



GREAT BASIN RESOURCE WATCH
AND WESTERN SHOSHONE DEFENSE PROJECT

182 IBLA 55

Decided February 7, 2012



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

GREAT BASIN RESOURCE WATCH
AND WESTERN SHOSHONE DEFENSE PROJECT

IBLA 2011-59

Decided February 7, 2012

Appeal from a Record of Decision of the Tonopah Field Office, Bureau of Land Management, approving an amendment to the Round Mountain Gold Corporation's Plan of Operations for the proposed Round Mountain Mine Expansion Project, located in northern Nye County, Nevada. NVN-072662.

Motion to dismiss denied; request to strike denied as moot; decision affirmed.

1. Environmental Quality: Environmental Statements-- Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements

BLM's approval of an amended Plan of Operations for open pit gold mining will be affirmed where, in the EIS, BLM has taken a hard look at the significant environmental consequences of mining operations and reasonable alternatives, where the record supports BLM's conclusion that implementation of the amended Plan of Operations, which includes environmental protection measures and was approved with required mitigation measures, will not result in unnecessary or undue degradation of the public lands, and where appellants have failed to show error in the decision.

APPEARANCES: Roger Flynn, Esq., and Jeffrey C. Parson, Esq., Western Mining Action Project, Lyons, Colorado, for appellant; Elizabeth A. Gobeski, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Jim B. Butler, Esq., and John R. Zimmerman, Esq., Reno, Nevada, and Nathan M. Longenecker, Esq., Assistant General Counsel, U.S., Kinross Gold U.S.A., Inc., Reno, Nevada, for intervenor, Round Mountain Gold Corporation.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

I. BACKGROUND

Great Basin Resource Watch and Western Shoshone Defense Project¹ (WSDP) (collectively referred to as GBRW) appeal the June 2010 Record of Decision (ROD) of the Tonopah Field Office (TFO), Bureau of Land Management (BLM), approving an amendment to the Round Mountain Gold Corporation's (Round Mountain's)² Plan of Operations (PoO (NVN-072662) or Proposed Action) for the proposed Round Mountain Mine Expansion Project (Project), submitted pursuant to the Department's regulations at 43 C.F.R. Subparts 3809 and 3715, and State of Nevada regulations governing the reclamation of mined lands. The ROD relies on the April 2010 Final Environmental Impact Statement (FEIS),³ prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), that evaluated potential environmental impacts of the PoO.⁴

The Project area is located east and southeast of the town of Carvers, and 55 miles north of the town of Tonopah, in the Big Smoky Valley, in northern Ney County, Nevada. The Proposed Action generally would include the expansion and development of facilities in the existing Round Mountain Area, including expansion of the Round Mountain open pit and dewatering operations, and the construction of new facilities in the Gold Hill Area, including an open pit, two waste rock dumps, and production water wells. ROD at 1-2, 4-7; FEIS at 2.4. The two areas would be connected by a new 1.1-mile-long Transportation/Utility Corridor. ROD at 2.

The Project requires new surface disturbance of approximately 4,698 acres, including 4,581 acres of public land administered by BLM and 117 acres of private

¹ According to the Statement of Reasons (SOR), WSDP is a non-profit organization located in northern Nevada. SOR at 11. "Its mission is to protect and preserve Western Shoshone rights and homelands for present and future generations based upon cultural and spiritual traditions." *Id.*

² By Order dated Dec. 9, 2010, the Board granted Round Mountain's motion to intervene.

³ The FEIS is included in the Administrative Record (AR) beginning at AR 11391. Henceforth, citations to the FEIS will refer only to the FEIS document.

⁴ BLM published a Notice of Intent to Prepare an EIS on Dec. 26, 2006, held public scoping meetings on Jan. 19 and 20, 2007, and contacted a number of interested entities, including GBRW and the Timbisha, Duckwater, Yomba, and Ely Western Shoshone Tribes to solicit their views. AR 1679-1700; ROD at 22. The 45-day public comment period for the Draft EIS began July 31, 2009.

land owned by Round Mountain. FEIS at 2-27, Table 2.4-2; ROD at 2. A total of approximately 1,026 million tons of processed ore and 1,136 million tons of waste rock will be mined. ROD at 4,7. The Project's principal method of mining the ore (primarily gold, but also silver) is open pit mining. The Round Mountain and Gold Hill pits would each be deep enough to penetrate the groundwater table. FEIS Figures 2.4-4 and 2.4-15. As a result, water is expected to naturally flow toward and into the pit. To prevent this during mining operations, the Project will utilize a process called "dewatering," in which wells placed around the periphery of the pits extract water to lower the water table. FEIS at 2-54, 2-67. BLM analyzed the impact dewatering would have on area groundwater sources, including the extent to which dewatering could lower the groundwater table. *Id.* at 4.3-1 to 4.3-30, 4.3-41 to 4.3-46.

The anticipated pit mine life would be approximately 13 years, followed by ore processing, reclamation, site closure activities, and post-closure monitoring. ROD at 2. The company will stop dewatering the pits at the close of mining operations, and over time both the Round Mountain and the Gold Hill pit lakes will fill with groundwater, forming terminal "pit lakes" or "hydraulic sinks," where groundwater that flows into the pits does not flow back out into downgradient groundwater sources. FEIS at 4.3-45, 4.3-51. BLM analyzed the formation and water quality of the pit lakes at FEIS 4.3-30 to 4.3-40, 4.3-47 to 4.3-55.

Round Mountain developed and incorporated into the PoO environmental protection measures (EPMs) that BLM treats as design features of the Proposed Action. ROD at 7-16; FEIS at 2.5. In addition, through the NEPA process, BLM analyzed other measures to mitigate and monitor impacts and prevent undue or unnecessary degradation of public lands. ROD at 16-21; *see* FEIS Chapter 4 (Environmental Consequences), at *e.g.*, 4.9.6 (social and economic values), 4.12.6 (visual resources), 4.13.6 (soils and watershed), 4.14.6 (vegetation), and 4.20.6 (noise). BLM selected the Proposed Action as the Preferred Alternative. The Decision approving the Proposed Action, with certain mitigation and monitoring measures analyzed in the FEIS, determined that the Project would not cause unnecessary or undue degradation of the public lands and that it is consistent with other applicable legal requirements. ROD at 2-3.

Appellants principally argue that BLM violated FLPMA's unnecessary or undue degradation provision, 43 U.S.C. § 1732(b) (2006), by approving a project predicted to result in minor exceedances of Nevada ground water quality standards, and that BLM also violated NEPA, 42 U.S.C. § 4332(2)(C) (2006), by not evaluating the effectiveness of the Project's EPMs and failing to consider and develop more mitigation measures. SOR at 2. For the reasons explained below, we find that

GBRW has failed to carry its burden on appeal, and affirm BLM's Decision approving the amendment to the PoO.

BLM and Round Mountain claim the appeal of WSDP should be dismissed for lack of standing. BLM Answer at 5-6; Round Mountain Response (Round Mountain Answer) at 3-6. Therefore, before considering the merits of appellants' arguments, we address the matter of WSDP's standing to bring this appeal.⁵

II. STANDING

An appellant is required to demonstrate the requisite elements of standing under 43 C.F.R. § 4.410 in order to pursue an appeal from a BLM decision and a petition for a stay of that decision. *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 146 (2008); *Colorado Open Space Council*, 109 IBLA 274, 280 (1989). Under the regulation at 43 C.F.R. § 4.410(a), an appellant demonstrates standing by showing that it is both a "party to a case" and "adversely affected" by the decision, 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. 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).

In accordance with longstanding Board precedent, 43 C.F.R. § 4.410(d) provides that 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 of the party. *See, e.g., The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 81-82. Such a legally cognizable interest must be shown to have been held by the party at the time of the decision that it seeks to appeal. *Center for Native Ecosystems*, 163 IBLA 86, 90 (2004). 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, coincident with the organization's purposes, that is or may be negatively affected by the decision. *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 86-87.

The burden falls upon the appellant 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

⁵ BLM notes that GBRW and WSDP have jointly filed a single SOR with identical claims and that, should the Board reject BLM's motion to dismiss WSDP's appeal for lack of standing, we should consider BLM's arguments advanced in its briefs as applicable to both appellants. BLM Answer at 6.

(1993); *Colorado Open Space Council*, 109 IBLA at 280. To meet this burden, WSDP 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, as we have long held, the threat of injury and its effect on the appellant must be more than hypothetical. See *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992); *George Schultz*, 94 IBLA 173, 178 (1986). Assertions regarding the threat of injury must amount to “colorable allegations of real and immediate injury.” *Legal and Safety Employer Research Inc.*, 154 IBLA 167, 172 (2001) (citing *Laser, Inc.*, 136 IBLA 271, 274 (1996)); *Salmon River Concerned Citizens*, 114 IBLA 344, 350 (1990). “[M]ere speculation that an injury might occur in the future will not suffice.” *Colorado Open Space Council*, 109 IBLA at 280.

In support of its claim of standing, the SOR claims that WSDP is a party to the case by virtue of the comments “both GBRW and WSDP submitted” to BLM on the Draft EIS; that its members have interests in using “the public lands at and adjacent to the Project site for traditional religious and cultural practices, hiking, aesthetic enjoyment, wildlife viewing, photography, and cultural educational purposes”; that those interests are coincident with the organization’s purposes; and that the interests may be negatively affected by the decision. SOR at 10-12. In addition, WSDP provides the January 27, 2011, declaration of Mary McCloud, an 81-year old “traditional Western Shoshone indigenous person residing in Schurz, Nevada.” SOR, Exhibit (Ex.) 2 at 1. McCloud attests to her use and enjoyment of the Project area “as a child,” “since,” and recently. *Id.* at 2; see also *id.* at 3 (“I visit these lands and waters at and adjacent to the Project site to pray and worship.”).

BLM contends that WSDP is not a “party to the case,” under 43 C.F.R. § 4.410(b), arguing it did not “actively participate in the decisionmaking process leading to the challenged Decision because it did not submit comments to the Draft EIS or at any other phase of the proceedings.” BLM Answer at 5 (citing *Sharon Long*, 83 IBLA 304, 307 (1984)). BLM acknowledges but summarily discounts the fact that WSDP’s logo appears, alongside GBRW’s, at the top of the comment letter. *Id.* BLM does not address the SOR’s claims that the comment letter was submitted by both GBRW and WSDP, nor the fact that the signature page is constructed in such a way that John Hadder, Executive Director, GBRW appears to sign both for that organization and on behalf of “Larson Bill, Community Coordinator, Western Shoshone Defense Project.” BLM does not prevail in its argument challenging WSDP’s status as a party to the case.

Round Mountain, which had joined in BLM’s argument above, focuses more explicitly on the regulatory standing criterion requiring a party to show it is “adversely affected” by a decision. Round Mountain Answer at 3-6; see 43 C.F.R.

§ 4.410(a). It argues that the declaration of Mary McCloud, provided by WSDP in support of its claim of standing, does not include sufficient facts to support a finding that she or WSDP will be adversely affected.

We are unpersuaded by this effort as well. Both the averments in appellants' SOR and McCloud's declaration credibly attest to the fact that McCloud and other WSDP members have habitually used and enjoyed the Project area and intend to continue this use in the future, and thus meet the standing criterion requiring a party to show it is "adversely affected" by the decision. 43 C.F.R. § 4.410(a); *Western Watersheds Project v. BLM*, 182 IBLA 1, 5-10 (2012); *Western Shoshone Defense Project*, 160 IBLA 32, 39 n.3 (2003); *Legal and Safety Employer Research Inc.*, 154 IBLA at 172. We conclude that WSDP has standing and turn to the merits of the appeal.

III. ANALYSIS: BLM'S ENVIRONMENTAL REVIEW COMPLIES WITH NEPA AND ITS DECISION WITH FLPMA

A. Legal Standards

[1] Section 302(b) of FLPMA, like section 102(2)(C) of NEPA, generally requires BLM to consider the nature and extent of surface disturbance and other environmental impacts on resources and lands resulting from a proposed operation. *Great Basin Mine Watch*, 160 IBLA 340, 370 (2004) (citing *Legal and Safety Employer Research Inc.*, 154 IBLA at 175); *Western Shoshone Defense Project*, 160 IBLA at 40 n.5.

Here, as in those earlier cases, appellants challenge BLM's decision to approve an amendment to a PoO, claiming violations under both statutory frameworks, NEPA and FLPMA, related to BLM's environmental analysis. We begin our discussion by considering the standard of review applicable to these challenges and the burden appellants carry with respect to this appeal.

In focusing on the legal standard relevant to appellant's NEPA claims, the Board has opined:

Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or a court (in the event of judicial review). *See Strycker's Bay Neighborhood Council, Inc. v.*

Karlen, 444 U.S. 223, 227-28 (1980), and cases cited. As we said in *Oregon Natural Resources Council*, 116 IBLA 355, 361 n.6 (1990):

[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.

It is established that, in order to overcome BLM's decision to approve a plan of operations, an appellant bears the burden of demonstrating by a preponderance of the evidence, with objective proof, that BLM failed to consider, or 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. See [*Colorado Environmental Coalition* (*JCEC*)], 142 IBLA [49,] 52 [(1997)].

Legal and Safety Employer Research, 154 IBLA at 174.

In addressing challenges under FLPMA, we stated in *Western Shoshone Defense Project*, 160 IBLA at 51 (citing *William J. Schweiss*, 139 IBLA 10, 12 (1997)), “WSDP, as the party challenging BLM’s decision, has the burden of showing error in the appealed decision.”⁶ See also, *Biodiversity Conservation Alliance*, 174 IBLA 1, 8 (2008) (The Board “will not disturb BLM’s discretion to balance the competing uses mandated by FLPMA where BLM has provided a reasoned explanation for its decision.”).

B. *Unnecessary or Undue Degradation*

Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), requires that “[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any

⁶ In that case, we examined the PoO, which incorporated a proponent-initiated measure (water management plan) to reduce impacts to water quality and quantity, the Environmental Assessment and Finding of No Significant Impact, which conditioned approval of the proposed amendment on the performance of mitigation measures designed to prevent any unnecessary or undue environmental degradation, and concluded that appellant failed to show error in BLM’s decision. *Western Shoshone Defense Project*, 160 IBLA at 32, 51-52.

action necessary to prevent unnecessary or undue degradation of the lands.” See *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 33, 41-46 (D.D.C. 2003); *Robert Lewis*, 180 IBLA 376, 382 (2011); *Austin Shepherd*, 178 IBLA 224, 232 (2009); *Cat Mountain Corp.*, 148 IBLA 249, 252 (1999); 66 Fed. Reg. 54834, 54841 (Oct. 30, 2001); 43 C.F.R. § 3809.5.

BLM’s Surface Management regulations at 43 C.F.R. § 3809.5(1)-(3) define unnecessary or undue degradation as “conditions, activities, or practices” that:

- (1) Fail to comply with one or more of the following: the performance standards in § 3809.420,^[7] the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources;
- (2) Are not “reasonably incident” to prospecting, mining, or processing operations as defined in § 3715.0-5 of this chapter; or
- (3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area

The ROD approving this Project emphasizes the requirement to comply with all applicable Federal, state, and local regulations. ROD at 23.

In their SOR, appellants argue that BLM erred in approving the Round Mountain Expansion Project by failing to prevent unnecessary or undue degradation because the “creation of Round Mountain Pit Lake and Gold Hill Pit Lake is predicted to cause the violation of numerous Nevada state water quality standards.” SOR at 14 (citing FEIS at 4.3-36, 4.3-48). With extensive analysis and citations to the Nevada Administrative Code §§ 445A.350-447, 445A.429(3) (Water Controls—Mining Facilities), the FEIS, BLM’s ecological risk assessment (ERA), and Board precedent, BLM and Round Mountain credibly describe appellants’ mistaken assumptions and unsupported claims tenuously undergirding this FLPMA challenge. BLM Answer at 9-15; Round Mountain Answer at 6-16. For example, they explain that appellants mistakenly presume that any exceedances of a Nevada water quality standard is a *per se* violation of Nevada law and/or water quality standards and that Nevada’s specific

⁷ The regulation at 43 C.F.R. § 3809.420(a)(6) provides that operators “must conduct all operations in a manner that complies with all pertinent Federal and state laws.” Appellants point to 43 C.F.R. § 3809.420(b)(5), which states that operators “shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 *et seq.*).”

pit lake regulations do not require pit lakes to meet State water quality standards.⁸ BLM Answer 9-12; Round Mountain Answer at 7-9, 13-14; BLM Supplemental (Suppl.) Response at 4-5 (citing *Great Basin Mine Watch*, 146 IBLA 248, 257-58 (1998)). BLM and Round Mountain conclude it was not error for BLM to determine that creation of the Round Mountain and Gold Hill pit lakes will not violate Nevada law or cause any other form of unnecessary or undue degradation. We find this conclusion reasonable, amply supported by the record, and essentially un rebutted by appellants.

Indeed, in their reply brief, appellants shift away from those arguments, focusing their FLPMA water quality challenge on the claim that approval of the Gold Hill pit lake will allow undue degradation because there is a potential for discharge to groundwater when the final pit lake reaches equilibrium, and that BLM ignored its own duty to consider impacts, relying instead on the State to consider Round Mountain's Water Pollution Control Permit for the Gold Hill operations. Appellants' Consolidated Reply at 2, 5-9. In initial briefing, BLM and Round Mountain contended that neither pit lake will degrade surrounding groundwater because they are expected to function as hydraulic sinks, discharging no or, in the possible case of the Gold Hill pit lake,⁹ nominal amounts of water to an adjacent groundwater unit.

⁸ As BLM notes, appellants do not dispute that the background water fails to meet Nevada drinking water quality standards. BLM Answer at 4.

⁹ BLM presented several reasons (with citations to State law, Board precedent, the FEIS, and the Hydrology and Geochemistry Report) why a nominal discharge of water from the Gold Hill pit lake into an adjacent groundwater aquifer would not degrade groundwater: (1) the background water quality of the aquifer is already below Nevada water quality standards; and (2) "the unchallenged groundwater model shows that any discharge would simply be recaptured by a surrounding higher permeable groundwater unit that in turn flows back toward the pit lake"; and (3) the ROD at 23 requires that Round Mountain obtain all necessary water permits from the State and comply with all other applicable State environmental laws, regulations, and permitting requirements. BLM Answer at 13; *see also* Round Mountain Answer at 14; BLM additionally noted: (1) the PoO requires groundwater quality monitoring in this area; (2) Round Mountain is required to take measures to restrict access to the pit lakes and minimize surface water drainage toward the pit lake; and (3) the Nevada Department of Environmental Protection (NDEP), which already had issued a Water Pollution Control Permit for the Round Mountain pit lake, had not commented or objected to BLM's water quality assessment and modeling for either the Round Mountain or Gold Hill pit lakes. BLM Answer at 14. BLM cited *Western Shoshone Defense Project*, 160 IBLA at 52 in urging the Board to defer to NDEP's failure to find
(continued...)

BLM Answer 9-12; Round Mountain Answer at 7-9, 13-14. Respondent and intervenor reaffirm their analyses in subsequent briefing. Round Mountain points to evidence in the record demonstrating that geologic formations surrounding the Gold Hill pit will prevent or impede groundwater flow; the pit lake level will be held constant due to evaporation; any discharge would be small because the surrounding rock is highly impermeable; and no water would flow to the aquifer because the pit lake elevation at equilibrium will be below the floor of the alluvial aquifer. Round Mountain Suppl. Response at 4. BLM agrees and reiterated the additional factors supporting its conclusions noted in its Answer. The record reasonably supports BLM's conclusion that the Project as approved will not cause unnecessary or undue degradation, and appellants have failed to carry their burden of showing error in the Decision.¹⁰

C. *EPMs and Mitigation Measures*

Appellants claim that BLM violated NEPA by not evaluating the effectiveness of the Project's EPMS and by failing to consider and develop mitigation measures to prevent alleged water quality violations and groundwater depletions. SOR at 2, 8-9, 26-30; Appellants' Consolidated Reply at 15-17.

⁹ (...continued)

potential violations of Nevada law for the Project. *Id.*

¹⁰ Round Mountain also asserts that it "complied with the requirement" in the ROD to obtain necessary permits when, on September 19, 2011, the [NDEP] issue[d] its Notice of Decision to issue a water pollution control permit for the Gold Hill project. . . . In issuing the permit, NDEP reached the same conclusion as BLM—that the Gold Hill pit lake will not degrade waters of the State. Notice of Decision at p. 1, 2. NDEP specifically responded to comments from Appellant . . . by confirming the regulatory standards applicable to pit lake waters and stating that "the Division has determined that the regulatory requirements will be met." Round Mountain Suppl. Response at 5-6. With this latest filing, Round Mountain provided the Board a copy of NDEP's Sept. 19, 2011, Notice of Decision to issue a permit authorizing Round Mountain "to construct, operate, and close the Gold Hill Project." *Id.*, Ex. 1 (Notice of Decision) at 1. Appellants object to this submission, and ask the Board to strike the document and disregard any argument related to it. Opposition to Round Mountain Gold Corp.'s Motion for Extension of Time and to Add New Evidence in its Sur-Reply, dated Sept. 13, 2011, at 2-4. Given our determination, made without regard to the additional evidence submitted by Round Mountain, that appellants have failed to carry their burden with respect to their claim of unnecessary or undue degradation, appellants' request is denied as moot.

The Council on Environmental Quality regulations implementing NEPA require that an EIS consider mitigation measures when significant adverse effects on the environment are expected, and when it is feasible to develop such measures. 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.14, 1508.20; *see also* BLM Handbook §§ 6.5.1.1 at 44, 6.8.4 at 61-62.

At the heart of appellants' argument is the presumption that approval of the Project will violate the law and result in significant adverse impacts. As discussed above in connection with appellants' claim of unnecessary and undue degradation, appellants have not shown error in BLM's determination that the Project is not expected to cause violations of applicable Federal or State water quality laws, regulations, or standards.

In connection with the claim that BLM violated NEPA by inadequately considering mitigation and the effectiveness of the EPMS, BLM and Round Mountain contend that measures to address the effects of groundwater pumping were included in the Project and analyzed as EPMS, that BLM analyzed and required mitigation measures to address potential impacts to riparian resources, and that appellants have failed to identify impacts not adequately addressed or to propose specific measures needed to mitigate anticipated impacts to water quality and quantity. They conclude that BLM did not fail in the duty under NEPA to take a hard look at the impacts of the Project and to evaluate mitigation measures. BLM Answer at 16-25; Round Mountain Answer at 20-27; Round Mountain Suppl. Response at 11.

Appellants' claim that BLM violated NEPA by failing in a duty to evaluate and require measures to mitigate impacts betrays a misunderstanding or minimization of the EPMS and mitigation measures at issue in this appeal, as well as an inaccurate representation of the requirements under NEPA. The EPMS, which Round Mountain developed and incorporated into the PoO, are design features of the Proposed Action that BLM identified in 8 pages of the FEIS at section 2.5 (2-71 to 2-79) in connection with 12 resource categories, including water resources. *See also* ROD at 7-16; Round Mountain Answer at 21-28.¹¹ The potential impacts of the proposed action, which includes the EPMS, and the alternatives are analyzed in Chapter 4 of the FEIS. In 70 pages of analyses, tables, and charts, BLM described potential impacts on water quality and quantity and water use. Potential impacts from the mining operations to

¹¹ Round Mountain states that "the primary reason" it included "mitigation for potential impacts to wells and springs as an applicant-committed [EPM] rather than wait for BLM to recommend and impose a mitigation measure was to assure the mine's neighbors that it was committed to protecting current water users." Round Mountain Answer at 26-27 (citing Ex. 3 (Gina Myers Declaration at ¶ 9)).

wells, seeps, and springs, including groundwater pumping for mine dewatering are analyzed at FEIS at 4.3-20 to 4.3-30.

The EPMs require Round Mountain to monitor potentially impacted water resources on a semi-annual basis for at least the next 30 years. FEIS at 2-72, 2-99. To assist BLM in determining whether any impacts are attributable to mining activities, BLM inventoried springs and seeps within the Project vicinity, and recorded features such as elevation, flow rate, temperature, and specific conductance. FEIS at 3.3-30, Table 3.3-4. If a decline in the water table is detected and determined attributable to mining activity, the EPMs require Round Mountain to mitigate the adverse effect, providing examples of the various types of mitigation that could be used, such as installing a new well, improving an existing spring or seep, or providing a replacement water supply for an impacted spring or seep. FEIS at 2-72. BLM points out that if Round Mountain fails to “effectively mitigate any adverse impacts that occur, BLM has authority to revoke or modify the PoO, require [Round Mountain] to mitigate the impacts and/or seek injunctive relief and collect damages,” as well as “to require the implementation of additional mitigation measures.” BLM Answer at 18 (citing 43 C.F.R. §§ 3809.602(a); 3809.604(a); 3809.605; FEIS 4.3-45).

As noted, the FEIS does not anticipate adverse impacts from the pit lakes. Nevertheless, Round Mountain included EPMs in the PoO that require the company to monitor and, if necessary, mitigate any adverse impacts that might occur from the pit lakes. FEIS at 4.3-45. The EPMs require Round Mountain to monitor groundwater near the pit lakes to ensure compliance with permit criteria and to identify potential impacts early. FEIS at 2-71. Here too, BLM states, if Round Mountain fails to prevent or mitigate any impact, BLM has authority to revoke or modify the PoO, order Round Mountain to mitigate the impact and/or seek injunctive relief and collect damages. BLM Answer at 19 (citing 43 C.F.R. §§ 3809.602(a); 3809.604(a); 3809.605).

As BLM points out, appellants have failed to identify any particular error or inadequacy in the analytical process for evaluating impacts to groundwater from the proposed Project with EPMs or in the results of the analysis, and have failed to suggest a specific, feasible mitigation measure that BLM should have, but failed, to consider. BLM Answer at 19-20. Appellants cite *South Fork Band Council v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009), to argue that BLM should have provided a separate, explicit discussion of the effectiveness of the EPMs. SOR at 27-29; Appellants’ Consolidated Reply at 16-17. However, the measures at issue in the effectiveness portion of the 9th Circuit analysis are agency-required mitigation measures, not EPMs. The Court, though acknowledging the existence of EPMs, did not hold that BLM must include an effectiveness discussion for EPMs. As BLM states,

“[h]ere, where there are simply no agency-proposed mitigation measures being disputed,[¹²] case law discussing the proper level of analysis for the predicted effectiveness of mitigation is irrelevant.” BLM Answer at 20.¹³

BLM contends that “considering the predicted extent of groundwater drawdown, potential water quality impacts, the EPMs in the PoO, and mitigation measures to address potential impacts to riparian resources, BLM reasonably determined that there were no remaining potential impacts to water resources that required additional mitigation.” BLM Answer at 16; *see* ROD at 16-21; FEIS Chapter 4. Having considered the evidence and arguments on appeal, we agree.

Appellants have not carried their burden to demonstrate that BLM failed to abide by section 102(2)(C) of NEPA. *Legal and Safety Employer Research Inc.*, 154 IBLA at 174.

D. *Fair Market Value for the Use of Mining Claims and Claim Validity in Connection with Approval of a PoO on Lands Open to Location under the Mining Laws*

Appellants allege that BLM violated FLPMA by failing to perform a validity examination of the mining claims contained within the PoO and to charge fair market value for the use of lands that were not covered by valid mining claims. SOR at 16-26; Appellants’ Consolidated Reply at 10-15. Appellants raised this same matter in comments on the Draft EIS. FEIS, Appendix F at 49 (BLM identifies the issue and the agency response as 9-72). BLM responded, explaining that BLM’s Surface Management Regulations require a validity examination only when an applicant (1) proposes operations on lands that have been segregated or withdrawn from the operation of the mining law or (2) applies for a patent, and that neither of these conditions applies to the proposed Project. *Id.* BLM’s response cited Solicitor’s Opinion, M-37012 (Nov. 14, 2005) (“In summary, because no law requires that the Secretary determine mining claim or mill site validity before approving a mine plan on open lands, the Department is under no legal obligation to do so.”).¹⁴ On appeal,

¹² In the FEIS, BLM analyzed and required certain measures to mitigate and monitor potential impacts to riparian vegetation from dewatering. Appellants do not challenge BLM’s decision to require these mitigation measures.

¹³ BLM, nevertheless, makes this important point: “In essence, by concluding that the EPMs were sufficient to address potential adverse impacts (other than riparian vegetation impacts that *are* addressed by agency-proposed mitigation), BLM *did* determine that the EPMs would be effective.” BLM Answer at 21.

¹⁴ Solicitor’s Opinions are binding on the Board. *United States v. Rannells*, 175 IBLA (continued...)

BLM again explains that, while BLM has the discretion to investigate the validity of unpatented mining claims to determine whether to initiate a contest, “it is not required to do so, nor should it suspend consideration of a [PoO] even when it decides to conduct a validity examination.” BLM Answer at 26 (quoting *Western Shoshone Defense Project*, 160 IBLA at 57 (emphasis omitted)); *see also* BLM Suppl. Response at 7-9; Round Mountain Answer at 17-20; Round Mountain Suppl. Response at 17-20. BLM again accurately demonstrates the legal error underlying appellants’ claim.

On appeal, appellants, for the first time, make assertions designed to cast doubt on the validity of Round Mountain’s mining claims, which BLM and intervenor debunk as pure speculation, inconsistent with observable facts about the property. SOR at 21-26; SOR Ex. 2 (Declaration of James R. Kuipers); Appellants’ Consolidated Reply at 12-15; BLM’s Answer at 26-27; Round Mountain’s Answer at 19-20. We concur with respondents’ reasoning. It is within BLM’s discretion to consider these and any other allegations or facts, but nothing appellants have produced preponderates in showing that, in issuing the Decision, BLM erred as a matter of law or failed to make a reasoned determination based on the record.

The second prong of appellants’ argument depends upon, and thus remains as ineffective as, the first. Its glaring inconsistency with applicable regulations further demonstrates its impotency:

[Q:] Am I required to pay any fees to use the surface of public lands for mining purposes? [A:] You must pay all processing fees, location fees, and maintenance fees specified in 43 CFR parts 3800 and 3830. Other than the processing, location and maintenance fees, you are not required to pay any other fees to the BLM to use the surface of public lands for mining purposes.

43 C.F.R. § 3800.6.

We affirm BLM’s approval of the amended PoO for open pit gold mining, finding that, in the EIS, BLM has taken a hard look at the significant environmental consequences of mining operations, the record supports BLM’s conclusion that implementation of the amended PoO, which includes EPMs and was approved with required mitigation measures, will not result in unnecessary or undue degradation of the public lands, and that appellants have failed to show error in BLM’s Decision.

¹⁴ (...continued)
363, 377 n.13 (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, BLM's and Round Mountain's motions to dismiss are denied, the request to strike is denied as moot, and the Decision appealed from is affirmed.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge