

INTERIOR BOARD OF LAND APPEALS

James Shaw and S. Eric Krasa

130 IBLA 105 (August 2, 1994)

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JAMES SHAW
S. ERIC KRASA

IBLA 93-656

Decided August 2, 1994

Appeal from decision of the Pocatello (Idaho) Resource Area Office, Bureau of Land Management, granting right-of-way IDI 29264.

Affirmed.

1. Environmental Quality: Environmental Statements--Environmental Policy Act: Generally--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Words and Phrases

"Indirect effects." CEQ regulations define "indirect effects" that an agency must consider in its environmental analysis as effects caused by Federal action that 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.

2. Environmental Quality: Environmental Statements--Environmental Policy Act: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rights-of-Way: Federal Land Policy and Management Act of 1976

In deciding whether to issue an environmental impact statement, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision), it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

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

A BLM decision granting a right-of-way for an access across public land to a subdivision on private land will be affirmed where the record shows the decision to be based on a reasoned analysis of the facts involved, made with due regard for the public interest, and where appellants fail to show error in the decision. Where BLM identifies adverse environmental effects, but reasonably judges them to be similar to effects resulting from the no action alternative, and where the action presents other benefits not provided by the no action alternative, its decision will be affirmed.

APPEARANCES: James Shaw and S. Eric Krasa, appellants pro sese; Boyd F. Henderson, respondent pro se. 1/

OPINION BY ADMINISTRATIVE JUDGE HUGHES

James Shaw and S. Eric Krasa appeal from the August 9, 1993, decision of the Pocatello (Idaho) Resource Area Manager, Bureau of Land Management (BLM), granting Boyd F. Henderson right-of-way IDI-29264.

On May 5, 1992, Henderson filed an "application for transportation and utility systems and facilities on Federal lands." The proposed action was later described by BLM as follows in its draft environmental assessment (draft EA):

Boyd F. Henderson proposes to construct a road across a parcel of Bureau of Land Management (BLM) land in order to gain access to a proposed subdivision. The public land is located three and one half miles southeast of Pocatello in the lower Mink Creek area * * *. The main access road would extend southeast from Mink Creek Road across BLM [lands] to Mr. Henderson's property located adjacent to the southeastern portion of the public land. A spur road would diverge southwest off of the southern portion of the main access road providing access to block #1 of the proposed subdivision. The [right-of-way], except for the spur road, would follow the route of an existing unimproved road present on public land. 2/ The [right-of-way's]

1/ Congressman Michael D. Crapo and G. D. Wood also both expressed concern about this case, but entered no formal appearance in the matter. Both will receive copies of the decision.

2/ Henderson's application included a topographic map showing a pre-existing unpaved road across public lands in approximately the same location as that selected by Henderson. The record shows that, at one time, this parcel of public land was encumbered with a "box car residence,"

total width would be 60', (24' paved), length 250' - 300', with a grade of less than 10%. The total acreage of the [right-of-way] would be approximately 0.4 acres. The road as proposed would conform to Bannock County subdivision standards and would become a public road. The applicant proposes the road be used in perpetuity on a year around basis.

(Draft EA at 1-2).

Mink Creek Road runs from southwest to northeast in the vicinity of the lands in question. The main access road runs perpendicular from Mink Creek Road to the southeast across Federal lands to the privately owned lands being developed, connecting with a loop road servicing the entire subdivision. According to a preliminary plat filed with BLM on May 24, 1992, the main access road covers approximately 300 feet of public lands.

The original plan also called for a spur road perpendicular to the main access road to the southwest, leading into a cul-de-sac in the northwest portion of the subdivision. The intersection of the main access and the spur road was to be on Federal lands, as well as approximately 150 feet of the spur road itself. As discussed below, that proposal was rejected by BLM.

Henderson's application noted that a road intersecting Mink Creek Road on private property to the south of the Federal lands had been considered as an alternative. The topographic map and plats show that Henderson owns a strip of land fronting several hundred feet on Mink Creek Road and extending due east to the lands on which the subdivision is to be built. Although it appears Henderson could construct an access road from Mink Creek Road to his private property through that strip, the application noted that the approach to Mink Creek Road would be more hazardous at locations other than the one applied for, and that, due to grade limitations imposed by Bannock County ordinance, the selected route was the most feasible to provide access to Henderson's subdivision.

On August 20, 1992, James Shaw wrote to BLM to express concern about the effects on the environment and wildlife of using the public lands as proposed by Henderson.

By letter dated December 30, 1992, the Bannock County Engineer, Office of Planning & Development Services advised BLM as follows:

I have reviewed the captioned subdivision as proposed by Mr. Henderson and find that the access road which crosses BLM land to be the most cost effective road to serve the subdivision.

fn. 2 (continued)

but that the box car and all outbuildings had been removed, the area rehabilitated, and the land returned to its natural setting (Final EA at 1). Photographs in the record indicate that some vestiges of the road remain.

This location is one that can meet Bannock County standards for grade (less than 10%) to cross Mink Creek. The approach can be at 90 degrees to Mink Creek Road with an approach grade of less than 2%. The proposed connection has adequate sight distance and adequate area for mail box drop and school bus stop.

The City Engineer, Pocatello, Idaho, advised BLM on February 13, 1993, that he concurred with those comments.

On April 22, 1993, BLM issued for public comment its Draft Decision Record (draft ROD) and draft EA for the road right-of-way. BLM stressed in its cover letter and in the draft EA that the purpose of this EA was to address the impacts of the proposed action and alternatives on public lands and not the surrounding private lands. ^{3/} The draft EA considered three alternatives: the "no action" alternative, where the application would be denied; the "proposed action" alternative, where the application would be granted as described in Henderson's application (quoted above); and an alternative called the "Spur Road Deletion," described as follows:

Construct the proposed access road with the following modification: The spur road that would provide access to block #1, which branches southwest off the main access road would not be allowed. This alternative would require Mr. Henderson to construct the spur road on his own property which borders the BLM land on the south side.

(Draft EA at 2). A copy of the draft EA was sent to Shaw and to others who had expressed interest in the case.

Many persons wrote to and called BLM concerning the matter; almost all supported the "no action alternative." In a letter dated May 10, 1993, the Bannock County Engineer, Office of Planning & Development Services, again expressed his support for the project as proposed by Henderson:

The road location as proposed by Mr. Henderson is the most desirable route to serve his subdivision and will provide a linkage with the remaining 150 Acres east of Mink Creek that is developable to Portneuf Road. * * *

This alignment provides the best approach to Mink Creek Road in terms of grade, horizontal alignment, sight distance and minimum disturbance of the riparian zone along Mink Creek. Erosion control and runoff can be better managed at this location. Since the grade is less at this location, the school bus turnout can easily be incorporated into the design as well as the mailbox location.

^{3/} On May 7, 1992, the BLM Area Manager wrote to the Bannock County Planning Commission, commenting on the proposed subdivision and its effects on other public lands to the east and south.

The [cul-de-sac] that serves the property to the south is highly desirable since it eliminates the need for multiple driveways that back into Mink Creek Road. These driveways would be at locations where sight distance and grades are not good. This enhances the safety in the area for motorists and pedestrians.

On May 17, 1993, S. Eric Krasa wrote to BLM urging it to take the no action alternative. ^{4/}

On May 19, 1993, the Regional Supervisor, Idaho Fish and Game, wrote BLM as follows:

We have considerable interest in Mr. Henderson's project due to mule deer wintering which takes place in this vicinity * * * . This area of Mink Creek also serves as a fairly important migration corridor for wintering deer as well as resident deer.

We would prefer that the "No action" alternative be selected. We feel that any road construction on the public land will fragment further what little migration corridor will remain once the subdivision is built. This will be due to the direct impact of the loss of vegetative cover as well as the indirect effects of increased off road use in the area. We know that a fair number of mule deer are residents in the area and that some fawning occurs in the vicinity. Any increased human activity, such as that resulting from this road construction, will result in decreased security for wildlife and make the area less useable by deer for fawning, migration, or wintering.

On June 22, 1993, the Area Manager signed BLM's final ROD and EA recommending that Henderson be granted the right-of-way for a 60-foot wide by 500-foot long road containing approximately 0.69 acre. BLM considered the same three alternatives as in the draft EA and adopted the Spur Road Deletion Alternative, disallowing the construction on the public lands of the spur road that would provide access to block #1. BLM reiterated in the final EA that the EA was being written in response to the right-of-way action and to address impacts on public lands, and that it did not address the impacts associated with the development of private lands.

The EA summarized the impacts of the proposed action, that is, Henderson's original proposal, as follows:

Direct Impacts - The implementation of the proposed action would require that an area 60' wide and 600' long be cleared of vegetation. In addition topsoil and subsoil would have to be removed until a firm subsoil base is established for the road bed.

^{4/} Krasa also filed a similar letter with the BLM office in Pocatello, Idaho.

This would result in the loss of vegetative cover for wintering deer and resident deer.

Indirect Impacts - The presence of the road will increase to some degree the possibility of an accident occurring between vehicles, pedestrians and wildlife that use the area. As a result of increased human activity, there would be a [decrease] in security for wildlife and the area [would be made] less useable by deer for fawning, migration, or wintering.

The presence of the road would increase the likelihood of off road vehicle use (ORV) occurring on the parcel and also on the public land lying further to the east. Both areas are closed to ORV use. The developer plans to construct a travel lane across the proposed development that would provide access to the BLM land to the east. This could lead to unauthorized ORV use on the BLM land.

Because of the ground disturbance due to road construction there could be an increase of weeds on the disturbed area in the future.

The [road's] presence would, to a small degree, impact the visual resource of the immediate area. Because the area along Mink Creek Road has been developed, the visual impact would be similar to the rest of the area and would not appear to be out of place.

Cumulative Impacts - The construction of the proposed access road would allow access to the proposed subdivision development. This would lead to increased deer use on nearby public land as a result of the loss of winter range on private land.

The road would directly impact 0.83 acres, however its presence would reduce the open space of the area by approximately 5 acres, therefore contributing to the decline of the visual resource of the public land.

* * * * *

Residual Impacts - The existing dirt road would be replaced by a paved road that will have a long term adverse impact on the visual quality, plants, wildlife, and soil of the public land under study.

(EA at 3-4, 6). The EA summarized the impacts of the Spur Road Deletion alternative, concluding that both the direct and indirect impacts would be the same as those of the Proposed Action but to a smaller degree, because less ground would be disturbed due to road construction, as the spur road would not be built on public land. Cumulative and residual impacts were judged identical.

The EA also lists mitigation measures for the proposed action, consisting largely of specifications for reseeding all disturbed areas, controlling weeds, and protecting any cultural and/or paleontological resource discovered by the right-of-way holder. The EA provided more generally that Henderson must "recontour the disturbed area and obliterate all earth work by removing embankments, backfilling excavations, and grading to re-establish the approximate original contours of the land in the land use permit" (EA at 4). Those mitigation measures were also deemed appropriate for the Spur Road Deletion alternative.

The ROD rationale listed four reasons for approving the right-of-way application:

1. This action is in conformance with the Pocatello Resource Management Plan.
2. The environmental impacts associated with the recommended alternative are minimal.
3. The applicant will be required to construct the road in a manner which will not present a safety hazard to the area. The approach onto Mink Creek Road is the most desirable from a safety aspect i.e. visibility.
4. A single road across public land is the most preferable to serve the applicant's needs.

BLM sent copies of the decision to Shaw and Krasa, among others, informing them that issuance of the right-of-way grant constituted BLM's final decision and giving them right of appeal to this Board. Shaw and Krasa (appellants) filed a joint notice of appeal.

By order dated November 2, 1993, appellants were granted a stay of the decision pending appeal. By order dated December 20, 1993, Henderson's intervention in this case as a respondent was allowed. Lastly, by order dated May 16, 1994, expedited consideration was allowed.

Appellants assert that the road proposed for this right-of-way would damage the desert and nearby Mink Creek, and that it would obstruct wildlife access to and across the creek and reduce deer winter range and cover. They argue that the EA is flawed and another EA should be prepared, incorporating information from the Idaho Department of Fish and Game and analyzing impacts upon Mink Creek water quality. They emphasize that this right-of-way would traverse a corridor of public land that provides to wildlife public land access to Mink Creek as well as passage between two mule deer wintering areas. They warn of impacts on public land of the planned subdivision nearby, particularly the potential for increased off-road vehicle use. They point out that they were among area residents who opposed this proposal before BLM, particularly objecting the dedication of public land to a private use and objecting to increased housing density in the area. Appellants do not ask BLM to prepare an environmental impact statement (EIS), but for another more detailed EA describing particularly

the impacts of the subdivision on water quality in Mink Creek and on deer movements and habitat, as well as the impact of increased housing in the area generally.

Respondent Henderson replies that the impacts and the area involved will be minimal. He submits letters from Bannock County and City of Pocatello engineers and the local school district in support of his assertion that this right-of-way provides the safest access to Mink Creek Road. He points out that BLM granted a different right-of-way to cut a new road into a different subdivision slightly to the south. He opines that there are few deer in the area.

Many of the objections raised by appellants were not addressed to the right-of-way but to the impact of increased residential development in the Mink Creek area. Appellants argue that BLM should have considered the impact of the private project that this right-of-way would facilitate. We consider that argument first.

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1988), requires Federal agencies to take environmental considerations into account when making decisions and to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). Federal agencies may develop EAs to determine whether the environmental impacts of a given action are significant. 40 CFR 1501.3, 1501.4, 1508.9, 1508.27. The purpose of an EA is to provide sufficient evidence and analysis to determine whether to prepare an EIS. 40 CFR 1508.9(a)(1); see Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985). An EA is a concise discussion of relevant issues that either concludes that an EIS is necessary or makes a finding of no significant impact (FONSI). 40 CFR 1508.9, 1508.13. Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). A FONSI is the agency's determination that an EIS need not be prepared, as there is no Federal action identified as having a "significant impact."

The Federal action here is the decision to grant a right-of-way across Federal lands for a paved access to a housing subdivision. The subdivision itself is not on Federal land, and BLM is not responsible for authorizing it. In its EA, BLM addressed only direct impacts of the road that could result either from initial construction and repaving of the road or from later use of it. No off-site environmental impacts, including the impacts of the subdivision on private land, were considered.

The EA did not explain BLM's failure to consider the impacts of the subdivision. However, in a July 30, 1993, letter to appellant Shaw, the Area Manager did elaborate:

Because approval of the subdivision is clearly within the province of Bannock County, impacts resulting from development within the subdivision are considered outside of the scope of the environmental assessment for Mr. Henderson's right-of-way. Unless an

additional BLM right-of-way would be required to service this part of the subdivision, BLM has no basis to expand the scope of the present environmental assessment.

We are unsure what BLM meant when it stated in the second sentence that it was not required to expand the scope of the EA "[u]nless an additional right-of-way would be required to service this part of the subdivision." In fact, a right-of-way was being granted to "service" the entire subdivision. Reading only the first sentence, we are left with the more rational impression that BLM believed that it could limit the scope of the EA to the impacts of the proposed access road because BLM had not been asked to grant a right-of-way to enable the subdivision itself, and because it lacked authority to authorize the subdivision in any event. That explanation is unsatisfactory, however, as it misstates BLM's general obligations under governing Federal regulations and controlling caselaw.

[1] The Council on Environmental Quality (CEQ) has provided regulations applicable to and binding on BLM for implementing the procedural provisions of NEPA. 40 CFR 1500.3; Red Thunder, Inc., 117 IBLA 167, 181 n.11, 97 I.D. 263, 271 n.11 (1990). Those regulations define "effects" that an agency must consider in its environmental analyses, expressly including "indirect effects":

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 CFR 1508.8(b).

[2] Thus, BLM must address indirect effects, including reasonably foreseeable changes in land use or population density, provided those effects are caused by its action. Agencies like BLM have been required by the courts to consider the effects of private development where it is likely to be facilitated by Federal action, or at least made likely. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 358 (1989); Sabine River Authority v. U.S. Dep't of Interior, 951 F.2d 669, 680 (5th Cir. 1992); Lockhart v. Kenops, 927 F.2d 1028, 1033 (8th Cir.), cert. denied, 112 S. Ct. 186 (1991); Sierra Club v. Marsh, supra at 877-80; Conservation Law Foundation of New England, Inc. v. General Services Administration, 707 F.2d 626, 633 (1st Cir. 1983); City of Davis v. Coleman, 521 F.2d 661, 677 (9th Cir. 1975); National Forest Preservation Group v. Butz, 485 F.2d 408, 411-12 (9th Cir. 1973). 5/

5/ This principle has been stated in the context of the exchange of Federal lands for private lands, where it appears likely that the Federal lands will be developed after being transferred to private ownership. Those situations admittedly involve a more direct impact on Federal lands (in the form of the eventual development of those lands by the intended recipients) than that

Thus, 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. Despite BLM's mis-statement to that effect, we are able to affirm BLM's decision, as our review of the circumstances of this specific case indicates that it was not required to consider indirect effects here. ^{6/} A "reasonably close causal relationship" between the Federal action and the effects at issue is critical, and where the "causal chain" is unduly lengthened, NEPA does not apply. See Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774-75 (1983). We have concluded that it cannot be said that the Federal action in this particular case is the cause of the impacts associated with private development, as BLM's decision to grant the right-of-way in this case is not the physical cause of any "indirect effects" associated with the construction of the subdivision. This is evident when one realizes that the subdivision would very likely proceed even if BLM denied Henderson's application for a right-of-way.

Although not absolutely free from doubt, it appears likely (based on the information in the record) that Henderson would build the subdivision even if he had to provide access to Mink Creek Road over the privately-owned strip of land connecting Mink Creek Road with his subdivision. Henderson alluded to the possibility of building an access road across private lands in his application. Other references to the superiority of the proposal to build the access road across Federal lands (e.g., the December 30, 1992, letter from the Bannock County Engineer) naturally imply that an alternative (building the road on private land) was available. According to the EA, the no action alternative, under which Henderson could not construct an access road on public land, would force him to do so on private land to the south of the proposed site. Appellants have not demonstrated that the subdivision would not be developed if BLM denied the right-of-way application. In these

fn. 5 (continued)

presented here. However, the principle has also been enunciated in a more relevant context, in Sierra Club v. Marsh, *supra* at 878-82, where the court concluded that Federal agencies were required to consider the impact of industrial development of nearby private lands that would be facilitated by construction of a cargo port and causeway. Similarly, in City of Davis v. Coleman, *supra*, the court concluded that the Federal Highway Administration was required to consider the impact of nearby private industrial development that would be facilitated by a proposed highway interchange. Thus, the court stated that environmental review should "evaluate the possibilities in light of current and contemplated plans and * * * produce an informed estimate of the environmental consequences." *Id.* at 676 (emphasis added).

It cannot be said in the present case that development is remote and highly speculative. Compare Trout Unlimited v. Morton, 509 F.2d 1276, 1283-84 (9th Cir. 1974). To the contrary, development of the private lands appears definite, in light of Henderson's current plan.

^{6/} As BLM did not make the misstatement in its decision, it is unnecessary to modify that decision.

circumstances, we conclude that BLM was not required to address the environmental effects of the subdivision, as those effects were not "caused by the action" within the meaning of 40 CFR 1508.8(b).

[3] We next review the merits of BLM's decision to grant the right-of-way. Pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(6) (1988), BLM, as the duly authorized representative of the Secretary of the Interior, has discretion to accept or reject a right-of-way application for a road. The Board will generally affirm a BLM decision approving or rejecting a right-of-way 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. Coy Brown, 115 IBLA 347, 356 (1990); see High Summit Oil & Gas, Inc., 84 IBLA 359, 92 I.D. 58 (1985).

BLM reviewed the environmental impact of the decision to grant the right-of-way, including the impacts on wildlife, frankly concluding that public land would be adversely affected by granting the right-of-way. However, the effects of granting the right-of-way over Federal lands were found preferable compared with the effects of the no action alternative.

BLM concluded that taking the no action alternative and denying this right-of-way would result in the construction of a road on private lands, creating similar environmental impacts. The record also shows that a safer intersection with Mink Creek Road can be built on public lands, providing for adequate turn-out room for a school bus stop and mail drop area. The public land route is more level and offers more visibility. Further, steeper terrain on private land with tighter turns could pose greater danger from cars to wildlife, bicyclists, and pedestrians. Thus, granting the right-of-way presents other benefits not provided by the no action alternative.

Appellants have not persuaded us that BLM was incorrect in its implicit determination that it was in the public interest to grant this right-of-way.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Pocatello Resource Area Manager is affirmed.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge