

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance

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SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2001-57

Decided September 22, 2004

Appeal from a Decision Record/Finding of No Significant Impact of the Acting Field Manager, Price, Utah, Field Office, Bureau of Land Management, approving the granting of public-land rights-of-way in connection with the Lila Canyon Coal Mine Project. EA No. UT-070-99-22.

Affirmed.

1. Environmental Quality: Environmental Statements--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: Applications

A BLM finding of no significant impact (FONSI) for a grant of public-land rights-of-way for surface facilities, access road, telephone line, and power line in connection with underground coal mining operations based on an analysis set forth in an environmental assessment will be upheld when the record reveals that BLM has taken a hard look at the environmental impacts and establishes a rational basis for the FONSI.

APPEARANCES: W. Herbert McHarg, Esq., Southern Utah Wilderness Alliance, Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; Denise A. Dragoo, Esq., Erik G. Davis, Esq., and George Tsiolis, Esq., Salt Lake City, Utah, for UtahAmerican Energy, Inc.; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Southern Utah Wilderness Alliance has appealed from an October 27, 2000, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Acting Field Manager, Price, Utah, Field Office, Bureau of Land Management (BLM), deciding to grant to UtahAmerican Energy, Inc. (UEI), rights-of-way on public lands for surface facilities associated with an underground mine, a mine access road, a telephone line, and a 46 kV power line. The rights-of-way are intended to facilitate UEI's proposed underground coal mining operation, known as the "Lila Canyon Coal Mine Project" (Project), situated in central Utah. The Project is expected to involve mining from 1.5 to 4 million tons of coal annually over the 20-year life of the Project from reserves underlying about 5,605 acres of Federal, State, and private land in the Book Cliffs coal field leased to UEI.^{1/}

In deciding whether to approve the granting of public-land rights-of-way in connection with the Project, BLM, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), and its implementing regulations (40 CFR Chapter V), prepared an Environmental Assessment (EA) (No. UT-070-99-22). The EA was initially issued in July 2000, and then, following a 30-day public comment period, was revised and finalized in September 2000. Citations to the EA are to the final EA, except in the case of the various maps (plates) which are appended to the July 2000 version of the EA. The EA analyzed the environmental consequences of the proposed right-of-way grants and the rest of the Project (Alternative B) and a no action alternative (Alternative A). The FONSI concluding there is not likely to be any significant impact which would require preparation of an environmental impact statement (EIS) is based on the analysis in the EA.

In connection with the Project, UEI's predecessor-in-interest applied for three rights-of-way pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (2000), and its implementing regulations, 43 CFR Part 2800. Each of the rights-of-way would be issued for a term of 30 years, subject to renewal. (DR at 1.)

The first right-of-way (UTU-77122) would encompass mine-related surface facilities which would be constructed in connection with underground mining operations. The facility area would include approximately 39.6-acres with on-the-

^{1/} A motion to intervene in this case has been filed by UEI. As the proponent of the action approved by BLM, UEI is a party to the case which will be affected by any decision by the Board in this appeal and, hence, has standing to intervene. Accordingly, the motion to intervene is granted.

ground disturbance impacting close to 35 acres of public land located along the bottom of a narrow part of Lila Canyon. (EA at 19.) Such facilities would provide access to and ventilation for the mine; convey coal to the surface for crushing, stockpiling, and loading on trucks; and also include a sediment pond, storage sheds and warehouse, and administrative and other offices and buildings. The facilities would be utilized for the life of the Project and then removed, and the lands rehabilitated.

In order to provide appropriate access to its proposed mining operations, for coal hauling and other purposes, UEI proposed a second right-of-way (UTU-76617). This right-of-way would authorize the public land segment (about 600 feet) of an upgrade of 2.8 miles of the existing two-lane graveled "Lila Canyon Road," as well as public land segments (3.54 miles) of a new 4.7-mile long two-lane paved road which would be used as a haul road. The roads would access the mine site from the northwest (County Road 125) and the southwest (U.S. Highway 191/6), respectively. (EA at 9-11.) About 600 feet of the existing road and 3.54 miles of the new road would cross public land, with the remainder crossing private and/or State land. The area of public land disturbed by UEI's road upgrading/construction activity would total 43.59 acres (0.69 acres of existing road and 42.90 acres of new road). The upgraded Lila Canyon Road will be used only during construction of the proposed surface facilities and of the new road, and then gated. In addition, UEI would be authorized to run a buried telephone line, serving the proposed mine, along the access road, within a right-of-way corridor which would be fenced on both sides of the roadway.

UEI also seeks a third right-of-way (UTU-76614), which would authorize the construction of a 1.3-mile long 46 kV power line running across public land, in order to provide electrical power to the mine and related facilities. Such activity would include the erection of power poles and cross arms, suspension of electrical lines, and installation of a switching station, metering station and substation, which would disturb a total of 15.76 acres, during construction, and 12.61 acres, following construction and rehabilitation of the disturbed lands.

Based on the EA, the Acting Field Manager issued his October 2000 DR/FONSI, adopting a modified Alternative B, thus approving the granting of public-land rights-of-way in connection with the Project, subject to various mitigating measures. Since he also found that no significant environmental impact was likely to result from proceeding with the right-of-way grants, the Acting Field Manager held that no EIS was required, thus rendering a FONSI. However, he provided that no construction, operation, and maintenance could take place in conjunction with the right-of-way grants until the State approved the mining permit for the Project, making approval of each of the right-of-way grants "contingent upon mine plan

approval.” (DR/FONSI at 1, 2.) The Acting Field Manager thus stated: “Implementation [of BLM’s decision] may begin upon approval of the mine plan for the [P]roject.” Id. at 7.

At the time of BLM’s preparation of the EA and the Acting Field Manager’s October 2000 DR/FONSI, UEI was in the process of seeking approval by the Utah Division of Oil, Gas and Mining (UDOGM) of its plan for underground coal mining operations and related surface activity in connection with the Project, and then reclaiming the affected lands. Primary responsibility for administration of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (2000), is committed to UDOGM.^{2/} See 30 CFR Part 944. By decision dated July 27, 2001, following the Acting Field Manager’s October 2000 DR/FONSI, UDOGM approved UEI’s application for a surface coal mining permit, pursuant to the State surface mining law. Appellant appealed that decision to the Board of Oil, Gas and Mining (BOGM), which, on December 14, 2001, reversed UDOGM’s July 2001 decision and remanded the case to UDOGM. BOGM did so because of errors in the permit approval process, principally relating to deficiencies in UDOGM’s analysis and supporting data concerning the anticipated impacts of mining on surface and groundwater quality and quantity, which was deemed to be specifically violative of the State surface mining law and its implementing regulations. We have not been advised further by the parties of the status of the permit application.

In conjunction with its appeal, appellant petitioned for a stay of the effect of the Acting Field Manager’s October 2000 DR/FONSI, pending our final decision in its appeal, pursuant to 43 CFR 2804.1(b). In view of our disposition of this appeal on the merits in this decision, appellant’s stay petition is denied as moot.^{3/}

In its statement of reasons (SOR) for appeal and other filings, appellant principally contends that BLM failed, in its EA, to adequately consider the potential environmental impacts of approving the right-of-way grants for the Project, and should have prepared an EIS since “substantial questions” have been raised regarding whether the Project is likely to significantly impact the human environment, citing Foundation for North American Wild Sheep (Wild Sheep) v. U.S. Department of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982)).

^{2/} Although the Lila Canyon Mine is an underground coal mine, the definition of surface coal mining operations regulated under SMCRA includes “surface operations and surface impacts incident to an underground coal mine.” 30 U.S.C. § 1291(28)(A) (2000).

^{3/} In accordance with the terms of the DR, approval is not effective until the mine plan is approved. (DR at 6-7.)

Appellant is particularly concerned that BLM failed to adequately consider the likely impacts of underground coal mining and related surface activities associated with the Project on Lila Canyon and surrounding areas, which it characterizes as a “defacto wilderness.” (SOR at 2) It asserts that the Project is likely to have significant adverse impacts on BLM-designated wilderness study and inventory areas, and their wildlife populations including Rocky Mountain bighorn sheep (Ovis Canadensis Canadensis), mule deer, and elk.

[1] A BLM decision to proceed with a proposed action, absent preparation of an EIS, will be upheld, as being in accordance with section 102(2)(C) of NEPA, where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991). An appellant seeking to overcome such a decision must carry its burden to demonstrate, with objective proof, that BLM failed to, or did not 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. Southern Utah Wilderness Association, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); Red Thunder, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); Sierra Club, 92 IBLA 290, 303 (1986).

Appellant argues as an initial matter that BLM was required by section 102(2)(C) of NEPA, and, specifically, BLM’s own internal policy guidance to prepare an EIS before approving the right-of-way grants at issue here. It cites section 11.4(A) of Title 516 of the Departmental Manual (DM) (“Department of the Interior NEPA Revised Implementing Procedures”), to the effect that an EIS is normally required for “[a]pproval of any mining operation where the area to be mined, including any area of disturbance, over the life of the mining plan is 640 acres or larger in size.” (SOR at 5 (quoting from 65 FR 52212, 52231 (Aug. 28, 2000)).) Appellant asserts that the Project “far exceeds the 640[-]acre threshold, as [UEI’s mining] plan anticipates mining 1.5 million to four million tons of coal per year from a total of 5,605.66 acres of [F]ederal and State of Utah coal reserves.” (SOR at 5-6.)

Appellant fails to recognize, in arguing that BLM was required to prepare an EIS here, that BLM is not approving any mining operations. Thus, UEI asserts that the policy guidance cited by appellant concerns BLM’s authorization of a mining plan of operations under the surface management regulations governing hardrock mining claims (43 CFR Subparts 3802 and 3809), rather than surface coal mining operations regulated under SMCRA, which are generally subject to regulation by the UDOGM subject to the oversight jurisdiction of OSM. (Answer at 5; compare 516DM

11.4(A)(7), 65 FR 52231 (BLM) with 516 DM 13.4.A(4)(b), 65 FR at 52237 (OSM).) Approval of surface coal mining operations is committed to the State permitting authority (UDOGM), which is acting pursuant to the State's approved program under SMCRA and the State-Federal cooperative agreement regarding surface coal mining operations on Federal lands. 30 CFR 944.10, 944.30. UDOGM has primary regulatory authority over underground coal mining operations and related surface activities with respect to State and private lands, and also with respect to Federal lands, by virtue of a delegation of that authority by the Secretary of the Interior. See 30 CFR Part 944. Thus, UDOGM would, for the most part, make the final permitting decision, approving most of UEI's PAP, subject to OSM oversight. (DR/FONSI at 5.) Not included would be approval of UEI's mining plan, since that authority was retained by the Secretary, under 30 CFR 745.13, and delegated to the Assistant Secretary, Lands and Minerals. (DR/FONSI at 5-6; see 30 CFR 746.13.) We recognize that underground mining operations and related surface activity would not occur but for BLM's granting of a right-of-way for surface facilities necessary to the processing and transportation of mined coal after it exits the mine portal. (EA at 8; UEI Opposition to Petition for Stay, dated Dec. 8, 2000, at 10 ("[D]evelopment is impossible until BLM grants the rights-of-way".)) However, while the siting of such facilities on public land is wholly dependent on UEI having the necessary BLM right-of-way, the approval of mining operations, which would result in the actual operation of the mine, rests with UDOGM. (EA at 3 ("UDOGM issues the applicant a permit to conduct coal mining operations".)) Thus, we are not persuaded that BLM is required by section 11.4(A) of Title 516 of the DM to prepare an EIS before granting the right-of-way for surface facilities, since it is not approving any mining operations.

Appellant further argues that BLM failed to take a hard look at the environmental impacts of the Project on public lands within two wilderness inventory units (WIU) of the 1999 BLM wilderness inventory, Desolation Canyon Inventory Unit 8 and Turtle Canyon Inventory Unit 4, which BLM has been studying for their wilderness characteristics and which have generally been found to have retained their natural character. See EA at 45-46. Impacts to the Turtle Canyon wilderness study area (WSA) found to possess wilderness characteristics upon inventory pursuant to section 603 of FLPMA, as amended, 43 U.S.C. § 1782 (2000), are also cited by appellant in challenging the EA. Appellant states that the WIU's and WSA have all, at one time, been proposed for designation as wilderness areas to be managed pursuant to the Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000), in a bill submitted to Congress, "America's Redrock Wilderness Act, H.R. 1732." (SOR at 13.)

Appellant states that BLM failed to appreciate the fact that Project activities are incompatible with outstanding opportunities for solitude and primitive, unconfined recreation, and other wilderness characteristics. It specifically notes that the surface facilities, covered by BLM's proposed right-of-way grant UTU-77122,

would be constructed “within” the Desolation Canyon WIU. (NA/Petition at 3.) It asserts that the resulting “clear[ing]” of trees, shrubs, and other vegetation and “scrap[ing] away” of soil over an area of close to 35 acres, will, along with day-to-day operations and related truck and other traffic, “destroy[] the wilderness character” of part of this WIU. *Id.* Appellant also argues that the underground mining operations will cause the “surface subsidence” of close to 2,000 acres of public land within the two WIU’s and the WSA. (NA/Petition at 3.)

As a threshold matter, a distinction must be recognized between WSA’s designated pursuant to the review of roadless areas of 5,000 acres or more disclosed during the inventory conducted pursuant to section 603 of FLPMA, 43 U.S.C. § 1782 (2000), and areas found to possess wilderness characteristics as a result of subsequent inventories. In this regard, we noted in Southern Utah Wilderness Alliance, 158 IBLA 212, 214-15 (2003):

[A]s we have stated on a number of occasions, final administrative decisions relating to the designation of land as WSA’s in Utah were completed in the 1980’s. Southern Utah Wilderness Alliance, 123 IBLA 13, 18 (1992); Southern Utah Wilderness Alliance, 122 IBLA 17, 21 n.4 (1992). The lands in question were not included in a WSA. Therefore, BLM may administer them for other purposes, including the approval of drilling for oil and gas. *Id.*

Southern Utah Wilderness Alliance, 128 IBLA 52, 65-66 (1993) (footnote omitted); quoted in, Southern Utah Wilderness Alliance, 151 IBLA 338, 341-42 (2000); see State of Utah v. Babbitt, 137 F.3d 1193, 1208-1209 (9th Cir. 1998). In the Babbitt case involving a legal challenge to a 1996 re-inventory of public lands in Utah which had not been included in WSA’s as a result of the earlier review of roadless areas under section 603 of FLPMA, the court rejected the Department’s claim that section 603 provided authority for the later re-inventory. 137 F.3d at 1206, n. 17. In finding plaintiffs lacked standing to challenge the re-inventory itself, the court noted that an inventory of the public lands under the authority of section 201(a) of FLPMA, 43 U.S.C. § 1711(a) (2000), shall not affect the management or use of the public lands. 137 F.3d at 1208-1209; see 43 U.S.C. § 1711(a) (2000). Upon remand, the district court approved a stipulated settlement which provided in part that “[t]he 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage public lands as if they are or may become WSAs.” Utah v. Norton, No. 96-C-870 B (D. Utah Apr. 14, 2003) (Stipulation No. 4). Thus, the WIU’s are not subject to the restrictions on surface-disturbing activities afforded WSA’s by the non-impairment mandate of section 603(c) of FLPMA and do not affect the management or use of the public lands involved.

BLM noted that no surface facilities or activities authorized by its rights-of-way, and thus no surface manifestations of the Project, would be located within or even impact the Turtle Canyon WSA (or the 7,300-acre Turtle Canyon WIU). (EA at 45-46, 56, Plate IV; DR/FONSI at 6.) It thus concluded that there would be no impairment of naturalness, outstanding opportunities for solitude and primitive, unconfined recreation, and other wilderness characteristics of the WSA (or the WIU), and thus no significant impact. (EA at 56-57; DR/FONSI at 6, 8.)

BLM, however, acknowledged that the Project would, during its 20-year life, directly affect 8 acres of public land within the 48,900-acre Desolation Canyon WIU, due to the construction, operation, and maintenance of mine-related surface facilities (not including the access road, telephone line, and power line). (EA at 45, 56, Plate IV; DR/FONSI at 6.) It also noted that such facilities (and the road) would, given the existing topography, indirectly affect an additional 25.12 acres of public land in the WIU, within Lila Canyon. (EA at 56; DR/FONSI at 6.) Nonetheless, BLM concluded that the activities associated with such facilities would not violate Departmental policy concerning the management of WIU's and would not impair the wilderness character of the WSA, and thus would not be significant. (DR/FONSI at 6, 8.) Further, BLM found that the proposed action is in conformance with the BLM land use plan ^{4/} for the area. *Id.* at 6.

Appellant asserts that BLM's conclusion regarding the insignificance of the Project's impacts on the WIU's and WSA suffers from the fact that BLM did not take into consideration

547 coal haul truck and 175 personal and delivery vehicle round-trips per day on a 24 hour/7 day schedule, and operation of heavy equipment including loaders, crushers, a 2,000-ton per hour conveyor, and a 1,000[-]horsepower mine [fan]. [^{5/}]

^{4/} Appellant also argues that the Project "does not conform with the land[-]use plan" (Price River Resource Area Management Framework Plan (Price River MFP)), since it does not ensure the "maintenance of undeveloped recreation resources," particularly the outstanding opportunities for primitive, unconfined recreation recognized by BLM in designating the two WIU's and WSA. (SOR at 21 (citing Price River MFP at R-8).) BLM specifically determined that the Project would conform with the MFP objective to maintain undeveloped recreation resources. (EA at 1-2.) Appellant provides no evidence that such resources will not be adequately maintained generally in the Project area, consistent with the MFP. Nor does it otherwise rebut BLM's conformance determination. (EA at 1-2; DR/FONSI at 7.)

^{5/} Appellant also argues that BLM failed to take into account the construction, (continued...)

(SOR at 13.) It also notes that the Project may entail “five core drilling and sampling sites” within the WIU’s and WSA, which will themselves have significant impacts. Id. at 14.

The record discloses BLM took cognizance of all aspects of the proposed surface activities associated with the Project, including all of those cited by appellant. (EA at 8-9, 11, 23-25.) This included consideration of possible future exploratory drilling, although no such drilling was proposed or anticipated: “Based on current conditions, exploratory drilling would not be expected to be required for the development of the coal lease.” (EA at 8; see EA at 9, 26-27; UEI Answer at 22 (citing EA at 61) (“[UEI] has not determined the time, the place, or even the necessity of any such drilling”).) Further, we think that the record is clear that BLM took all these aspects into account when finding that the Project will not significantly impact the wilderness characteristics of the two WIU’s and WSA at issue here. (EA at 56-57, 62; DR/FONSI at 6, 8.)^{5/}

^{5/} (...continued)

operation, and maintenance of additional ventilation structures within the WIU’s and WSA. (SOR at 14-15.) Such structures were not part of the proposed action approved by the Acting Field Manager, in his October 2000 DR/FONSI: “[N]o such ventilation structures * * * have ever been proposed, they are not part of the mine plan, and there is no foreseeable need for any such structures.” (UEI Answer at 23; see DR/FONSI at 1 (“It is the decision of the Price Field Manager * * * to select Alternative B outlined in the referenced environmental assessment with modification”)); EA at 23, 27.)

^{6/} Appellant also argues that BLM failed to take into account the significant cumulative impacts “to wilderness values” generated by the Project together with the “Blue Castle Mine,” “within” the Desolation Canyon WIU. (SOR at 14.) UEI, however, asserts that the Blue Castle Mine, a proposed 132.57-acre surface gold-mining operation, is “approximately 2.5 miles away from the westernmost boundary of [the WIU], the nearest Wilderness Inventory Unit.” (Answer at 23.) This is borne out by the record. (EA at 61, Plate IV.) Further, while it is expected that this mine would add, on a daily basis, “[a]s many as 85 vehicles” to traffic on the new access road, the section of the road likely to experience cumulative traffic is located a comparable distance west of the WIU. (EA at 61.) BLM did not report any likely cumulative impact to wilderness values in the WIU. Appellant doesn’t provide any evidence that the Blue Castle Mine is itself likely to impact “wilderness values,” or that, by virtue of their geographic proximity or any other factors, the two mines are likely to interact in a manner which may generate cumulative impacts to “wilderness values,” or that any such impacts might be significant. See Wyoming Outdoor Council, 147 IBLA 105, 109 (1998). Further, appellant hasn’t demonstrated
(continued...)

In assessing impacts, BLM also determined that use of longwall mining to mine the underground coal seam may cause as much as 6 feet of subsidence in overlying formations, but found that the presence of a thick overburden dampens the impact of subsidence leading to low to nonexistent subsidence on the surface. (EA at 50, 56.) It noted that only portions of the WIU's and a small part of the WSA would be subject to potential subsidence as a result of such operations. (EA at 56, Plate IV; DR/FONSI at 6.) Further, BLM concluded that the depth of mining operations, at least 1,500 feet below the surface, would minimize any surface impacts from subsidence, throughout most of the WIU's and the WSA: "[S]ubsidence should be low to nonexistent at the surface." (EA at 50; see id. at 56; DR/FONSI at 6.) It thus held that naturalness, outstanding opportunities for solitude and primitive, unconfined recreation, and other wilderness characteristics would not be generally diminished or degraded, especially since the surface manifestations of subsidence "would not appear different from the surrounding geology." (EA at 56.) Thus, BLM specifically held that subsidence would not impair the wilderness characteristics of the WSA or render it unsuitable for designation as wilderness. Id. at 56-57.

Appellant argues that subsidence, to the extent that it occurs within the WSA, may be precluded by BLM's "Interim Management Policy for Lands Under Wilderness Review" (IMP), since it constitutes a new disruption of soil and vegetation which must be reclaimed. (SOR at 14, citing BLM Handbook H-8550-1 (Rel. 8-67 (July 5, 1995))^{7/}.) It appears from the analysis that any subsidence will be so minor as to not entail disruption of soil or vegetation. However, because the development of pre-FLPMA coal leases is normally necessary to the exercise of such valid existing rights, underground mining and any surface effects, should they occur, are generally "except[ed]" from the IMP preclusion of new surface disturbances. (BLM Handbook H-8550-1 at 9.)^{8/}

^{6/} (...continued)

that any cumulative impacts are likely to result from the Project, together with other specific past, present, and/or reasonably foreseeable future actions, or, if they are likely, were not adequately considered by BLM. See EA at 61-64.

^{7/} This Handbook, along with numerous others, was deleted effective Aug. 23, 1996. (BLM Instruction Memorandum (I.M.) No. 96-147 (July 22, 1996)). The deletion of this Handbook did not purport to change the BLM policies set forth in the Handbooks. See I.M. No 96-147 at 2.

^{8/} All of UEI's Federal coal leases at issue here pre-date enactment of FLPMA on October 21, 1976, pursuant to which the Desolation Canyon WSA was designated. They thus afford UEI "valid existing rights," which are not generally subject to the non-impairment mandate of section 603(c) of FLPMA. Sierra Club v. Hodel,

(continued...)

Ultimately, appellant provides no independent evidence that Project activities are likely to significantly impact the wilderness characteristics of the WIU's and WSA, or that it is necessary to mitigate any significant impacts, by eliminating all or part of the Project, in order to render them insignificant.^{2/} Further, appellant has not demonstrated that, in making its FONSI regarding potential impacts to wilderness or other resource values, BLM relied upon any mitigation measure which was not likely, for any reason, to be effective in reducing a significant impact to insignificance. (SOR at 23.)

Appellant also asserts that Project activities will significantly affect visual resources in the Project area, since they will violate the visual resource management (VRM) classification (VRM-III) for that area, because such activities, which will convert the area from one which has wilderness character into an "industrial zone," will not only be seen, but also "dominate the landscape." (SOR at 15.)

BLM analyzed the visual impacts of the Project, taking into account the VRM-III classification of the Project area, established in the Price River MFP. (EA at 42.) Among other things, BLM provided for minimizing visual impacts of all surface facilities by having them painted a BLM-approved "flat grey color, developed to reduce line and form contrast with the existing environment." (EA at 30.) Based on its analysis, BLM concluded that the Project facilities and activities will not violate the VRM-III classification of the Project area. (EA at 54-55.)

Appellant takes issue with BLM's conclusion, arguing that BLM "peer[ed] into the [P]roject [area] only from limited 'Key Observation Points' (KOP's) near the intersection of mine access roads and a highway [and county road]." (SOR at 15; see EA at 42.) Appellant is correct that BLM focused on the visual impacts of the Project

^{8/} (...continued)

848 F.2d 1068, 1086-88 (10th Cir. 1988).

^{2/} Appellant also argues that the impacts of the Project on the wilderness characteristics of the Project and surrounding areas, as well as on other aspects of the human environment, are likely to be significant since the Project is "highly controversial because of its size and location." (SOR at 11, citing 40 CFR 1508.27(b)(4).) Whether a proposed action is likely to have a significant impact, thus requiring an EIS, is determined, in this respect, by considering "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 CFR 1508.27(b)(4). Thus a proposed action can be considered "highly controversial" when "a substantial dispute exists as to the size, nature or effect of the * * * [F]ederal action." Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973); see Wild Sheep, 681 F.2d at 1182. Appellant provides no evidence of the existence of such a dispute.

at KOP's. However, BLM's VRM policy requires BLM to assess the visual resource impacts of proposed actions "from the most critical viewpoints," or KOP's, "usually along commonly traveled routes or at other likely observation points." (BLM Handbook H-8431-1 (Rel. 8-30 (1/17/86)), at 2.)^{10/} The KOP's at issue here were clearly selected by BLM as a way of assessing the visual impacts of the Project from locations around the Project area likely to be accessed most often by members of the public, since they were along roads, and which also afforded a view of the "characteristic landscape of the [P]roject area" and the proposed mine-related surface facilities, road, telephone line, and power line. (EA at 42 noting that County Road 125 has an annual average daily traffic volume of 280 vehicles and U.S. Highway 191/6 has an "overall traffic rate of as many as 10,600 vehicles per day".) This conforms to relevant BLM policy concerning the selection of KOP's:

[Visual contrast rating] is usually [done] along commonly traveled routes or at other likely observation points. Factors that should be considered in selecting KOPs are[:] angle of observation, number of viewers, length of time the project is in view, relative project size, season of use, and light conditions * * *. Linear projects such as powerlines should be rated from several viewpoints representing:

- Most critical viewpoints, e.g., views from communities, road crossings.
- Typical views encountered in representative landscapes, if not covered by critical viewpoints.
- Any special project or landscape features such as skyline crossings, river crossings, substations, etc. [Emphasis added.]

(BLM Handbook H-8431-1 (Rel. 8-30 (1/17/86)).)

In its analysis, BLM reported that the intersection of the proposed new access road and the highway was the particular KOP concerning the mine site, and related surface facilities, since it was most likely to be seen by many members of the public from that point. (EA at 54.) Generally, BLM found the mine facilities unobtrusive, stating: "Since the mine surface facility would be located within the narrow Lila Canyon, visibility of the facility from any KOP would be minimal." Id.

Appellant provides no argument or supporting evidence demonstrating that BLM's selection of KOP's violated its policy declarations. Further, we are not

^{10/} This Handbook was also deleted effective Aug. 23, 1996. (BLM Instruction Memorandum No. 96-147 (July 22, 1996)). See note 7, supra.

persuaded that BLM was required to select KOP's "within Lila Canyon," or other areas within the two WIU's or WSA, because they afforded "[t]ypical" views available to many members of the public. (SOR at 16.) Appellant has not shown that the mine site is even likely to be visible from anywhere except right inside the narrow canyon, or indeed from anywhere in the WIU's or WSA, which are situated mostly to the east above the canyon rim or escarpment, which separates the mine site from the rest of the Project area. (EA at 39 ("The mine site is at the toeslope of the Book Cliffs and has mostly a southwest aspect"), 42 ("[T]he proposed mine surface facility [is] located along the broken sloping pinyon-juniper benches below the Book Cliffs"), Plates II-A and V; Ex. D (Photographs) attached to Appellant Response.)

Looked at from these KOP's, BLM concluded that the Project would not violate the VRM-III classification, since while Project facilities could be seen, they would not dominate the landscape when viewed from these vantage points. (EA at 42, 54-55.) Appellant provides no evidence to the contrary.

Appellant also asserts that Project activities will significantly affect Rocky Mountain bighorn sheep, which number 15 to 25 year-round in Lila Canyon, and other wildlife and vegetation throughout the Project and surrounding areas, since underground mining operations are expected to "dewater" and/or pollute numerous springs and seeps, and related surface waters. (NA/Petition at 3; see SOR at 16-22.)

In the EA, BLM found that surface waters consist of occasional runoff in drainage channels of Lila Canyon, which has no perennial water flow, and regular discharge from 19 springs and seeps in and around the Project area, which generally flow at a rate of from 1 to 10 gallons per minute (gpm), both of which eventually enter the Price River. (EA at 40, Plate IV.) It found that mine dewatering and subsidence might alter the water flow of springs and "augment" water flows in existing channels, thereby contributing to additional erosion and an increase in total dissolved solids (TDS) and total suspended solids (TSS) in receiving waters, were the flows to reach them. (EA at 52.) However, BLM did not find that mining operations were likely to completely dewater all, or even any, existing springs and seeps, and thus eliminate all, or any, surface waters, or pollute any such waters. In particular, BLM noted that "a complete Sedimentation and Drainage Control Plan to control and contain off-site discharge of water from the mine site as required by UDOGM and OSM is included in the MRP." Id.

Further, BLM provided for mitigating the elimination of any springs or seeps in Lila Canyon, by requiring UEI to place two water catchments or guzzlers "in suitable locations along the cliff-talus habitat south of the Lila Canyon area," thus "avoid[ing]" the displacement of sheep which are concentrated in the canyon and dependent on these water sources: "UEI would be required to provide two guzzlers

to benefit bighorn sheep populations and habitat because of the potential loss of seeps.” (EA at 27, 59; DR/FONSI at 3; see EA at 53, 58-59.) BLM also provided for mitigating or avoiding the detrimental effects of mine dewatering on surface waters, by discharging all water derived from mining operations into a sedimentation pond, where it would be treated, in order to comply with State and Federal laws, before being allowed to flow into existing drainages. (EA at 20-21, 28-29, 52.) BLM thus anticipated no significant impact. (DR/FONSI at 8.)

Appellant provides no evidence contradicting BLM’s analysis, and demonstrating that any springs or seeps are likely to dry up or that any surface waters are likely to become contaminated, to any degree, as a result of any Project activities, including dewatering and subsidence resulting from underground mining operations. Appellant provides, with its Response to Answers (filed June 14, 2001) a May 29, 2001, declaration (Ex. C) of Dr. Elliott W. Lips, a professional geologist who, at one time, studied the potential hydrologic impacts of underground mining operations in Lila Canyon. Dr. Lips does not assert that the Project will or is even likely to dry up any seeps or springs in the Project area. Based upon his own knowledge of the area and reviewing the EA, he does say that not enough is known about hydrologic and geologic conditions underlying the Project area for BLM to draw any conclusions regarding the likely impacts of mining on seeps and springs. (Ex. C at 2-3.)

UEI reports that BLM’s knowledge of hydrologic and geologic conditions underlying the Project area was based on “detailed hydrologic studies from the [nearby] Horse Canyon Mine, three monitoring wells, and seep and spring inventories within the proposed mine site.” (Answer at 26.) This is borne out by the record. (EA at 40-41.) Appellant has not shown that available information was not sufficient for BLM to be able to reasonably assess the likely hydrologic impacts of the Project, consistent with NEPA and its implementing regulations. Further, BLM is not precluded from proceeding in the face of some uncertainty regarding such impacts, and thus may grant the rights-of-way, facilitating the Project, especially where it has taken this uncertainty into account, and provided for mitigating the impacts caused by the loss of any seeps or springs. Powder River Basin Resource Council, 144 IBLA 319, 323-25 (1998). Thus, appellant fails to show that there are likely to be adverse consequences for bighorn sheep, or any wildlife, vegetation, or other downstream resources or to demonstrate that any impacts are likely to be significant.

Appellant does not provide any evidence that the habitat afforded by the placement of water guzzlers near Lila Canyon will not be utilized by bighorn sheep, or that such habitat “will [not] accommodate [the] vitality and growth of the herd.” (SOR at 19.) Rather, it simply asserts that BLM failed to demonstrate the effectiveness of guzzlers: [T]he instant EA does not even provide specific locations

for such guzzlers and an analysis of their effectiveness in those locations, but merely speculates that such guzzlers will be effective.” (Response at 9-10.) BLM is committed to place the guzzlers in “suitable locations” “to benefit bighorn sheep.” (EA at 27; DR/FONSI at 3.) Appellant’s doubts fail to rebut the reasonableness of the BLM mitigation in that the creation of any water source in the Project area, which is admittedly located in an arid region with little available surface water, will likely be used by sheep and other wildlife, and thus compensate for the loss of water anywhere else in the immediate area. (EA at 37, 40; UEI Answer at 28 (“BLM’s experience has shown that recent additions of guzzlers to similar habitat areas * * * have resulted in increased use”).) Further, such mitigation, which would place guzzlers “along the upper cliff tiers away from mining disturbance,” was considered “appropriate” by the Utah Division of Wildlife Resources (UDWR). (Letter to BLM from Regional Supervisor, UDWR, dated Aug. 14, 2000.) Appellant fails to carry its burden to show that such mitigation will be ineffective in reducing any impact to insignificance. Oregon Natural Resources Council, 116 IBLA 355, 362 n.7 (1990).

We find this case to be distinguishable from the Wild Sheep case, 681 F.2d at 1172, cited by appellant. See Appellant Response to Answers at 7-10. What was particularly at stake in the Wild Sheep case was one of a few areas used by “one of the few remaining herds of Desert Bighorn Sheep (Ovis Canadensis Nelsoni),” a State and Federally-protected species, for “lambing’ and rearing of its young,” through which would pass a proposed mine access road. 681 F.2d at 1175, 1176. The court described the importance of that area to the sheep as follows:

The Bighorn require a finely tuned ecological balance for their “lambing” and rearing functions and * * * “[a]ny disturbance of these [lambing] areas would be a catastrophe to the sheep as the ecosystems needed for lambing are extremely limited in this area.” * * *

Thus, it appears that the continued use of the lambing area through which Road 2N06 passes is essential to the continued productivity of the herd at issue here. [Emphasis added.]

Id. at 1180. The road was proposed for reconstruction and use, under a Forest Service (FS) special use permit, in conjunction with nearby tungsten mining.

The court concluded that FS had failed to demonstrate, in its EA, that closing the road during the three-month “lambing” season, which was designed to mitigate adverse impacts, would be effective in reducing potential impacts to the sheep to insignificance. It noted that FS had failed to provide any evidentiary basis for its “assumption that the sheep would return to the area to perform their most sensitive function after that area had been invaded by man for nine months,” especially where

FS had failed to assess the likely volume of traffic on the road, and the corresponding impact on the sheep, given their inability to tolerate human intrusion. 681 F.2d at 1181. The court thus held that FS had not demonstrated that the planned mitigation would avoid significant impacts to the sheep, which would be caused by their permanent displacement from the area, thus supporting its decision not to prepare an EIS. Id. at 1181. Rather, it stated that “substantial questions” remained unanswered, requiring preparation of an EIS. Id.

Since the Project area at issue here has not been shown to be critical, or even important, to the survival or life cycle of bighorn sheep, which have considerable habitat extending west and south of the area, the Project does not, in BLM’s estimation, pose a comparable threat to any sheep which might be displaced from the impacted area. (EA at 58-59, Plate IX.) Appellant provides no evidence to the contrary. We note that the Lila Canyon road would be closed (gated) following construction of the mine surface facilities and the haul road. We do not find that substantial questions have been raised by appellant regarding the effectiveness of relocating the water source, through the placement of guzzlers, or any other measure designed to mitigate impacts to the sheep, or that the potential unmitigated impacts are similar to those at issue in Wild Sheep or, most importantly, likely to be significant. Hence, we do not think that the court’s holding and analysis requires preparation of an EIS here.

Appellant also asserts that Project activities will significantly affect a “Fremont Rock Shelter” (Site No. 42EM2517), which is eligible for listing in the National Register of Historic Places and is adjacent to and visible from the proposed mine and Lila Canyon Road. (SOR at 6; see EA at 48.)

BLM noted, in its EA, that the Fremont Rock Shelter, which had “intact cultural remains” in the form of charcoal and oxidized rocks, was eligible for listing in the National Register “based on its potential for contributing significant data relative to * * * chronology, site function, technology, subsistence, seasonality of occupation, social organization, and extra regional relationships.” (EA at 48.) BLM concluded that Project activities would not directly disturb the particular site, since it is situated outside the area of authorized surface-disturbing activities, but recognized that the site might be subject to “[v]andalism,” by virtue of the new accessibility to the area afforded by the Project. Id. at 60. It thus required UEI, as a prerequisite to granting the rights-of-way, to enter into and implement a “data recovery plan,” approved by BLM, under a programmatic agreement with the Utah State Historic Preservation Office, which would fully preserve the research values of the cultural resources at the site. (EA at 60; DR/FONSI at 3.) BLM, thus, concluded that any impact to the site would be reduced to insignificance. (DR/FONSI at 8.) Appellant provides no

evidence that the Project is likely, despite the required mitigation, to significantly impact the shelter.

Appellant also contends that BLM failed to consider “reasonable alternatives” to the proposed right-of-way grants and the Project. (SOR at 7.) It asserts that BLM focused only on the “extreme ends of the spectrum of reasonable alternatives,” either approving the right-of-way grants (thus allowing the Project to go forward) or not approving the grants (thus preventing the Project from going forward). *Id.* at 9. Appellant argues that BLM thus failed to consider the “suspension of approval” of the right-of-way grants until the wilderness status of the two WIU’s and WSA is finally determined by the Secretary and/or Congress.^{11/} *Id.* In support of its assertion that BLM should have considered the alternative of suspension pending resolution of the wilderness status of the lands, appellant references an unpublished interlocutory order^{12/} of the Board relying upon the precedent of Southern Utah Wilderness Association, 127 IBLA 331, 100 I.D. 370 (1973). The latter case applied the Interim Management Plan (IMP) provisions applicable to management of lands within a WSA to adjudication of an APD for an oil and gas well and associated road right-of-way within a WSA which would impair wilderness characteristics. Finding that the Secretary was authorized to direct a suspension of operations even with respect to a pre-FLPMA oil and gas lease pending a final determination of the wilderness status of the lands, we remanded the case to BLM to consider that alternative. We find this precedent to be distinguishable from the present case. The lands which would be impacted by surface improvements authorized by the DR are all within WIU’s and are

^{11/} Appellant argues that BLM should have also considered the alternative of locating the mine portal and other surface facilities outside the WIU. (SOR at 9.) BLM briefly considered such an alternative, which would have used the existing portal of the “abandoned” Horse Canyon Mine, located close to two miles north of the Project area, but did not analyze it in detail. (EA at 35.) BLM noted that this alternative required extensive rehabilitation of the “old mine works,” in order to render them safe, and, given the 2.65-mile distance to the Lila Canyon coal reserves, the construction of “as many a[s] five new surface entries,” in order to provide adequate ventilation, thus making the Project economically “infeasib[le],” and causing a greater environmental impact. (EA at 35, 36.) Absent any evidence to the contrary, we find no violation of NEPA. A reasonable range of alternatives embraces alternatives which are feasible and would fulfill the purposes of the project. Valley Citizens for a Safe Environment v. Aldridge, 886 F.2d 458, 461-62 (1st Cir. 1989); Howard B. Keck, Jr., 124 IBLA 44, 53-54 (1992), *aff’d*, Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993).

^{12/} Unpublished orders may not generally be relied upon as precedent against a party adversely affected. 5 U.S.C. § 552(a)(2) (2000); Kentucky Resources Council, 137 IBLA 345, 351 n. 5 (1997).

not within a WSA. As noted above, the WIU's shall not be used to create additional WSA's and do not affect the use or management of the public lands. While a small fraction of the coal lease lands which would have underground workings lies under the WSA, the record indicates that impacts which would affect the WSA are not anticipated.

Under section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), BLM is required to consider a reasonable range of alternatives which includes the no-action alternative. Defenders of Wildlife, 152 IBLA 1, 9 (2000); Southern Utah Wilderness Alliance, 122 IBLA 334, 338-40 (1992). Such alternatives should be reasonable alternatives to the proposed action, which will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 CFR 1500.2(e); 46 FR at 18027; Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); Howard B. Keck, Jr., 124 IBLA at 53-54. Suspension of the right-of-way applications in the context of this case has not been shown to be a reasonable alternative in that it would make development of intervenor's coal leases unfeasible. Accordingly, we reject appellant's contention that BLM was obligated to consider the alternative of suspension.

To the extent they have not been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellant are rejected on the ground that they are contrary to the facts or law, or are immaterial.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge