

INTERIOR BOARD OF LAND APPEALS

Southwest Center for Biological Diversity

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SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY

IBLA 98-125

Decided April 2, 2001

Appeal from a decision of the Las Cruces (New Mexico) District Manager, Bureau of Land Management, and the Forest Supervisor, Gila National Forest, approving a mining plan of operations. NM 91644.

Affirmed.

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

NEPA is primarily a procedural statute designed to insure a fully informed and well-considered decision. It requires that an agency take a "hard look" at the environmental effects of any major Federal action. An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. In deciding whether an EIS has done so, it is well settled that a rule of reason will be employed such that the question becomes whether the statement contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.

APPEARANCES: Jack D. Mattox, Tucson, Arizona, for Southwest Center for Biological Diversity; Dalva L. Moellenberg, Esq., Phoenix, Arizona, for Phelps Dodge Mining Company; Grant Vaughn, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Southwest Center for Biological Diversity (Southwest) has appealed a December 4, 1997, decision of the Las Cruces (New Mexico) District, Bureau of Land Management (BLM), and the Forest Supervisor, Gila National Forest, United States Forest Service (Forest Service), approving the Record of Decision (ROD) for the Little Rock Mine Project and Final Environmental

Impact Statement (FEIS) and Plan of Operations for the Phelps Dodge Mining Company's (Phelps Dodge) proposed open-pit copper mine located near the Tyrone Mine in New Mexico.

The proposed Little Rock Mine Project is located in Grant County, New Mexico, approximately 7 miles south of Silver City in secs. 16, 17, and 20, T. 19 S., R. 15 W. (FEIS at 1-2.) It occupies the site of an existing, nonoperational mine west of the Phelps Dodge open-pit copper mine and the copper leaching operation and solution extraction/electro-winning plant that have been in operation at Tyrone Mine since the late 1960's. (FEIS at S-1; Phelps Dodge Answer (PD Answer) to Statement of Reasons (SOR) at 2.) Phelps Dodge has never operated the Little Rock Mine and if the ROD is not affirmed, Phelps Dodge will not reopen the mine. (PD Answer at 2.) The proposed project area includes lands administered by the Las Cruces district of the BLM, by the Silver City Ranger District of the Gila National Forest, and private patented lands owned by Phelps Dodge and MM Holding Company of San Jose, California. (FEIS at S-3.)

Under the proposed plan, Phelps Dodge would reopen and expand an existing open-pit copper mine on BLM land at the Little Rock Mine. (Phelps Dodge Response to Petition for Stay (PD Response) at 2.) The Little Rock Mine was abandoned in 1972. (FEIS at 3-12.)

The purpose of the proposed Little Rock Mine Project was to "re-establish the mine and extend the operating life of the copper processing facilities at the Tyrone mine site." (FEIS at 1-1.) The objective was identified as mining and processing the ore body as well as removing existing leach and waste stockpiles from BLM and Forest Service land and reclaiming the existing site. (FEIS at 1-1.) Phelps Dodge would remove 1.6 million tons of minable ore that was left as leach stockpile by the prior operator of the Little Rock Mine. (FEIS 4-7.) In addition, Phelps Dodge would remove waste stockpiles and associated processing facilities left behind by the mine operator. *Id.*; ROD at 5-6. The waste and leach piles negatively impact water quality at California Gulch. (FEIS at S-5.)

Phelps Dodge submitted a plan of operations to BLM in October 1993. The plan of operations estimates that approximately 100 million tons of leachable ore could be removed from the pit and processed at existing, permitted sites at Phelps Dodge's Tyrone Mine facility over a 2- to 4-year period, thus extending operations at Tyrone for that period. (FEIS at S-1.) No processing or waste disposal facilities are planned for the project area. (FEIS at S-2.) The proposed project would require the construction of a haul road that would enable Phelps Dodge to transport ore from the Little Rock Mine pit to the existing Tyrone operations for processing. (FEIS at S-1.) "The permit area covers approximately 600 acres, of which 164 acres are patented mining claims, 390 acres are administered by the BLM and 46 acres are administered by the Forest Service. The proposed mine pit will cover approximately 190 acres, and the haul road approximately 40 acres." (FEIS at 1-1.) The mining operation would be an open, terraced pit with a potential mine floor elevation of

approximately 5,600 feet. The project would require the diversion of California Gulch, as well as 46 kilovolt (kV) and 4.1 kV power lines, an electric substation, a water supply for dust suppression, and construction of temporary operations and maintenance facilities. (FEIS at 2-2.)

BLM served as the lead Federal agency for the preparation of the EIS in accordance with the National Environmental Policy Act of 1969 (NEPA); the Forest Service was a cooperating Federal agency. (ROD at 1.) Several action alternatives and a no-action alternatives were considered in the FEIS. (FEIS Chapter 2.) All of the action alternatives required the diversion of California Gulch. (FEIS at 2-13.) The mine operation would be essentially the same for any of the alternatives. Under the proposed action (Alternative 2) a pit lake would result after mining operations ceased. The pit lake would be contained within the proposed pit and would eventually reach an elevation of 5,730 to 5,800 feet. (FEIS at S-5.) Another alternative considered was the partial backfill alternative under which the open pit would be partially backfilled to an elevation of 5,800 feet after mining ceased. Id. Under this alternative, a 100-foot wide drainage channel would be constructed to prevent upstream surface water and ground water collected at the pit from ponding, and to allow it to flow through the east wall of the pit into Deadman Canyon. Under the no-action alternative there would be no diversion of California Gulch and thus no impacts to surface water within the gulch between the proposed pit and Deadman Canyon. In this case, existing leach and waste stockpiles from the previous mining operations would continue to affect surface water in California Gulch and ground-water quality in the area.

BLM issued a Draft EIS (DEIS) in August 1996 (AR Doc. 15), and received comments. (AR Doc. 18.) It then issued the FEIS in September 1997 (AR Doc. 20), which was followed by a comment period. Southwest was among those who commented on the DEIS and FEIS. (AR Doc. 18 at 54; AR Doc. 21 at 1.) BLM responded to those comments by letter of December 4, 1997 (AR Doc. 22 at 1), and on the same day issued the ROD. This appeal followed.

In its SOR, Southwest argues that the FEIS

is flawed because it does not take a "hard look" at the short and long term environmental consequences of the prolonged drawdown of water from the Gila River Basin, the soon to be operational addition of several other mining operations in the immediate area, the obvious and admitted violations of air and water quality standards that will occur, and, finally the insufficient precautions needed to protect migratory birds and other animals from a polluted pit lake.

(SOR at 2.) Southwest also complains that no reclamation plan has been made available to the public nor have sufficient mitigation measures been developed to address and possibly remedy the flaws in the FEIS. It asserts that BLM is relying on the State permit process to take care of the problems. (SOR at 2.)

In particular, Southwest contends that the

FEIS and ROD are deficient because there is no investigation into or evaluation of the effects over time of both the drawdown of groundwater at the Little Rock Mine site on the Gila River watershed, or the predicted reduced flow of water from California Gulch into Mangas Creek, a tributary of the Gila River.

(SOR at 2.) Southwest argues that BLM failed to examine cumulative effects or impacts and to prevent "unnecessary or undue degradation" as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994). (SOR at 2.) Southwest argues that BLM's focus of review was too limited. In particular, Southwest maintains BLM must look at the environmental consequences in the Gila River area which it describes as "located only 5+ miles from the Mangas Creek tributary." Id. Southwest maintains that BLM failed to make a "serious effort to determine effects pertaining to water loss from California Gulch and the continuation of the 'prodigious use' of water at the Tyrone facility taken from the Gila River." Id. at 4.

Southwest maintains that the FEIS and ROD are deficient because they did not examine the consequences of the known, planned and additional mining activity in the immediate and adjacent area of the project. It asserts that while BLM is aware that there is other mining in the area it did not evaluate the cumulative ecological effects of this additional mining, only the economic effects. (SOR at 6-7.)

Southwest also objects to specific findings in the EIS regarding environmental effects. For example, it objects to the conclusion that the flow in Mangas Creek will be reduced by only 9 percent. Southwest believes that critical factors were not considered when this number was derived. (SOR at 5.)

Southwest asserts that the FEIS approved activity that violates, Federal, State, and local air quality standards. Southwest objects to the FEIS' assumptions used to correct calculations of particulate emissions in the DEIS. (SOR at 8.) Further, Southwest maintains that even if air quality standards violations would only occur in a localized vicinity near the mine, this is legally unacceptable. (SOR at 9.)

Southwest argues that both the FEIS and ROD are internally inconsistent in their treatment of water quality. Southwest notes that the FEIS concedes that the project will violate the Water Quality Control Commission (WQCC) standards for copper and fluoride, while at the same time stating that the mine pit would become a manmade lake which would meet the water quality standards for wildlife and thus potentially constitute a beneficial effect for wildlife habitat. (SOR at 9.) Moreover, Southwest objects to the ROD's statement that water from the pit would be discharged to the No. 1X Tailing Dam on grounds that this would be contrary to the refusal by the New Mexico Environment Department (NMED) to permit such dewatering.

Southwest maintains that there is a "strong probability" that the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 (1994), will be violated. Southwest objects to BLM's attempt to mitigate power line problems and insists that "BLM has not gone far enough to ensure compliance with federal law." (SOR at 10.)

Southwest also questions the reclamation plan, noting that the FEIS states that "[a]t this time the proposed reclamation and closure plans are conceptual and developed to address the general types of concurrent reclamation, final reclamation and closure." (SOR at 10, quoting FEIS at 2-27.) Southwest complains that there is no way for the public to understand how concerns, defects or deficiencies will be brought up to compliance with Federal and State laws. (SOR at 10.)

In its Response to the Stay Request (BLM Response), BLM argues that all of the concerns raised by Southwest were raised during the public comment portion of the EIS preparation and that it has made diligent efforts to deal with those concerns and resolve them. BLM asserts that Southwest simply disagrees with BLM but that disagreement is not enough to overcome the validity of the FEIS. It contends that it has adequately addressed the anticipated environmental impacts in Chapter 4.0 of the FEIS and that those impacts show "no unnecessary or undue degradation of the lands." (BLM Response at 4.) BLM avers that section 4.12 of the FEIS considers the cumulative impacts of the Tyrone mine. Id. BLM asserts that environmental protection measures will be ensured by the necessary permits and a reclamation plan to be approved by the State of New Mexico, and under Federal standards by BLM and the Forest Service. Finally, BLM maintains that all of Southwest's concerns about air, water, and migrating bird problems have been addressed, and provides cites to appropriate locations in the FEIS. (BLM Response at 5.)

Phelps Dodge submits a Response to the Stay Request (PD Response) and an Answer (PD Answer). The company focuses on the fact that BLM has determined that the remnants of the historic mining operation have adversely impacted surface and ground water and also that implementation of the plan of operations, including removal of the existing stockpiles and waste material, should improve ground-water quality associated with historic mining impacts and eliminate surface water discharges. (PD Response at 2, citing ROD at 3, 5-6.) It maintains that there is no operator at the mine site currently who is addressing existing water quality degradation but that under the plan of operations, Phelps Dodge would be required to comply with water quality protection laws including the Clean Water Act and the "stringent groundwater protection requirements of the New Mexico Water Quality Act." (PD Response at 11.) Phelps Dodge also asserts that to the extent that water quality in the pit poses any threat to birds, the ROD requirement of compliance with all applicable strictures of the MBTA will ensure compliance with that statute. (PD Response at 11, citing ROD at 9.)

Noting the procedural aspect of NEPA, Phelps Dodge points out that BLM's consideration of environmental effects is sufficient and does not prevent BLM from deciding that other values outweigh environmental costs.

(PD Response at 7.) Phelps Dodge cites where "BLM included an adequate discussion of cumulative impacts in the EIS" and evaluated the physiography and ground disturbance impacts of the cumulative analysis area, including impacts on soils, geology and minerals, water resources, biological resources, vegetation, wildlife and fisheries, special status species, land use, socioeconomics, visual resources, recreation, cultural resources, air quality, and noise. (PD Response at 7-8.) It argues that all of the issues and concerns identified in the public scoping process were researched and discussed in the FEIS and that the FEIS relied upon information contained in numerous studies conducted by professional consultants. Id.; see PD Answer at 3.

Finally, Phelps Dodge contends it is appropriate for "BLM to rely upon legally enforceable requirements of state agencies to require the detailed mitigation plans through such legally required instruments such as water quality and mine reclamation permits." (PD Response at 9, citing Supreme Court and Board precedents.) It states that it will comply with all applicable permitting requirements and that ensuring that these permitting requirements are met reasonably supports the ROD. Id.

[1] It is well established that under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), the adequacy of an EIS must be judged by whether it constituted a "detailed statement," which took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto. Colorado Environmental Commission (CEC), 142 IBLA 49, 52 (1997), and cases cited.

In general, an EIS must fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove mining operations, is fully informed regarding the environmental consequences of such action. 40 C.F.R. §§ 1500.1(b) and (c); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. As the court stated in County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978):

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The critical question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto.

State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

When BLM has complied with the procedural requirements of section 102(2)(C) of NEPA, by actually 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.

In order to overcome BLM's decision to approve a plan of operations, an appellant must carry its burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to consider adequately, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. See CEC, 142 IBLA at 52. Southwest has failed to do so.

Southwest asserts that the FEIS did not adequately address the impacts of predicted ground-water drawdown on the Gila River watershed or the predicted reductions in the flow of water from California Gulch into Mangas Creek. It claims that the FEIS is flawed in its determination of how much water will not reach Mangas Creek, due to the pit construction and diversion of California Gulch, because the calculation was based on water loss from surface area only and assumes that an "even rate of loss-variations" would exist. (SOR at 5.)

We disagree with Southwest's assertion that the impact on water resources was not adequately analyzed. First, Southwest has presented no evidence of any adverse environmental impacts. Its case is presented as a series of quotes from the FEIS that note possible negative effects. This fails to meet the burden on appellant to demonstrate failure of adequate consideration by BLM.

Second, the record reveals the allegedly missing analysis. As part of the environmental study, Dames & Moore conducted a hydrogeologic investigation and water sampling program to evaluate existing hydrogeologic conditions and water quality in the study area, and prepared a number of technical reports. These reports included a Ground Water Model Technical Report (Document 9), Surface Water Hydrology Technical Report (Document 11), and Hydrogeologic Investigation Report (Document 12).

Based on these technical reports and the mining plan, the FEIS arrived at a number of conclusions on the impact of the proposed mine to water resources. Southwest has not challenged the scientific reliability of these reports.

Moreover, the FEIS' analysis of the watershed was extensive. The Mangas Creek watershed is located within the cumulative analysis area and Mangas Creek receives flows from the three potentially affected watersheds. (FEIS at 3-14.) <sup>1/</sup> However, because Mangas Creek is above the junction with the joint inflows of the other three watersheds, it was determined that Mangas Creek was not directly impacted by the proposed action above the proposed mine site. Id. Rather, any impacts would be derivative of impacts on California Gulch.

California Gulch will be diverted as part of the mining operation. (FEIS at 2-15.) The FEIS recognizes that there are negative effects from the diversion and discusses the impacts of three diversion alternatives. (FEIS at 4-14 to 4-18.) Under the selected alternative (SD-3), water would be diverted from California Gulch to the pit bottom both during and after operation of the mine. (FEIS at 4-14.) The flows collected in the pit bottom during mine operation would be pumped to the No. 1X Tailing Dam or used as process make-up water. (FEIS at 4-14; ROD at 3.)

The FEIS recognizes that "[p]it construction would bisect California Gulch, effectively removing surface water flow between the south rim of the proposed pit and its confluence with Deadman Creek" (FEIS at 4-61) and that would decrease flow at the California Gulch/Deadman Canyon discharge point. (FEIS at 4-20.) The effect on the flow of water during mining was found to be uncertain "due to the uncertainty in the amount of flows to be pumped to the Tailings Pond and retained within the mining operation." (FEIS at 4-16.) However, the FEIS was able to conclude that after mining, water entering the pit from California Gulch would no longer contribute to downstream stormwater flows, peak storm flows and average annual flows and thus they would be less than under existing conditions. (FEIS at 4-16.) The net result of this would be a "decrease in flows ultimately entering Mangas Creek, with a decrease of 1.06 square miles from an original 11.26 square miles of contributing drainage." (FEIS at 4-20.) <sup>2/</sup> However, the effect of this decrease in contributing drainage area can fluctuate over time because of the ephemeral nature of the watershed flows at the location of the pit and the fact that flows from California Gulch entering the pit "would either evaporate or recharge the groundwater." (FEIS at 4-22.)

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<sup>1/</sup> The three affected watersheds are the Whitewater Canyon, California Gulch and Deadman Canyon.

<sup>2/</sup> The 11.26 square (sq.) miles is the total from the 3.99 sq. miles for Whitewater Canyon, 6.21 sq. miles for Deadman Canyon, .88 for California Gulch and .27 sq. miles for the pit. The decrease of 1.06 sq. miles derives from the .27 sq. miles of area covered by the pit and the .79 sq. miles of California Gulch upstream of the pit. (AR Doc. 11 at 2.)

Consistent with these conclusions, the FEIS notes that this surface effect will occur because the rain that falls on the pit would no longer contribute to natural flows to Mangas Creek. The effect of this would be to reduce the area contributing streamflow in the cumulative analysis area. (FEIS at 4-12.) This in turn results in slightly lesser flood flows and total runoff. (FEIS at 4-12.)

Thus, it is clear that the FEIS considered the impact on Mangas Creek of the California Gulch diversion but found no significant environmental impacts. The ROD recognized that the result of the proposed action would be a net decrease of flow into Mangas Creek by about 9 percent of the contributing drainages in the area. (ROD at 5.) However, Southwest has neither shown that BLM failed to identify any significant, negative environmental impacts from the decrease of flow nor shown where its conclusions are incorrect.

BLM properly concluded that the Little Rock Mine would not have additional direct impacts on the Gila River. In this regard, the FEIS pointed out that because the Tyrone Mine already withdraws water from the Gila River pursuant to Phelps Dodge's water rights, no additional water rights would be needed to develop the Little Rock Mine. (FEIS at 3-24.) The FEIS thus concluded that the mine would not require any increase in the rate of withdrawal of water from the Gila River beyond what is used for existing operations. (FEIS at 4-61.) While Southwest asserts that BLM should have considered the impact of the additional years of water usage, its only charge relates to the preexisting and approved water usage at the Tyrone Mine, a matter not within the coverage of the FEIS.

This lack of substantiation dooms Southwest's claims regarding the effect on ground water as well. Thus, while Southwest charges BLM with a failure to adequately consider effects on ground water (SOR at 4), the FEIS' consideration is detailed and clear. The FEIS states that "pit dewatering will be necessary to pump out groundwater that enters the pit once the pit bottom reaches the present groundwater table located at an elevation of about 5,800 feet." (FEIS at 4-8.) Ground-water drawdowns of up to 10 feet were predicted at distances of up to 7,000 feet from the pit during mining with the maximum drawdown predicted after 3 years. (FEIS at 4-11.) The FEIS concluded that pit dewatering would have drawdown effects up to 10,000 feet away. Once mining is completed the pit dewatering would end and the pit would be allowed to fill with water, creating a lake with no outlet. (FEIS at 4-11.) The FEIS identifies two residential properties approximately 3,000 feet north of the proposed pit and approximately one-half mile southeast of the proposed pit. (FEIS at 3-24.) The FEIS predicted that the well at the residence north of the proposed pit would have temporary ground-water drawdowns, while the residence southeast of the pit would suffer well drawdown of 10 to 20 feet at the end of mining, followed by a 50-year period for the well to rebound. (FEIS at 4-12.) The FEIS concluded that because of the hydrologic complexities of the site it was unclear what the effect would be on seeps and springs in the mining area. (FEIS at 4-12.) However, based on this data, the FEIS determined

that mining operations would not directly affect the Gila River which is more than 5 miles from the Little Rock Mine Site. (FEIS at 4-61.)

Thus, while Southwest challenges the FEIS on the topic of ground-water drawdown, the record shows that extensive studies were done. Southwest has alleged no particular error in the various technical reports or conclusions in the FEIS. Thus, Southwest has failed entirely to meet its burden. CEC, 142 IBLA at 52.

Moreover, Southwest fails entirely to mention the long-term positive effects to surface and ground-water quality that are a goal of the plan, and a rationale for its approval. See FEIS at 4-71, ROD at 4. "California Gulch presently drains through the existing mine and at this point is severely altered from its original character within the previous mine area and downstream to the intersection of Deadman Canyon." (FEIS at 3-52.) Samples of surface water from California Gulch and Deadman Creek show that water quality presently exceeds New Mexico Water Quality Control Commission (NMWQCC) standards for aluminum and copper. (FEIS at 3-20, 3-21.) Ground-water samples from wells that may be affected by past mining activities often exceed standards for several metals, fluoride, sulfate, pH, and TDS (total dissolved solids). (FEIS at 3-24.) The FEIS concludes that removal of the existing leach stockpiles would improve the overall surface water quality in intact areas of California Gulch and the adjacent area. (FEIS at 4-8, 4-62, 4-71.)

Thus, with respect to water, Southwest fails to meet its burden. The FEIS and ROD recognize that there will be some negative and some positive effects, but negative effects do not prohibit BLM from approving an action. Southwest has not shown that BLM failed to fully consider the environmental factors or that it did not make a reasoned decision after balancing the effects of the diversion.

Southwest charges BLM with failure to evaluate the cumulative effects of the planned activities. It complains that the "FEIS and ROD are deficient because they do not examine the consequences of the known, planned, and additional mining activity in the immediate and adjacent area of the project." (SOR at 6.) A cumulative impact is defined by the Council on Environmental Quality (CEQ) as

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other action. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

The FEIS inventoried all general and specifically planned and proposed land uses within the study area boundary.

Future land uses were identified from (1) projected uses included in the officially adopted general and comprehensive plans for the area (Grant County); (2) specific development plans recorded by county and state land management agencies; and (3) on county lands outside of municipalities where planned or proposed land use data were not available (Grant County assigns these areas a single-family residential and agricultural zoning classification).

(FEIS at 3-42 to 3-43.) Planned land use information was obtained from general or comprehensive plans adopted by each Federal, State, county, and municipal agency and included both short- and long-term goals and expectations. (FEIS at 3-43.)

The FEIS identified past and expected actions within the cumulative impact area. (FEIS at 4-55.) The estimated potential future mine life of the Little Rock Mine was determined to be up to 4 years. (FEIS at 4-57.) On BLM lands, only the proposed Little Rock Mine was anticipated within the project area. The FEIS identified Forest Service future land use management plans as including a long-term increase of herbaceous forage for wildlife, maintaining species population levels, and establishing livestock grazing numbers through standard range analysis procedures. Id. The FEIS identified three other open-pit copper mine operations planned for the area, as well as possible mines on unpatented mining claims. (FEIS at 4-58.) The FEIS went on to evaluate the cumulative impact on soils, geology and minerals, water resources, biological resources, vegetation, wildlife and fisheries, special status species, land use, socioeconomics, visual resources, recreation, cultural resources, air quality, and noise. (FEIS at 4-54 to 4-68.) The FEIS found that either the impact would be minimal or that negative impacts would be offset by positive ones such as jobs (FEIS at 4-66) or improvement of overall surface water quality at particular sites by removal of the leach stockpile. (FEIS at 4-62.)

Southwest presents no evidence of any effects that BLM did not consider. Rather, its challenge is based on a presumption that because there are or may be other mining projects in the area in the future, there must be cumulative effects. Southwest's contention that BLM's failure to find evidence of cumulative environmental effects is proof of error is not sustained by any factual assertion. Thus, we are not persuaded that BLM failed to address a particular cumulative impact.

Southwest contends that the project will violate the Annual National Ambient Air Quality Standard for Inhalable Particulate Matter. (SOR at 8.) It supports this contention by reference to comments made in response to the DEIS by the NMED and by a group called LASER, and attached as comments to the FEIS at 5-63, 5-73. Southwest also cites as probative a

BLM response to LASER, stating that "potential violations of the State and National Air Quality Standards predicted in the FEIS indicate the potential for harmful health effects." (FEIS at 5-73, FEIS Response at 25-2.)

Based upon these statements in the record, Southwest asserts that BLM cannot approve a plan which violates air quality standards and contests BLM's conclusions in the FEIS with respect to the effects of particulate matter less than 10 micrometers in size (PM-10), because they are based upon "newly revised" calculations published subsequent to the DEIS. (SOR at 8.) Thus, Southwest states that this "is **suspect.**" Id.

However, Southwest's stated suspicion does not prove its case. Rather, the record contains a lengthy analysis of the change in conclusions with respect to PM-10. The DEIS predicted a potential violation of air quality standards at several off-property points within several hundred meters of the mine, using an assumed annual PM-10 background concentration of 22 micrograms per cubic meter (*ug/m<sup>3</sup>*). This DEIS figure was based on total suspended particulate emission factors published by the EPA where data was unavailable. Subsequently, in consultation with NMED, use of these EPA factors was determined to be incorrect. (FEIS at 4-47; see also FEIS Response 21-34 at 5-63.) In this case, moreover, some data was available. In a supplemental study produced by Dames and Moore, the "Little Rock Mine Project, Air Quality Technical Report Supplement, 1997" (AR Doc. 19), the contractor relied on actual data for the years 1991-93 from a monitoring station in Hurley, New Mexico, based on advice and information provided by NMED. See AR Doc. 19 at 2. 3/

In addition, Phelps Dodge purchased the location where the off-property monitoring points were sited, thus eliminating concern regarding potential off-site violations close to the mine. (AR Doc. 19 at 1-2.) Based on these changes, the FEIS concluded that the violations predicted in the DEIS were not likely to occur. (FEIS at 4-50; FEIS Response 18-1 at 5-52.)

Southwest may find these changes disturbing, but it does not explain any error in them. Southwest's assertion of a lack of confidence in the process is not sufficient to carry its burden to demonstrate that any air quality standard is violated or that BLM failed to consider relevant factors in making its decision. CEC, 142 IBLA at 52. Accordingly, we reject Southwest's argument on this point.

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3/ The data from Hurley, New Mexico, was "assumed to be representative of the Little Rock Mine area based on the proximity of the monitoring station to the proposed Little Rock Mine. Furthermore, the monitoring station is in close proximity to a similar mining operation in the vicinity of Hurley, New Mexico." (FEIS at 3-72.) In 1995 the NMED indicated that the data was acceptable because all permitted sources in the area were operating during the period of ambient particulate monitoring. (Air Quality Technical Report Supplement, AR Doc. 19 at 2.)

Southwest contends that the ROD and FEIS indicate that NMWQCC Standards will be violated and cites a number of comments from individuals who commented on the DEIS and expressed concerns as to the water quality of the pit lake. It notes that the ROD states that during mining, water would be discharged to the existing No. 1X Tailing Dam—a process Southwest asserts is illegal. (SOR at 9.)

The quality of the water in the pit lake was addressed in the FEIS. The Geochemical Evaluation Technical Report (AR Doc. 8) evaluated "the present conditions of the groundwater and surface water in the vicinity of and at the proposed open pit mine at the Little Rock site and determine[d] what effect open pit mining [would] have on the groundwater and surface water quality." (AR Doc. 8 at 4.) The Technical Report concluded that allowing the pit to fill with water after mining produced "a low risk for generating poor water quality due to acid rock drainage" and that it would "most likely not produce any lower water quality in the lake than the present quality of the groundwater at the site." (AR Doc. 8 at 3.) Under the worst case scenario copper would slightly exceed the NMWQCC surface water standard for livestock watering. (FEIS at 2-33.)

However, BLM has made the approval contingent on the requirement that Phelps Dodge obtain all necessary approvals and permits from the State of New Mexico prior to beginning construction and operations, as well as all State, Federal, and local approvals for the hydrologic portion of the reclamation plan. (ROD at 7, 9.)

Southwest's objection is based on this contingency; it argues that the FEIS may not be approved until specific measures are spelled out in the ROD. However, the FEIS states that it approves the mining plan in recognition of the fact that methods will be developed with the pertinent regulatory agencies if a problem develops. In fact, details of mitigation measures are not required to be set forth in the FEIS. As the Supreme Court stated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989): "To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." However, the Court cautioned that

[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other \* \* \* it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

Id. at 352-53. It is clear from the record that only under the worst case scenario would NMWQCC surface water standards be violated. Phelps Dodge is

required to comply with Federal, State, and local water quality standards and to design a plan that meets those standards. Any failure to comply with those standards would be a violation of its approved mining plan. BLM is not required to await final approval by the State to approve the mining plan contingent on that approval. <sup>4/</sup>

Southwest charges that discharge of water to the No. 1X Tailing Dam has been declared illegal by NMED. In fact, what NMED stated was that discharge of the dewatering fluid was not currently permitted under the existing plan and might not be approvable. (FEIS at 5-57, Comment 21-4.) BLM acknowledged the comment and stated Phelps Dodge would not discharge mine dewatering water without the required permits from the State. (FEIS at 5-57, FEIS Response at 21-4.) See 43 C.F.R. § 3809.3-1(a) (1999). If Phelps Dodge is not granted a State permit, that portion of the plan would not be implemented as any discharge would be a violation of the requirement of the ROD that it be in accordance with applicable regulations. Id.; see ROD at 2. We also note that Phelps Dodge has itself acknowledged this. (PD Answer at 13.)

Southwest asserts that there "is a strong probability" that the MBTA will be violated. (SOR at 10.) Southwest is concerned both with the impact of the power lines and possible water pollution. Id. In part, it bases its concerns on warnings by the Fish and Wildlife Service (FWS) of potential impacts from the power distribution line and FWS' request that the pit lake be made "bird safe." Id., citing FEIS at 5-101. However, BLM responded to FWS stating that the power lines are to be constructed in accordance with guidelines set forth in "Suggested Practices for Raptor Protection in Power Lines" (Olendorff, et al. 1981) and could be designed to further reduce the potential for collision hazards by modifying the poles, crossarms, and conductor placements. (FEIS at 5-101, FEIS Response at 35-1.)

Southwest objects to the words "could be." (SOR at 10.) However, Southwest does not state an error in BLM's efforts to mitigate these impacts. We again note that the ROD is conditioned on the requirement that Phelps Dodge comply with all State and Federal laws, specifically including the MBTA both during and after operation of the project. (ROD at 9.) BLM personnel will monitor the project for compliance with the plan of operations, and in order for Phelps Dodge to be in compliance with its approved mining plan, it must take whatever compliance action is necessary. (ROD at 9.) The fact that these actions are not spelled out in detail in

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<sup>4/</sup> While Southwest complains about the lack of a close-out or reclamation plan, the ROD states that final reclamation of the site will comply with regulations in place at the time of closure and closure will be consistent with the regulations of the various agents. (ROD at 9.) Thus, BLM and the Forest Service will determine reclamation needs for their respective lands with input from the New Mexico Mining Act Reclamation Bureau. Id.

the FEIS does not alter the fact that the ROD expressly conditions approval on compliance with the MBTA, in response to FWS comments. Finally, the power lines are part of the operation of the mine and will be removed once mining operations are completed and the pit lake created. (FEIS at 5-101, FEIS Response at 35-1.) Thus, once there is water which might attract birds, the power lines will be gone and no longer present any hazard.

For the reasons stated above, we find that the FEIS adequately considered the environmental impacts of the approved alternative. BLM met the standard established by the CEQ regulations at 40 C.F.R. Part 1500. The FEIS considered the overall effect of the mine on the area. We conclude that Southwest failed to demonstrate 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.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge