LARRY THOMPSON, ET AL.

IBLA 98-474 Decided December 10, 1999

Appeal from a Decision Record/Finding of No Significant Impact approving issuance of a mineral material sales contract. CACA-39654.

Affirmed.

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

   An environmental analysis for a mineral material sale properly considers the impact of connected actions which are triggered by the action or which are part of a larger action and which depend on the larger action for their justification. An environmental analysis for a sand and gravel mining operation is not required to consider the impact of construction of a processing plant for crushing and asphalt mixing which is not authorized by the sales contract and is not a necessary result of the sale.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   A decision approving a mineral material sale based on an EA and FONSI may be upheld in the absence of considering a requirement for a permit under section 404 of the Clean Water Act when it appears from the record that no section 404 dredge and fill permit is required for incidental fallback from a sand and gravel mining operation.

3. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   A BLM decision approving issuance of a mineral sales contract is properly affirmed when the record

shows the FONSI was based on reasoned decisionmaking, and appellant fails to demonstrate that the finding was based on an error of law or fact, or that the analysis failed to consider a substantial environmental problem of material significance.

APPEARANCES: Ted Stevens Jr., Esq., and Michael H. Zischke, Esq., San Francisco, California, for appellants; William T. Chisum, Esq., and Scott A. Morris, Esq., Sacramento, California, for respondent W. Jaxon Baker, Inc.; Steve Addington, Field Manager, Bishop, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Larry Thompson, Robert W. Gracey, and Nikolaus & Nikolaus, Inc., have appealed from a Decision Record/Finding of No Significant Impact (DR/FONSI) signed by the Acting Field Manager, Bishop, California, Field Office, Bureau of Land Management (BLM), dated July 28, 1998, approving issuance of a mineral materials sales contract (CACA-39654) to W. Jaxon Baker, Inc. (Jaxon). The contract authorizes the sale of 550,000 cubic yards of sand and gravel, over a 5-year period, at the "Independence Pit" in Inyo County, California. 1/

Jaxon was the sole bidder for a mineral materials sales contract at a competitive sale held previously on October 23, 1997. The competitive sale was conducted by BLM immediately following preparation of a Draft Environmental Assessment (DEA) (CA-017-97-64), which briefly analyzed the environmental impacts of issuance of a mineral materials sales contract, but no alternatives thereto. After the receipt of comments, which revealed problems with the adequacy of the analysis, BLM substantially revised the DEA and prepared a new environmental assessment (EA) (No. CA-017-98-28) so as to "identify the issues we had missed and reanalyze whether we should sell [mineral] material or not." (BLM Response to SOR at 2; see SOR at 14-16.)

1/ Nikolaus & Nikolaus, Inc. (Nikolaus), is a general engineering contractor based in Bishop, California, whose main business is asphalt paving and aggregate processing. (Declaration of Larry Thompson, dated Feb. 1, 1999 (attached to appellants' Petition for Immediate Stay and Expedited Review (Petition)), at 1; Statement of Reasons for Appeal (SOR) at 7.) In addition, it operates a competing mineral materials site on private land near Bishop, which is 40 miles north of the pit. (Declaration of Thompson at 1; SOR at 7; Jaxon Response to SOR at 2; Reply to Responses at 18 n.5.) Thompson, a resident of Bishop, is Nikolaus' Vice President and General Manager and regularly travels U.S. Highway 395 past the pit for both business and personal reasons. (Declaration of Thompson at 1; SOR at 5-6.) Gracey owns private land, on which he resides with his family, and two small businesses in the town of Independence, California. (SOR at 6.)

Initially, sale of 555,000 cubic yards of sand and gravel from the pit was proposed by BLM pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601 ! 604 (1994), and its implementing regulations, 43 C.F.R. Group 3600. Sand and gravel would be extracted and removed, over a 5-year period, from the existing 31-acre pit, from which sand and gravel has been mined intermittently by the California Department of Transportation (Caltrans) for over 40 years. Prior extraction by Caltrans was authorized by a materials site right-of-way (No. LA-0151584) issued under the Federal Aid Highway Act, 23 U.S.C. § 317 (1994). (EA at 2.) During the period that it held the right-of-way, Caltrans removed 133,000 cubic yards of material. (EA at 2-3; SOR at 9.) Caltrans relinquished the right-of-way in 1997, with the "understanding" that BLM would keep the pit open and sell the sand and gravel to a private commercial operator, which would make it available for Caltrans projects and for other local uses. (EA at 3; see SOR at 9, 11-12; BLM Response to SOR at 1-2; Ex. 57 attached to SOR at 1; Ex. 59 attached to SOR.)

The pit is located on the west side of Owens Valley, on the edge of an alluvial fan at the base of the Sierra Nevada Mountains. Specifically, it is situated in the NW¼SW¼ and SW¼NW¼ sec. 7, T. 13 S., R. 35 E., Mount Diablo Meridian, Inyo County, California, just west of U.S. Highway 395 at mile post marker 75.1, 1.2 miles northwest of Independence. The pit is also immediately northwest of the "Boron Springs Wash," an ephemeral drainage which runs northeast towards the highway.

The sand and gravel sold from the pit would be used in connection with seven highway maintenance and improvement projects planned by Caltrans which would require an estimated 555,000 cubic yards over the 5-year period from 1998 through 2002, and for other local purposes. 2/ Since many of the highway projects are 5 to 30 miles south of the pit, a substantial percentage of the material extracted and removed from the pit would be hauled

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2/ The seven projects, listed in BLM's EA (along with the planned project year and needed cubic yards (CY) of sand and gravel), are the "Independence Rehab" (1998 - 10,000 CY), "Alabama Gates 4-lane" (1998 - 120,000 CY), "Ash Creek Rehab" (1999 - 15,000 CY), "Ash Creek 4-lane" (1999 - 90,000 CY), "Independence CAPM" (2000 - 20,000 CY), "Fish Spring[s] 4-lane" (2001 - 190,000 CY), and "Manzanar 4-lane" (2002 - 110,000 CY). (EA at 2-3; see Ex. 51 attached to SOR at 2.) The Independence CAPM project is located very near the pit. (SOR at 12; Ex. 30 attached to SOR at 2.) The Alabama Gates, two Ash Creek, and Manzanar projects are to be located, respectively, 10 to 15, 30, and 5 to 10 miles south of the pit. (SOR at 11; Declaration of Thompson at 3-4; Ex. 60 attached to SOR.) The Independence Rehab and Fish Springs projects are to be located, respectively, 40 to 45 and 15 to 25 miles north of the pit. (SOR at 11; Declaration of Thompson at 3; Ex. 60 attached to SOR.)

by truck south through Independence during the 5-year term of the mineral materials sales contract. The expected mining operations were described as follows:

> Average anticipated extraction is estimated at 110,000 cubic yards per year, with a maximum extraction of 300,000 cubic yards in any one year.
>
> Mining (extraction and processing) would be intermittent, based upon demand. It would be conducted as a surface operation, using heavy earthmoving equipment. Processing of materials on site could include typical aggregate operations such as screening, washing, crushing, asphalt mixing and concrete batching.
>
> Reclamation of the pit would be conducted at the end of mining and during extended periods of the intermittent shut-downs. Reclamation would include slope recontouring and stabilization, construction of drainage channels, resoiling and seeding of native vegetation. The goal of reclamation is that the site would provide for flood protection of [U.S.] Highway 395 and the Independence [A]irport, provide usable open space and wildlife habitat, visually blend with the surrounding terrain from key observation points, and retain the potential for future mineral extraction.

(EA at 2.)

In addition to the proposed action (Alternative 1), the May 1998 EA considered the alternatives of extracting and removing 550,000 cubic yards of sand and gravel from the pit over a 5-year period with no batch plant on site (Alternative 2), extracting and removing 1.2 million cubic yards over a 10-year period (Alternative 3), and a no-action alternative (Alternative 4). Alternative 2 differed from Alternative 1 in that daily mining operations would be scaled back, so as to reduce potential visual, noise, traffic, and dust impacts. Rather than relying on a bulldozer, front-end loaders, and other heavy equipment working on a large area at any one time, Alternative 2 provided for a single large backhoe working on one small area at any one time. There would also be no crushing or asphalt mixing operations on site. The EA also addressed whether any of the anticipated impacts might rise to the level of a significant impact, which would necessitate preparation of an environmental impact statement (EIS), 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) (1994).

Based on the EA, the Acting Field Manager issued a proposed DR/FONSI on May 19, 1998. He decided to adopt Alternative 2 and concluded that, since none of the anticipated environmental impacts were likely to be significant, no EIS was required. The proposed DR/FONSI was distributed to the public for comment by interested parties and a public meeting was held.

On July 28, 1998, the Acting Field Manager issued his DR/FONSI, finally adopting Alternative 2. He formally accepted Jaxon's bid and stated that BLM would issue a mineral materials sales contract, which would be effective only following approval by BLM and Inyo County (County) of Federal and State plans for mining and reclaiming the pit. (DR/FONSI at 1; BLM Response to SOR at 5.) The Acting Field Manager provided that Jaxon would be required to submit a Federal mining plan for approval by BLM, pursuant to the regulations at 43 C.F.R. Part 3600, and a State Surface Mining and Reclamation Act (SMARA) Plan for approval by the County, pursuant to section 2770 of the Surface Mining and Reclamation Act of 1975, as amended, Cal. Pub. Res. Code (West 1992). See EA at 16; DR/FONSI at 1, 4; BLM Response to SOR at 3.

After completion of thorough briefing before the Board by appellants and respondents, Jaxon and BLM, appellants filed a petition for a stay of the BLM decision pending the Board's review on the merits. Appellants also requested expedited review on the merits. By previous order in this case, we took the stay petition under advisement and granted the motion for expedited consideration.

Appellants raise several objections to the sufficiency of the EA in their SOR on appeal. Appellants request the Board to set aside that decision and require BLM to reconsider the question of whether to authorize issuance of a mineral materials sales contract, following preparation of an EIS for the instant sale and a regional or programmatic EIS for all of the reasonably foreseeable future sales concerning Caltrans highway projects in BLM's Bishop Resource Area in the next 10 years. (SOR at 4, 50-52.)

Appellants contend that BLM violated section 102(2)(C) of NEPA in several respects. It is argued that BLM improperly limited the scope of its EA, focusing on the impacts of extracting and removing sand and gravel from the pit. Appellants assert error in the failure of BLM to consider the impacts of off-site crushing and asphalt mixing necessary to render those materials usable for highway purposes. (SOR at 21-24.)

Appellants also assert that BLM violated NEPA by failing to adequately consider all of the potential environmental consequences of approving issuance of a mineral materials sales contract to Jaxon. Adverse affects cited include impacts on "waters of the United States," which are regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act, as amended, 33 U.S.C. § 1344 (1994), on visual resources (including the views of the Eastern Sierra along U.S. Highway 395), on the people and businesses of Independence from increased truck traffic, and on wildlife (including birds, mule deer, and elk). Also cited are cumulative impacts. (SOR at 31-33, 34-49.)

Appellants further contend that BLM violated NEPA by deferring the analysis of the environmental impacts of mining operations to the County, even though the County is charged solely with considering the effects of reclamation activity, in connection with approving the SMARA Plan. (SOR

at 33-34; Reply to Responses at 11.) They assert that BLM has, thus, also deferred consideration of the effectiveness of mitigation measures, which will be undertaken pursuant to that plan, and the residual impacts which will remain after such mitigation.

Appellants also argue that BLM violated section 102(2)(E) of NEPA, as amended, 42 U.S.C. § 4332(2)(E) (1994), by not considering a reasonable range of alternatives to the proposed action, specifically alternative sites for the extraction/removal of sand and gravel. (SOR at 26-31.)

Based on our review of the record in this case, we conclude that appellants have not sustained the burden of showing error in their appeal from the Acting Field Manager's July 1998 DR/FONSI.

[1] With respect to the scope of the EA in this case, we note that regulation 40 C.F.R. § 1508.25(a)(1) provides that actions are deemed "connected," and thus should be considered in a single EIS or EA, "if they: (i) Automatically trigger other actions * * * [;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." The object of the regulation is to avoid segmenting interrelated projects such that cumulatively significant environmental impacts are overlooked or deliberately ignored in violation of section 102(2)(C) of NEPA. Wilderness Watch, 142 IBLA 302, 305 (1998).

Recognizing that BLM did not consider, in connection with Alternative 2, the impacts of subjecting the sand and gravel extracted and removed from the pit to crushing and asphalt mixing operations at off-site locations, the question is whether the latter operation is so "connected" as to invalidate the EA and FONSI predicated thereon on the basis that the analysis was improperly segmented. Conceding that mined materials will have to be processed for use in road paving operations, the record does not establish that this will require the construction of a new plant (as opposed to use of an existing plant). See Jaxon Response to SOR at 26 ("[T]he mined material [could] be processed at existing plants.") Further, it appears that the sale has an independent utility apart from an asphalt batch plant and a gravel crushing plant as BLM recognized that the pit was needed as a source of sand and gravel for other purposes including local construction and general masonry work. (FONSI/DR at 6.) Indeed, the increased demand for sand and gravel resources in the State coupled with the depletion of available resources was cited by BLM in requesting Caltrans to relinquish material site rights-of-way not needed for highway projects. (Appellants' Ex. 58.) It has not been demonstrated that by authorizing the instant sale the construction of new plants will become a foregone conclusion, thus requiring that the review of the impacts of that construction be undertaken in conjunction with the sale. Conner v. Burford, 848 F.2d 1441, 1446-51 (9th Cir. 1988), cert. denied 489 U.S. 1012 (1989); Southern Utah Wilderness Alliance, 122 IBLA 165, 168-69 (1992); compare with Thomas v. Peterson, 753 F.2d 754, 757-60 (9th Cir. 1985) (construction of road in connection with timber sale); Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 473, 477 (9th Cir. 1979) (erection of power

transmission lines in connection with construction of mineral processing plant); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1428, 1433-34 (C.D. Cal. 1985) (bank stabilization in connection with proposed development). Thus, it has not been shown that BLM improperly segmented the scope of the EA. As BLM noted, section 102(2)(C) of NEPA will be satisfied by undertaking a separate environmental review prior to approval of construction of any off-site processing facilities which might be required. (DR/FONSI at 6.)

Appellants also argue that BLM improperly limited the scope of its analysis by failing to consider the potential environmental impacts of extraction/removal operations lasting 10 years. (SOR at 25.) The record discloses the existence of Caltrans highway improvement projects scheduled for dates more than 5 years in the future and that a sale of 1.2 million cubic yards of material over 10 years was an alternative considered in the EA. (EA at 18, 24-25.) The BLM proposal arising from the analysis in the EA, however, was to reject this alternative and select Alternative 2 calling for operation of the pit over 5 years while BLM looks for other sites for future gravel sources. (EA at 29, DR/FONSI at 6.) If any proposal is made to extend operations at the pit past the initial 5 years, BLM must undertake another environmental review, before deciding whether or not to approve such operations. In no sense has BLM committed itself to approval by virtue of the present authorization. Thus, we find no irretrievable commitment of the public resources which might be affected by a 5-year extension, such that BLM must now undertake a review of that commitment. See Conner v. Burford, 848 F.2d at 1446.

We find the record fails to support appellants' contention that BLM was required to prepare a regional or programmatic EIS, which analyzed the environmental impacts of all reasonably foreseeable future sales concerning Caltrans highway projects in the Bishop Resource Area, which includes 750,000 acres of Federal, State, and private land in Inyo and Mono Counties, California, in the next 10 years before deciding to go forward with the present sale. Appellants have cited the recent efforts by BLM to encourage Caltrans to relinquish material site rights-of-way unneeded for current highway construction projects in order to obtain greater control of sand and gravel deposits which might be needed to supply future public demand. See SOR at 50 and Ex. 58. We find no evidence, however, that the instant sale is part of a comprehensive plan for the sale of Federal mineral materials generally in the Resource Area or that there are likely to be any cumulatively significant impacts as a result of authorizing this sale together with other reasonably foreseeable future sales in that area. See SOR at 50-52. Thus, we find no legal justification for requiring preparation of a regional or programmatic EIS, before permitting the present sale to go forward. Peshlakai v. Duncan, 476 F. Supp. 1247, 1257-59 (D.D.C. 1979); Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257, 268 (1994).

We also find that appellants have failed to carry the burden of showing that the EA was flawed by a failure to consider the impacts of extraction/removal operations at the existing pit on "waters of the United States" regulated by the Corps pursuant to statutory authority. 33 U.S.C. § 1344 (1994). The area within the existing material site is defined by the rectangular system of the public land surveys and, hence, necessarily

entails significant areas of land undisturbed by mining operations. The EA acknowledges the presence of a major intermittent drainage, Boron Springs Wash. (EA at 5.) The Ventura Field Office of the Corps of Engineers concluded that the site may contain waters of the United States "in the vicinity of existing excavation areas." (Appellants' Ex. 83 at 1.) This does not, however, establish that sand and gravel mining operations impact the intermittent stream. Although the regulatory definition of waters of the United States at 33 C.F.R. § 328.3(a) includes intermittent streams the use of which could affect interstate commerce, the preamble to the regulatory promulgation clarifies that waters of the United States generally do not include:

> Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless or until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

51 Fed. Reg. 41217 (Nov. 13, 1986); see Memorandum of Acting Field Manager, BLM, to File Dated July 24, 1998, Ex. 3 to SOR. Thus, subsequent investigation by the Corps led to a conclusion that such waters do exist on site, but that existing operations do not appear to cause a discharge of dredged or fill material into such waters. (Appellants' Ex. 84 at 1.)

The record reveals that:

> Two check-dams (now partially eroded) have been built across the Boron Springs Wash with channels directing part of the flow into the existing gravel pit and existing flood control basins. This was done by the Los Angeles Dept. of Water and Power (LADWP) as part of their water-spreading program, and in response to past flooding of Highway 395 and the Independence airport (there is only a single, 3' diameter culvert on the entire section of Hwy 395 north of Independence where the Boron Springs watershed drains).

(EA at 5.) 3/ It is this intermittent diverted water overflow which crosses the "proposed mining area" of the materials site as a result of

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3/ It appears from the record that the water diversion structures on the public land in and adjacent to Boron Springs Wash were constructed pursuant to the statutory right-of-way granted across the public lands for development of ditches and canals for conveyance of water. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253, repealed in part, Federal Land Policy and Management Act of 1976, section 706(a), 90 Stat. 2793. See Letter of July 24, 1998, from Acting Field Manager, BLM, to Robert W. Gracey, Ex. 5 to SOR. The provision of this statute granting a right-of-way for ditches and canals developed on the public lands was self-executing and did not require approval of Departmental officials. R.W. Offerle, 77 IBLA 80, 84-85 (1983). Repeal of the provision of this statute granting a right-of-way for construction of ditches and canals did not affect rights-of-way previously acquired. See Martin Hackworth, 141 IBLA 249 (1997).

the upstream diversion of water flowing, at times of heavy rainfall and/or snow melt, in the Boron Springs Wash which is the focus of appellants' concern. (SOR at 34-35; appellants' Ex. 6 at 4; see EA at 5, 8; Memorandum from District Hydraulics Engineer, Caltrans, dated June 13, 1996.)

[2] The record fails to support the conclusion that such intermittent overflow should be considered "waters of the United States," as that phrase is defined in the regulations which implement section 404 of the Clean Water Act. In order for "intermittent streams" to be covered by that definition, there must be a showing that the "use, degradation or destruction" of the waters of the intermittent stream or tributaries thereof could affect interstate or foreign commerce. 33 C.F.R. § 328.3(a)(3) and (5). Appellants have made no such showing here.

Appellants have shown the intermittent flow of diverted overflow water in the pit. See SOR at 34-35, 38-41. The evidence fails to show that this water, which is diverted into the existing pit and associated flood control basins, reaches a perennial or intermittent stream or any other water body, especially given mean annual precipitation of 5.39 inches spread over a 3,650-acre (or even a 6,657-acre) watershed. See id. at 40; EA at "Map 1", 5, 8, DR/FONSI at 3 ("combined capacity of the two basins would be about 32[-]acre[ ]feet, which is greater than the expected volume of discharge from a 24[-]hour storm with a 20[-]year return period"), 7; Minutes of Dec. 11, 1997, Public Information Meeting at 1 ("Water would soak in"); 1982 U.S. Geological Survey Quadrangle Map (Independence, Calif.); "Map Sheet #1, Caltrans Material Site #118, Existing Site Conditions"; Ex. 26 attached to SOR at 24-25; Ex. 77 attached to SOR at 3.0-4; Ex. 13 attached to SOR (Letter to appellants' counsel from EDAW, Inc., dated June 15, 1998) at "Page 3." Although it appears from the record that the intermittent Boron Springs Wash may at times flow under the highway and into another drainage, this has not been shown for any of the intermittent overflow into the basins or the pit. Nor do we find any evidence of a potential impact on interstate or foreign commerce as required by regulation. 33 C.F.R. § 328.3(a)(3)(i)-(iii).

Thus, we do not regard the intermittent streams at issue here as "waters of the United States," within the meaning of section 404 of the Clean Water Act. See G. Jon Roush, 112 IBLA 293, 308 (1990); compare with United States v. Eidson, 108 F.3d 1336, 1341-42 (11th Cir. 1997), cert. denied, 118 S.Ct. 248 (1997) (man-made storm sewer drain whose waters, during times of adequate rainfall, eventually reach bay); Quivira Mining Co. v. U.S. Environmental Protection Agency, 765 F.2d 126, 129-30 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) (normally dry creek and arroyo whose waters, during times of adequate rainfall, reach streams); United States v. Zanger, 767 F. Supp. 1030, 1032-34 (N.D. Cal. 1991) (intermittent stream whose waters reach, during times of adequate rainfall, river and eventually ocean); United States v. Phelps Dodge Corporation, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) ("'waters of the United States' * * * includ[es] normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, [or] sea or ocean").

Since the record before us fails to establish that the intermittent water flows into the pit are "waters of the United States," we can find no violation of section 404 of the Clean Water Act as a consequence of BLM's failure to require Jaxon to obtain a section 404 permit from the Corps. (SOR at 42.) However, even if such waters were present in the mine pit, it has not been shown that a permit would be required for the activities authorized here, since they do not involve the "discharge of dredged or fill material." 33 U.S.C. § 1344 (1994); see 33 C.F.R. § 323.2(d); National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1403-04 (D.C. Cir. 1998) (incidental fallback or redepositing of material removed from waters of the United States does not constitute discharge of dredged material, under 33 C.F.R. § 323.2(d)); BLM Response to Petition at 2; Ex. 84 attached to SOR (Corps says no permit required for "existing operations," since it appears there is no "discharge of dredged or fill material" into waters of the United States).

[3] In preparing an EA, which assesses whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), an agency is required to take a "hard look" at the problems addressed, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Oregon Natural Resources Council, 131 IBLA 180, 186 (1994); Yuma Audubon Society, 91 IBLA 309, 312 (1986). As a general rule, the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Owen Severance, 118 IBLA 381, 392 (1991); G. Jon Roush, supra; Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984). The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. Oregon Natural Resources Council, supra; G. Jon Roush, supra at 298; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. Oregon Natural Resources Council, supra; Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); G. Jon Roush, supra at 297-98.

With respect to visual resources, we find that BLM considered the impacts of extraction/removal operations on visual resources, including the view of the Eastern Sierra from U.S. Highway 395. (EA at 10, 23-24, 26; DR/FONSI at 6; BLM Response to SOR at 4.) The record reveals that BLM was aware of the fact that, while the pit itself would generally not be seen from the highway, equipment in the pit would, to some extent, be visible from the highway, and thus affect that view. (EA at 10, 23-24; DR/FONSI at 6.) The record indicates BLM acknowledged that the area of the pit is classified as Visual Resource Management (VRM) Class III, and thus the level of change to the characteristic landscape is to be moderate, such that management activities may attract attention, but should not dominate

the view of the casual observer. (EA at 10; DR/FONSI at 6; Ex. 76 attached to SOR at A3-1.) It appears from the record that BLM found the extraction/removal operations would not violate this standard. See EA at 23-24; DR/FONSI at 6; BLM Response to SOR at 4. This was also the view of EDAW, the expert hired by Nikolaus to review BLM's EA, which stated that "the level of change to the characteristic landscape as a result of the project may be consistent with those acceptable within VRM Class III areas." (Ex. 31 attached to SOR at Ex. 1 (Letter to appellants' counsel from EDAW, dated Nov. 18, 1997) at "Page 4".) The fact that others may have different views (SOR at 45 (citing Ex. 30 attached to SOR at 5)) does not establish error in BLM's conclusion. When the BLM decision is based on consideration of relevant factors and the record indicates that individuals knowledgeable in their fields contributed input to the decision, the Secretary is entitled to rely on their expertise. A mere difference of opinion will not overcome the reasoned opinions of the Secretary's technical staff. Bill Armstrong, 131 IBLA 349, 351 (1994).

Appellants also assert that BLM was required to take into account the fact that "plans are under way to classify th[e] area [along U.S. Highway 395] as a Scenic Byway." (SOR at 45.) We note that, when the California BLM State Director promulgated the Final Bishop Resource Management Plan (RMP) and EIS in August 1991, he "proposed" designating U.S. Highway 395 a Scenic Byway. (Ex. 75 attached to SOR at 1-19.) However, when he approved the RMP on March 25, 1993, he did not provide for such designation. See Ex. 76 attached to SOR at 43-46. We also find no evidence that BLM has any plan to effect that designation or even evidence that any steps have been taken to do so or that it is likely to occur in the reasonably foreseeable future. See Ex. 34 attached to SOR (Letter to appellants' counsel from State Director, dated Nov. 17, 1997) at 1 ("[U.S.] Highway 395 is not currently designated a Scenic Highway"). With respect to the potential for future designation, the Acting Field Manager noted that the impact of the instant sale would be temporary and should not interfere with designation. (DR/FONSI at 6.) We discern no NEPA violation in this aspect of BLM's analysis.

It also appears that BLM considered the impacts of extraction/removal operations at the pit resulting from increased truck traffic through the Town. (EA at 3-4, 12-13, 17, 21-24 (up to 200 round-trips by trucks per weekday at peak operation); DR/FONSI at 6.) Appellants have provided no evidence that BLM failed to recognize the extent to which truck traffic would increase or otherwise overlooked or minimized any aspect of the resulting impacts. See SOR at 46.

In addition, the record discloses that BLM considered the impacts of extraction/removal operations at the pit on wildlife, specifically birds (including a State-listed endangered species and three species of special concern), mule deer, and elk. (EA at 7-8, 19-20, 23; DR/FONSI at 7; BLM Response to SOR at 4.) It concluded that there would be little or no impact, since they spend little or no time at the materials site due to the absence of suitable habitat and other factors. Appellants have provided no evidence that BLM erred, in any important respect, in its analysis. See SOR at 47-49. While they state that birds (including the four

species), mule deer, and elk may frequent the site, due to the presence of water and suitable habitat, they make no showing that they might be adversely affected, in any way, by extraction/removal operations. The record does not support appellants' assertion of a violation of section 2(a) of the Fish and Wildlife Coordination Act, as amended, 16 U.S.C. § 662(a) (1994), from BLM's failure to consult with the U.S. Fish and Wildlife Service and the California Department of Fish and Game regarding the impact on wildlife of permitting Jaxon to "control or modify * * * 'the waters of any stream or other body of water."' (SOR at 48-49.) As noted by BLM in the DR/FONSI, such consultation may be needed with respect to LADWP's work in the Boron Springs Wash, but not for work in the gravel pit. (DR/FONSI at, 7.)

We reject appellants' argument that the BLM DR/FONSI approving the mineral material sale subject to subsequent approval of a reclamation plan constituted an improper failure to examine the impacts of the mineral material sale or an improper segmentation of the scope of the EA under NEPA. The record does not disclose a reliance by BLM upon future unspecified reclamation measures in order to mitigate potentially significant impacts and reduce them to insignificance and justify a FONSI. In this context, the FONSI is not disqualified by a failure to articulate a reclamation plan and analyze its effectiveness to reduce any impacts to insignificance. See National Wildlife Federation, 126 IBLA 48, 61 (1993). 4/

Appellants also assert that BLM failed to consider a reasonable range of alternatives, in violation of section 102(2)(E) of NEPA. When preparing an EA for a proposed action BLM is required to consider a reasonable range of alternatives which includes the no-action alternative. Southern Utah Wilderness Alliance, 122 IBLA 334, 339-40 (1992). Thus, BLM is required by section 102(2)(E) of NEPA, as amended, 42 U.S.C. § 4332(2)(E) (1994), to consider "appropriate alternatives" to the proposed action, as well as their environmental consequences. See 40 C.F.R. §§ 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hastey, No. S92 ! 1670 ! WBS ! PAN (E.D. Cal. Oct. 4, 1993). Such alternatives should include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically

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4/ The Board of Land Appeals has recently been provided with a copy of a resolution of the Inyo County, California, Board of Supervisors, denying approval of the reclamation plan for this mineral material sale. (Resolution No. 99-64 (Oct. 26, 1999).) In that resolution finding approval of the reclamation plan to be inconsistent with the requirements of the California Environmental Quality Act, the Inyo County Board of Supervisors addressed certain issues regarding the adequacy of the environmental analysis under that statute which we have dealt with in this decision regarding compliance by BLM with NEPA. We note that our jurisdiction is limited to the review of the decision of BLM to approve the mineral material sale contract. The BLM decision itself was conditioned upon approval of a reclamation plan by Inyo County officials.

feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d at 1466-67; Howard B. Keck, Jr., 124 IBLA at 53. In the present case, the BLM EA analyzed the impact of the proposed action and of three alternatives thereto, including the no-action alternative. Alternative 2, the choice of BLM, involves reduced impacts as no asphalt batch plant or gravel crushing plant are permitted on site. While it appears that other known materials sites suggested by appellants could have supplied sand and gravel for Caltrans' planned highway projects, BLM concluded, in its EA, that the other closest pits for the projected highway work would involve "excessive hauling costs" for all or most of that work, thus rendering them, for the most part, infeasible from an economic standpoint. (EA at 3; see Reply to Responses at 2 (Jaxon could have been "low bidder" for Caltrans' highway projects south of Independence).) Thus, we find no error has been shown on the ground that BLM failed to consider a reasonable range of alternatives in its EA.

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

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge