CONCERNED CITIZENS FOR NUCLEAR SAFETY, *ET AL.*

175 IBLA 142 Decided July 10, 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

CONCERNED CITIZENS FOR NUCLEAR SAFETY, *ET AL.*

IBLA 2008-147 Decided July 10, 2008

Appeal from a decision of the Field Office Manager, Taos (New Mexico) Field Office, Bureau of Land Management, to grant rights-of-way across public lands for the Buckman Water Diversion Project.

Motions to intervene granted; Motions to strike denied; Contingent request for hearing denied; Motions to dismiss denied; Decision affirmed; Petition for stay denied as moot.

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

When appellants charge that the environmental impact statement upon which a BLM decision to grant rights-of-way for that part of a water diversion project on public land is inadequate, that decision will be affirmed when the record shows that BLM is well informed about the issue of concern to the appellants, *i.e.,* the possible degraded condition of diverted water due to contamination from the Los Alamos National Laboratory; that the potential for contamination is low; and that use of the diverted water is subject to compliance with Federal drinking water standards.

APPEARANCES: Bruce Frederick, Esq., Doug Meiklejohn, Esq., and Eric Jantz, Esq., Santa Fe, New Mexico, for Concerned Citizens for Nuclear Safety, Amigos Bravos, Inc., and Joni Arends; Nancy R. Long, Esq., and Mark T. Baker, Esq., Santa Fe, New Mexico, for the Buckman Direct Diversion Board; Stephen C. Ross, Esq., and Rachel A. Brown, Esq., Santa Fe, New Mexico, for the County of Santa Fe; Frank D. Katz, Esq., and Marcos D. Martinez, Esq., Santa Fe, New Mexico, and Barry M. Hartman, Esq., Washington, D.C., and Christopher R. Nestor, Esq., Harrisburg, Pennsylvania, for the City of Santa Fe; Charles T. DuMars, Esq., and Stephen Curtice, Esq., Albuquerque, New Mexico, for Las Campanas Limited Partnership.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Concerned Citizens for Nuclear Safety (CCNS), Amigos Bravos, Inc. (Amigos Bravos), and Joni Arends (collectively, appellants) have appealed from and petitioned for a stay of the effect of an October 4, 2007, decision of the Field Office Manager, Taos (New Mexico) Field Office, Bureau of Land Management (BLM), to grant rights-of-way (ROWs) for the "Buckman Water Diversion Project" (Project), across public lands administered by BLM in Santa Fe County, New Mexico.

Since the Project also involves the issuance of special use permits across Federal lands in the Santa Fe National Forest, administered by the Forest Service, U.S. Department of Agriculture, BLM and the Forest Service (collectively, the Agencies) issued a joint 36-page Record of Decision (ROD). Administrative Record Number (ARN) 469. BLM's decision to grant the ROWs appears at pages 20-21 of the ROD. The Forest Service's decision to authorize permits, although dated October 5, 2007, appears at pages 18-19 of the ROD. BLM and the Forest Service published Notice of Availability of the ROD in the *Federal Register* on February 11, 2008. 73 Fed. Reg. 7695, 7696. Only BLM's decision is at issue in this case.[1]

The Agencies prepared a joint Final Environmental Impact Statement (FEIS) for the purpose of addressing the potential environmental impacts of the proposed Project and alternatives thereto (including no action), as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000).

The purpose of the Project is to divert surface waters from the Rio Grande (the River) to supply water for consumption and other uses to residents in the County and City of Santa Fe, New Mexico. The Project is intended to satisfy the immediate and near-term need for a more reliable and sustainable supply of water than the current sources.

Under the proposed Project, a water diversion structure and sediment processing facility would be situated on Forest Service lands adjacent to the River. The first section of pipeline running from the processing facility to the first booster station would also be located on Forest Service lands. The remaining sections of pipeline, along with other booster stations and a water treatment plant, would be situated on BLM lands. The pipeline would run a total of approximately 12 miles across Federal lands to the plant, which would be operated by the City and County. The plant, which would be tied by pipeline to the City and County water systems, would treat all of the water diverted from the River. The quality of the treated water

[1] Appellants separately appealed the Forest Service decision, which was affirmed by the Deputy Regional Forester, Southwestern Region, on Apr. 25, 2008.

would be monitored, and solid waste generated by treatment would be disposed of in the local landfill.

Appellants' challenge to BLM's decision focuses on a single issue, *i.e.,* the inadequacy of the NEPA process. Appellants argue that during the NEPA process BLM failed to recognize or adequately address the potential for radionuclide or other water and soil contaminants emanating from the Los Alamos National Laboratory (Laboratory or LANL) to migrate into the River and enter the Project, thereby posing a significant threat to downstream water users.[2]

Because in reviewing this appeal for purposes of addressing the petition for stay, we conclude that appellants have failed to show any error in BLM's decision or the underlying NEPA process, we affirm BLM's decision and deny the petition for stay as moot.

Background

In 2001, the City, the County, and Las Campanas Limited Partnership (LCLP), which represents the residents of the private residential community of Las Campanas, situated just north of the City, applied for a grant of ROWs and special use permits across Federal lands administered by the Agencies for the purpose of undertaking the Project. Several years after the filing of the applications, the City and the County created the Buckman Direct Diversion Board (BDDB) to oversee the implementation and operation of the Project. The BDDB is the grantee of the ROWs in question, issued pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2000), to allow BDDB to construct, operate, and maintain water transmission pipelines and associated infrastructure on Federal lands.

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[2] The Laboratory is a Federal facility established in 1943, which has been and/or continues to be used for nuclear weapons design and testing; high explosives research, development, fabrication, and testing; chemical and material science research; electrical research and development; laser design and development; and photographic processing. It currently encompasses an area of approximately 40 square miles (or 25,600 acres) on the Pajarito Plateau in north-central New Mexico, about 25 miles northwest of the City. The area is dissected by numerous major surface drainages or canyons and their tributaries that flow easterly to the River and is underlain by a regional aquifer. Part of the Laboratory area borders the River approximately four miles downstream of the Project diversion point, and most of the area is also situated west of the River, downstream of the diversion point. *See* FEIS at 8 (Figure 1 (Location of facilities for the Proposed Action and alternatives)), 18 (Figure 2 (Vicinity map)), 95 ("The proposed diversion structure location is immediately upstream of an arroyo, Canada Ancha").

In his decision, the Field Office Manager approved the granting of ROWs for Project pipelines and other facilities on public lands administered by BLM. Importantly for our purposes, the Agencies concluded that, while they were not responsible for compliance with the Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j-26 (2000), which fell instead to the City, the County, and Las Campanas, "as water providers," they had determined, based on a review of "the best available information regarding the potential hazards posed by surface water diversion at the Buckman site," that "the risk of introducing harmful substances is low," adding: "[T]he measures proposed to stop taking water during storm events, as well as the use of the best available technology to remove any substances that could be diverted with the water, provide[] a reasonable certainty that this project will be able to meet the requirements of the Safe Drinking Water Act." ROD at 17. The Agencies also stated, in direct response to comments on the FEIS that the Project water might be "*unusable*" due to the presence of LANL-origin contaminants:

> Based on this information [in reports that were reviewed], it has been determined that the risk presented by contamination is small. Although contamination may be present at the lower detection limits (which [are] magnitudes below the established health standards for such substances), the Buckman applicants are required to meet all Federal standards for drinking water, which [are] based on continuous water quality monitoring.

Id. at 33.

Appellants timely appealed the Field Office Manager's decision. The County, the City, BDDB, and LCLP have all responded to the appeal and oppose the granting of a stay.[3] BLM opposes the granting of a stay.

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[3] Appellants filed a Motion to Strike in response to each Answer filed by the County, the City, BDDB, and LCLP, uniformly asserting that these entities have "no standing to participate in this appeal as a matter of right[.]" Motion to Strike Answer to Notice of Appeal and Motion for Summary Dismissal filed by BDDB (Motion to Strike) at 2. In responses to the Motions to Strike, the County, the City, and BDDB each moved to intervene in the appeal. Although LCLP has not separately moved to intervene, we will treat its response to the Motion to Strike as a motion to intervene in that appeal. Because they are the proponents and/or applicants for the Project, we grant the motions to intervene and deny the Motions to Strike. *See Bales Ranch, Inc.*, 151 IBLA 353, 355 (2000). Appellants have filed a "Contingent Request of Hearing," arguing that the Board should refer this case to an administrative law judge, pursuant to 43 C.F.R. § 4.415, if the Board grants one or more of the motions to intervene. We find no basis for such a referral and deny the request for hearing.

Motions to Dismiss for Failure to Serve

The County, the City, BDDB, and LCLP each motioned the Board to summarily dismiss the appeal, pursuant to 43 C.F.R. § 4.402, because appellants failed to serve the County, the City, BDDB, or LCLP with a copy of their notice of appeal within 15 days of filing the notice, as required by 43 C.F.R. § 4.413(a), alleging that each is an adverse party named in the ROD. Appellants argue that 43 C.F.R. § 4.413(a) does not apply because none of the entities is an adverse party named in the ROD. They also state that, in any event, BDDB was, in fact, served within the 15-day period. *See* Appellants' Motion to Strike at 4. A review of the appeal procedure set forth by BLM at page 20 of the ROD shows that BLM did not name any adverse parties. In addition, clearly the County, the City, BDDB, and LCLP each received copies of the notice of appeal, whether or not served by appellants. The motions to dismiss for failure to serve adverse parties are denied. *See Red Thunder, Inc.*, 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990).

Motions to Dismiss for Lack of Standing to Appeal

The County, the City, BDDB, and LCLP filed motions to dismiss the appeal for lack of standing. They do not challenge appellants' status, under 43 C.F.R. § 4.410, as a "party to a case;" rather they assert that appellants are not "adversely affected" by BLM's decision to grant the ROWs. Appellants oppose the motions.

In accordance with 43 C.F.R. § 4.410, an appellant must be both a "party to a case" and "adversely affected" by the decision being appealed, within the meaning of 43 C.F.R. § 4.410(b) and (d). *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-86 (2005), and cases cited therein. An appeal must be dismissed if either element is lacking. *Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997); *Mark S. Altman*, 93 IBLA 265, 266 (1986). We have long held that it is the responsibility of the appellant to demonstrate the requisite elements of standing. *Colorado Open Space Council*, 109 IBLA 274, 280 (1989).

Under 43 C.F.R. § 4.410(d), a party to a case is adversely affected by a decision when that decision has caused or is substantially likely to cause injury to a legally cognizable interest. *See*, *e.g.*, *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 81-82. When an organization appeals a BLM decision, it must demonstrate that one or more of its members has a legally cognizable interest in the subject matter of the appeal, coinciding with the organization's purposes, that is or may be adversely affected by the decision. *Id.* at 86-87.

The burden falls upon an appellant seeking to establish standing to appeal to make colorable allegations of an adverse effect, supported by specific facts, sufficient

to establish a causal relationship between the approved action and the injury alleged. *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004); *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. *Donald K. Majors*, 123 IBLA 142, 145 (1992). However, we have long held that the threat of injury and its effect on the 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). "[M]ere speculation that an injury might occur in the future will not suffice." *Colorado Open Space Council*, 109 IBLA at 280.

Appellants assert that they have shown standing to appeal based on two declarations: Declaration of Joni Arends, Executive Director, CCNS, dated Apr. 24, 2008 (Ex. A attached to Motion to Strike), and Declaration of Brian Shields, Executive Director, Amigos Bravos, dated April 22, 2008 (Ex. B attached to Motion to Strike).

Arends, who also appealed individually, asserts that she has been a member of CCNS since its founding in 1988 and has been its executive director since 2003. She states that CCNS is a non-profit community-based organization in Santa Fe established for the purpose of voicing community concerns about the transportation of nuclear waste from the Laboratory through Santa Fe, and that its mission has broadened to encompass "ensuring that LANL is in full compliance with all applicable laws and regulations and that the natural resources and biological integrity of New Mexico's air, water and land is protected and restored." Arends Declaration, ¶¶3, 4, at 1, 2.

Shields asserts that he is an original member of Amigos Bravos and has been its executive director since 1996. He states that Amigos Bravos is a non-profit statewide river conservation organization in Taos and Albuquerque, New Mexico, that was originally founded in 1988 for the purpose, *inter alia*, of "*[r]eturn[ing] New Mexico's rivers and the Rio Grande Watershed to drinkable quality wherever possible, and to contact quality everywhere else*." Shields Declaration, ¶3, at 1. He further states that the current strategic plan of Amigos Bravos "calls for stopping toxic contaminants from LANL from entering both the Rio Grande and community drinking water sources," and that it is committed to "ensuring that LANL is in full compliance with all applicable laws and regulations and that the natural resources and biological integrity of New Mexico's water is protected and restored." *Id.*, ¶4, at 2.

Both Arends and Shields further state, in identical language, that many of the organizations' members live in and around the River's watershed and its tributaries, including adjacent to or downstream from the Laboratory and that "[m]embers of [CCNS and Amigos Bravos] (including me) have also visited, hiked, swam and recreated in the river and [on] the [F]ederal lands on which the Buckman Direct Diversion [Project] will be located, and [we] intend to continue to do so in the future." Arends Declaration, ¶¶3, 5, at 1-2; Shields Declaration, ¶¶3, 5, at 1-2. They conclude: "The Buckman Direct Diversion [Project] requires substantial structures to be built on [Federal] lands, which will disturb the land and adversely affect [CCNS and Amigos Bravos] members' aesthetic enjoyment of the land." Arends Declaration, ¶5, at 2; Shields Declaration, ¶5, at 2.

To the extent that Arends and Shields assert that they have personally engaged, and intend to continue to engage, in use and enjoyment of lands and resources affected by the Project, they have demonstrated that Arends and the two organizations are substantially likely to be injured by BLM's decision to approve the granting of ROWs for construction, operation, and maintenance of the Project across these lands. These allegations alone are sufficient to establish standing to appeal for the organizations and for Arends.[4] The motions to dismiss for lack of standing are denied.

Appellants' Arguments

Appellants challenge BLM's decision to approve the granting of the Project ROWs, alleging that BLM violated section 102(2)(C) of NEPA by failing in the FEIS to address the potential for human health or other adverse environmental impacts associated with such diversion. Statement of Reasons (SOR) at 5. They assert that BLM failed specifically to address "the types of LANL-origin contaminants that might be diverted by the Buckman Direct Diversion," and "the levels of contaminants that might be expected under a normal or worst-case scenario," given the nature and

[4] Arends and Shields also state that members of their organizations are residents of the County and consumers of public drinking water supplied by the City and the County and that they will be potentially harmed by the approval of the ROWs, which will allow the Project to proceed. However, in their Declarations neither Arends nor Shields identifies herself/himself as one of the CCNS or Amigos Bravos members who resides in the County, and who consumes public drinking water supplied by the City or the County. Nevertheless, we note that in their notice of appeal at page 2 appellants represent that Arends is a "resident of Sante Fe County." These allegations provide an additional basis for standing for Arends and CCNS. No such representation is made regarding the location of Shields' residence. We note that his organization has offices in Taos and Albuquerque.

extent of contamination created over time by the Laboratory and the likelihood that such contaminants will, now and in the future, be transported to the Buckman Direct Diversion. SOR at 12. They conclude that "it is reasonably foreseeable that LANL-origin contaminants can and will be diverted into the Buckman Direct Diversion, thus potentially allowing hazardous and radiological contaminants to enter into a public water supply." *Id.* at 5. Appellants assert that members of the public

> could be exposed to these contaminants in several ways, including: (a) the failure to detect and remove LANL-origin contaminants from the water diverted by the Buckman [Water] Diversion Project; (b) the failure to reduce concentrations to safe limits; (c) long-term exposure to chronic and acute low levels of contaminants; (d) inadvertent releases from the diversion or distribution works; and (e) exposures incidental to the required disposal of the radiological, hazardous and toxic contaminants removed by the water treatment plant.

Id. at 14.

Appellants also argue that BLM failed to consider appropriate measures for mitigating the likely adverse effects of diverting contaminated water from the River, specifically addressing the effectiveness or consequences of treating the Project water to remove any contaminants emanating from the Laboratory, "except" to say that the water "would be treated to meet [F]ederal drinking water standards." *Id.* at 6.

Appellants ask the Board to overturn the approval of the ROWs and require BLM to prepare a new or supplemental EIS, addressing all of the reasonably foreseeable environmental impacts of approving the ROWs.

Discussion

[1] As we stated most recently in *Santa Fe Northwest Information Council, Inc.,* 174 IBLA 93, 104 (2008), the Board will affirm a BLM discretionary decision approving or rejecting a FLPMA 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. In this case, the only reason offered by appellants for overturning the decision to grant the ROWs is their assertion that the NEPA process underlying the decision is flawed because of a lack of consideration of the contamination issue. We find no flaw.

An EIS must constitute a detailed statement that takes a "hard look" at the potentially significant environmental consequences of the proposed Federal action and reasonable alternatives thereto, considering all relevant matters of environmental concern. *Oregon Natural Desert Association,* 174 IBLA 341, 345 (2008); *Biodiversity*

Conservation Alliance, 174 IBLA 1, 14 (2008), and cases cited. In determining whether the agency has taken a "hard look" at environmental consequences, the courts have applied a "rule of reason," the critical question being whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action and alternatives thereto. *Citizens for Alternatives To Radioactive Dumping v. U.S. Department of Energy*, 485 F.3d 1091, 1098 (10th Cir. 2007); *Swanson v. U.S. Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996); *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). A party challenging a BLM decision based on an EIS must demonstrate by a preponderance of the evidence and with objective proof that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Oregon Natural Desert Association*, 174 IBLA at 345; *Western Exploration Inc. and Doby George LLC,* 169 IBLA 388, 399 (2006), and cases cited.

In response to comments from CCNS and Amigo Bravos asserting the likelihood that contaminants from the Laboratory would negatively affect the quality of Project water for use as drinking water, the Agencies characterized such a likelihood in their "Response to Public Comments" as "speculative." FEIS at 265, 273. The Agencies did not think that contaminants would be transported to the River and downstream to the diversion point in substantial quantities, noting that, in any event, treatment by the Project would successfully render the water compliant with Federal drinking water standards:

> [T]he applicants will test and treat all water from the diversion site to Federal drinking water quality standards.[[5]] In addition, water quality data that was reviewed for this analysis does not indicate that there would be any problem with treatment of diverted water to Federal drinking water quality standards for distribution within the City, County, or Las Campanas distribution systems.

Id.

We find no evidence to support the conclusion that BLM is unaware of possible pollution by Laboratory-originated contaminants. *See, e.g.*, Final Report, "Historic and Current Discharges from Los Alamos National Laboratory: Analysis and Recommendations," dated September 2006 (ARN 389). Rather, after considering the

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[5] *See* FEIS at 21 ("Two new water treatment plants would be required for processing the raw water to safe drinking water standards"), 31 ("The facilities necessary to implement this proposal include . . . two water treatment plants (one located on private land and one located on land leased by the City from BLM) where the raw water would be treated to Safe Drinking Water Act standards").

potential for contaminants from the Laboratory to be diverted by the Project and cause human health or other adverse environmental impacts, the Agencies concluded in the ROD that the likelihood that the treated water would cause any such impacts was low, since the water would be required to meet Federal drinking water standards. *See* ROD at 17, 33-34; *see also* FEIS at 265.

Indeed, the record reflects the fact that the contamination issue was raised throughout the NEPA process, from scoping through comments on the FEIS. Regarding the Draft EIS comments, the Agencies concluded that

> because none of the information presented specific concerns about the water quality issue at Buckman that could not be mitigated, we found that they presented no additional substantive information about the presence of contamination. Therefore, the conclusion remained unchanged: the likelihood of contamination affecting the construction or operation of the Buckman Project was considered low and was not a significant issue warranting inclusion in the FEIS.

Memorandum to Project File from District Ranger, Espanola Ranger District, Santa Fe National Forest, dated Oct. 2, 2007 (ARN 435), at 2.[6]

The Agencies further stated, after citing numerous reports, that "[a]lthough the presence of Los Alamos generated contaminants in and along the river is documented in many of these reports, these documents also indicate the potential for exposure is very low and that the possible diversion of these contaminants, even if diverted, would be extremely low." *Id.*

Finally, the Agencies stated that the issue again was raised in FEIS comments with additional sources of information proposed for review; that all available information was reviewed "to assure all credible scientific information was taken into account" prior to making a decision; and that discussions with the Project proponents and Laboratory representatives offered "assurance that the facility could be operated in compliance with the Clean Drinking Water Act." *Id.* at 2. The Agencies concluded: "In sum, the available information does not change the fundamental conclusion that the nature of the potential for contamination at the Buckman site and the probability of any contamination entering the water system are very low." *Id.* at 3.

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[6] The District Ranger stated, at page 1 of his Oct. 2, 2007, Memorandum, that his memorandum "document[ed] how the Forest Service and Bureau of Land Management considered the available information in response to concerns raised [during the environmental review process] about contamination of the water and sediment of the Buckman Project Area caused by the Los Alamos National Laboratory's (LANL) activities."

It is true that the EIS does not discuss in detail the water treatment process, or specifically how particular contaminants from the Laboratory will be detected and removed. BLM, the Forest Service, and the Project proponents were, however, well aware of the basic design of the proposed water treatment process, which was based on the existing quality of the River water and the effectiveness of the adopted treatment methods in removing known contaminants. *See* FEIS at 40-42, 49-50, 100-01, 112; Letter to Appellants from Deputy Regional Forester, dated Apr. 25, 2008, at 3 ("[T]he potential for transmitting potential hazards was evaluated as a part of the project feasibility assessment"); Report, "Feasibility Study and Recommendations for San Juan-Chama Water Division," dated September 2002 (ARN 192), at 4-23 to 4-25; Report, "Buckman Surface Diversion Project, Project Description and Preliminary Construction, Operations, and Maintenance Plan," dated Feb. 13, 2002 (ARN 87), at 3-15 to 3-21. The Agencies concluded, based on review of water quality data, that no problems were anticipated in treating the water "to Federal drinking water quality standards for distribution within the City, County, or Las Campanas distribution systems." FEIS at 265, 274. Moreover, the fact remains that, absent treatment sufficient to render the River water of a quality that meets Federal drinking water standards, no diverted River water will be made available for public use, and, therefore, no human health or other adverse environmental impacts are likely to occur.[7]

Appellants' supporting documentation establishes, at best, that waters that will be taken in the future from the River by the Project may contain contaminants which are presently being, or which have in the past been, generated by the Laboratory, and that such waters will be transported by the ROWs to the water treatment plant for the City and the County. However, such documentation does not demonstrate that the treatment plant will be inadequate to protect human health. In fact, Dr. Kerry J. Howe, whose draft report, entitled "Effectiveness of the Proposed Santa Fe City/County Water Treatment Plant for Removing Radiological and Other Specific Contaminants" (Howe Draft Report) (ARN 442), is cited by appellants (excerpts attached to SOR as Ex. E), reached the opposite conclusion. Based on an independent assessment conducted on behalf of BDDB of the proposed effectiveness of the water treatment plant, Howe concluded in his Draft Report:

> The evidence indicates that the proposed C/CWTP [City/County Water Treatment Plant] will be able to reliably provide water to the community that meets all drinking water regulations with respect to

[7] To the extent that appellants are challenging the adequacy of the Federal drinking water standards to protect human health, such a question is beyond the scope of the present appeal, since BLM does not set the standards. *See* Petition at 4 ("[T]he drinking water standards for plutonium and other radionuclides are not necessarily protective of human health").

> these [identified] contaminants. This reliability results from a three-tiered barrier: (1) concentrations in the river that are nearly always below regulated levels, (2) an operational strategy that can prevent water possibly containing higher levels of contaminants from entering the plant,[[8]] and (3) a robust treatment process that removes or could be modified to remove all the contaminants of interest.

Howe Draft Report at i;[9] *see* Memorandum to BDDB from Rick Carpenter, Senior Water Resources Coordinator and BDD Project Manager, Water Division, City of Santa Fe, *et al.*, dated July 26, 2007 (ARN 432), at 1 ("We believe that the robust BDD water treatment plant processes in combination with operations procedures and monitoring will result in production of drinking water that will not contain LANL-origin contaminants that have in the past or may in the future migrate to the Rio Grande").

Moreover, in commenting on the Draft EIS, neither the U.S. Environmental Protection Agency (EPA) nor the New Mexico Environment Department (NMED), the appropriate Federal and State regulatory agencies responsible for safe drinking water, registered any concern that the Project would result in exposing the public's drinking water to LANL-origin contaminants. *See* Letter to Forest Service from Acting Chief, Office of Planning and Coordination, Region 6, EPA, dated Feb. 11, 2005 (ARN 325); Letter to Forest Service from Secretary, NMED, dated Mar. 4, 2005 (ARN 336).[10]

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[8] Prior to issuance of the ROD, BDDB adopted an "operational constraint" which provides for shutting off the diversion of water from the River when the potential for contamination is high, *e.g.*, when there are high amounts of turbidity and suspended solids in the River. "This constraint means that there is less likelihood of Los Alamos generated contamination being diverted at any levels, let alone levels that could cause harm." Memorandum to Project File from District Ranger, dated Oct. 2, 2007, at 1; *see* Joint Response to SOR at 11.

[9] The Howe Draft Report was finalized on Apr. 15, 2008. *See* Ex. C (attached to Joint Response to SOR). The Final Report reached the same basic conclusion, for the same three reasons, though phrasing the conclusion in terms that the proposed water treatment plant "meets all SDWA [Safe Drinking Water Act] maximum contaminant levels on a continuous basis for all contaminants discussed in this report." Howe Final Report at i.

[10] Appellants assert in a reply to the City's response to the Motion to Strike that their claim that the Project could exacerbate the extent and distribution of LANL contamination is not based on speculation, but on substantial data, citing and providing a copy of a 2002 NMED document. That document details the history of

(continued...)

Thus, utilization of water from the Project is expressly contingent on all water extracted from the River and diverted by the Project for public use meeting Federal drinking water standards, thereby eliminating any threat to human health.

It is clear that appellants' disagreement is with the Agencies' conclusion regarding LANL-origin contaminants, *i.e.*, that they do not represent a significant impact to public drinking water quality, because the case record shows that BLM was fully informed about the issue. Mere differences of opinion about the likelihood or significance of environmental impacts provide no basis for overturning BLM's decision. *See Oregon Natural Desert Association*, 173 IBLA 348, 352 (2008).

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 County's, the City's, BDDB's, and LCLP's motions to intervene in the pending appeal are granted. Appellants' Motions to Strike are denied. Appellants' Request for a Contingent Hearing is denied. Intervenor's motions to dismiss the appeal for failure to serve adverse parties and for lack of standing to appeal are denied. The decision appealed from is affirmed and the petition for stay is denied as moot.

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

/s/
H. Barry Holt
Chief Administrative Judge

[10] (...continued)
contamination at LANL, which is not in dispute. The case record, however, shows the likelihood of contaminants entering the River upstream of the diversion to be low, and there is no evidence that NMED is concerned that the Project will exacerbate the extent and distribution of LANL contamination.