



ORION ENERGY, LLC

175 IBLA 81

Decided June 30, 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

ORION ENERGY, LLC

IBLA 2007-171

Decided June 30, 2008

Appeal of a decision by the Assistant Field Manager of the Kingman, Arizona, Field Office, Bureau of Land Management, to grant a right-of-way to the Mohave County Board of Supervisors. AZA-33512.

Set aside and remanded.

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

BLM properly authorizes rights-of-way for access roads 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 set aside where the appellants 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.

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

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

An environmental document under the National Environmental Policy Act of 1969 (NEPA) must address the indirect effects of development on private lands, including reasonably foreseeable changes in land use, population density, and other environmental impacts, provided the proposed Federal action will cause or facilitate such development to occur. The extent to which indirect effects must then be addressed in taking a hard look at environmental impacts under NEPA depends upon the degree to which such development can be reasonably ascertained, as under private development plans approved by local authorities.

APPEARANCES: Grady Gammage, Jr., Esq., Phoenix, Arizona, for BP Alternative Energy AN, Inc. (formerly, Orion Energy, LLC); Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Norman D. James, Esq., Phoenix, Arizona, for Intervenor, Arizona Land Development, Inc.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Orion Energy, LLC, now BP Alternative Energy AN, Inc. (BP), has appealed a March 27, 2007, decision by the Assistant Field Manager of the Kingman, Arizona, Field Office, Bureau of Land Management (BLM), to issue a right-of-way (ROW), AZA-33512, to the Mohave County Board of Supervisors (Mohave County). This ROW grants Mohave County the “right to construct, operate, maintain, and terminate a road” which has 59 “corner crossings” of and four linear ROW segments on public lands in the White Hills area south of the Lake Mead National Recreation Area.

The ROW granted by BLM affects about 50,000 acres which are in a “checkerboard” pattern of alternating sections in private and Federal ownership. A “corner crossing” is necessary to construct a road crossing the corner shared by four sections, allowing the width of a road crossing diagonally between sections of private land to traverse Federal lands.¹ One “corner crossing” is granted for each affected

¹ Although not raised as an issue, it seems indisputable that corner crossings are necessary to have legal access to private lands interspersed with public lands in a checkerboard pattern. See *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (creation of a checkerboard pattern under 12 Stat. 489 (1862) did not reserve an easement in the

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section of Federal land (two are needed to cross from one section of private land onto another when the two other sections at that corner are Federal lands). Each “corner crossing” allows the use of 0.287 acres; the ROW’s 59 “corner crossings” allow the use of 17 acres of Federal land.² The primary ROW segment extends for approximately six miles east from U.S. Highway 93 to an area of anticipated private development and covers 118 acres of public lands; the three other linear ROW segments allow the use of an additional 24 acres of public lands.³

Background

Mohave County’s ROW application was preceded by two applications from Arizona Land Development, Inc. (Arizona Land). The first, filed jointly with Double Diamond Utilities, Inc. (along with Arizona Land, collectively referred to as “Land Developers”), sought a ROW for nine “corner crossings” and a ROW corridor, explaining that they were needed “to provide legal and physical access to Senator Mountain Estates.” The second sought a ROW for ten “corner crossings,” stating that legal access was needed “before the private land can be sold and the intervening federal land must be crossed with proper authorization.”⁴ On August 14, 2006, the Land Developers entered

¹ (...continued)

United States to pass over the corner of an odd numbered section in private ownership to reach an even numbered section retained by the Federal government); *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1265 (9th Cir. 2006); *United States v. Jenks*, 129 F.3d 1348 (10th Cir. 1997).

² The grant identifies specific corners of secs. 4, 10, T. 25 N., R. 20 W., sec. 6, T. 27 N., R. 17 W., secs. 2, 4, 6, 8, 10, 12, 14, 16, 18, 24, 26, 36, T. 27 N., R. 18 W., secs. 4, 6, 12, 16, 20, 22, T. 27 N., R. 19 W., sec. 2, T. 27 N., R. 20 W., secs. 18, 30, T. 28 N., R. 17 W., secs. 12, 14, 24, 32, 34, 36, T. 28 N., R. 18 W., secs. 30, 32, 34, 36, T. 28 N., R. 19 W., sec. 36, T. 28 N., R. 20 W., and secs. 22, 26, T. 29 N., R. 18 W., Gila and Salt River Meridian (G&SR Mer.).

³ The primary ROW segment crosses secs. 1, 2, 3, 4, 5, 6, T. 27 N., R. 20 W., G&SR Mer.; the other linear segments cross secs. 26, 32, 34, T. 28, R. 19 W., G&SR Mer.

⁴ By e-mail on Sept. 13, 2006, the Land Developers requested BLM to note that Mohave County’s application supersedes the second of their ROW applications. Although the record does not indicate whether BLM took formal action on that request, we here consider that second ROW application to have been withdrawn. Arizona Land’s earlier ROW application is for different lands and was not addressed in the decision on appeal;

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into a “Master Agreement” with BLM for processing ROW applications filed by either company or by Mohave County.⁵

Mohave County’s application requested 59 “corner crossings” and four linear ROW segments which would collectively cover 114.38 acres of the public lands.⁶ The application explained that “[t]he initial clearing and grubbing of a 24’ wide roadway is intended to begin as soon as possible” and would “include grading, a hard surface roadway application of penetration chip seal or other county approved soil stabilization, and drainage facilities including possible culverts, rip-rap, and drainage swales.” It further stated that the roadway would be used for 1 to 3 years, at which time “the Developer intends to initiate the full width road section design work in accordance with county standard[s]” and that “full width improvements may include paved road lanes, permanent drainage structures (culverts, rip-rap, swales, etc.), median area, and possible pullouts along the route.”

BLM issued a draft environmental assessment (EA) for public comment and then issued its final EA in March 2007 for the “Mardian Scenic Parkway and Corner Crossing Road Rights of Way Application AZA-33512.” EA AZA-310-2006-031. The EA explains that U.S. Highway 93 will be rerouted and that a new bridge and highway would be completed, at which time “the northwestern part of Arizona (White Hills area) would be within commuting distance from Las Vegas.” EA at 3. As explained in its statement of purpose and need:

The population growth in Las Vegas and surrounding southern

⁴ (...continued)

we consider it no further.

⁵ Mohave County was not a party to that agreement. In addition, while 43 C.F.R. § 2804.17 is cited as the authority for BLM’s entering into that agreement, the record does not include the Land Developers’ “scope of activity,” their “preliminary work plan,” or a “preliminary cost estimate and a timetable for processing the application and completing the projects.” See 43 C.F.R. § 2804.17(b). Instead, the agreement simply provides a table of times within which BLM would process various applications and a table of estimated payments for BLM staff work during FY 2007. Although the “Master Agreement” may not be binding on Mohave County or complete under 43 C.F.R. § 2804.17, we need not resolve those issues to decide this appeal.

⁶ While the ROW issued to Mohave County states that it “shall be perpetual in nature,” this ROW grant also states it “may be renewed” and could expire. See 43 U.S.C. § 1764(b) (2000); 43 C.F.R. § 2805.11(b).

Nevada communities has been explosive with up to 6,000 people moving to these areas every month such that Las Vegas and Clark County, Nevada, have grown to an excess of a million people. Property values in Clark County have increased commensurate to this growth.

Arizona Land Development, Inc. or associated entities own over 40,000 acres of private land in the White Hills area. It has plans to build homes on the private lands associated with this rights of way application. It is anticipated that these homes would provide affordable housing for many of the people desiring to work, retire and recreate in Clark County where available land for housing is becoming scarce.

....

The rights of way are needed and essential for access to and the development of the private lands associated with the rights of way application. The road would allow for the uninterrupted flow of traffic and services between the affected private properties. Adequate access is critical to the success of the development of the affected private lands.

EA at 3, 6. The EA also points out that approving the ROWs is consistent with Mohave County resolutions approving area plans for “The Ranch at White Hills” and “The Mardian Ranch,” which are described as providing for low (1-5 units per acre), medium (5-10 units per acre), and high (10+ units per acre) density residential housing, businesses, roads, open space, parks, and public facilities. *Id.* at 6.⁷ The EA evaluated the proposed action (*i.e.*, issuance of the ROW) and a “no action alternative.” *Id.* at 10-11.

The Assistant Field Manager issued a Finding of No Significant Impact (FONSI) on March 6, 2007. His FONSI states that the EA addressed “Unique Characteristics of the area” and found that “cultural resources, farmlands (prime or unique), historic properties, wetlands, Threatened and Endangered species, wild and scenic rivers,

⁷ The Ranch at White Hills Area Plan was approved by Mohave County in 2004; The Mardian Ranch Area Plan was approved in 2006. EA at 6. The Arizona Department of Water Resources determined that sufficient water is available for The Ranch at White Hills and was then evaluating whether sufficient water is also available for The Mardian Ranch development. *Id.* at 6-7. In early 2007, the Arizona Department of Transportation was evaluating the Land Developers’ proposed funding for an interchange with U.S. Highway 93. *Id.* at 7.

wilderness, Areas of Critical Environmental Concern, etc. are either not present or not expected to be affected.” FONSI at 1. The FONSI concludes that even with additional effects from “other actions and impacts occurring within the area of White Hills,” overall cumulative impacts of the proposed action are “not expected to be significant.” *Id.* at 2.

The Assistant Field Manager approved Mohave County’s application and granted the ROW at issue, serialized as AZA-33512, on March 27, 2007 (ROW grant). BLM’s grant of this ROW includes attached maps and stipulations. *See* ROW grant Exs. A - G. The primary ROW segment (6 miles) applied for by Mohave County, intended for a high speed access road to Land Developers’ development, was on the northern edge of secs. 3, 4, 5, 6, T. 27 N., R. 18 W., G&SR Mer. The draft EA stated that this “new high speed access road . . . could be located along the southern boundary of these same sections . . . [to] abut private lands to the south[,] affording greater public benefit for general access.” Draft EA at 28. Mohave County did not object to relocating the access road along an existing road used by private landowners to the south, but Arizona Land did, claiming that it would provide a less aesthetically pleasing entrance to their development (*e.g.*, haphazard development on adjacent private lands to the south) and that their high speed access road “would create unsafe conditions for local traffic and particularly for the fronting lot owners.” Mohave County e-mail, Jan. 30, 2007; Arizona Land Correspondence dated Jan. 12, 2007.

BP was informed of the ROW by decision dated March 27, 2007. The BLM Assistant Field Manager there explained that the ROW had been issued to “provide legal and physical access to private land” and to “provide access to Master Planned communities that have been approved by the Mohave County Board of Supervisors,” attaching copies of both the ROW and the supporting EA prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000). BP’s notice of appeal and statement of reasons (SOR) were then timely filed.⁸

Arguments on Appeal

BP seeks to protect its interests in developing wind energy projects in the White Hills area. BP holds two BLM-issued ROWs for wind energy testing and monitoring sites (AZA-32315 and AZA-32655), encompassing more than 19,000 acres of Federal lands, and has submitted a “Wind Project” plan of development (POD) for nearly 20,000 acres

⁸ Arizona Land was granted intervention by order dated June 18, 2007. BLM thereafter moved to consolidate this appeal with a separate appeal by Aurumbank Incorporated, IBLA 2007-170. Although both challenge the same ROW, they raise fundamentally different, non-overlapping issues. We elect to address each appeal separately and therefore deny BLM’s motion to consolidate.

of public lands, including land subject to the ROW at issue. SOR at 1-2; *see* Arizona Land Answer Exhibit C. BP also holds wind development rights on nearby private lands. SOR at 1-2. BP contends that BLM failed “to fully assess the impacts of the Residential Development and the Road ROW on the Appellant’s Wind Project, associated ROWs and Wind Project POD which is before the BLM for review.” *Id.* at 2. BP claims that the roads to be constructed and the residential development allowed under the ROW granted by BLM will adversely affect its Wind Project. In particular, it challenges three aspects of the EA which are identified below in their order of importance to our resolution of this appeal.

First, BP argues that the EA is inadequate because its assessment of environmental impacts addresses only the road itself, not the environmental effects of development made possible by this ROW. BP notes that the EA considered the Land Developers’ development plans, but only in its discussion of socio-economic impacts and a brief comment on cumulative impacts. SOR at 2-3; *see* EA at 22, 25. Because access for residential development on non-BLM land “is entirely dependent on obtaining road access across BLM-administered public lands,” BP contends that the EA should have been expanded to more directly “assess the cumulative environmental impacts of the entire Residential Development.” SOR at 3. BP there quotes BLM’s Record of Decision for “Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments” (Wind ROD), wherein BLM states:

In general, the scope of the NEPA analyses will be limited to the proposed action on BLM-administered public lands; however, if access to proposed development on adjacent non-BLM land is entirely dependent on obtaining ROW access across BLM-administered public lands and there are no alternatives to that access, the NEPA analysis for that proposed ROW may need to assess the environmental effects from that proposed development.

BLM responds that excluding consideration of impacts from the Land Developers’ planned development was not error because that development had been earlier approved by Mohave County. Answer at 7-8. It adds that BP’s reliance on the above-quoted statement of BLM’s NEPA responsibilities is inapposite because that statement was made in connection with wind project ROWs and this case involves a ROW for roads. *Id.* at 8-9. Arizona Land recognizes that Federal agencies are required to take a “hard look” at the environmental consequences of their actions and must consider the direct and indirect effects as well as the cumulative effects of a proposed action under regulations promulgated by the Council on Environmental Quality (CEQ). Arizona Land Answer at 11-12. It nonetheless contends that BLM was not required to address the environmental effects of private development because it has no authority to control development on private lands. *Id.* at 1-2, 11, 14.

BP separately argues that the EA is deficient in addressing only impacts to its meteorological towers and not to the environmental effects of residential development on its Wind Project, which BP believes could be significant because its application includes “wind turbine corridors and related facilities[,] some of which are located in close proximity to the proposed Road ROW.” SOR at 2; *see* EA at 8-9. BP points out that the EA acknowledges that BLM’s review of visual and noise impacts resulting from its proposed wind energy development will be “more problematic than if the private lands were to remain undeveloped.” EA at 26. As acknowledged in the EA, BLM issued its Wind ROD and an accompanying “BLM Wind Energy Development Program Policies and Best Management Practices (BMPs)” which will be used to review BP’s Wind Project POD. EA at 26; *see* BLM Answer, Ex. B. Because “Residential Development could have substantial effects” on BP’s ability to fully develop its Wind Project,⁹ it questions the EA’s assertion that the ROW “would not preclude development of a wind energy project on public lands” and contends that the EA should have more fully considered environmental impacts under NEPA, including “potential impacts of the Residential Development on the Wind Project -- even if development of the Wind Project is not precluded -- and how to accommodate both developments.” SOR at 2; *see* EA at 10.

BLM counters that BP failed to provide objective evidence that alleged conflicts between its wind project and the ROW are anything more than a difference of opinion or establish that its Wind Project POD would be precluded by the ROW. BLM argues that BP has not met its burden for demonstrating error in the EA’s consideration of environmental effects on its wind project(s). Answer at 6-7; *see also* Arizona Land Answer at 16-17.

Third, BP argues that the EA is deficient because it evaluated only granting the ROW and a no action alternative and did not assess other reasonably available alternatives, such as scaling back residential development “to avoid or minimize potential impacts on the Wind Project.” SOR at 3. More particularly, BP suggests that BLM could have identified and should have considered a limited action alternative “that would have no significant effect on the Wind Project.” *Id.* BLM counters that since BLM could not “scale back” the development approved by the County, it was without the authority to consider BP’s suggested alternatives. Answer at 9-10; *see also* Arizona Land Answer at 19-22. Arizona Land adds that other alternatives were, in fact, considered: a land exchange which was not evaluated because BLM determined it was infeasible, as well as relocating the high speed access road discussed above. *Id.* at 20.

⁹ The protest filed by Orion Energy LLC noted a Mohave County wind ordinance which would impose siting limitations on wind energy facilities, including setbacks from residential properties and sound limitations, as measured from residences.

Analysis and Discussion

[1] The Board has frequently stated that approval of a ROW application is a discretionary act and that a decision granting or denying a ROW ordinarily will be affirmed when the record shows the decision was based on a reasoned analysis of the factors involved, including environmental impacts, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision.¹⁰ *Santa Fe Northwest Information Council (SNIC)*, 174 IBLA 93, 104 (2008). As to the consideration of environmental impacts, we there explained:

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. 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.

174 IBLA at 107 (citations omitted). Thus, if it is shown that an EA failed to take a hard look at the environmental impacts of a proposed action or that a FONSI and its supporting EA failed to make a convincing case that an EIS was not required, BLM's decision will be set aside.

¹⁰ The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2000), grants the Secretary broad authority to make rights-of-way grants subject to specific terms and conditions, directs BLM to include terms and conditions which "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment," and authorizes it to include such terms and conditions in granting a ROW as may be necessary to "manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way" and "the public interest in the lands traversed by the right-of-way or adjacent thereto." 43 U.S.C. § 1765 (2000); see *Shell Pipe Line Corp.*, 69 IBLA 103, 105 (1982). Thus, BLM has clear, discretionary authority to deny a ROW, impose mitigation measures through stipulations, approve fewer than the requested number of ROWs, and/or limit the width of the ROW to constrain the type of roads that could be constructed.

CEQ's regulations allow BLM to decide, as it did in this case, whether to prepare an EIS by preparing an EA. 40 C.F.R. § 1501.4. Whether BLM ultimately decides to issue an EIS or EA/FONSI, BLM must take a hard look at the environmental impacts of its proposed action, including direct and indirect effects and cumulative impacts. 40 C.F.R. §§ 1502.16, 1508.9(b), 1508.25; *see SNIC*, 174 IBLA at 107 (a "rule of reason" is applied in determining whether potential environmental impacts were adequately considered). Direct effects are those "which are caused by the action and occur at the same time and place," 40 C.F.R. § 1508.8(a); indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects 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." 40 C.F.R. § 1508.8(b). A cumulative impact "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. It is against the above-identified principles and definitions that we address BP's several claims of error under NEPA.

A. The EA Failed to Take a Hard Look at the Indirect Effects of Residential Development Facilitated by the Proposed Action.

The need to address private development facilitated by a proposed BLM action is addressed in three key NEPA decisions of this Board: *Howard B. Keck, Jr.*, 124 IBLA 44 (1992), *aff'd sub nom.*, *Keck v. Hastey*, Civ. No. S92-1670-WBS-PAN, 1993 WL 485212 (E.D. Cal., Oct. 4, 1993) (*Keck*); *James Shaw*, 130 IBLA 105 (1994) (*James Shaw*); and *SNIC*, 174 IBLA at 109-15, which analyzed and applied *Keck* and *James Shaw* to the facts of that case. We recognized in *Keck* that "BLM must, when considering the impact of a proposed [land] exchange, assess the impact of private development enabled by the exchange if the exchange will lead to such development or at least make development likely." 124 IBLA at 47. After determining that development of the subject property was likely and that an environmental review of developmental impacts was required, we considered the proper scope of that review. Noting that a precise plan of development had not been formulated (no decisions had yet been made on the "specific nature and scope of development"), we held that the EA in that case need only address the *type* of development likely to occur. 124 IBLA at 48, 50. As stated in *SNIC*, "[t]he point of the Board's holding in *Keck* is that BLM need only consider the effects of development that are reasonably foreseeable." 174 IBLA at 115. Applying *Keck*, we held that BLM properly considered the reasonably foreseeable impacts of constructing 128 homes (not the 670+ feared by the appellants), "given the complete absence of any plan, or even clear intention, of the proponents to subdivide or otherwise develop their private properties." *Id.*; *but see Dissent* at 174 IBLA at 146-47.

In *James Shaw*, we held that “BLM must address indirect effects, including reasonably foreseeable changes in land use or population density, provided those effects are caused by its action” and that Federal agencies are required “to consider the effects of *private* development where it is likely to be facilitated by Federal action, or at least made likely.” 130 IBLA at 113, and cases cited. After finding that “the subdivision would very likely proceed if BLM denied [the ROW application],” we concluded 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 C.F.R. 1508.8(b).” 130 IBLA at 114, 115; *see SNIC*, 174 IBLA at 110 (“The Board in *James Shaw* made clear . . . that BLM is required by NEPA to consider the environmental impacts of foreseeable development resulting from the ROW.”). Stated in the obverse, NEPA documentation need not address environmental impacts which would likely occur regardless of any action by BLM. *Center for Biological Diversity*, 162 IBLA 268, 283-84 (2004); *San Carlos Apache Tribe*, 149 IBLA 29, 47 (1999).

[2] We here conclude that if BLM’s proposed grant of a ROW causes or facilitates private development to occur, the reasonably foreseeable environmental impacts of that development must be considered under NEPA. The extent to which impacts must then be addressed, however, depends on the degree to which such development can be reasonably ascertained; BLM is not required to indulge in speculation or to use a “crystal ball” to identify those impacts. *St. James Village*, 154 IBLA 150, 157-58 (2001); *Keck*, 124 IBLA at 50; *see Sierra Club Uncompahgre Group*, 152 IBLA 371, 384-85 (2000); *Southern Utah Wilderness Alliance*, 124 IBLA 162, 167 (1992) (EA for pipeline ROW must assess “the foreseeable impacts of the wells it is designed to serve”). As discussed below, the ROW at issue is reasonably necessary to develop private lands, and the nature and scope of the ROW was readily ascertainable under the Land Developers’ County-approved development plans, yet BLM failed to identify or assess the indirect effects of that development and so failed to take a hard look at the environmental impacts of its proposed action.

The EA discusses anticipated development primarily in responding to the following question: “What would be the economic impacts to the proposed developments?” EA at 8. The EA answers that question by stating that the ROW “would allow owners of checkerboard sections of private land in White Hills Central to access and develop their private property . . . in accordance with the Area Plans approved by Mohave County in 2004 and 2006,” and that the “potential economic loss of not developing the private property as planned has been estimated to be no less than \$300,000,000,” adding that the County would then lose more than \$3,000,000 per year in expected property taxes and other income, as well as a reduction in anticipated employment and business opportunities. EA at 22, 25. Like the statement of purpose and need, the foregoing establishes that BLM’s proposed action of granting the ROW will

enable the Land Developers to undertake residential and commercial development on more than 30,000 acres of private land, construct thousands of homes, and earn more than \$300,000,000 when their approved master development plans are fully implemented. Moreover, the EA identifies the ROW as “essential” and “critical” to the Land Developers’ approved development plans, stating that “[w]ithout road rights-of-way, development in accordance with the Mohave County approved Master Planned Communities would not occur.” EA at 6, 33. We therefore conclude that this ROW will facilitate and result in the development of private lands and now turn to whether the reasonably foreseeable environmental impacts of that development were considered to the extent such development could be reasonably ascertained by BLM.

The EA is devoid of any substantive information about, or meaningful analysis of, changes in land use, population growth, and their “related effects on air and water and other natural systems, including ecosystems” that are facilitated by and likely to result from the proposed agency action. See 40 C.F.R. § 1508.8(b). Thus, it does not appear that BLM considered the reasonably foreseeable environmental impacts of anticipated development on the Land Developers’ private lands. Moreover, as to the degree to which such development could be reasonably ascertained by BLM,¹¹ we note that the Land Developers’ County-approved development plans were sufficiently detailed for BLM to calculate that 85-90% of the private land would be used for housing, roads, and public facilities, to determine that as many as 25,000 homes could be built in only one portion of the area, and to conclude that approval of the ROWs would benefit the Land Developers by an estimated \$300,000,000 (and Mohave County by \$3,000,000 per year in property taxes and other County income). EA at 25, 26. Equally compelling is the fact that the 59 “corner-crossings” and three of the ROW segments are positioned to allow for the construction of a planned road network for accessing residences, businesses (e.g., shopping centers and office buildings), and public facilities (e.g., schools and hospitals), all to be located on private lands. See EA at 27 (Map 3a). In addition to providing the basis for identifying reasonably foreseeable effects on land use and population density, these approved plans could have been used by BLM to quantify and evaluate “related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b); see 40 C.F.R. § 93.150.¹² Clearly, BLM had

¹¹ The Land Developers’ County-approved plans are not in the record BLM forwarded to the Board, but they were no doubt submitted by the Land Developers in connection with their ROW applications and/or by the County in its ROW application. See 43 U.S.C. § 1761(b)(1) (2000); 43 C.F.R. § 2804.12(a)(6).

¹² Although the EA recognizes that the ROW permit “would increase the density of people living in the area which may eventually have an adverse overall impact to the

(continued...)

considerable information available to it from which the nature and scope of anticipated development could be readily ascertained, yet it failed to use that information to identify, consider, and analyze reasonably foreseeable environmental impacts of that development. Simply stated, BLM failed to comply with its NEPA obligations because it did not take a hard look at the indirect effects of private development caused or facilitated by the proposed action of approving a ROW.

Arizona Land contends that *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) allows BLM to exclude developmental impacts from its NEPA review. Arizona Land Answer at 11-14. The Supreme Court there held that the Federal Motor Carrier Safety Administration (FMCSA) was not required to address emissions from Mexican trucks crossing the border because FMCSA was required by law to certify any motor carrier that satisfied its safety regulations and had no ability to limit or prevent environmental impacts resulting from cross-border truck operations. 541 U.S. at 769 (it would be contrary to "NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform"). The Court also held "that where an agency has no ability to prevent a certain effect . . . , the agency cannot be considered a legally relevant 'cause' of the effect [under 40 C.F.R. § 1508.8(b)]." 541 U.S. at 768, 770. Since BLM's grant of this ROW is reasonably necessary for the Land Developers' County-approved development to occur, the indirect effects and cumulative impacts of that development are caused or facilitated by that ROW, and BLM had the discretionary authority to grant, limit, or deny the ROW, *see discussion supra*, we find *Dep't of Transp. v. Public Citizen* to be inapposite to the circumstances here presented and Land Developers' reliance on that case to be misplaced.

Arizona Land also asserts that "NEPA does not grant the BLM authority to override Mohave County's local planning and zoning decisions or otherwise authorize the BLM to regulate land uses occurring on private land" and that "the extent of the federal agencies' involvement in and control over a non-federal project determines the scope of the agency's NEPA analysis." Arizona Land Answer at 11, 15-16. We rejected similar claims in *James Shaw*, holding that "the fact that the housing development was not within BLM's authority to grant or deny is not, by itself, grounds to remove BLM's obligation to consider its environmental effects." 130 IBLA at 114; *see Julie M. Walton*, 150 IBLA 222, 228 (1999); *Mullin v. Skinner*, 756 F. Supp. 904, 921-23 (E.D.N.C. 1990). More fundamentally, it has long been recognized that reasonably foreseeable indirect effects of development must be considered under NEPA even where such development

¹² (...continued)

existing public land resource in the form of increased littering, off road vehicle traffic, and people problems in general," EA at 25, it does not quantify those impacts or otherwise make a convincing case that these impacts are not significant under NEPA.

will take place solely on private property. *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007) (crossing public lands to log private lands); *Sierra Club v. Marsh*, 769 F.2d 868, 877-79 (1st Cir. 1985) (building a causeway and road to an undeveloped island for the construction of port facilities); *Port of Astoria v. Hodel*, 595 F.2d 467, 477-79 (9th Cir. 1979), *Sierra Club v. Hodel*, 544 F.2d 1036, 1044 (9th Cir. 1976) (construction of new power transmission line for an aluminum processing plant); *City of Davis v. Coleman*, 521 F.2d 661, 674-77 (9th Cir. 1975) (highway interchange providing access for industrial development).

In summary, we find on the record provided by BLM that the Land Developers' County-approved plans anticipate and authorize the construction of what appears to be a city with amenities and that this planned development on private lands is dependent upon (not independent of) BLM's granting the ROW at issue in this appeal. Under these circumstances, we conclude that BLM was required by NEPA to identify and analyze reasonably foreseeable impacts of County-approved development plans to the extent allowed by available information. Given the lack of any meaningful analysis of the indirect effects of the Land Developers' approved development plans or their likely environmental impacts, we do not find that BLM took the requisite "hard look" at the environmental consequences of its proposed action or that it made a convincing case that the reasonably foreseeable environmental impacts from constructing a city within commuting distance of Las Vegas will not be significant, as discussed below.

B. The EA Was Too Narrow and Circumscribed and Failed to Take a Hard Look at Direct Effects of the Proposed Agency Action.

BLM was well aware of the plant and animal species in the area, but critical aspects of the EA are confined only to direct effects on the public lands underlying the ROW corridor. In describing vegetation and wildlife habitat in the affected environment, the EA broadly states:

The proposed project area is located in the Mohave Desert Floristic Region, a region with a rich diversity of plant species characterized by their shrubby nature. The dominant aspect plants are Mohave yucca, Joshua tree and creosotebrush. The vegetation provides forage for domestic livestock and a wide variety of desert wildlife typified by desert mule deer, coyote, Harris ground squirrel, and many avian and reptile species. The vegetation also intercepts rain drops minimizing soil erosion in a direct relationship with the amount of ground surface covered.

....

The vegetation and soils in the area combine to provide habitat for wildlife such as small mammals, reptiles and birds and species of concern such as the Swainson's hawk, loggerhead shrike, Arizona night lizard, kit fox, Sonoran desert tortoise, Allen's lappet browed bat, pale Townsend's big-eared bat, California leaf-nosed bat, Bendire's thrasher, gilded flicker, western burrowing owl, golden eagle, Gila monster, and the chuckwalla. Mule deer, Gambel's quail, mourning dove, white-winged dove, cottontail and black-tailed jackrabbit are the primary wildlife species hunted within the project area.

EA at 18. Nonetheless, the EA states that only "114 acres of native vegetation . . . [.] 409 Joshua trees, 551 Mohave yuccas, 254 barrel cactus, and 118 Johnson's pineapple cactus" would be affected when roads are constructed under the ROW. EA at 21. Concerning impacts to wildlife habitat, the EA similarly addressed only direct effects:

There would be permanent loss of approximately 114 acres of wildlife foraging habitat, due to dedicated motor vehicle use, for all wildlife species found within the project area including bats, mule deer, golden eagles and other migratory birds. Potential nesting and burrow habitat for the Bendire's thrasher, loggerhead shrike, western burrowing owl, Swainson's hawk, gilded flicker, desert tortoise, Arizona night lizard, Gila monster, chuckwalla, and kit fox, would also be lost. Although there is habitat present and nearby occurrence records for the above species, a survey of the proposed ROW route did not find signs of any of these species within the proposed ROW boundaries with the exception of the loggerhead shrike. . . . No roosting habitat for any bat species is known from the project site.

EA at 21.

The Arizona Game and Fish Department (AGFD) commented on the draft EA to express its wildlife concerns:

The White Hills area is occupied by or falls within the range of many Special Status Species recognized by both of our agencies. These include desert tortoise, golden eagle, western burrowing owl, banded Gila monster, chuckwalla, Arizona night lizard and several species of bats. Based on Breeding Bird Surveys conducted in the area, the following birds of federal conservation concern have been documented: gilded flicker, Bendire's thrashers, and loggerhead shrike. Several conservation plans also identify important species in the White Hills.

AGFD Correspondence dated Jan. 19, 2007. It also asserted that “this EA does not adequately address potential or cumulative impacts to [desert tortoise, burrowing owls, kit fox, mule deer, and spotted leaf-nosed bat]” and claimed that the EA is not consistent with NEPA. *Id.* BLM responded by expanding the list of affected species appearing in the draft EA, but its discussion of special status species remained cursory: “There are no known Threatened, Endangered or Candidate Plant [sic] Species within the project or action area . . . with the exception that the project area is located within the designated non-essential experimental population range of the California condor.” EA at 20. The problem with this statement is that the area referred to in the EA is not the 30,000 private acres to be developed or the 20,000 public acres which will be affected by that development, but the 114 acres directly affected by new roads to be constructed under Mohave County’s ROW application. As acknowledged in the EA, BLM’s “survey of the proposed ROW route did not find sign of any of these species within the proposed ROW boundaries with the exception of the loggerhead shrike.” EA at 21.¹³ Although BLM clearly knew that special status species are present on nearby Federal lands, the EA does not mention any impacts to them beyond conclusory, almost generic, statements of effects on wildlife and wildlife habitat.

As to wildlife impacts, the EA states that there would be increased “vehicle collisions with wildlife and increased habitat fragmentation . . . [which may affect] wildlife’s ability to occupy or forage within an area” and “may cause larger wildlife species such as mule deer and Swainson’s hawks, to limit or abandon use of the area that they may traditionally use for foraging and movement.” EA at 21. These modestly stated conclusions stand in marked contrast to cumulative impacts, which the EA identifies as including “the loss of approximately 30,000 acres of native habitat on private land . . . [,] the fragmentation of existing habitat within a larger area,” and the “degradation of habitat values and subsequent loss of wildlife productivity on 50,000 acres of public and private lands.” *Id.* at 26.

The 114 directly affected acres analyzed and evaluated in the EA are the lands covered by Mohave County’s initial ROW application, but the ROW granted by BLM is largely for different lands. The ROW relocated the high speed access corridor to the south and enlarged it to affect 118 different acres than had been considered in the EA or surveyed and inventoried for special status species. *See* discussion *supra*; Biological Report, dated Sept. 26, 2006. Although this relocated route was identified in the draft EA, the final EA did not assess the direct effects of that route or its efficacy as a

¹³ A Biological Report, dated Sept. 15, 2006, states that the inventory to determine the presence or absence of plant or animal threatened, endangered, and sensitive species, and species of special concern “was conducted by driving or walking to each corner and walking the right of way in a crisscross pattern.”

mitigation measure. See *Southern Utah Wilderness Alliance*, 166 IBLA 140, 175-76 (2005), and cases cited. Additional access roads and ROWs are identified in the Land Developers' approved development plans which are reasonably foreseeable and would result in the loss of an additional 776 acres of public lands. EA at 26, 27 (Map 3a).¹⁴ Thus, only 48 of the 159 directly affected acres of public lands covered under the ROW (48 of the 935 acres to be lost under the Land Developers' proposed access routes) were addressed in the EA and FONSI.¹⁵ Had the EA not been so narrow and circumscribed, we might find some merit to BLM's argument that BP has not demonstrated error under these circumstances, but such is not this case.¹⁶ We therefore find that BLM failed to take a hard look at the direct effects of its proposed action of granting the ROW at issue.

C. BLM Failed to Make a Convincing Case that an EIS was not Required.

The EA identifies cumulative impacts by stating that the proposed granting of this ROW would "increase the density of people living in the area which may eventually have an adverse overall impact to the existing public land resource in the form of increased littering, off road vehicle traffic, and people problems"; change the natural vista

¹⁴ The EA identifies that a total of 890 acres would be lost, including the 114 acres under Mohave County's ROW application (890 - 114 = 776).

¹⁵ Under the precedent established by the ROW and absent this appeal, we recognize that BLM would likely consider the environmental effects of additional access routes under other ROW applications in either EAs tiered to the EA at issue or a Documentation of Land Use Conformance and NEPA Adequacy expressly identifying this EA. See *Center for Native Ecosystems*, 170 IBLA 331, 345-46 (2006). We question, but need not here decide, whether it is proper for BLM separately to consider these several access routes to the Land Developers' approved development.

¹⁶ Other, similar deficiencies are also presented in this case. For example, the EA concludes "that there will be no economic effect to the town of Dolan Springs," EA at 23, yet this town is on Pierce Ferry Road between U.S. Highway 93 and the Land Developers' approved development. It simply is not credible to suggest that Dolan Springs will not be affected by the nearby construction of several thousand residences and the presence of many thousands of new residents. Similarly understated is the EA's representation that "[t]here *could be an increase in casual use* of the public lands intermingled with the development for such thin[g]s as hiking, rockhounding, target shooting, etc. There *could also be an increase in unauthorized uses* such as OHV riding, dumping of trash, etc." EA at 27 (emphasis added). The addition of thousands or tens of thousands of residents to this arid, relatively desolate area certainly "could" have these consequences, and others too.

currently enjoyed “to one viewed from fast moving vehicles without the accompanying enjoyment”; and adversely affect “[w]ildlife habitat values and hunting opportunities on approximately 20,000 public land acres.” EA at 25, 26. It then notes that wildlife may be displaced or killed by increased traffic and off-road vehicle use, harassed by “free-roaming cats and dogs coming from the subdivisions,” and exposed to disease from domestic pets. EA at 26. The EA concludes its discussion of wildlife by stating: “A degradation of habitat values and subsequent loss of wildlife productivity and diversity on 50,000 acres of public and private lands within the project area is anticipated.” *Id.* In determining that an EIS is not required, the FONSI simply states: “The cumulative effects section of the EA addresses other actions and impacts occurring within the area of White Hills. The addition of these effects to the effects of implementing the proposed action or no action alternative is not expected to be significant.”

We find under the circumstances of this case, as detailed above, that neither BLM’s FONSI nor its supporting EA make a convincing case that the degradation of 50,000 acres, including degrading 20,000 acres of public land, is not a significant impact requiring the preparation of an EIS (*i.e.*, that there will be no significant environmental impacts from the proposed agency action or that any impacts will be reduced to insignificance by appropriate mitigation measures).

The crabbed approach reflected in the EA simply is not in accord with NEPA. The direct and indirect effects of the Land Developers’ approved development plans must be considered, but the EA does not establish that BLM compiled available information concerning those effects or took a hard look at the environmental consequences of its proposed action. 40 C.F.R. § 1508.27(b)(3). Nor does this EA provide a reasoned analysis to support the FONSI’s conclusion that the environmental impact of the proposed action “is not expected to be significant.” *See* EA at 26. Thus, we are unable to conclude that BLM made a convincing case that the environmental effects of this planned development are insignificant or will be reduced to insignificance by mitigation.

D. BLM’s Consideration of Adverse Impacts to Wind Energy Development and Alternatives to Minimize those Impacts.

BP objected to the ROW because it “would be incompatible with the development of wind energy on public lands” and would adversely affect BLM’s consideration of its 20,000-acre Wind Project POD. EA at 10; SOR at 2. The EA responds by stating that since BP’s project would not be precluded by the ROW, “[i]t is beyond the scope of this EA.” EA at 10. While the ROW granted by BLM may create reasonably foreseeable indirect effects and cumulative impacts that must be considered under NEPA, it is by no means clear that such effects and impacts will adversely affect wind energy development, as claimed on appeal by BP. *See* SOR at 3. On remand, it will be for BLM to determine

in the first instance whether those effects and impacts are reasonably foreseeable. If they are, alternatives or mitigation measures may then be appropriately considered to minimize or avoid those effects and impacts; but if indirect effects are not reasonably foreseeable or likely to adversely affect other activities on the public lands, including wind energy development, BLM's negative determination need only be identified and explained to satisfy its NEPA obligations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the March 27, 2007, decision of the Assistant Field Manager to issue ROW permit AZA-33512 is set aside and remanded.

_____/s/_____
James K. Jackson
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge