2005, in which it adopts Hoyt's response to appellants' SOR as its own, asserting that the response "properly and adequately addresses all of the matters at issue." BLM Response, dated Aug. 12, 2005, at 11.

¹² Hoyt notes that information obtained from the New Mexico Public Regulation Commission (PRC), which "regulates corporations in New Mexico," discloses that "aside from SNAC[,] . . . this appeal fundamentally is pursued by the Kirschenbaum family." Response at 5, 6. She points out that on May 2, 2005, the PRC website identified Stephen and Barbro Kirschenbaum, who are husband and wife, as the sole officers of both SNIC and HDC. *See* Exs. A and B (attached to Hoyt Response). In addition, they are the only directors of SNIC, along with Leif Kirschenbaum, and Stephen Kirschenbaum is the sole director of HDC. The same address is given for all three Kirschenbaums.

In order to have standing under 43 C.F.R. § 4.410(a) to appeal from a BLM decision, an appellant must be a “party to the case” and be “adversely affected” by the decision within the meaning of 43 C.F.R. § 4.410(b) and (d). As we said in *Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997): “If either element is lacking, an appeal must be dismissed.” Further, it is the responsibility of the appellant to demonstrate the requisite elements of standing. *Colorado Open Space Council*, 109 IBLA 274, 280 (1989).

Hoyt does not challenge appellants’ status as a “party to a case.” Rather, she contends that appellants have not shown that they are likely to be “adversely affected” by BLM’s decision to authorize construction/improvement, operation, and maintenance of the roads and utility lines: “Appellants have not alleged, for example: (a) that they own property in the area or otherwise use the area where the rights-of-way are located; or (b) if they do own property, where that property is located in relation to the rights-of-way at issue in this proceeding.” Response at 1, n.1.

Appellants responded to Hoyt’s motion to dismiss their appeals, asserting that they will be adversely affected by BLM’s decision to authorize construction/improvement, operation, and maintenance of the roads and utility lines to the Association’s private lands. They note that HDC owns a “guest ranch with some private dwellings” on 336 acres of private land which are “access[ed] . . . via [the] Horcado [Ranch] Road.” Reply at 2. They also note that HDC “form[ed] the entity known as SNIC,” which holds the ROW for the Horcado Ranch Road, and that HDC originally constructed the road and now pays SNIC to repair and maintain the road. *Id.* Appellants point out that the Horcado Ranch Road will be used by traffic accessing the new and improved roads created as a consequence of BLM’s decision: “All traffic for [the] El Monte [Road Association] would come north on Paseo de La Tierra, and then travel approximately five miles on Horcado [Ranch] Road, on the SNIC ROW, to reach the newly granted Right[s]-of-Way to the El Monte lands.” *Id.* They also state that subsequent residential development of private lands by the Association will result in increased traffic on the road, both during and after housing and other construction, and that this increased traffic will interfere with HDC’s use of the road, and result in increased expenses to repair and maintain the road. *Id.* at 3.

Moreover, appellants assert that SNAC constitutes an “‘umbrella’ organization” which “represent[s] the various homeowners, residential developments, businesses, homeowners associations, etc., that inhabit the Northwest area of Santa Fe County.” Reply at 3. They also note that SNAC has written documents concerning the area, specifically part of the County’s “Master Plan,” known as the “Northwest Sector Plan,” and in connection with BLM’s proposal to designate the area as an “Area of Critical Environmental Concern” (ACEC), pursuant to section 202(c) of FLPMA, 43 U.S.C.

§ 1712(c) (2000). Reply at 3. They also state that SNAC has challenged past efforts to site utilities and other facilities in that area.

It is well settled that an appellant will be deemed to be “adversely affected” by a BLM decision only where he demonstrates that he has suffered or is substantially likely to suffer some sort of injury or harm to a legally cognizable interest. Regulation 43 C.F.R. § 4.410(d) provides: “A party to a case is adversely affected . . . when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” See *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 82 (2005). There must be colorable allegations of adverse effect and there is a causal relationship between the action undertaken and the injury alleged, which allegations are supported by specific facts. *Southern Utah Wilderness Alliance*, 127 IBLA 325, 327 (1993); *Colorado Open Space Council*, 109 IBLA at 280. The appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action. E.g., *Donald K. Majors*, 123 IBLA 142, 145 (1992). However,

the threat of injury and its effect on a party appellant must be more than hypothetical. *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992); *George Schultz*, 94 IBLA 173, 178 (1986). Standing will only be recognized where the threat of injury is real and immediate. *Laser, Inc.*, 136 IBLA [271,] 274 [(1996)]; *Salmon River Concerned Citizens*, 114 IBLA 344, 350 (1990).

Legal & Safety Employer Research Inc., 154 IBLA 167, 172 (2001).

We are persuaded that SNIC, SNAC, HDC, and Barbro Kirchenbaum have identified a legally cognizable interest that is substantially likely to be injured by BLM’s decision to authorize the construction/improvement, operation, and maintenance of new and existing roads. They have shown that these parties may be “adversely affected” by BLM’s decision. We therefore deny Hoyt’s motion to dismiss the appeals for lack of standing to appeal.

V. THE MERITS OF THE APPEALS

We now turn to the merits of the appeals, which, as we have observed, principally concern whether BLM complied with section 102(2)(C) of NEPA in selecting the Proposed Action alternative. Before turning, however, to the specifics of appellants’ NEPA challenges to BLM’s decision approving the Proposed Action alternative, we will evaluate the ROW grants under section 501(a) FLPMA, 43 U.S.C. § 1761(a) (2000).

A. *BLM's Selection of the Proposed Action Alternative Complies with FLPMA*

[2] We begin with the rule that under section 501(a)(6) of the FLPMA, 43 U.S.C. § 1761(a)(6) (2000), a decision to accept or reject an ROW application for a road is discretionary. *See, e.g., Wiley F. & L'Marie Beaux*, 171 IBLA 58, 66 (2007); *Mark Patrick Heath*, 163 IBLA 381, 388 (2004); *Douglas E. Noland*, 156 IBLA 35, 39 (2001). The Board will affirm a BLM decision approving or rejecting an ROW application where the record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and where no reason is shown to disturb BLM's decision. *James Shaw*, 130 IBLA 105, 115 (1994); *Mark Patrick Heath*, 163 IBLA at 388; *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *James M. Chudnow*, 70 IBLA 225, 226 (1983); *James E. Sullivan*, 54 IBLA 1, 2 (1981). As we have said, to successfully challenge a discretionary decision,

[t]he burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

International Sand & Gravel Corp., 153 IBLA 293, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999).

In looking at the language of section 501(b) of FLPMA, we see that it requires an applicant for a ROW to “disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way . . . which he [the Secretary] deems necessary to a determination . . . as to whether a right-of-way shall be granted . . . and the terms and conditions which should be included in the right-of-way.” 43 U.S.C. § 1761(b). The language “use, or intended use” indicates the specific use in the mind of the applicant, not possible or speculative uses. *See Sol. Op.*, “Federal Land Policy and Management Act’s Effect on the Right-of-way Application for the Middle Fork Reservoir on the Powder River, Wyoming,” M-36900, 86 I.D. 293, 298-99 (Jan. 12, 1979).

BLM very clearly and consistently articulated the purpose and need of the project analyzed in the EA: “The purpose of and need for the project is to establish legal access for roads and utilities to four parcels of private land adjacent to the project area while minimizing new disturbance. Improvements to currently unimproved roads and construction of new roads will assure that they are passable and will address ongoing erosion problems on those roads.” EA at 1 (Need for the Project). In BLM’s notice of the Public Scoping Meeting to be held on February 5, 2003, the purpose of the project was described as follows: “The purpose and need

for this project is to re-establish access for applicants to private lands located west and north of the project area off of Horcado Ranch Road approximately 8 miles northwest of Santa Fe.” AR 26. A similar description was used for the individual notice letters to members of the interested public announcing the availability of the final EA and requesting comments:

The purpose and need for the project is to establish legal access for roads and utilities to four parcels of private land adjacent to the project area while minimizing new disturbance. Improvements to currently unimproved roads and construction of new roads will assure that they are passable and will address ongoing erosion problems on those roads.

AR 219. These descriptions of the project accurately describe the ROW applications before BLM and BLM’s intentions to fulfill its obligations under the Settlement Agreement.

In this case, in response to regulatory requirements, Ortiz and Garcia/Hoyt submitted to BLM a Road Plan of Development, dated November 12, 2001. See AR 173. As to the intended use of the requested ROWs, the Plan states:

Until residential structures are built, the property will continue to be used for grazing purposes. Thereafter, at such time as residential structures are built on the property, the traffic use will be residential in nature. . . . Initially, very little road traffic is anticipated. If all 11 lots were sold and built on, the average daily traffic two-way 24-hour (ADT) would be 99 vehicles per day at Horcado Ranch Road. At some point in time the land might be sub-divided. It is difficult to project the total number of lots that might be created. However, it would seem reasonable that an ultimate typical lot size would be 20 acres, given the location and terrain. At this density, 80 lots would be created, and the ADT would be 720 vehicles per day at the Horcado Ranch Road.

AR 173 at 3. In the absence of any immediate specific plan pending with Santa Fe County to either sell or subdivide the property, BLM clearly thought that this information, together with other information presented in the Plan, was sufficient to initiate processing the ROW applications.

While the EA does state, for example, that “[t]he project area is rural and is currently used only by people who are managing cattle grazing on BLM lands or who use those lands for recreation” (EA at 79), it also states that “traffic rates on roadways would depend on the number of residences built on the private lands if the properties are subdivided.” EA at 80. This type of reference to ranching and cattle grazing is not inappropriate, because it is accurate as to the current uses of the

properties. There is no evidence in the record that there was any specific plan for development of the properties at the time of the ROW applications. There are indications that Ortiz and Garcia/Hoyt were considering either selling their properties or possibly developing them. But, it is equally clear that during the time the ROW applications were pending through the date of issuance of the FONSI, there were no specific plans filed with Santa Fe County to sell or develop the properties. *See, e.g.,* AR 69.

What this case comes down to is the fact that appellants oppose ROW grants that might result in some level of traffic increase in the vicinity where they themselves own property. This is the classic “not-in-my-backyard” case. We reject a reading of section 501 of FLPMA that leads to scuttling an EA that resolves a complex set of circumstances, and represents the culmination of years of negotiation and litigation involving the granting of access across public land to privately-owned inholdings, all because the appellants want to prevent development in an area where they themselves own property. The fact that they disagree with BLM’s decision does not render it contrary to section 501 of FLPMA.

The record makes clear that the Association and BLM did not disclose the Association’s development plans because there were none. Appellants ask that we accept as reality what they fear, *i.e.*, that the private landowners will either develop their property or that the purchasers (unknown) of the property will. The fact is that the Association’s members have no control over, and are in no better position, to predict how future owners of the property might or might not manage the property. It is possible that a purchaser will choose not to develop the property. As we show in more detail, *infra*, the Association disclosed what it could about possible future development of the inholdings.

A review of the “Proposed Action/Purpose and Need” section of the El Monte EA, as well as the record in this matter, shows a clear “rational connection between the facts found and the choice made.” *International Sand & Gravel Corp.*, 153 IBLA at 299. The decision to approve the Proposed Action for the upgrading of existing gravel roads and the construction of a short new connection to provide access to landlocked privately owned properties rests upon a solid basis. Rather than reflecting deceit and subterfuge on the part of BLM and the Project proponents, as appellants allege, we are convinced that, to the contrary, the record shows them to have been completely candid in their proposal.

As the following discussion concerning BLM’s measures to comply with NEPA in developing the EA will demonstrate, BLM thoroughly evaluated several reasonable alternatives and selected the Proposed Action alternative as best balancing the need to provide reasonable access to the private properties of the Association members against the objective of minimizing environmental impacts to the surrounding public

lands. BLM's decision, reflecting as it does the sometimes conflicting factors involved, was clearly made with due regard for the public interest. *E.g.*, *James Shaw*, 130 IBLA at 115.

B. BLM's Selection of the Proposed Action Alternative Complies With NEPA

[3] A BLM decision to proceed with a proposed action, absent preparation of an EIS, will be upheld under section 102(2)(C) of NEPA, where the record demonstrates that BLM has considered all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *Nez Perce Tribal Executive Committee*, 120 IBLA 34, 37-38 (1991). An appellant seeking to overcome such a decision must carry its burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); *Red Thunder*, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); *Sierra Club*, 92 IBLA 290, 303 (1986).

In deciding whether BLM has taken a hard look at the likely environmental consequences of a proposed action, we will be guided by the "rule of reason," as expressed in *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992):

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information." *Blue Ocean Preservation Society v. Watkins*, 767 F.Supp. 1518, 1526 (D. Hawaii 1991) So long as an EA contains a "reasonably thorough discussion of . . . significant aspects of the probable environmental consequences," NEPA requirements have been satisfied. *Sierra Club v. United States Department of Transportation*, 664 F.Supp. 1324, 1338 (N.D. Ca. 1987), . . . quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). [Footnote deleted.]

See 40 C.F.R. § 1508.9; 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981);¹³ *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Missouri Coalition for the Environment*, 124 IBLA at 219-20. As we said in *Oregon Natural Resources Council*, 116 IBLA at 361 n.6:

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

1. *BLM Considered the Indirect Effects of the Proposed Action*

As noted, appellants' primary argument is that BLM violated section 102(2)(C) of NEPA by failing to consider the "full indirect, growth-inducing effects" which are likely to be engendered by authorizing new and improved roads, specifically by facilitating new development of the private lands accessed by the roads.¹⁴ SOR at 7. While acknowledging that BLM considered the indirect effects associated with the potential development of the 1,678.82 acres of private land owned by Hoyt, Ortiz, Walker, and La Luz, appellants argue that BLM failed to consider the true extent of development of that land and the resulting impacts on the environment given the

¹³ The Federal Register publication consists of a Mar. 17, 1981, memorandum, entitled "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," issued by the Council on Environmental Quality (CEQ). The memorandum is considered to be "persuasive authority offering interpretive guidance" regarding NEPA's implementing regulations. *Davis v. Mineta*, 302 F.3d 1104, 1125 n.17 (10th Cir. 2002).

¹⁴ Among other things, appellants argue that BLM "should have" declined to approve road construction/improvement across the public lands at issue because such activity would undermine BLM's ability to designate these and other public lands, totaling close to 18,000 acres, as an ACEC pursuant to a pending proposal by SNAC. SOR at 13 n.22. For whatever reason, ACEC designation had not occurred by the time of BLM's September 2004 FONSI/DR. See EA, Appendix B (Comment Resolution) at 4. This Board has clearly and consistently rejected the idea that BLM is required to manage public lands according to citizens' proposals for certain land uses, including proposals for designation of ACECs. See *Biodiversity Conservation Alliance*, 171 IBLA 313, 318 (2007), and cases cited therein. Even were the lands to be so designated, Hoyt correctly points out that the proposed ACEC "expressly allows for new roads required to access private land." Response at 18; see Letter to BLM from SNAC (AR 192), dated Jan. 21, 2000, at 8.

possible number of houses and related traffic. Appellants assert that BLM relied upon the expected construction of up to 128 houses, based upon a minimum lot size of 12.5 acres, when the reality is that up to 134 and even 671 houses may be built, based upon a minimum lot size of 12.5 and even 2.5 acres. SOR at 8; *see* County Brief, dated July 14, 2005, at 4. They note that this will result in traffic on the order of up to 1,208 and even 6,039 vehicle trips per day, rather than the 704 vehicle trips per day projected by BLM.

Appellants further assert that “far more land” than envisioned by BLM may be developed as a consequence of the proposed action, pointing to the fact that members of the Association actually own or control other lands “in the immediate area totaling many more thousands of acres,” or close to 3,692 acres. SOR at 7, 8. They state that development of this additional private land will result in a total of 1,476 houses, and traffic on the order of “over 15,734 vehicle trips per day.” *Id.* at 9. Appellants argue that, by failing to take into account the true scope of development stemming from BLM’s authorization of new and improved roads, BLM failed to consider the actual potential impacts of road construction and improvement. In their view, an increase in the number of lots developed and the number of daily vehicle trips expected to occur would, under the County’s Development Code, fundamentally alter the nature of such activity. They point out that the Development Code provides that, when lots exceed 200 and daily trips exceed 2,000, the access road (then considered a minor arterial road) must be a minimum of 66 feet wide and have from 2 to 4 driving lanes, and that, when daily trips exceed 5,000, the access road (then considered a major arterial road or highway) must be a minimum of 100 feet wide and have from 2 to 6 driving lanes, including acceleration and deceleration lanes. SOR at 9, *citing* Development Code, Article V, Appendix 5.A (“Road Classification and Design Standards”); *see* County Brief at 4.

Regulation 40 C.F.R. § 1508.25 requires BLM to consider the “indirect” effects of its proposed action, which are defined, by 40 C.F.R. § 1508.8(b), as those

which are *caused by the action* and are later in time or farther removed in distance, but are still *reasonably foreseeable*. [They] may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. [Emphasis added.]

See Sierra Club v. Marsh, 769 F.2d 868, 877-78 (1st Cir. 1985); *Mullin v. Skinner*, 756 F. Supp. 904, 920-23 (E.D. N.C. 1990). In order to conclude that a particular indirect effect is “cause[d]” by a proposed action, within the meaning of 40 C.F.R. § 1508.8(b), it must be shown that there is a “reasonably close causal relationship between a change in the physical environment [wrought by that action] and the

effect at issue.” *James Shaw*, 130 IBLA at 114, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Further, indirect effects must be considered even where they would be the consequence of non-Federal action that would take place solely on private property. *Sierra Club v. Hodel*, 544 F.2d 1036, 1037-38, 1043-44 (9th Cir. 1976); *City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir. 1975).

These principles, specifically the “indirect effects” standard embodied in 40 C.F.R. § 1508.8(b), were involved in *James Shaw*, a case that we find instructive. In that case, the appellants objected to a BLM decision approving an ROW. Their objections related not so much to the ROW itself but to the “impact of increased residential development in the Mink Creek area.” 130 IBLA at 112. The appellants warned of the impacts on public land of the planned subdivision, particularly the potential for increased off-road vehicle use and increased housing density in the area. They asked that BLM prepare a more extensive EA, focusing on the impacts of possible residential development on water quality and wildlife habitat, as well as the impact of additional housing in the area generally. *Id.* at 111-12.

Although the Board generally confirmed in *James Shaw* that BLM must address the indirect effects of reasonably foreseeable changes in land use or population density resulting from BLM’s action, we found that BLM’s decision to grant the ROW was not the cause of any indirect effects associated with the construction of the anticipated subdivision. “This is evident when one realizes that the subdivision would very likely proceed even if BLM denied [the ROW]. . . . Appellants have not demonstrated that the subdivision would not be developed if BLM denied the right-of-way application. In these circumstances, we conclude that BLM was not required to address the environmental effects of the subdivision, as those effects were not ‘caused by the action’ within the meaning of 40 CFR 1508.8(b).” *Id.* at 114-15.

In this case, BLM rightly states that its jurisdiction extends to whether to approve the Proposed Action, but that it has no control over whether and to what extent the private properties will be developed. The Board in *James Shaw* made clear, however, that BLM is required by NEPA to consider the environmental impacts of foreseeable development resulting from the ROW. Appellants have not demonstrated that development resulting from the disputed ROWs is foreseeable, much less inevitable, nor have they shown that denial of the ROW will result in the private lands remaining unsubdivided and undeveloped, or conversely, that granting the ROWs will necessarily result in the subdivision and development of those lands to the extent claimed by appellants. BLM’s objective with the EL Monte EA was to study the *foreseeable* environmental impacts of approving the Proposed Action. Actual development of the private lands is a speculative matter, depending, as noted, upon a number of factors related to water rights and zoning. Development of those lands will materialize, if at all, independent of whether BLM issues the disputed ROWs.

See EA at 70 (“Communities to the south of the project area would be visually impacted by changes from increased traffic under either the Horcado Ranch Road [access] alternatives or the Buckman Road [a]ccess alternatives”), 84-85, 128. But both are ROWs which, if denied, might-could prevent development.

Moreover, the El Monte EA in fact provides a detailed assessment of the indirect effects of the Proposed Action occasioned by the likely development of the four parcels of private land accessed by the roads at issue in the El Monte EA. See, e.g., EA at 42-43, 53, 71, 72, 77, 78-79, 80, 84-85, 86, 108, 128, 129-31; FONSI/DR at 2. BLM noted that the likely extent of development would be determined “by the owners, the terrain of the property, and State of New Mexico and Santa Fe County laws and ordinances.” EA at 130. It stated that the private landowners could build up to 11 houses, without County or State review and approval, once the new and improved access roads were built, but that the “most likely” development would be 80 houses, based on a minimum lot size of 20 acres, given the practical limitations of the “rough terrain” encompassed by these parcels.¹⁵ *Id.*; see *id.* at 131; EA, Appendix B at 7. The existence of rough terrain is borne out by the record. See, e.g., EA at 5 (Figure 2.2), 61 (Figure 3.3). However, BLM further recognized that, “[i]f problems with rough terrain could be overcome,” development on the order of 128 houses might occur, given the County’s minimum lot size of 12.5 acres for that area of the county, as determined by the availability of water. EA at 131; see BLM Response at Attachment B (Declaration of Kevin Wellman, Senior Project Manager, SWCA, dated Aug. 10, 2005) (“[T]he minimum lot size allowed under the Santa Fe Land Development Code [was] found to be 12.5 acres”). BLM based its assessment of the indirect effects of the proposed action on reasonably expected development, given a 12.5-acre minimum lot size.¹⁶

Since we are concerned with what may be “caused” by a proposed action, and particularly what is “reasonably foreseeable” as a consequence of that action, we do not think that it is appropriate to assess the likely extent of development based

¹⁵ BLM also indicated, in its EA, that the four private-land parcels would generally be served by a “dead-end road” or “only one access road,” thus restricting the number of houses that could be built: “[A] total of 90 houses could be developed on Sections 2, 10 and 15 under Alternatives A, C, and E. Only 60 houses, total, could be placed on the private lands under Alternatives B, D, F, G, and H.” EA at 130, 131. This is not contradicted by appellants.

¹⁶ BLM properly designed the proposed roads at issue to comply with the County’s Development Code, providing that they would be 50 feet wide with two driving lanes, because the roads, considered to be collector roads, were expected to serve from 60 to 199 houses and generate from 601 to 1,999 vehicle trips per day. See Development Code at 150.

strictly on the absolute minimum lot size of 2.5 acres. *See* 40 C.F.R. § 1508.8(b). We recognize that it might be possible to determine the full extent of development which might occur under ideal circumstances, were all the potential lots in a given area to be developed, thus engaging in a purely mathematical calculation. However, that calculation would be a matter of extreme speculation, given that the likely extent of development is not dependent solely, or even necessarily, on the maximum number of lots which may be developed, under ideal circumstances. It is also dependent, to a great extent, on the mutual needs and desires of potential buyers and sellers/developers, as well as zoning, water availability, and other concerns of local and State authorities. Moreover, the ROWs, as granted, would not support such development, as recognized by appellants. Thus, BLM had a reasoned and rational basis for assessing effects from 128 houses, rather than engaging in pure speculation of what could happen under possible, ill-defined and not yet realized circumstances.

Perhaps most important in the present case is the matter of water availability. The Development Code states that “future population growth in the County should be supported by adequate long term water availability,” and provides that minimum lot size will be determined by two methods, depending on whether expected development will “Utilize Permitted Water Rights” or “Not Utilize Permitted Water Rights.” Development Code at 106. In the former case, the “minimum lot size” here would be “2.5 acres,” since the private lands at issue do not appear to be “within an Urban, or Metropolitan Area or a Traditional Community[.]” *Id.* In the latter case, the “minimum lot size” is determined using a formula, in which U, denoted as the anticipated water needs for a lot (measured in acre-feet per year), is multiplied by the acreage of the lot and then divided by A, denoted as the amount of water available in the aquifers underlying the lot (measured in acre-feet per acre per year). Absent evidence to the contrary, the County provided for “standard values” for U and A, respectively, of 1.0 acre-feet per year and 0.02 acre-feet per acre per year for the Basin Fringe Zone, thus resulting in a minimum lot size of 50 acres. *Id.* at 107, 108. Were U adjusted to 0.5 or 0.25 acre-feet per year, in order to take into account the effect of water conservation measures to reduce anticipated water needs, the resulting minimum lot size would be, respectively, 25 or 12.5 acres. *Id.* at 109. However, the Development Code provides: “The maximum reduction in U which shall be considered achievable [by normal means] . . . shall be a reduction of U to no less than 0.25 acre feet per year per dwelling unit.” *Id.* at 108. Thus, the minimum lot size which BLM considered to be achievable is 12.5 acres.

Neither appellants nor the County have offered any evidence that water or water rights are sufficient to permit development with a minimum lot size less than 12.5 acres, or that development is otherwise likely to proceed in that manner, in the case of the private lands at issue. *See, e.g.,* County Brief at 4. Absent any evidence that the maximum number of houses is likely to be built, based on the absolute minimum lot size of 2.5 acres, we will not require BLM to assess the environmental

consequences of such development, since it is not reasonably foreseeable. Appellants have provided no evidence that the maximum development of the four private-land parcels at issue is likely to occur, or even that BLM's actual assessment of the likely extent of development deviated from what is reasonably foreseeable. See EA at 128; County Brief at 4; Hoyt Response at 9.

In fact, the County stated in its Brief that "any development of th[e] [private] properties (even the construction of a single family dwelling) requires applications, permits, . . . and review of the Board of County Commissioners and Local Development Review Committees [and their staff] for conformance with regulations," that the "development potential" of this area of the County is "low" given the "minimal" infrastructure and services, and that the County "would prefer" that development not occur there. Brief at 2-3, 9. Rather than detract from the El Monte EA as not addressing the consequences of the Association members' development plans, this assertion supports the contrary view, *i.e.*, that the likelihood of the private parcels being subdivided and extensively developed in the foreseeable future is fairly remote.

Appellants also charge that BLM erred by failing to consider the indirect effects of the additional development which appellants expect to occur "in the immediate area" of the four private-land parcels at issue. SOR at 8. It is clear that appellants are referring to private land which can only be accessed by crossing these parcels, once the roads at issue are constructed and improved, or which is situated along the Horcado Ranch Road, which already brings traffic to the area of the parcels. See SOR at 8, 9. The four parcels will only be developed once the members of the Association obtain approval to construct and improve roads across these parcels. Thus, additional development is dependent on these additional roads. However, the private land will be developed regardless of whether the roads at issue, which extend beyond the terminus of the Horcado Ranch Road, are constructed and improved, or whether other access is approved.¹⁷ As in *James Shaw*, in neither instance can we say that the additional development will occur as a consequence of construction and improvement of the roads at issue, or that such roads will "cause[]" the development. 40 C.F.R. § 1508.8(b).

¹⁷ It is well established that development cannot be considered to be "caused" by a proposed ROW, within the meaning of 40 C.F.R. § 1508.8(b), when that development is predicted to occur regardless of whether BLM approves the ROW. See *Landmark West! v. U.S. Postal Service*, 840 F. Supp. 994, 1009-10 (S.D. N.Y. 1983), *aff'd*, 41 F.3d 1500 (2d Cir. 1994); *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 561-65 (S.D. Ohio 1982); *San Carlos Apache Tribe*, 149 IBLA 29, 46-47 (1999); *James Shaw*, 130 IBLA at 114-15. Development of private lands along the Horcado Ranch Road will take place, if at all, regardless of BLM's approval of the Proposed Action alternative.

Appellants have failed to demonstrate that BLM underestimated the indirect effects of the proposed approval of road construction/improvement, or to otherwise show that this action might result in a significant environmental impact which BLM was required by section 102(2)(C) of NEPA to consider in an EIS. In *Howard B. Keck, Jr.*, 124 IBLA 44 (1992), *aff'd*, *Keck v. Haste*, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993), involving a land exchange, we held that BLM's consideration of the expected impacts of development on a Federal parcel need only be commensurate with the known or anticipated level of detail concerning such development. The Board stated: "Absent formulation of a precise plan for the development of public land, it is virtually impossible for BLM, at the time it is deciding whether to proceed with a proposed exchange, to assess the specific environmental impact of development. It cannot realistically engage in a reasoned analysis of the likely impact of such development. That is the case here." 124 IBLA at 48. It is not feasible for BLM to require El Monte "to prepare development plans so that BLM may consider them in the course of its environmental review of the [ROW application]." *Id.* at 48-49. Such an exercise is no more appropriate in this case than it was in *Keck*. The Board's analysis, as quoted below, places these appeals into proper perspective:

In these circumstances, it is clear that the intended development of the selected public land is not sufficiently definite to permit a full review of its likely environmental impact. *See Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609, 624 (10th Cir. 1987). Therefore, BLM need not concern itself with the particular nature and scope of development. As the court indicated in *Sierra Club v. Marsh, supra* at 870, an agency will not be required to analyze the "precise details" of potential development where it would be "pointless" to do so, since the development plans are not detailed enough. Rather, it may content itself with analyzing the "type of development likely to occur." *Id.* (emphasis in original); *see also [Conservation Law Foundation of New England, Inc. v. GSA (CLF v. GSA)*, 707 F.2d 626, 634 (1st Cir. 1983)], ("[b]ecause the [environmental analysis] will necessarily be in terms of estimates of probabilities, no exhaustive detail is required"). That is what BLM did here.

Accordingly, we conclude that to require BLM to assess the environmental impacts of development, beyond those already addressed in the EA, would constitute an exercise in "crystal ball inquiry," which is not required by NEPA. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). We will not require BLM to undertake such an endeavor, especially where there is no evidence that the environmental impacts of actual development cannot adequately be analyzed by the appropriate county authorities at the time a proposal for such

development is advanced by Travertine. As the court observed in *CLF v. GSA*, *supra* at 636: “Any []use of the . . . lands . . . will be fully subject to the substantive constraints of local zoning laws and local and federal environmental standards.”

124 IBLA at 50.

The point of the Board’s holding in *Keck* is that BLM need only consider the effects of development that are reasonably foreseeable. A review of the El Monte EA shows that it is replete with discussions of the possible effects of reasonably foreseeable development. *See, e.g.*, EA at 33, 37, 42, 43, 52, 53, 60, 66, 68, 69, 70, 71, 72, 73, 74, 75, and similarly thereafter. Our review confirms that BLM accurately described the purpose of the proposed ROWs, and then analyzed the possible direct and indirect effects of reasonably foreseeable development, to the extent possible given the complete absence of any plan, or even clear intention, of the proponents to subdivide or otherwise develop their private properties.

BLM placed its analysis into the context of the procedural and zoning hurdles any developer must address and overcome for *any* development to occur, whether involving 2-acre or 200-acre lots. It would be futile, not to mention wasteful, to set aside this EA so that BLM can engage in a more detailed analysis of what might occur if the hypothetical variables are changed. Appellants proffer the worst case development scenario as inevitable, and it is this unbalanced, and ultimately unfair, approach that informs the modus operandi of the appellants that we now reject. The paramount question here is whether granting the ROWs is in the public interest, not whether El Monte and BLM should have disclosed more detail about possible, but by no means certain, development of the private parcels. It is this portrayal that we correct in this majority opinion.

2. *BLM Considered a Range of Reasonable Alternatives*

Next, appellants contend that BLM violated NEPA by failing to consider reasonable alternatives to the proposed action. They refer to BLM’s decision not to fully consider two alternatives (original Alternatives G and H), which had been proposed during scoping, but which they contend were improperly “eliminated” from consideration without sufficient justification.¹⁸ SOR at 18. According to appellants,

¹⁸ Appellants also object to BLM’s decision not to adopt either of the alternatives (Alternatives E and F) affording access from Buckman Road on the basis that each alternative requires construction of a bridge across the Calabasa Arroyo, at a cost of \$937,500, thus rendering the alternatives cost-prohibitive. *See* EA at 28. They argue that a bridge is not necessary, noting that the Santa Fe County Public Works

(continued...)

these alternatives, by providing access from Buckman Road to the four parcels of private land, are preferable, given that the Buckman Road area is “slated for further improvement.” Reply at 4; see County Brief at 11. The two alternatives would also have provided access primarily by crossing private rather than public land.

BLM is required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), to consider “appropriate alternatives” to a proposed action, as well as their environmental consequences. See 40 C.F.R. § 1501.2(c) and 1508.9(b); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466 (10th Cir. 1984); *Howard B. Keck, Jr.*, 124 IBLA at 53; *Powder River Basin Resource Council*, 120 IBLA 47, 55-56 (1991). Such alternatives should be deemed reasonable alternatives to the proposed action, will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 C.F.R. § 1500.2(e); 46 Fed. Reg. at 18027; *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d at 1466-67; *Defenders of Wildlife*, 152 IBLA at 9-10; *Howard B. Keck, Jr.*, 124 IBLA at 53-54. All this ensures that the BLM decisionmaker “has before him and takes into proper account all possible approaches to a particular project.” *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

BLM declined to formally consider the original Alternative G because it would provide for a longer route and require new road construction across lands where the terrain is “heavily dissected and easily eroded,” resulting in a greater environmental impact than the proposed action. EA at 10. Appellants assert that BLM is mistaken regarding the terrain crossed by this alternative, noting that it is “no more difficult than the terrain in general in this area.” SOR at 18. However, they present no evidence in support of their assertion, offering only a difference of opinion, which is

¹⁸ (...continued)

Department “informs us that no one has used a bridge for a Minor Arterial Road or Arterial Road to cross an arroyo” and that the Horcado Ranch Road has already been constructed across the arroyo, with County approval, even though, as they state: “There is no bridge.” SOR at 19; see County Brief at 11.

Appellants present no evidence specifically disputing BLM’s assessment that a bridge is needed to cross the Calabasa Arroyo, because it is an “ephemeral waterway[,]” in sec. 22. EA at 43; see *id.* at 47 (Figure 3.1); Letter to BLM from SNIC, dated Jan. 12, 2004, at 3. Further, the record indicates that a bridge is necessary in order to permit any subdivision of the private lands at issue accessed by that means. BLM states that, according to the County, “[s]ubdivisions cannot be placed on roads with grades in excess of 10% or with temporary drainage crossings,” noting that the Horcado Ranch Road itself must be “upgraded” in order to permit the subdivision of these lands. EA at 131; see Letter to Walbridge from Knox, dated Apr. 27, 2001, at 1; EA at 85; Development Code at 150.

not sufficient to show error in BLM's analysis and conclusion. *Great Basin Mine Watch*, 148 IBLA 1, 6 (1999).

As its reason for declining to formally consider the original Alternative H, BLM cited the refusal of the owners of the four parcels of private land crossed by the route to authorize road access across their respective lands. EA at 10-11. Appellants note that BLM had "doubts" about whether these private landowners could, by precluding access across their private lands, "dictate" that BLM only consider alternatives which provide access across public lands, and whether BLM could instead require that they provide access across their private lands. SOR at 18. Appellants note that BLM pursued a legal opinion from the Solicitor, but that, receiving none, "the matter was dropped." *Id.* We find no fault. BLM is not required to consider an alternative that is not likely to occur. Moreover, it is clear that the alternative does not meet the purpose and need for the project, *i.e.*, "to establish legal access for roads and utilities to four parcels of private land . . . while minimizing new disturbance." EA at 1. BLM was not required to consider an alternative which primarily crossed private lands where the landowners had already decided or even might decide to preclude access.

3. BLM Consulted With Appropriate Parties

Next, appellants contend that BLM "failed to consult" with appropriate parties, "in violation of NEPA and its own regulations," invalidating the EA. SOR at 14. They do not identify any specific provision of NEPA or its implementing regulations (40 C.F.R. Chapter V) which was violated. Rather, they refer to the directive in 43 C.F.R. § 2800.0-2, which states that "in granting rights of way, [i]t is the objective of the Secretary of the Interior to . . . [c]oordinate, to the fullest extent possible, all actions taken pursuant to this part [43 C.F.R. Part 2800] with State and local governments, interested individuals and appropriate quasi-public entities." SOR at 14, *quoting* 43 C.F.R. § 2800.0-2. Appellants assert that BLM failed to fulfill its obligation under 43 C.F.R. § 2800.0-2 in the manner of its consultation with the County.

We find no express mandate in 43 C.F.R. § 2800.0-2 that BLM "consult" with "State and local governments, interested individual and appropriate quasi-public entities" in granting ROWs. SOR at 16, *quoting* 43 C.F.R. § 2800.0-2. More precisely, the regulation states that BLM's objective is "to grant rights-of-way . . . and to regulate, control and direct the use of said rights-of-way on public land *so as to* . . . [c]oordinate, to the fullest extent possible, *all actions taken* pursuant to this part [43 C.F.R. Part 2800] with State and local governments, interested individuals and appropriate quasi-public entities." (Emphasis added.) The regulations do not define what is meant by the phrase to "[c]oordinate . . . all actions taken." However, it is reasonable to expect BLM, in deciding whether and where to grant an ROW, and under what terms and conditions, to consult with such entities by contacting them

and obtaining their input, such that their interests and concerns can be taken into account in reaching its decision. Further, the County correctly notes that 43 C.F.R. § 2802.4(d) specifically provides that,

[p]rior to issuing a right-of-way grant . . . , the authorized [BLM] officer shall . . . [c]onsult with all other Federal, State, and local agencies having an interest, as appropriate and . . . [t]ake any other action necessary to fully evaluate and make a decision to approve or deny the [ROW] application and prescribe suitable terms and conditions for the grant [Emphasis added.]

Our review of the record shows that BLM met this standard in consulting with appropriate State agencies and the Pueblo. It also contacted New Mexico State University (NMSU), as a grazing rights holder, and the Pueblo during the NEPA process. See Mailing List (AR 24); Letter to President, NMSU, from BLM (AR 24), dated June 11, 2004; Letter to Governor, San Ildefonso Pueblo, from BLM (AR 229), dated June 18, 2004.

Under CEQ regulations, BLM was required to involve the public “to the extent practicable” in preparing the El Monte EA. See 40 C.F.R. § 1501.4(b). BLM conducted two public meetings on the subject of providing access to the proponents of the Proposed Action alternative. The first of those meetings was publicized in radio spots, letters to interested parties, fliers were posted in public places, and publication took place in three newspapers, the *Albuquerque Journal North*, the *Sante Fe New Mexican*, and the *Los Alamos Monitor*. Moreover, despite appellants’ assertions to the contrary, the record substantiates the fact that BLM consulted with appropriate County agencies in the course of its NEPA review process. See EA at 139; EA, Appendix B at 9; BLM Response at 2, 3. To the extent that the County believes that other matters should have been brought to BLM’s attention, the County had ample opportunity to do so during the public scoping process, which began February 5, 2003, leading to promulgation of the EA, and during the public comment period, from June 16 to August 2, 2004, following promulgation.¹⁹

Moreover, BLM apparently contacted Santa Fe County first in 2001, initiating discussions with Robert Martinez of the Santa Fe County Public Works Department about road construction requirements. AR 121. Both the Santa Fe County Manager and Santa Fe County Open Space and Trails were included on the BLM public scoping address list for notification of public meetings and information relating to the

¹⁹ The record reflects the fact that the Santa Fe County Manager was on BLM’s initial mailing list (AR 24), and thus would have received copies of BLM’s original public scoping notice. In addition, BLM published, in local newspapers, notices announcing the public comment period and the availability of the final EA and FONSI/DR.

proposed ROWs. AR 24. Charles Gonzales, Director of the Permits and Inspection Division for Santa Fe County, contacted the EA contractor on February 3, 2003, and discussed the upcoming February 5, 2003, scoping meeting (he was considering attending and bringing another person). AR 293. Later, on March 10, 2003, the EA contractor contacted Emilio Gonzalez of the Santa Fe County Land Use Department to discuss zoning requirements, buildable areas, minimum lot sizes, and roadway requirements. AR 293, AR 4. Contacts with various employees of the Santa Fe County Land Use Department also were initiated in July 2003 and in March 2004. Agency [BLM] Response to Santa Fe County's Amicus Curiae Brief and Agency Response to Appellant's [sic] Reply Brief, attached Affidavits of Nancy Kastning and Kevin Wellman. A number of these direct personal contacts with Santa Fe County employees are documented in the EA. *See, e.g.*, EA § 3.8.1.6; Appendix B Comment Resolution at 9.

These direct contacts, the notices and information provided through the public scoping address list, the opportunity to attend the public scoping meeting on February 5, 2003, the NEPA process meeting on April 17, 2003, and the availability of the EA for review, together clearly demonstrate that BLM engaged in sufficient consultation with Santa Fe County. The EA also references many times that Santa Fe County would be responsible for reviewing and approving any development or subdivisions on the private lands in the area. *See, e.g.*, EA §§ 3.2.1.14, 3.2.2.14, 3.2.3.14, 3.2.5.14, and thereafter; Appendix B Comment Resolution at 5, 6, 7, 10. For example, BLM explains that:

If the applicant's private lands were to be developed, developers could be required by Santa Fe County to file an environmental impact statement in conjunction with a development plan which assesses all impacts to the Santa Fe County environment from the proposed development. This would include an analysis of the impacts of increased traffic to existing roads and neighborhoods which could in turn determine the scale of a proposed development.

EA Appendix B Comment Resolution at 6. The record simply does not support appellants' charge that BLM failed to comply with the public involvement requirements that derive from either FLPMA or NEPA.

We conclude that the record establishes that the Field Office Manager properly determined, in his September 2004 FONSI/DR, that there will be no significant impact from approving the Proposed Action, since BLM has, considering all relevant matters of environmental concern, taken a hard look at potential environmental impacts and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by adoption of the identified

mitigation measures. *Nez Perce Tribal Executive Committee*, 120 IBLA at 37-38. He properly found that no EIS was required.

Appellants have simply not carried their burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed actions, or otherwise failed to abide by section 102(2)(C) of NEPA. See *Southern Utah Wilderness Alliance*, 127 IBLA at 350, 100 I.D. at 380; *Red Thunder*, 117 IBLA at 175, 97 I.D. at 267; *Sierra Club*, 92 IBLA at 303. The fact that appellants have a differing opinion about likely environmental impacts or prefer that BLM take another course of action does not show that BLM violated the procedural requirements of NEPA. See *San Juan Citizens Alliance*, 129 IBLA 1, 14 (1994).

VI. THE DISSENT

Our colleague, in the dissenting opinion, offers three bases for disagreement with our analysis and conclusion. We address them below.

A. The ROW Application

The concern about the technical nature of the application for the El Monte ROW is, we believe, unfounded. In footnote 2, *supra*, we describe how the EA approving 4.67 miles of improved and new roads came about. When the Burkes closed access across Horcado Ranch, the Ortiz family filed an ROW application with BLM covering 1.5 miles to their property. The quiet title litigation that ensued involved the Ortiz and Garcia families, as well as the Burkes and BLM. An ROW application amendment was filed for 2.5 miles on behalf of the El Monte Association in 2001, subsequent to execution of the Settlement Agreement. The ROW amendment states that it is for a 50' ROW and that it "is in the Horcado Ranch area and its use will be similar to what is already there." The Settlement Agreement provides that, subject to compliance with 43 C.F.R. Part 2800, BLM would grant the Ortiz and Garcia families ROWs across public lands as shown on Exhibit A. Among the three maps included with the Settlement Agreement is one labeled Exhibit B. A memorandum from C.R. Walbridge & Associates states that "[w]hen the settlement occurred, the group used this map and called it Exhibit A." Exhibit A (or B) delineates the main road segment connecting the Burke property with the "old road on the NW side of the arroyo," as well as the two spurs leading to the private inholdings. These maps correspond with Figure 2.3 (Alternative A, or the Preferred Alternative) in the El Monte EA. BLM considered the original Ortiz ROW and the El Monte ROW amendment together as Alternative A.

In short, we find no ambiguity as to the location or nature of the ROW sought by the Association that would justify a remand.

B. The Buckman Road Alternatives

We have previously explained our reasons for concluding that the El Monte EA reflects a range of reasonable alternatives as required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000). The dissent faults BLM for not exercising its discretion to consider an additional Buckman Road alternative while acknowledging the inferiority of the two Buckman Road Alternatives addressed in detail in the EA (Alternatives E and F).

Alternative A involves constructing 0.45 miles of new roads, and the rehabilitation of 4.24 miles of existing two-track roads. The ROW would be 50 feet wide through most of the alignment, with a 100-foot-wide segment along 200 feet of the alignment where it crosses a low ridge. The total project will disturb approximately 22.4 acres, with 7.4 acres of new roadway impacts.

Alternative E involves building and improving 7.04 miles of 24-foot-wide dirt roads across BLM lands. Segment 11 would consist of a new road built across broken and rough terrain and would require a 100-foot-wide ROW to accommodate road cuts. The total ROW would be 7.04 miles, including 0.75 miles of new road construction, and 6.33 miles of rehabilitated existing road. Alternative E would further require construction of a new bridge with 6,250 square feet of bridge deck and a 5-foot clearance under the bridge cross Calabasa Arroyo within Segment 10.²⁰ Alternative E would involve 37.8 acres of new construction disturbance, with 11.3 acres of new roadway impacts.

Alternative F, the other Buckman Road alternative that was considered, would involve building and improving 5.66 miles of 24-foot-wide dirt roads across BLM lands. Segments 11 and 12 would again require new roads across broken terrain, requiring a 100-foot-wide ROW to accommodate wider road cuts. This alternative would involve dam stabilization and floodplain crossing for safety considerations at Segment 12. Under this alternative, neither the Walker parcel nor the Ortiz parcel would have direct access from BLM land. This alternative would also require construction of a new bridge with 6,250 square feet of bridge deck and a 5-foot clearance under the bridge across Calabasa Arroyo within Segment 10.

Alternative A involves the recontouring of an existing two-track road, involving only one hill where a 100-foot-wide ROW is needed in Segment 1 at the south end, and the construction of a bridge across Calabasa Arroyo. By contrast, Alternatives E and F would require recontouring on six and seven hills, respectively, to address safety and stabilization problems. Alternative F would have the greatest

²⁰ See *supra* note 18 and accompanying text.

impact to arroyos, affecting 26, including two main-stem arroyos that cross the road along Segment 9.

Table 2.2 of the El Monte EA provides a summary comparison of the effects of each alternative. The projected cost of upgrading the existing road under Alternative A is \$990,996.00. By contrast, the anticipated cost of implementing Alternative E, including the cost of building a new bridge across Calabasa Arroyo and building the new road across the rough terrain in Segment 11, is \$2,675,132.00. The cost of implementing Alternative F would be \$2,497,624.00, including the cost of building the bridge across Calabasa Arroyo, dam stabilization and floodplain crossing in Segment 12, and the cost of building the new road across Segment 11. The new bridge would have to meet FEMA Zone A flood zone requirements. *See EA at 56.*

The long-term level of use under Alternative A or the Buckman Road Alternatives depends upon the number of residences built on the private lands if the private properties are subdivided. EA at 83. The increase under either Alternative will be the same. The EA uses as models an 11-lot minimum on the private lands, and a maximum of 128 lots based on subdivision of the private property into 12.5 acre parcels. Both Buckman Road and Horcado Ranch Road are classified as sub-collector roads based on the existing and potential houses that could be served by the roads. EA at 84-85. Increased traffic under either Alternative A or the Buckman Road Alternatives will impact the residents along either Road. The density of development will take place regardless of means of access.

We are convinced that Alternative A involves less disturbance and far less expense than either of the Buckman Road Alternatives. The EA supports BLM's decision to reject the Buckman Road Alternatives in favor of the Alternative A.

The EA, on pages 10-11, discusses two additional Buckman Road alternatives that were considered but eliminated from further evaluation. The first would have required construction of 3.33 to 3.72 miles of new road over heavily dissected and easily eroded terrain, and would involve 2.62 miles of new road to reach the same access points as Alternatives E and F. BLM was right to eliminate this alternative from further study. The second alternative that was eliminated from further evaluation involved following an existing utility and road ROW used by PNM Gas Services of New Mexico. Presumably this is the ROW that leads directly to Section 16, which is owned by the La Luz Group. This alternative would require the owners of the La Luz property to grant ROWs across its property to the Walkers, the Ortizes, and Zannie Hoyt. It is this alternative that the dissent concludes should have been considered in detail by BLM.

There are two short answers to why BLM rejected further study of the PNM ROW: (1) This is not the ROW that El Monte applied for; and (2) This ROW would

not meet the stated need, *i.e.*, to provide access to privately owned inholdings. Further, this ROW would not have settled the quiet title litigation, since it does not address the consequences of the Burkes having closed access across Horcado Ranch Road. Given the existing condition and use of Horcado Ranch Road, BLM will have to restrict or close the affected public lands. There is a serious question as to whether BLM has the authority to take such action, given the historic and current use of the Horcado Ranch Road. Any such action raises the litany of issues that faced the Board in *Bear River Development Company*, 157 IBLA 37 (2002), and that are resolved by granting the El Monte ROW. Moreover, it is clear that limiting access to the PNM ROW would have required the construction of many miles of new roads, rather than the 0.45 miles of new road construction under Alternative A.

C. Development of the Private Property

The dissent appears to recognize that predicting the level of future development of the private property is speculative, but then suggests that the EA should have been more specific about the impacts of that development. This quandary forms the basis for the Board's decision in *Howard B. Keck, Jr., supra*. We reject the argument that the Association was required to prepare a development plan to address a fictional worse-case-development scenario argued by the appellants. Nor was BLM required to analyze the impacts of such development. As we stated in *Keck*:

Here, however, BLM cannot reasonably forecast the impact of any particular development of the public land since such development is dependent on a multitude of factors (many of which cannot be predicted), particularly the financial fortunes and business judgments of Travertine. No plans have been drawn up. Nor is there any evidence that any are being formulated.

124 IBLA at 50. In this case, there was only an intent to sell the land at some future date for development. There was no developer and no plan of development filed with the County.

The ROWs, as granted, do not support the development feared by the appellants and the dissent. Appellants assert that development of the private land will result in a total of 1,476 houses, and traffic on the order of over 15,734 vehicle trips per day. SOR at 9. They then state that the Development Code provides that when lots exceed 200 and daily trips exceed 2,000, the access road must be a minimum of 66 feet wide and have from 2 to 4 driving lanes, and that when daily trips exceed 5,000, the access road (then a major arterial road or highway), must be a minimum of 100 feet wide and have from 2 to 6 driving lanes. Thus, in evaluating appellants' argument, we see that development at the level they fear is not permitted under the Development Code. The ROW as approved will not accommodate

development at that level. The development asserted by appellants would require a new ROW grant to widen the road, in addition to approval by the County under the Development Code. This leaves us with the question of how much analysis is enough in a matter that is by definition speculative. BLM chose as its model subdividing the private property into 12.5 acre lots, consistent with its grant of an ROW of 50 feet wide. BLM then analyzed the impacts of development at that level. This was an eminently reasonable approach.

VII. CONCLUSION

This case began with a dispute over access to private lands that then escalated into a quiet title action to which BLM was a party. The litigation was resolved, with BLM agreeing to grant ROWs generally along a route agreed to by all of the parties to the settlement, subject to 43 C.F.R. Part 2800. Although there may have been aspirations by the ROW applicants to develop their private lands (or, more likely, to sell the lands as developable properties) in the future, no specific plans had been filed with Santa Fe County at the time of their applications.²¹ As a result, BLM described the purpose and need of the project accurately, *i.e.*, to provide legal access to private lands. The NEPA process conducted by BLM involved initial contacts with Santa Fe County, a public scoping meeting, a public NEPA process meeting, circulation of the EA to interested members of the public with a request for comments, and responses to those comments. BLM's description of the project clearly did not mislead the public, considering a significant number of comments during the scoping process and in the EA itself dealt with possible future development. As a result of this extensive public process, the EA addressed, to the extent possible, indirect effects of reasonably foreseeable development of the private property. More specific plans for development or subdivision on the private property would be evaluated, regulated, and ultimately approved or rejected by Santa Fe County. We are hard-pressed to determine what more BLM could have done.

We, therefore, conclude that the Field Office Manager, in his September 2004 FONSI/DR, properly authorized the construction, operation, and maintenance of access roads and utility lines across public lands to the Association's private lands in Santa Fe County, New Mexico.

²¹ There were no plans for years after the applications were submitted. The 2006 Sales Notice confirms that Ortiz and Garcia/Hoyt did not intend to develop their properties, electing instead to market them. Even appellants admit that as of November 2006, there was no viable plan of residential development by Ortiz and Garcia/Hoyt filed with Santa Fe County.

To the extent not addressed herein, all other assertions of error in the Field Office Manager's September 2004 FONSI/DR are rejected as contrary to the facts and law, or immaterial.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Hoyt's motion to dismiss the appeals for lack of standing is denied and the decision appealed from is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
H. Barry Holt
Chief Administrative Judge

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge

_____/s/_____
James K. Jackson
Administrative Judge

_____/s/
Christina S. Kalavritinos
Administrative Judge

_____/s/
R. Bryan McDaniel
Administrative Judge

ADMINISTRATIVE JUDGE HEMMER, DISSENTING:

I agree that BLM has broad discretion to grant or deny an ROW application. And, as an administrative body deciding for the Secretary, this Board may adopt additional information contained in the full record of an appeal beyond that considered by BLM to cure perceived deficiencies in its analysis. *In re Lick Gulch*, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983). But, where BLM has failed to comply with the statutory obligations of NEPA section 102(2) or FLPMA section 501(b), and deficiencies are not corrected by material that can be found in the record, the Board must remand the matter for BLM to supply what is missing. I would set aside and remand for that purpose here. I agree that it would be futile and wasteful to remand solely to add “more detail” into a bulky record. Majority Opinion (Maj.) at 32. I do not seek a threshold of detail weighty enough to prove that BLM considered many things; to the contrary, this EA is already weighted down with details regarding implausible alternatives the law did not require BLM to consider. I would require record facts necessary to show that BLM adhered to requirements of the two statutes it was implementing in rendering its decision.¹

I find three legal defects. First, the Association never submitted a complete ROW application for the proposed project. The majority explains how what it construes to be the application “came about.” Maj. at 96 n.1, 120. I am aware of no case where this Board has constructed a final ROW application under FLPMA out of documents filed at random times which, in part, pre-date even the existence of the applicant Association. Even so, in lieu of a missing record element I would accept a set of incomplete documents if, together, those documents comprised a complete ROW application. The partial applications in the record do not; they fail, together or separately, to “disclose those plans, contracts, agreements or other information reasonably related to the use, or intended use, of the [ROW] . . . ,” as required by FLPMA, 43 U.S.C. § 1761(b) (2000). This gap leads to our different positions. The majority reads the application as one for ROWs to four private parcels, assuming development of the parcels is speculative and unforeseeable. As I read it, the record shows that the applicants’ purpose in obtaining road ROWs large enough for collector roads to a subdivision was to fulfill plans to sell land in the northwest sector of Santa Fe for residential development. An application disclosing “plans, contracts, agreements or other information reasonably related to the use, or intended use” of the ROW, *id.*, would have avoided any confusion and this dispute.

Second, BLM failed to consider, for alternative access to the private lands, a pre-existing route and utility ROW (NM-97059), sufficiently under Hoyt’s control that she granted use of it to PNM for utilities. BLM presents no legal justification for

¹ I do not restate the citations and quotations from law, regulation, and precedent, which are accurately presented in the majority opinion. I also adopt its acronyms.

failing to consider, for roads, that part of the ROW route already granted across public lands and used as a road. Two maps attached to this dissent, taken from the EA, depict the problem. Figure 2.3 Alternative A shows relevant land sections and roads, and ROWs chosen by BLM. Figure 2.7 Alternative E shows an alternative considered and rejected by BLM. BLM considered lengthy and costly Segment 10 as alternative access to the “La Luz Group” parcel from Buckman Road, *instead of* the shorter “Existing Utility ROW/Road” to the north from Buckman Road to sec. 16. An existing ROW should have been an alternative considered by BLM.²

Finally, BLM refused to consider the indirect impacts of the proposed action on neighboring lands to the south, through which hundreds of drivers are projected to travel daily. The EA considered as a connected action development of the Association lands into 128 houses on 12.5-acre lots, acknowledging that 704 daily vehicle trips through residential subdivisions to the south would result. But when residents of those developments asked BLM to address indirect impacts on them in the EA, BLM refused to do so, stating that, although 128 new residences would be a “connected action,” residential development was speculative. This conclusion is unsupportable.³

The challenged decision authorized (a) utility lines within the pre-existing road and utility ROW 97059 from Buckman Road across public lands to the west of the private inholdings; (b) ROW NM-95859 for new roads from Horcado Ranch Road, crossing public lands to the east; and (c) construction of roads 24 feet wide in a 50-foot roadbase across the ROW for roads. Appellants contend that the decision regarding roads was preordained and that BLM failed to entertain plausible alternatives outside those defined in the Settlement Agreement among the Burkes, Garcias, and BLM. Santa Fe County appears as amicus curiae claiming inadequate consultation and lack of notification of decisionmaking that will control County infrastructure. Zannie Hoyt (also in the record with first name Suzanne and surnames Weil and Garcia), is a member of the Association and intervened in support

² I do not object to the majority’s comparison of Alternative A to Alternatives E and F. Maj. at 121-22. I agree that Alternatives E and F are inferior environmentally, technologically, or economically. Under NEPA, therefore, they need not have been considered. The failure to consider an alternative plainly feasible because it already exists as a BLM-granted ROW, and could have reduced the needed mileage of the ROW, is the basis for my conclusion that BLM’s alternatives analysis violates NEPA.

³ I do not quarrel with the majority’s refusal either to expand consideration of *direct* impacts on the public lands or to require BLM to consider effects of a potential increase in houses on the Association lands, based on 2.5-acre lots or water access. Appellants’ speculation that lot size would be reduced and housing would be increased is refuted by the Association’s plans, clearly articulated in this record, to sell their inholdings to developers for large-lot-size, high-end residential development and by the EA’s focus on tax consequences to the County of such high-end housing.

of the decision. BLM mostly adopts Hoyt's brief. BLM Response at 11. On November 20, 2006, appellants submitted an internet Sales Notice advertising the sale of Association lands as a "Santa Fe Land Empire."

This case is unequivocally about development of Santa Fe County. Members of the Association plan to sell private lands in the northwest sector of the County to real estate developers complete with fully approved ROWs across public lands for roads sufficient to serve large-lot residential development, so as to maximize use of private lands that can be sold for high-end housing. Appellants hope to protect the same public land from development impacts. I have no opinion about what should happen in the northwest sector; the only question before us is whether, when BLM granted the ROWs, it implemented the law correctly.

BACKGROUND

Northwest Santa Fe County Development. Development of the northwest sector of Santa Fe County began in the mid-1970s, beginning with the 1975 sale of land by Suzanne and Bob Weil for "La Tierra." "La Tierra Nueva followed in 1980 and the first phases of Tierra de Oro and Salva Tierra in subsequent years. All were designed and marketed by Zannie Garcia and Bob Weil, who operated as La Tierra Ltd." AR 203, "Santa Fe Northwest Sector Plan," March 1997, at 13.⁴ Between 1987 and 1991, a Phoenix company combined the final subdivision phases into "Las Campañas," a golf, spa, tennis, and equestrian residential development comprising 1,717 lots. *Id.* The median value of homes in the sector is \$512,800, triple the County median of \$169,100. EA at 109.

In 2000, SNAC proposed to designate an ACEC in the northwest sector. AR 192, Jan. 21, 2000, ACEC Recommendation, Figures 1, 2 (maps). In 2001, BLM denied an application submitted by PNM for a pipeline ROW within proposed ACEC boundaries. Feb. 28, 2001, Decision entitled "Application Rejected," *PNM Gas Services*, Aug. 1, 2005, Appellants' Reply Ex. C. It explained that the proposed pipeline was "in an area of high public interest," based on SNAC's 1997 Santa Fe Northwest Sector Plan, and that the Taos Field Office (TAFO) was preparing to designate an ACEC where public lands would "remain undeveloped and in the public domain." *Id.* BLM suggested PNM substitute a nearby pipeline route, asserting that PNM did not "gain entitlement to a particular right-of-way because alternative access may be difficult or expensive." *Id.* at 2, citing *Kirk Brown*, 151 IBLA 225 (1999).

⁴ The Santa Fe Comprehensive Extraterritorial Plan, Aug. 3, 1988, directed SNAC to prepare this Sector Plan. SNAC submitted it to the County Board of Commissioners on Apr. 30, 1997. Zannie Garcia was a SNAC Member Executive and Delegate, who provided editing and maps and "recorded the history of early ranching and land development in the sector" for the Sector Plan. AR 203 at 33, 36.

Association Lands. The 1,678.82 acres to which the Association seeks utility service and road access represent four landlocked parcels of private land surrounded by public land. The inholdings are 9.7 miles northwest of Santa Fe; west of the Tesuque Pueblo; and north and northwest of the Las Campañas, La Tierra Nueva, and La Tierra residential developments. Los Dos subdivision lies north of La Tierra. See Fig. 2.1, attached. Hoyt owns the southern 398.82 acres of sec. 2 (the 399-acre parcel). Section 10 (640 acres), southwest of and cornering sec. 2, is held by Paul Ortiz (north half) and Lillian Ortiz Walker (south half). The La Luz Group LLC, owns sec. 15 (640 acres) south of and abutting sec. 10. See maps. Hoyt and her family also own adjacent and nearby private lands. Sec. 16, abutting sec. 15 to the west, was put in trust for her heirs as the “Suzanne Hoyt Garcia Trust.” This is the land which ROW 97059 connects to Buckman Road. Hoyt also owns a smaller private 180-acre inholding in sec. 17. AR 37. Hoyt controls the 2,050-acre “Santa Fe Ranch,” and the Ortiz family controls the 1,600-acre “Ortiz Ranch,” all near Buckman Road. AR 174, August 2003 “The Buckman Roadway Study for the Buckman Water Diversion Project,” prepared by Tierra, LopezGarcia Group, at III-4 and 5, Table IV. Identification of the Ranches is not possible from the EA, which does not address Association members’ total ownership in the northwest sector. See AR 192, Figure 2.

For years, owners grazed the lands. At least the Garcias accessed their lands by two-track roads that connected to Santa Fe through the nearby Horcado Ranch. The Association members’ interest in finding access routes to the private inholdings in order to sell the inholdings for residential development spans a decade. In 1996, Hoyt expressed interest in an ROW to lands for which “some subdivision is planned.” AR 128. On November 12, 2001, the Association created a “Plan of Development for Access Roads to Four Properties” (POD), which stated a plan to sell the lands to a residential developer after acquiring ROW access, with grazing being maintained until the sale. AR 173, Sec. 1.B (current use is grazing; planned use is residential) and Sec. 1.G (four owners use land for livestock, plan is to sell lots which purchasers may then subdivide). In an April 28, 2006, letter to BLM, Gloria Ortiz reported that the La Luz Group was marketing its property and “*trying to get our property subdivided.*” May 25, 2006, BLM filing.⁵ The families offer the lands for sale in a

⁵ The EA states: “The project area encompasses 1,600 acres in the northwest part of Santa Fe County. Currently there are 11 property owners who own a total of 11 lots, eight of them contiguous parcels held by members of one family.” EA at 118. The EA implies that 11 lots would be improved once the ROW is approved. *Id.* at 84. The “project area” is the public lands considered for ROWs *surrounding* the 1,678.82 acres of private lands. The “11 lots” are elusive; no map identifies them. The record states that the 11 lots are owned by the four members of the Association and 7 Hoyt children (AR 173 Sec. 1.G; EA at 3), but also that they are owned by Walker, Ortiz,

(continued...)

unit including Association lands and the sec. 16 parcel which ROW 97059 connects to Buckman Road. The Sales Notice, “Santa Fe Land Empire,” shows that the ROWs permit the Association to market unencumbered private lands to developers with pre-existing access. The families offer to sell together secs. 15 (part of the land to which the Association seeks access) and 16 (Hoyt Tract accessed by ROW 97059). See Sales Notice, Nov. 13, 2006, www.santafelandempire.com, attached to Appellants’ Nov. 20, 2006, Response to *Ex Parte* Communication. The “Ortiz, La Luz Tract,” sec. 15, is offered at \$8,320,000, or \$13,000/acre; the “Hoyt Tract,” sec. 16, is offered at \$6,400,000, or \$10,000/acre. The EA values sec. 15 at \$500/acre and sec. 16 at \$8,600/acre. EA at 109. The Sales Notice asserts that “there are 180 and 400 acre tracts that could be purchased with” the Hoyt tract. These must be Hoyt’s isolated parcel in sec. 17 and her 399-acre tract in sec. 2. See EA at 5, Fig. 2.2. “[O]ne more section could be added” which “would, in effect, be all the private land in this part of the County and would leave you with a private in-holding, surrounded by government lands.” Sales Notice at 2. This section must be the Ortiz and Walker sec. 10. The Sales Notice advises purchasers that County subdivision requirements apply, that the “families are very aware of development avenues” and will not “allow the land to be further encumbered,” and that “these tracts are virtually all quite useable land.” *Id.* The Sales Notice advises purchasers that 10- to 15- acre lots in nearby La Tierra “can top \$400,000 to \$500,000 and homes are commensurate, with \$4,000,000 to \$5,000,000 being the top echelon.” EA at 110 (based on median house value, aggregate value of houses to be built on Association inholdings could reach \$65,638,400 on 128 lots).

Access to the Inholdings. Buckman Road, running northwest/southeast through secs. 20 and 17 west of the “Hoyt Tract” in sec. 16 is closest to the inholdings, and is “an unpaved County maintained, rural road.” AR 174, “Buckman Roadway Study for Buckman Water Diversion Project” at I-1. A road runs 1,500 meters from Buckman Road through secs. 20 and 21 along ROW 97059 to Hoyt land in sec. 16.⁶ It is the shortest distance and the only pre-existing ROW between a road to Santa Fe and any part of the private inholding block. See maps. The 2006 Sales Notice advertises Buckman Road as the route to the Hoyt Tract, and states that it will become an all-weather road. By October 5, 2004, letter, Hoyt, acting as trustee for the Suzanne Hoyt Garcia Trust, agreed to provide utility service across the ROW to Association members. File NM-109922 contains an application for the utility ROW to Association lands. AR 298. The cover letter asserts that Hoyt owns the sec. 16 parcel. *Id.*

⁵ (...continued)

Hoyt, and 8 members of La Luz Group. AR 173 Attachment Recitals. The majority opinion cites both options. Maj. at 97 n.2. The POD refutes any suggestion that the land is expected to be divided into 11 lots for use by current owners. AR 173.

⁶ The Suzanne Hoyt Garcia Trust submitted application NM-97059 in June 1997, for a road and utility ROW to secs. 16 and 17. AR 168. BLM approved it July 8, 1997.

To the east, the closest road is Estrada Calabasa West, formerly Horcado Ranch Road. This road dead-ends at Mariah Ranch. See attached maps. This road, running to the north through secs. 24 and 13 and/or between the La Tierra Nuevo and La Tierra subdivisions, at its closest point, is approximately 1.3 miles east of the La Luz Group lands in sec. 15 and 2 miles from each of secs. 10 (Ortiz/Walker) and 2 (Hoyt). Both Buckman Road and Estrada Calabasa West (Horcado Ranch Road) connect with Santa Fe from Camino la Tierra off of Route 599. See attached maps. They diverge at a junction in Las Campañas, where Paseo de la Tierra heads north and then northwest, becoming Estrada Calabasa West. See EA Figure 2.1.⁷

On April 19, 1996, Anthony Ortiz submitted an ROW application for a 1.5-mile access road from Horcado Ranch Road across BLM lands to sec. 15, later identified as owned by the La Luz Group. The application does not specify a location for the ROW. See ROW File 95859 and AR 126-27, AR 173 (POD). In *Lawrence J. and Gabrielle Burke v. U.S. Dept. of the Interior; BLM; Board of County Commissioners, County of Santa Fe, Eloy and Suzanne H. Garcia*, Civ. 98-01110 (D. N.M.), the Burkes sued the Garcias, BLM, and the County to quiet title to the route over the Mariah Ranch that the Garcias had used for access to the 399-acre (Hoyt) parcel in sec. 2. By letter dated March 14, 2000, BLM proposed to Zannie Garcia that she, Paul and Anthony Ortiz, and the Walkers meet to discuss ROW issues.

On April 3, 2000, the Garcias, Burkes, and BLM (but *not* the County) entered into a Settlement Agreement. The parties agreed that BLM would “grant the Garcia and the Ortiz family [‘Susanita Ortiz, La Luz Group LLC, Paul Ortiz, Lillian Ortiz Walker, and Charles A. Walker’] Rights-of-Way over the public lands West of the Burkes’ property, along the route shown in Exhibit ‘A’ attached hereto, in order to obtain access to lands owned by the Garcias in Section 2 . . . and to the Ortiz family Property.” Settlement Agreement at ¶¶ 1, 3, 4. The parties agreed to an access route to the Garcias’ land, as depicted in Exhibit A, from which “spurs” would lead to lands owned by non-parties in secs. 10 and 15. *Id.* at ¶ 5. As the Majority notes, there is confusion over Exhibit A, which never appeared in the EA, and seems actually to be labeled Exhibit “B.” See AR 173, POD (map); AR 116, Apr. 22, 2002, memorandum from Clif Walbridge to BLM; AR 287, Oct. 29, 2004, letter post-dating the FONSI/DR from Assistant U.S. Attorney Zavitz to U.S. District Court attaching Ex. B (“should be Exhibit ‘A’”). This map approximates ROW Alternative A and includes a principal winding road across BLM land between Horcado Ranch Road in sec. 13, running through secs. 11, 12, and 14, to Hoyt’s land at the corner of secs. 1 and 2. Spurs lead across sec. 11 to the Ortiz/Walker parcel in sec. 10, and across sec. 14 to the La Luz

⁷ SWCA added a new and corrected Fig. 2.1 (EA at 4) in front of EA text, to identify subdivisions through which residents would travel to get to the road ROWs, after public complaint. *E.g.*, AR 245, e-mail regarding EA from Stanley E. Logan (asserting that EA concealed that ROWs would funnel traffic through residential development).

Group parcel in sec. 15. The routes cover over 4 miles of public land. The “Ortiz family” was not party to the suit or settlement. The Garcias committed to “request and encourage” the Ortiz family to relinquish any claim for access across the Mariah Ranch. EA Appendix C, Settlement Agreement (absent Ex. A or B) ¶ 4.

The Burkes agreed to pay for the design and construction of a 1,200-foot segment of the road running south of the Ranch from Horcado Ranch Road. AR 287; see attached Figure 2.3 Alternative A (Segment 1); AR 173, POD Attachment (Ex. B) (points L1, L14-15). It would have a driving surface 22 feet wide and meet “minimum Santa Fe County standards.” EA Appendix C, Settlement Agreement at ¶ 5.a. The Garcias agreed to pay for the cost and design of the main roadway to sec. 2, and took responsibility for “all environmental clearance documentation for the main right of way” and “BLM’s direct administrative costs in accordance with 43 CFR Part 2800” (rules governing FLPMA ROWs). *Id.* at ¶ 3. The private landowners formed the Association; the La Luz Group, Paul Ortiz, and Lillian Walker agreed to share costs for spurs to secs. 10 and 15. AR 101, Joint Road Maintenance Declaration at 4, with May 5, 2003, cover letter to BLM.

The Application and EA. The record contains 2-3 faxed pages of an undated application under the names Suzanne Garcia and Lillian Walker for 2.5 miles of road, with a 50-foot ROW in the “Horcado Ranch area.” AR 117. If any specification for the ROW, its location, or routes was provided, it was in attachments not in the record. A copy of this appears as POD Attachment 1. AR 173. A November 28, 2001, letter from Hal Knox, BLM, to Garcia documents that BLM received an application to amend the 1996 Ortiz application NM-95859 which appears as POD Attachment 2. This letter advised Garcia that BLM would proceed to process the application under FLPMA and that it required an EA under NEPA.

Scoping Process. BLM publicly described the proposed action as one to provide ROWs to four private parcels to make roads passable for the current landowners’ use of private parcels for rural livestock grazing. EA at 79. *“The purpose of and need for the project is to establish legal access for roads and utilities to four parcels of private land adjacent to the project area while minimizing new disturbance. Improvements to currently unimproved roads and construction of new roads will assure that they are passable and will address ongoing erosion problems on those roads.”* *Id.* at 1 (emphasis added); see, e.g., AR 102 and 103, Apr. 13, 2003, Public Meeting notices; AR 273, EA Comment Period notice; AR 296, Sept. 27, 2004, Notice of EA Availability. BLM conducted public meetings on February 5 and April 17, 2003, focusing on ROW sites derived from the lawsuit settlement. See AR 46, Apr. 17, 2003, Meeting Agenda; Jan. 21, 2003, Scoping Notice Project Map. Publications stated that the ROW’s purpose was “to re-establish access to private lands” formerly available through Horcado Ranch. AR 34, EA Project Information Handout; AR 26, Newspaper Notice.

The public objected to suggestions that the ROWs related to grazing. See AR 39, Feb. 15, 2003, article, “Los Dos Residents Fight Developers.” Contractor Tetra Tech, Inc., prepared a Scoping Meeting Report, EA Appendix A, summarizing 460 comments from 75 participants. (A Table of Contents lists the report as comprising 6 topics in 39 pages, but the report ends at heading 4.2 on page 23.) A majority of comments appeared under the “alternatives” heading. Participants claimed Buckman Road would provide superior pre-existing access with fewer environmental impacts. The La Tierra Neighborhood Association Board complained that directing traffic up Estrada Calabasa West would divert hundreds of vehicles through their subdivision. See EA Appendix A, Scoping Meeting Report at 18; 20-23. Others pointed out that the project proponents already had plans for development of the last open lands in the northwest sector. AR 29, Jan. 29, 2003, Letter from HDC; see AR 32 (map). Participants expressly recommended, with maps submitted to SWCA, Buckman Road alternatives using existing ROW 97059, employing the “existing road to Garcia” in sec. 16.⁸ AR 37, Feb. 11, 2003, SWCA Memorandum, maps (notation “Map from Gabrielle Burke”). Many participants favored use of the ROW combined with some internal access among the private landowners, which would reduce public lands needed for subdivision roads. Eight commenters opposed an ROW crossing ACEC lands, apparently in omitted portions of the Report. EA Appendix A; see, e.g., AR 43, letter of Thomas Blog. Others complained about public safety from use of roads through existing subdivisions. EA Appendix A; AR 41, calls from Knopfer, Drousin.

Project proponents spoke in favor of the project. See AR Binder 2, “Public Scoping.” It could only be Hoyt who commented, orally: “We reached a settlement in court that I should get new access and I am obligated to abide by and fulfill all the existing federal regulations to get such a road. I intend to do so.” EA Appendix A, Scoping Meeting Report at 23. It appears that Association members objected to expectations that the landowners should provide internal access among parcels, claiming the “Ortizs are not prepared to give each other any access on their own deeded land.” *Id.* at 17. The proponents objected to addressing development. *Id.*

ROW 97059 and Indirect Effects. BLM and SWCA subsequently contemplated providing access from Buckman Road along the existing Hoyt ROW to sec. 16, then traveling east along the southern boundary of secs. 15 and 16. AR 12, undated “El Monte Roads Map” Alternative 6, and “2003 Figure Xx” Alternative 4, “El Monte study area arroyo locations.” (Oddly, AR 12 is a folder entitled “El Monte Roads Tree Counts.”) BLM sought the Association’s cooperation in limiting use of public lands,

⁸ This 2003 map indicates that Association lands were part of a planned county housing development, for which lots were publicly marked. It contains handwritten notations: Sec. 2 (“Zannie Garcia, marked for development”); Sec. 10 (“Walker, to be sold to developer”); sec. 15 (“Ortiz, to be sold to developer”); sec. 16 (“Zannie Garcia, Roads already, Lots marked for development”).

and also an accurate statement of environmental impacts from housing development expected to occur from the planned sale of the private lands. In a May 14, 2003, meeting, BLM and SWCA discussed, *inter alia*, the road POD and the fact that the EA must address traffic pattern changes and “use realistic numbers for traffic increase based on most dense possible development.” AR 67, May 14 Meeting notes; AR 118, 2001 cover letter enclosing POD. “BLM asked various members of the El Monte Roads Association if they would give access across their lands to other members of the . . . Association and access was denied so access to each private landowner has to be given to the landowners across BLM lands.” *Id.* at 3. On July 11, 2003, BLM NEPA Specialist Churchill stated that reasonable development scenarios and Buckman Road alternatives must be addressed. AR 68, E-Mail from Churchill to Knox. Describing a discussion with SWCA regarding anticipated development of 12.5- to 20-acre parcels, she stated: “the important point is that the EA includes a reasonable development analysis in indirect and cumulative impacts discussions.” *Id.* “[W]e also committed to going back out to the public to discuss the alternatives prior to releasing the EA for public comment. . . .” *Id.* PNM demanded to bring utilities to Association lands from Buckman Road across Zannie Hoyt’s pre-existing ROW to sec. 16. PNM explained that the western Buckman Road access route was 10,000 feet shorter than from Horcado Ranch Road, and the utilities could then cross Hoyt’s private lands. AR 288, Jan. 1, 2004, E-mail of Hal Knox re “PNM meeting.”

Project proponents objected to further public meetings, to recognizing their plans to sell their lands to developers, and to including the POD with the EA. *See* Scoping Meeting Report. In 2003, Paul Ortiz objected to the inclusion of “connected actions” in the EA, complaining that BLM had “absolutely no jurisdiction” over development of private lands and that any plans for development were “not in the scope” of the EA. AR 69, Aug. 3, 2003, Comments of Paul Ortiz (¶¶ 2, 6). He asserted that the Association “must have a road to the property prior to any development plans,” that the POD “must not be part of the EA,” and that “any plans of development be included somewhere else.” *Id.* (¶ 2). He objected to any more public meetings. *Id.* (¶ 4). Ortiz insisted on a Buckman road alternative with “tremendous costs and the major damage to the environment,” rather than an alternative that would use the existing ROW. *Id.* (¶ 5). “The Western Alternatives consist of 100% new roads of about 80% new roads plus a \$1,000,000.00 cost for a bridge and improvements on smaller arroyos.” *Id.* (¶ 3) [sic].⁹

⁹ EA photographs and text plainly refute the assertion that eastern alternatives used “100% of existing roads,” in particular with respect to the La Luz tract owned by the Ortizes. *See, e.g.*, EA Figure 3.8 (segment 7, spur road to sec. 15); EA at 80. Further, the 2001 POD called for “all new construction” of roads across public lands east of the private parcels. AR 173, POD at 1, “location map.”

In September 2003, BLM employees objected to the proponents' approach and advised that BLM was considering use of the existing "two track" road from Buckman Road. AR 19, Sept. 29, 2003, Chavez comments; *see also* AR 152, Sept. 30, 2003, Memorandum from TAFO Manager, BLM, to State Director, BLM. On October 8, 2003, BLM proposed alternatives. A cover letter under that date appears in the record and describes a set of enclosed alternatives including some from Buckman Road. AR 144. The enclosure is missing. (In an October 14, 2003, letter, Lillian Walker objected to alternatives. AR 91.) In an October 30, 2003, letter to SWCA, BLM's Churchill advised SWCA that "it makes sense to consolidate road and utility corridors and we want sufficient information in order to examine that." AR 86. BLM employee Gustina questioned whether Association members could refuse internal access to each other. AR 17, Nov. 25, 2003, comments. He asserted that an ROW from the west was a "more likely approach," given that utilities will "come from Buckman Road." *Id.*

Given BLM's evident misgivings, TAFO issued a Request for Solicitor's Opinion Regarding Legal Access to Private Land, on January 13, 2004. BLM provided background and asserted that the landowners were refusing internal access:

The central question BLM would like answered in this request, is whether the TAFO would be obligated to adhere to the proposed action which would be to provide per the [ROW] for separate access roads leading to the respective private lands owned by Paul Ortiz, Lillian Ortiz Walker and La Luz group? *Or as the Ortiz family lands are contiguous, does BLM have the discretion under FLPMA to provide for only one route to these lands utilizing one of the aforementioned spur roads.* This alternative would provide access to one or possibly two of the private properties but not all of them. The owner(s) of this parcel(s) would then provide access across their private land(s) to the other members' lands. [Emphasis added.]

AR 82, Request for Solicitor's Opinion at 2. "[G]ranting [an ROW] over only one spur road leading to the Ortiz properties would potentially have less impact to the public land than granting the [ROW] over multiple spur roads, each leading to an individual member's property." *Id.* at 3. No response appears in the record.

The project proponents sought Congressional intervention. *E.g.*, AR 119, Oct. 31, 2001, letter from Ortizes to Sen. Domenici, at 3; AR 92, Sept. 2003 letter from Ortizes to Sen. Domenici; AR 138, 277, Apr. 29, 2003, "Congressional Courtesy Briefing"; AR 84, Nov. 9, 2003, letter to Rep. Udall from Ortizes; *see* AR 85, letter from Rep. Udall to BLM; AR 83, BLM letter to Rep. Udall; AR 93, Oct. 17, 2003, letter from Sen. Domenici to BLM. In a Congressional inquiry response, BLM discussed impacts on nearby communities and defended its plan to consider ROW 97059:

The [February 5, 2003, scoping] meeting was conducted as an initial step in the development of any [EA] for the project. The BLM's goal was to inform the public of the proposed action and to initiate public input and participation in the EA process. A number of key concerns and issues arose as part of the scoping process. Those issues concern what effect the granting of [an ROW], as proposed, would have on neighborhoods south of the Garcia-Ortiz lands. Access to the public land and Garcia and Ortiz private lands is initially off of Camino La Tierra and then along Santa Fe county roads to Horcado Ranch Road, which flanks the public land. These roads pass through several communities that potentially could be impacted by the granting of [an ROW]. Because the private lands can be developed in the future there is great concern among residents of these neighborhoods that development will greatly increase traffic and congestion, raise security issues, lower land values, and generally impact their quality of life.

In response to the issues raised by residents of these communities at the scoping meeting, the BLM is currently considering several routes. One option, in particular, would avoid the communities lying further east. It is an existing two-track road leading off of Buckman Road that crosses public lands and connects to the Garcia-Ortiz lands.

AR 109, Mar. 12, 2003, letter from BLM to Sen. Domenici.

Draft EA. BLM issued a Draft EA for public comment (possibly in June 2004). No draft EA appears in the record. I agree with and need not repeat the description in the Majority Opinion of the eight action alternatives and "no action" alternative (I), in the Final EA. AR 275. Action alternatives related only to route location. Common to all alternatives, the EA amended Hoyt's existing ROW 97059 extending new utility lines and service from Buckman Road to the Association parcels. EA at 11. BLM did not consider a road alternative along that ROW. See Figure 2.3 Alternative A, attached.

Alternatives B, D, G, and H, with a single access route to secs. 10 and 15, proposed shorter total routes across the public lands than Alternatives A and C, which were permutations similar to Exhibit "B" to the Settlement Agreement. Alternatives B and D posited road segment 9 along a drainage flow-way making them "technically undesirable." AR 131, May 3, 2004, Louis Berger Group alternatives cost analysis. Alternatives G and H posited road segment 13 with a large concrete culvert structure at a major arroyo crossing, adding \$80,000 to \$100,000 in costs. *Id.* Alternatives A and C, duplicating the Settlement Agreement's Horcado Ranch routes, posed the longest mileage and highest acreage use, but were less expensive or more feasible than eastern alternatives added in response to public demand. See EA Table 2.1.

The two Buckman Road Alternatives E and F proposed a Segment 10 crossing 2.83 miles of public lands south of and bypassing ROW 97059, and required an increase in mileage in roads to the east. See attached Map EA Figure 2.7 Alternative E. Though beginning to the west, Alternatives E and F access sec. 15 near its southeastern corner. They would require a bridge across the Calabasa Arroyo costing \$1 million.¹⁰ They propose a route up the east side of sec. 15 and then more roads crossing public lands in secs. 11, 14, 12, and 1 to access the Ortiz/Walker and Hoyt parcels. The Buckman Road alternatives considered were not the alternatives the public urged, but were the lengthiest of the 8 alternatives considered, and doubled or tripled the cost of all other options.

The western Buckman Road alternatives ignored any internal access among properties owned by the Association members or their relatives. The EA defended its refusal to analyze ROW 97059 as a road alternative: the “property in Section 16 cannot be used as a right-of-way because it is currently owned by multiple heirs of Zannie Hoyt, some of them underage, and it is not possible to gain permission from every heir.” EA at 1-2. BLM also defended not considering internal access, at 10-11: “This alternative is not implementable because the four members of the Association decided in the fall of 1999, while working on a roads maintenance agreement, that they would not give each other access across their holdings.”

The EA’s road design considered only one set of road specifications. Wherever the ROW was to be located, it would be 50 feet in width and roads would have a 24-foot two-lane gravel roadbed “for houses that may be built on the private lands.” EA at 3, 11. The design derived from the “Santa Fe County Land Development Code” (Development Code) which addresses planned development. AR 195, Appendix 5.A establishes different road standards based on “Subdivision Design Standards,” which depend on the average daily traffic and number of lots served. See *id.* at 139, sec. 8. The Development Code allows “local roads” for less than 30 residences as a “lane or place” with a 20-foot width, designed to “discourage through traffic.” *Id.* at 142, 143, 150 n.17. The EA never considered construction of local roads or mentioned specifications required by the County for non-residential access to four parcels of ranch lands or for access to 11 lots.¹¹ The only roads considered in the EA would serve a subdivision. The EA’s roads are “collector roads” under the Development Code, AR 195, Appendix 5.A, designed to serve from 60 to 199 houses generating

¹⁰ BLM’s Chavez stated that a “bridge is not an option at this or any location along these routes for obvious cost reasons.” AR 133, Mar. 14, 2004, Memorandum. Appellants contend that “Santa Fe Public Works” has advised that “[i]n all of Santa Fe County no one has used a bridge to cross an arroyo.” SOR at 19.

¹¹ If the point of the ROWs was to provide access for the landowners, the number of units served would be 4 or 11. This access would be a place or lane in the Development Code.

from 601 to 1,999 vehicle trips daily. *Id.* at 150. The EA anticipates that the ROW may ultimately be declared “a county road,” at which time “the responsibility for maintenance and operations may devolve upon Santa Fe County.” EA at 10.

Chapter 3 of the EA addressed direct impacts resulting from construction and use of the roads. The EA addressed as “connected actions”¹² and “secondary impacts” development of a subdivision with “12.5-acre lots or 128 households” and acknowledged long-term impacts on such things as water usage, visual and air quality, and noise. EA at 3.2.3.14 Connected Action; *see also id.* at 60, 69 (long-term impacts if subdivisions are built); at 70-78. Discussing “secondary impacts” common to all alternatives, the EA explains that increased traffic will occur with “subdivision of the private properties on Sections 2, 10, and 15 once legal access is acquired.” *Id.* at 70. “Workers would commute in to build on properties; residents would commute out to go to work.” *Id.* The EA described development ranging from of a minimum of 11 lots to 128 lots with subdivision development. For maximum development, the EA projected 704 traffic trips/day, increasing weekday traffic by a factor of 59.6, based on the Santa Fe Model Trip Generation Standards, which averages 5.5 trips per day per household (5.5 x 128 = 704). EA at 84-85; *see also id.* at 110 (increase in property value and County revenue from development); at 115 (“private lands served by the chosen alternative would have a maximum housing density no greater than that of La Tierra or Los Dos”). The EA did not, however, describe indirect effects of the “connected actions” on the neighboring residential areas.

The Final EA and FONSI/DR. The TAFO Manager issued the FONSI/DR adopting Alternative A. BLM included in the Final EA a “Comment Resolution” in which it addressed 279 comments contained in 30 letters. Appendix B. Despite describing development of a residential subdivision based on 12.5-acre lots as a “connected action,” the Comment Resolution refused to consider indirect effects of the connected action on lands to the south. BLM denied that the ROWs bore any relation to sale of private land for development.

Response: *there is no proposed development associated with the project. The proposal is to provide access to private land-locked lands. There is no clear link between expansion in previously-approved developments and possible future development on the lands held by El Monte Roads Association members. It would be speculative to link those actions and effects. All development will be subject to Santa Fe County approval.*

EA Appendix B at 5 (emphasis added). Residential development “is outside the scope of this document.” *Id.* “At this time, with no development proposed, traffic impacts

¹² “Connected actions” are normally one of three types of actions to be considered in an EIS. 40 C.F.R. § 1508.25(a)(1).

to the neighborhoods south of the applicant's private lands are speculative.” *Id.* at 6. BLM changed the “maximum” action foreseeable to 11 houses built by Association family members; the project “could result in a *maximum* of 11 new residents¹³. . . . If the private lands are subdivided or developed, the County planning process will consider impacts . . .” *Id.* at 7, 10 (emphasis added); *compare* EA at 84-85 (“maximum” of 128 lots). The ROWs “will not substantially increase traffic,” because they will only “permit a *maximum* of 55 extra trips (from 11 lots),” and BLM stated, “[t]his level of development was judged not to be a significant impact to local residents.” EA Appendix B at 10 (emphasis added). The Comment Resolution contended that assessing “indirect impacts” was the responsibility of the County. *Id.*

ANALYSIS

BLM's FLPMA obligation was to require a complete and accurate application for the ROWs sought, as well as responsive information about the intended use of the ROWs it was asked to grant. Its NEPA role was to identify the proposed action, its impacts, and alternatives. Despite BLM employees' efforts to do both, it ultimately did neither in a way that met legal requirements.

1. *The Association Did Not Submit an Application Which Properly Defined the Intended Use of the Public Lands as Required by FLPMA.*

The following things are true: the County Development Code does not require collector roads for access to 4 or 11 lots; the Code would not require collector roads for rural grazing use; the Association members did not intend to take up residence on their lands; and the Settlement Agreement did not mention construction of subdivision roads north of Mariah Ranch. Had the intended use of the ROWs been to access four parcels for grazing, it would have been unnecessary to consider road specifications for subdivisions set out in the County Development Code. Had the intended use been to access a potential residential subdivision, the County's role in developing its own best infrastructure would have been obvious.

FLPMA section 501(b) ensures that the Secretary must require an ROW applicant to submit and disclose plans or information reasonably related to its use or intended use. 43 U.S.C. § 1761(b)(1) (2000). The agency must know and identify the intended use of an ROW before it can weigh the public interest and make a

¹³ A “maximum of 11 new residents” is an acknowledgment that none of the Association members currently resides on the private lands, and an assertion that the only foreseeable result of granting the ROWs would be residence by family members. The POD refutes this, explaining that the property owners do not reside on the lands and that residential development will occur only after the land is sold. AR 173 at 3.

reasoned decision whether to grant it. See 43 C.F.R. § 2802.3(b)(3) (2004) (statement of need).

The record contains no signed, dated, or accurate application, depicting the road ROWs applied for. The plan to sell the lands for which access was sought was a clear element of the roads POD, but was never articulated in an application which, by law, must disclose the intended use of the requested ROW. The application form requires applicants, at question 15, to provide a statement of the “need for the project,” the “next best alternative,” and the “expected public benefits.” The only conceivable answer to these questions on the 1996 form filled out by Ortiz is “only access to our property.” The undated 2001 form filled out by Garcia and Walker avoids answering these questions at all.¹⁴ The absence of a clear statement of need which embraced the intended use, or a plain answer to simple questions on the application form, permitted the EA’s Comment Resolution to deny the plainly anticipated sale for subdivision development associated with the ROWs, even when the EA acknowledged the sale as a connected action, and the POD explained the intended purpose to sell the lands to residential developers.

BLM routinely requires an applicant to fully disclose the intended use of and plans for an ROW before granting the application. We regularly affirm BLM’s denial of ROW applications when an applicant’s information is incomplete or erroneous. *Pete Zanetti*, 113 IBLA 239, 241 (1990) (applicant “presented nothing with th[e] appeal to persuade us that the facility he seeks to construct on public land is a needed improvement that will benefit the public as much as it will enhance the value of his mobile home park.”); *Farm Development Corporation*, 105 IBLA 353, 356 (1988) (“nothing in the record to indicate how any entryman has used or will use the roads, nor are the entrymen identified as users of any of the roads identified.”); *Edward J. Connelly*, 94 IBLA 138, 145-46 (1986) (BLM properly insisted on proof of access across private lands before considering access across public lands); *John W. Barbee*, 60 IBLA 81, 84 (1981) (applicant failed to supply critical data about ROW’s use and applications for “use should only be made after . . . plans have coalesced”).

The applicants here contended that their plans were private business. While it may be that the project proponents did not properly understand their obligations in applying for ROWs, BLM should have demanded the same information in this case

¹⁴ The complete response to question 15 on this application is: “To provide access to land locked property, a New Mexico State University permit and BLM land. Cost to be determined. Maintenance to be provided by the Home Owners A[ss]ociation.” I know of no case where we have affirmed BLM’s failure to require conformance to 43 C.F.R. § 2802.3 (2004) (application content). In *Southern Utah Wilderness Alliance*, 172 IBLA 183, 185 (2007), we refused BLM’s request to correct errors in a BLM decision, because we do not “manage the public lands as a proxy for BLM.”

that it demands in others. What an applicant must submit with an ROW application should be guided by rules that are consistently applied by BLM.

Whether a decision granting an ROW in the absence of a direct statement of the intended use of an ROW should be set aside may be a matter of first impression for this Board. It is clear, however, that a complete ROW application with responses to questions on the form, or even just a statement in the application of plans or agreements reasonably related to the intended use of the ROW under FLPMA would have avoided the battles in this appeal. The Association members are already using two-tracks to access their lands for grazing. A need for an ROW across public lands to get there is evident, but the need to improve them into the size of collector roads necessary to serve a large-sized-lot development (50-foot wide with a 24-foot driving surface) is inconsistent with the EA Comment Resolution's denial of any "link" between the ROW and residential development. From the time of the 2001 POD, the proponents' purpose has been to take grazing land and sell it for residential development at a level of 60-199 houses, thus requiring collector roads. Moreover, the EA asserts that the "revenue base available to Santa Fe County would increase with the level of subdivision in the landlocked properties," and the "beneficial impact to the county property tax revenue base, based on value per acre, could be \$30,400,000.00 if legal access is gained and the property is developed." EA at 110. BLM provides no basis for denying this information at the decision point.

BLM's decision will only lead to later conflict over the ROW's actual use. Any use of an ROW beyond the scope and specific limitations of the authorization is prohibited. 43 C.F.R. § 2801.3(a) (2004); *see Southwest Wireless Networks*, 167 IBLA 327, 344 (2006); *Tom Watson*, 154 IBLA 140, 146 (2001) (rejecting ROW holder's claim that ROW allows uses not applied for or addressed by BLM). I agree with the Majority that it is in no one's interest for us to doom the parties to continued debate. *See, e.g., Bear River Development Corporation*, 157 IBLA 37 (2002). I would therefore not leave any issue open as to whether the ROWs could provide access to hundreds of residents, a question of critical importance to the Association members and their purchasers, and to their neighbors to the south.

The simple answer is to require a complete application which complies with the plain terms of FLPMA section 501(b) and its implementing rules, with plain answers to application form questions. At a minimum, to the extent this Board constructs an application from documents in the record, the entire POD, and not just portions of it, should be considered an element of a complete application. This would include the proponents' stated intentions never to reside on the lands, but to sell them once access across public lands sufficient for subdivisions was acquired. Either way, NEPA analysis, public response, and County involvement obviously would have followed and BLM would have been forced to resolve under FLPMA and NEPA how development is both a connected action and yet unforeseeable in the same EA.

II. *BLM Should Have Addressed an Environmentally Superior Alternative Using ROW 97059 and Internal Access.*

There is no dispute that alternatives to a proposed action must be considered in an EA. 40 C.F.R. §§ 1508.9(b), 1501.2(c); *see also* 516 DM 3.4(A). The agency must “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects” 40 C.F.R. § 1500.2(e). Alternatives “must accomplish the intended purpose of the proposed action, be technically and economically feasible, and have a lesser impact than the proposed project.” *Bales Ranch, Inc.*, 151 IBLA 353, 363 (2000). “Project alternatives derive from [a] ‘Purpose and need’ section . . . [which] dictates the range of ‘reasonable alternatives’ and an agency cannot define its objectives in unreasonably narrow terms.” *Carmel-By-The-Sea v. U.S. Dept. Of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997).

It is in the alternatives analysis that the lack of a full application explaining the intended use of the ROW becomes critical.¹⁵ Alternatives for family members to access 4-11 parcels would, presumably, be different from those that would best serve as access to lands marked for subdivision development. Accuracy on this point would govern the County’s interest in the outcome as well. The EA did not consider the County’s or the public’s interest. Rather, the EA preparers did not intend to include alternatives because the Settlement Agreement established pre-chosen routes. When the public demanded the alternatives analysis that NEPA requires, the EA preparers devised environmentally, technologically, and economically inferior routes to consider, without deference to the best infrastructure as the County might identify it.

I see several problems with the alternatives analysis. The alternatives added were inferior choices as a matter of economic and technical feasibility, and increased impacts to the public lands, thus failing the legal test for upholding them: (a) they will “avoid or minimize adverse effects,” 40 C.F.R. § 1500.2(e); and (b) they are “technically and economically feasible.” *Bales Ranch, Inc.*, 151 IBLA at 363. Despite a simple option to use existing ROW 97059 and avoid the Calabajas Arroyo, the only Buckman Road alternatives (E and F) propounded and addressed in the EA required a prohibitive \$1 million bridge. Finally, BLM did not address, under either test, alternatives that would best serve County infrastructure needs, an issue that BLM was necessarily deciding.

Alternatives analysis does not allow a project proponent to develop options so onerous that the only possible outcome is to choose its preference. At least as to the Buckman Road alternatives in the EA, this was the point. *E.g.*, AR 69, Ortiz

¹⁵ As noted above, the ROW application form question 15 required the applicants to provide the “next best alternative.” Ortiz denied the existence of any alternative in 1996, and Garcia and Walker failed to answer that question at all.

comments. I might give no weight to these comments if I could see a single reason, other than to make Buckman Road alternatives cost-prohibitive, why the Calabasas Arroyo Bridge options were added and a shorter, cheaper, pre-existing route along an existing ROW (used by PNM) was ignored. But I cannot. This should be “fatal” to the EA. *State of Wyoming Game & Fish Commission*, 91 IBLA 364, 369 (1986).

I have factual and legal problems with the EA’s explanation for BLM’s failure to consider use of pre-existing ROW 97059 for a road. The EA cites two reasons entirely within the control of the project proponents, and unrelated to the purpose of NEPA: (1) Hoyt denied that she could obtain legal authority from her heirs in sec. 16 to allow use of the ROW; and (2) the project proponents entered into an agreement refusing access to each other across their private lands, to force all access onto public lands and thereby shift the burden thereof to the public. But the point of NEPA alternatives analysis is a “fully informed” decision comparing effects of technically or economically feasible options; it is not properly a vehicle for project proponents to wrest administrative control of the use of public lands from the Secretary.

Hoyt’s assertion that use of ROW 97059 is not possible because she cannot compel or persuade her underage heirs to agree to allow it is repudiated by the fact that she did just that to allow utility access across that ROW by PNM. AR 168, 298. Either she misstated information about her heirs, or she exercised authority she did not have. Likewise, the Sales Notice indicates that the “Hoyt Tract” in sec. 16 is for sale with the remaining inholdings; clearly someone has authorized sale of those lands. If it is another representative of the heirs, Hoyt’s authority is irrelevant.

As a legal matter, I would not excuse BLM’s obligation to comply with NEPA section 102(2)(E), 42 U.S.C. § 4332(2)(E) (2000), based on private agreements among applicants seeking an ROW for use of the public lands. The project proponents agreed among themselves to refuse each other access to avoid obvious alternatives reducing public land use. Such agreements cannot be interposed to deflect NEPA’s requirements with respect to alternatives analysis in a way that forces BLM to ignore environmentally superior alternatives. I believe we have generally resolved this issue in rulings that, when BLM must provide access to inholdings, the choice of access may not be controlled by the landowner where other options are available. *D.J. Laughlin*, 154 IBLA 159, 165 (2001), cited in *Ronald Malone*, 173 IBLA 332 (2008); *Kirk Brown*, 151 IBLA 221, 228 (1999); *Edward J. Connelly*, 94 IBLA at 145-46; see also *Union Telephone Company Inc.*, 173 IBLA 313 (2008). To the extent the issue of BLM’s obligation to provide use of public land to uncooperative private parties has not been fully resolved by this Board, I would resolve it now and rule against the project proponents. I would reject a principle establishing that ROW applicants, clearly acting in concert relative to use and disposal of their properties, can agree among themselves to orchestrate an outcome that delivers use of the public land of their choosing for their own benefit. I would remand this case.

This is also my answer to the Majority's complaint that the BLM need not consider ROW 97059 because "[t]his is not the ROW that El Monte applied for." Maj. at 122. That may be a FLPMA answer, but it is not an answer under NEPA. Under NEPA, BLM is obligated to consider alternatives that are technologically, environmentally, and economically superior. ROW 97059 is unequivocally such a possibility and BLM cannot dispense with such an obvious option merely because the applicants apply for access elsewhere. Under NEPA law, "all reasonable alternatives must be considered (*North Slope Borough v. Andrus*, 486 F.Supp. 326, 330 (D.D.C. 1979)), and obvious alternatives may not be ignored (*California v. Bergland*, 483 F.Supp. 465, 488 (E.D. Cal. 1980))." *State of Wyoming Game & Fish Commission*, 91 IBLA at 369. This does not mean BLM has to adopt the ROW 97059 alternative; it has discretion to grant whatever ROWs it believes are proper under the circumstances. But for its decision to be "fully informed," obvious alternatives must be considered.

Nor does the Settlement Agreement change this conclusion. The Burkes and Garcias were parties. BLM signed the agreement; the County and the other proponents did not. The Settlement Agreement fully acknowledged that compliance with NEPA and FLPMA was required. In the face of claims that the EA was drafted to justify routes established in the Settlement Agreement, the EA responded that the settlement was "not binding on BLM." EA Appendix B at 8. I query whether, under the Attorney General's Settlement Guidelines, the Department of Justice would have entered into an agreement that would circumvent BLM's discretion under or obligation to implement either statute. BLM did not contend that the Settlement Agreement allowed it to ignore a NEPA obligation to consider alternatives; otherwise, it would not have considered 8 of them. Once BLM acted on NEPA's requirement to consider alternatives, it was required to consider reasonable and obvious ones such as a road using ROW 97059.

I disagree with the Majority that, should BLM consider ROW 97059, it "will have to restrict or close the affected public lands" due to the Burkes' closure of Horcado Ranch Road. Maj. at 123. This strikes me as a non-issue. I do not know the combination of routes from the west and east that actually could have minimized, rather than maximized, impacts on the public lands because BLM did not consider such an alternative. Noting that the Settlement Agreement purported to resolve issues for non-parties to it, I have no basis for concluding what pre-litigation access was actually used by the project proponents other than the Garcias. Even in its Request for Solicitor's Opinion, TAFO sought authority to limit, to one, the number of eastern spurs, not to foreclose eastern access. AR 82 at 2-3.¹⁶ I would leave those

¹⁶ Thus, I also disagree with the majority (at 123) that use of the PNM ROW would necessarily require "many miles of new roads." TAFO did not believe this was the

(continued...)

issues for BLM to decide in the first instance.¹⁷ I would not excuse BLM's obligation to consider obvious alternatives under NEPA because it might raise a "serious question" regarding Horcado Ranch Road. It seems to me that such questions are already sufficiently joined.¹⁸

III. *The EA Should Have Considered Indirect Impacts of the Action on Neighboring Developments to the South.*

The only way for future residents of the Association lands (the intended market for the "connected action") to get there, other than by helicopter, is by driving from Santa Fe through the residential subdivisions to the south. These subdivisions are described as semi-rural, but high-end, large-lot, new developments. When residents there pointed out that their own roads are not sufficient to meet County standards (as set forth in the Development Plan) for handling the additional 704 daily traffic trips from the connected action, stated that their own Infrastructure is not sufficient to meet additional needs for police, fire and medical care, and asked BLM to describe the indirect effects of the development to the north on themselves, BLM refused. The Comment Resolution, at 7-10, denied any BLM obligation to address indirect impacts (contending that doing so would be the County's job) on grounds that residential development is not "linked" with granting the ROWs and is entirely speculative. BLM must employ the same development parameters that it

¹⁶ (...continued)

case when it recommended to the Solicitor "a single spur road" to the east, in the Horcado Ranch Road area. *Id.* at 3.

¹⁷ As noted above, in 2000, TAFO denied a PNM request for an ROW across the same public lands based on stated plans to establish an ACEC there. BLM must act consistently and consider ways to minimize impacts on lands it had previously endeavored to protect. *Westar Energy, Inc., v. Federal Energy Regulatory Commission*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (agencies must treat like cases alike). While appellant's claims may be a NIMBY issue, as the majority contends, consistency in actions taken by a single agency is not.

¹⁸ Appellants contend that the Horcado Ranch Road runs through private lands owned by Ed and Donna Klopfer, and that SNIC owns an ROW for Horcado Ranch Road. SOR at 19. The Klopfers claim that Hoyt "insisted" that the road be "legally declared private" in 1991, that they have never given easements to the Ortizes, and that they would not willingly grant easements for subdivision development. AR 247, July 4, 2004, Klopfer comments; AR 260, Klopfer phone call; AR 27, Nov. 7, 2003, E-Mail to Nancy Kastning, SWCA. According to the POD, the road may be an R.S. 2477 public highway. AR 173 at 2. In response to comments, the EA notes: "Members of the El Monte Roads Association have a 'prescriptive easement' over the Klopfer . . . portion[] of Horcado Ranch Road." EA Appendix B at 7.

used in its connected actions analysis, which it already assumed was *not* speculative. In fact, reviewing the EA's description of the number of houses in subdivisions to the south, along with the map of them at Figure 2.1, and the Development Code Appendix 5.A, the residents to the south may be correct in surmising that residential development of the Association lands will ultimately compel expansion of roads to the south to meet County Development Code standards. I cannot determine this from the record, but BLM can do so with knowledge plainly in its possession. As a matter of NEPA law and foreseeability, it is BLM's (not the County's) obligation to consider indirect effects in its EAs. I would require BLM to analyze indirect effects of the "connected actions" on public lands to the north, as they can readily be expected to be felt on the subdivisions to the south.

This does not mean an ROW would not ultimately be granted. Addressing its effects would have included indirect effects of traffic on neighboring landowners, not just direct impacts in the form of traffic on private/public lands to the north. But acknowledging indirect impacts would not be a major undertaking. The majority misconstrues my dissent when it presumes that I would expect an EA, in these circumstances, to consider fully direct impacts of subdivision development that will occur in the future, as in *Howard B. Keck, Jr.*, 124 IBLA at 44. My point is only that CEQ rules require consideration of indirect impacts "caused by the action . . . later in time or farther removed in distance" that are reasonably foreseeable. 40 C.F.R. § 1508.8(b). The EA did not do this, and the Comment Resolution refused to do so.

Conclusion

BLM easily ascertained what it should have done to comply with the law. BLM employees sought to address publicly the project proponents' plans to sell their inholdings for anticipated residential development. BLM employees sought to devise and consider alternatives that would "avoid or minimize adverse effects" from Buckman Road following the same ROW allowed PNM for its utilities. BLM employees sought a clear statement of indirect effects. BLM employees obviously did not anticipate that performing such tasks would be seriously difficult, burdensome, or time-consuming. What has consumed so much time is that they ultimately did not persevere. I would remand this matter to BLM to require an application fully compliant with FLPMA, consider a realistic alternative utilizing the ROW corridor Hoyt and her heirs have already been granted, and identify, for those residents to the south who will bear the brunt of the infrastructure changes resulting from the

Association's sale of private parcels for residential development, indirect impacts that will occur.

_____/s/_____
Lisa Hemmer
Administrative Judge

I concur:

_____/s/_____
Sara B. Greenberg
Administrative Judge

I concur:

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge

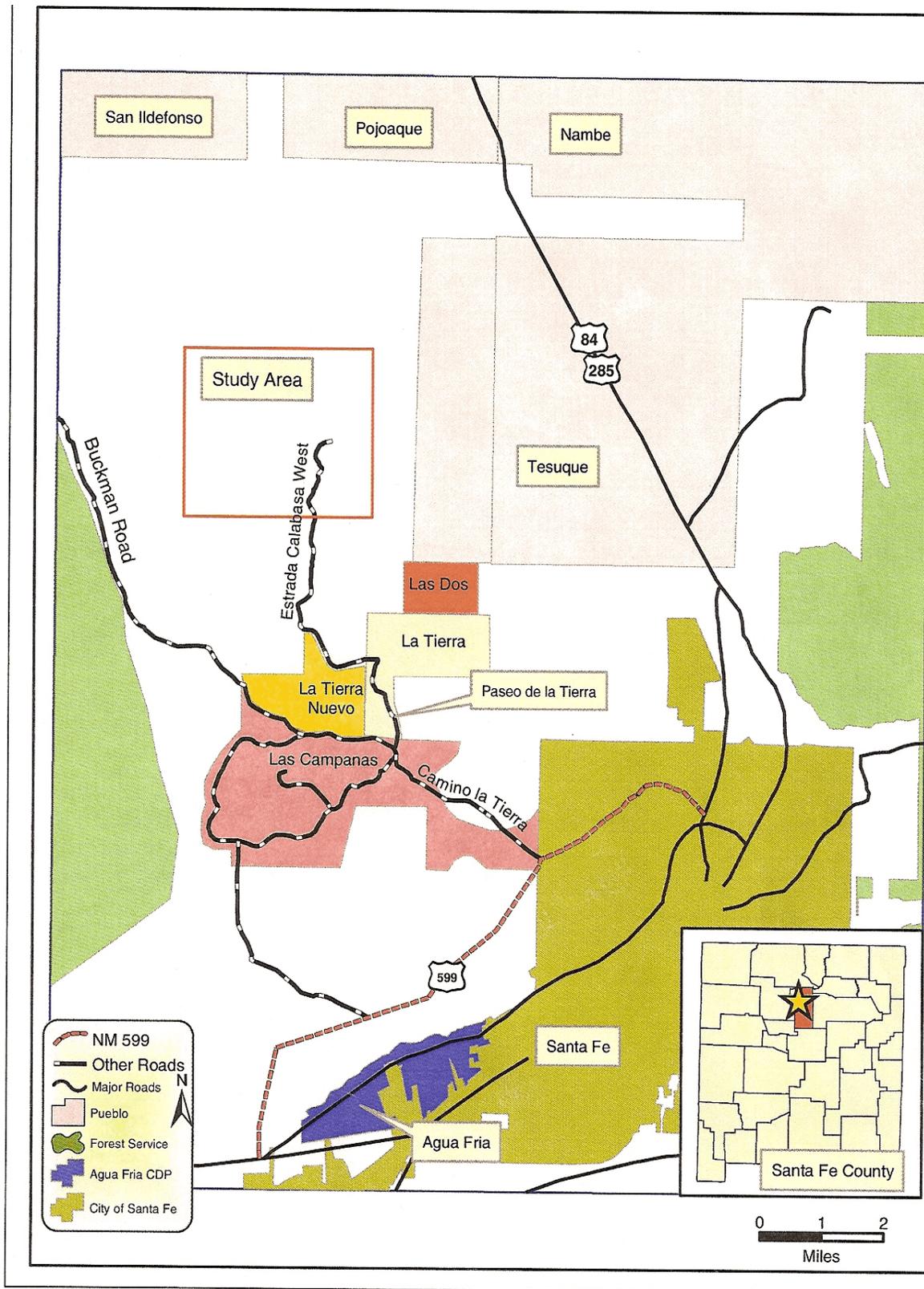
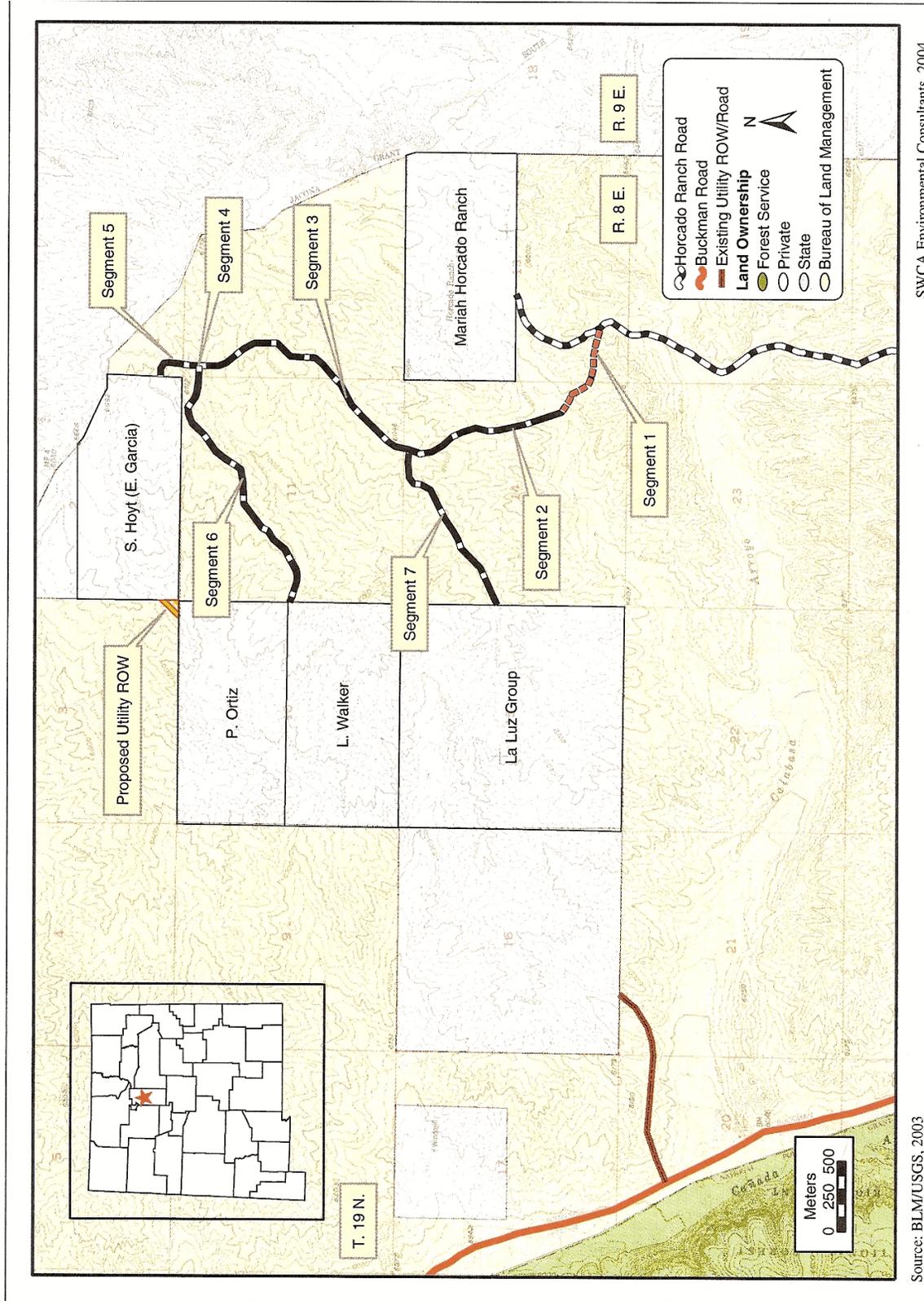


Figure 2.1 . Overview of Project area.



SWCA Environmental Consultants, 2004

Source: BLM/USGS, 2003

Figure 2.3. Alternative A.

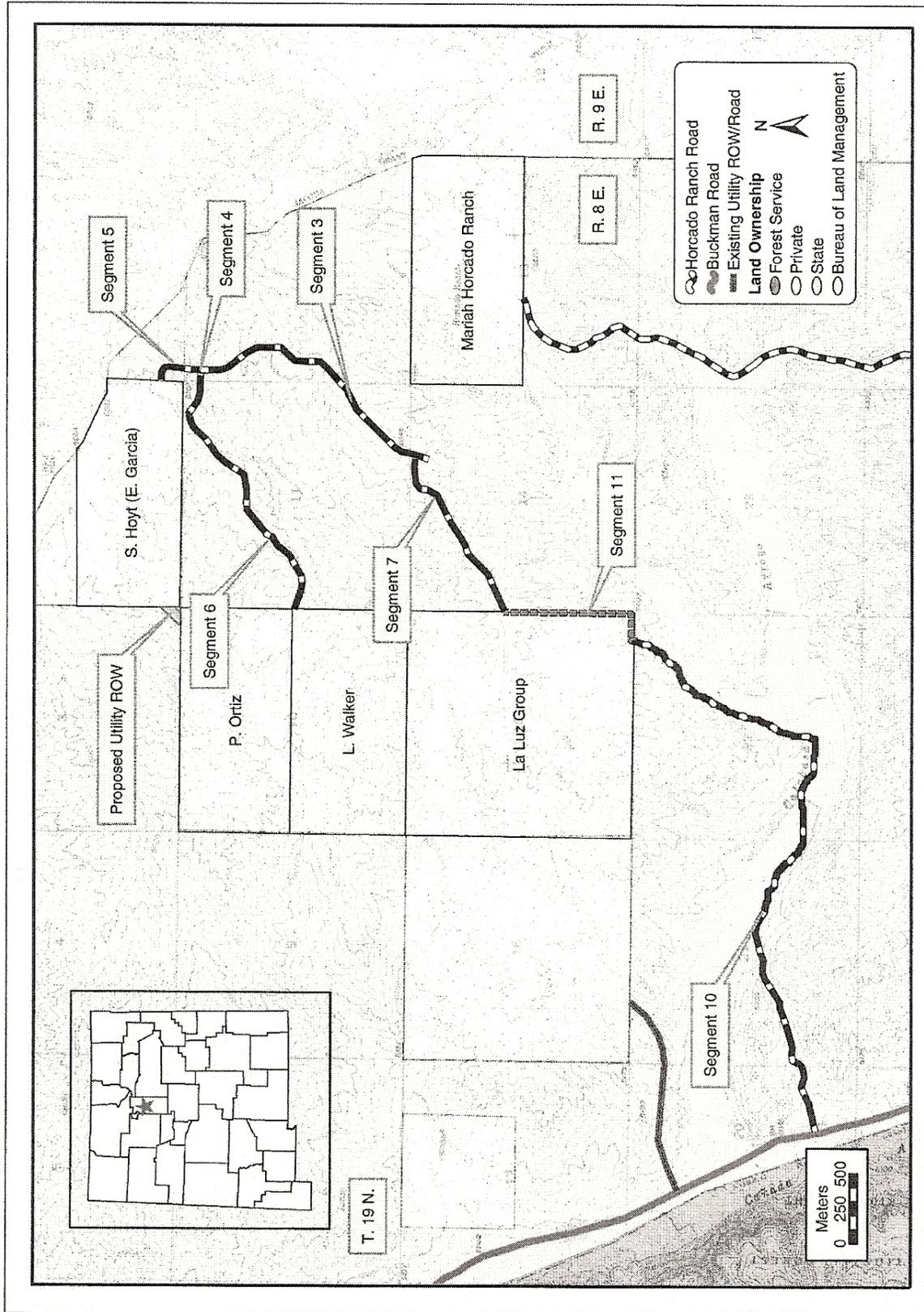


Figure 2.7. Alternative E.