

**Editor's Note: appeal filed Civ. No. ED CV-04-1572 VAP Jwx (D.C. Calif. December 17, 2004)**

SIERRA CLUB, ANGELES CHAPTER, SANTA CLARITA GROUP, ET AL.

IBLA 2000-353 etc.

Decided January 8, 2002

Appeal from the Record of Decision approving the Soledad Canyon Sand and Gravel Mining Project. CA-22901, CA-20139.

Affirmed as modified; IBLA 2000-399 dismissed.

1. National Historic Preservation Act: Generally

When authorizing a project, BLM is obligated under section 106 of the National Historic Preservation Act to seek to identify any property eligible for inclusion in the National Historic Register located within the area of the project's potential impact which may be affected by the project. An appellant challenging approval of a project must show that BLM erred in collecting the data, interpreting the data, or reaching its conclusion, and not simply that a different conclusion can be drawn from the evidence.

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

A BLM decision approving a sand and gravel mining project may be affirmed when the environmental impact statement takes a hard look at all of the potential significant environmental consequences and reasonable alternatives, including imposition of appropriate mitigation measures.

3. Endangered Species Act of 1973: Generally-- Endangered Species Act of 1973: Section 7: Consultation--Fish and Wildlife Service

Under the Endangered Species Act, BLM is obligated to ensure that any authorized project is not likely to jeopardize the continued existence of any threatened or endangered species or adversely impact its habitat.

4. Appeals--Delegation of Authority--Endangered Species Act of 1973: Generally--Endangered Species

Act of 1973: Section 7: Consultation--Fish and Wildlife Service--  
Office of Hearings and Appeals-- Rules of Practice: Appeals:  
Jurisdiction

On appeal from a BLM decision authorizing a sand and gravel mining project, the Board may review whether BLM considered the potential impact to threatened and endangered species or their habitat. However, it lacks jurisdiction to review the merits of a biological opinion issued by USFWS, as a result of consultation regarding a species, which serves, in part, as a basis for BLM's decision.

APPEARANCES: Deborah C. Prosser, Esq., Los Angeles, California, and Karen Budd-Falen, Esq., Cheyenne, Wyoming, for the City of Santa Clarita; Erica L. B. Niebauer, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Henry Schultz, Chair, Los Angeles, California, for the Sierra Club; Diane Terito, President, for the Agua Dulce Town Council; Don Banderas, Superintendent, for the Acton-Agua Dulce Unified School District; Robert D. Crockett, Esq., Los Angeles, California, for Canyon Country Enterprises dba Curtis Sand and Gravel; Robert C. Sagehorn, General Manager, for Castaic Lake Water Agency; Peter Galvin for the Center for Biological Diversity; Michael D. Antonovich, pro se; Robert C. Lee, District Supervisor, for the William S. Hart Union High School District; Steve A. Billy, Treasurer, for the International Union of Operating Engineers; The Honorable Howard P. McKeon, pro se; Thomas E. Shollenberger, General Manager, for the Newhall County Water District; Andrew G. Fried, President, for Safe Action for the Environment; Ron Bottorff, Chairman, for the Friends of the Santa Clara River; Lynne A. Plambeck, 1st Vice President, for the Santa Clarita Organization for Planning and the Environment; Connie Worden-Roberts, President, for the Santa Clarita Valley Chamber of Commerce; Robert E. "Mitch" Davis, President, for the Southland Regional Association of Realtors; Robert A. Nolet, Superintendent, for the Sulphur Springs School District; Dr. Jonathan Truong, pro se; Alan Kanase, President, for the Valencia Industrial Association; Richard A. Mickel for Realty Executives; Peter J. Engstrom, Esq., and Kerry Shapiro, Esq., San Francisco, California, for the Transit Mixed Concrete Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On August 1, 2000, the District Manager, California Desert District, Bureau of Land Management (BLM), issued a Record of Decision (ROD) for the Soledad Canyon Sand and Gravel Mining Project (referred to as the Soledad Canyon Project or Project). Based upon the analysis undertaken in the June 2000 Final Environmental Impact Statement, Soledad Canyon Sand and Gravel Mining Project (OEPC FES-00-18) (FEIS), the ROD allows the Transit Mixed Concrete Company (TMC) to extract 78 million tons of material and produce and sell approximately 56.1 million tons of sand and gravel over a 20-year period pursuant to mineral material sale contracts with BLM. (ROD at 3, App. B.) The Project as defined in the Reduced North Fines Storage Area Alternative, with modifications and conditions, was approved by BLM. (ROD

at 7.) Authority to mine the sand and gravel is provided by competitive sale contracts (CA-22901 and CA-20139) issued by BLM on March 9, 1990, pursuant to the Material Sales Act of 1947, 30 U.S.C. §§ 601-604 (1994).

The Project site is located north of Los Angeles in an unincorporated area of Los Angeles County. (FEIS at S-2.) The Project site is comprised of two adjacent areas. Area "A" where the mining will take place consists of approximately 460 acres of "split estate" land which has been patented pursuant to the Stock-Raising Homestead Act (SRHA). 1/ Title to the mineral deposits in these lands is held by the United States and administered by BLM. The patented surface estate is subject to the right of the Federal mineral lessee to use the surface estate to the extent necessary for purposes reasonably incident to mining and removal of the minerals. 2/ Project processing facilities will be located on Area "B" which has been leased by TMC from the surface owner. (FEIS at S-2.)

The Project site was mined from 1968 to approximately 1986 during which time the previous operator removed several million tons of sand and gravel. About 45 acres of the site remain disturbed and unreclaimed. (FEIS at 1-1.) Much of this mining was conducted under a conditional use permit issued by the County in 1972, which expired in 1992, pursuant to a lease issued by the surface owner. Id. However, as a result of litigation, minable deposits of sand and gravel on the lands at issue were held to be reserved to the United States under SRHA patents. Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983). This led to a trespass action for damages for mining of sand and gravel on the lands without authorization from BLM. Curtis Sand & Gravel Co., 95 IBLA 144, 94 I.D. 1 (1987).

On August 31, 2000, the Sierra Club, Angeles Chapter, Santa Clarita Group (Sierra Club), filed a notice of appeal and a petition for stay of the decision. Appeals were also docketed involving 20 other parties. 3/ These 21 appeals were consolidated for purposes of review by the Board in an Order dated October 20, 2000. In that same Order, we granted the motion of TMC to intervene in these appeals. With respect to the stay

1/ Act of Dec. 29, 1916, ch. 9, § 1, 39 Stat. 862, repealed Federal Land Policy and Management Act of 1976, P.L. 94-579, § 702, 90 Stat. 2787, formerly codified at 43 U.S.C. § 291 (1970).

2/ Stock-Raising Homestead Act of 1916, § 9, 43 U.S.C. § 299 (1994).

3/ The 20 additional appeals of the BLM decision docketed by the Board include:

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| Agua Dulce Town Council                                   | IBLA 2000-372 |
| Acton-Agua Dulce Unified School District                  | IBLA 2000-373 |
| Canyon County Enterprises,<br>d.b.a. Curtis Sand & Gravel | IBLA 2000-374 |
| Castaic Lake Water Agency                                 | IBLA 2000-375 |
| Center for Biological Diversity                           | IBLA 2000-376 |
| City of Santa Clarita                                     | IBLA 2000-377 |
| Michael D. Antonovich                                     | IBLA 2000-378 |
| William S. Hart Union High School District                | IBLA 2000-379 |

petitions filed by the Sierra Club, the City of Santa Clarita (City), and Michael D. Antonovich, we found that there was no risk of imminent harm to appellants in that prior to implementation of the BLM decision a reclamation permit was required from Los Angeles County and that the record indicated that TMC's application had been rejected and an appeal had been filed by TMC to the Los Angeles County Board of Supervisors (LABOS). In light of the potential for modifications of the Project in the course of the permit application process, we also found that a stay was not in the public interest at the time. Declining to grant the stay for these reasons in the October 2000 Order, we took the petition for stay under advisement and directed TMC to advise the Board when an approved Surface Mining and Reclamation Plan was obtained. No such information has been provided to the Board to date.

Our October 2000 Order also denied the City's request for an evidentiary hearing on the ground the City failed to identify a material issue of fact requiring an evidentiary hearing to resolve. 43 CFR 4.415. In doing so, we noted that cases of this type generally turn on the legal consequences of the facts as they are presented in the administrative record, including the overall adequacy of that record to support the decision under appeal.

Further, our October 2000 Order noted that Richard A. Mickel, on behalf of Realty Executives, Santa Clarita, California, had filed a request for an extension of time to file a statement of reasons. The request was docketed as an appeal (IBLA 2000-399), but no notice of appeal was in the administrative record received by the Board. Hence, by the terms of the October 2000 Order Realty Executives was required to submit a copy of its notice of appeal and provide evidence that it was timely filed with BLM. No response has been received from Realty Executives. Accordingly, there is no evidence that Realty Executives filed a timely appeal of the BLM ROD and, hence, the appeal (IBLA 2000-399) is dismissed.

In an Order dated February 23, 2001, we granted the motion for expedited review of this case filed by BLM. Subsequently, after numerous reply

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fn. 3 (continued)

International Union of Operating Engineers	IBLA 2000-380
Congressman Howard P. "Buck" McKeon	IBLA 2000-381
Newhall County Water District	IBLA 2000-382
Safe Action for the Environment	IBLA 2000-383
Friends of the Santa Clara River	IBLA 2000-384
Santa Clarita Organization for Planning and the Environment	IBLA 2000-385
Santa Clarita Valley Chamber of Commerce	IBLA 2000-387
Southland Regional Association of Realtors	IBLA 2000-388
Sulphur Springs School District	IBLA 2000-389
Jonathan Truong, M.D.	IBLA 2000-390
Valencia Industrial Association	IBLA 2000-391
Realty Executives	IBLA 2000-399

and supplemental briefs were filed on behalf of appellants, we granted a motion to close briefing in this case in an Order dated August 10, 2001.

The very extensive briefing in support of the appeals in this consolidated case was spearheaded by the City as one of the appellants. Many of the other appellants have filed pleadings adopting the statement of reasons (SOR) for appeal filed by the City.

The critical issues raised by the parties in these consolidated appeals involve BLM compliance with three major Federal statutes: National Historic Preservation Act (NHPA) 4/, National Environmental Policy Act (NEPA) 5/, and the Endangered Species Act (ESA). 6/ For the sake of clarity, we focus our analysis of the issues raised under these statutes in sequence.

The City contends that BLM violated NHPA in failing to make a reasonable effort to identify historical properties existing in the Project site. Specifically, it asserts that BLM failed to identify three historic sites identified by its consultant which are located within the Project area. (SOR at 36-38.)

The record reflects that a search of archeological records was made at the Archeological Information Center at the University of California at Los Angeles. The records search disclosed that the area of the Project site had been surveyed on two prior occasions by Chester King, PhD, in 1974 and by Louis Tartaglia, PhD, in 1989 and that no archeological sites were recorded in the parcel. Roderic McLean, Chambers Group, Inc., Cultural Resource Assessment of a 460-Acre Parcel in Soledad Canyon, California (July 1990) at 8; FEIS at 3-251. The on-the-ground reconnaissance conducted on April 10, 1990, by TMC's archeological consultant, located one historical archeological site consisting of "two terraced areas lined with river cobbles," which may have been associated with a residence and a related structure. Id. Because that site lies within a portion of the Project where no ground disturbance is planned, BLM found that the site would be avoided and, hence, no significant adverse impact would occur. (FEIS at 3-254.) Nevertheless, to ensure that no adverse impacts would occur, BLM invoked stipulations requiring fencing of the archeological site and, in the event that disturbance became necessary in future operations, an archeological testing program and, if the site were found to be important, implementation of a data recovery program. (FEIS at 3-254.)

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4/ Prior to approval of an undertaking, section 106 of the NHPA, as amended, 16 U.S.C. § 470f (1994), requires heads of Federal agencies to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment.

5/ 42 U.S.C. § 4332(2)(C) (1994).

6/ 16 U.S.C. §§ 1531-1534 (1994).

The City challenges the sufficiency of this compliance with NHPA on the ground that BLM failed to make a reasonable effort to identify historical sites existing in the Project Area. In support, the City indicates that its consultant, Chester King, performed a "spot check" of the adequacy of the analysis relied upon by BLM. (SOR at 36 and Ex. 23.) Dr. King's December 17, 2000, report was titled "Soledad Canyon Sand and Gravel Mining Project EIS Peer Review and Comment Concerning Cultural Resources." (Ex. 23 to City's SOR.) On the basis of his spot check, Dr. King found three sites which he concluded were archeological sites within the boundaries of the Project. Id. at 14-15. Regarding his earlier report referenced in the cultural resources report prepared for this Project, Dr. King indicates that his earlier survey was not systematic and involved different levels of detail. Id. at 16.

Russell L. Kaldenberg, archeologist and Deputy Preservation Officer for BLM in California, discloses that further examination of these sites was thereafter conducted by TMC's archeological consultant and by Kaldenberg himself on March 5, 2001. (Declaration of Russell L. Kaldenberg, March 19, 2001; see Ex. 18 to TMC's answer.) After examination of the sites found by Dr. King and analysis of the results, Kaldenberg concluded that the sites are not eligible for listing on the National Register of Historic Places. Id. at p. 2.

[1] Pursuant to section 106 of the NHPA, 16 U.S.C. § 470f (1994), the Department is required when authorizing the Project to seek to identify any property eligible for inclusion in the National Register that is located within the area of the Project's potential impact and which may be affected by the Project. See 36 CFR 800.4. It appears from the record that in assessing potential impacts to cultural resources, a search was made of the archives to find past surveys conducted to locate cultural resources in the area and those surveys, including one conducted by Dr. King, were consulted. In addition, a survey was made on the ground by TMC's archeological consultant. One archeological site was found and mitigation measures were developed to preclude adverse impacts to this site. (FEIS at 3-251, 3-254.) The City's consultant critiqued the assessment relied upon by BLM in conclusory terms in his "peer review," but he has not carried the burden of showing error therein. The sites found in his "spot check" were subsequently examined and found not to qualify as archeological sites eligible for listing on the National Register of Historic Places. It is well established that the Department is entitled to rely on the reasoned analysis of its experts in matters within their realm of expertise. Legal and Safety Employer Research Inc., 154 IBLA 167 (2001); Navajo Refining Co., 149 IBLA 14, 20 (1999); West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); Kings Meadow Ranches, 126 IBLA 339, 342 (1993). An appellant must show by a preponderance of the evidence that BLM erred when collecting the underlying data, when interpreting that data, or when reaching its conclusion, and not simply that a different interpretation can be drawn from the evidence. Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Appellants have failed to show that BLM erred in carrying out its responsibilities under NHPA.

With respect to NEPA compliance, the City contends BLM violated the requirement of § 102(2)(C) 7/, that it analyze inconsistencies of the proposal with approved State or local plans or laws, citing the regulations at 40 CFR 1506.2(d). (SOR at 17.) In particular, appellant argues that BLM erred in failing to discuss the inconsistencies between the Soledad Canyon Project and the City's General Plan on the basis that the Project site was outside the City's sphere of influence (SOI). Id. Further, appellant asserts BLM failed to adequately discuss the inconsistencies between the Project and Los Angeles County's Santa Clarita Valley Area Plan (Area Plan). Id. at 19. Appellant also contends BLM violated NEPA by failing to cooperate with local government agencies as required by regulation, 40 CFR 1506.2(b), in approving the Project. Id. at 20. Specifically, it argues that the FEIS ignores its concerns. Id. at 20-21.

In its answer, BLM contends that during the process of environmental review public hearings were held in the City of Santa Clarita, meetings were held with the City, and comment letters were received from the City and responded to by BLM as reflected in the FEIS. (BLM Answer at 5.) Further, BLM asserts that the FEIS analyzes the consistency of the Project with the County's Area Plan which, together with County zoning ordinances, provides planning policy for unincorporated areas of the County. Id. at 6. With respect to consistency with the City's General Plan, BLM notes that the FEIS discussed this issue and concluded that the site is outside both the City's jurisdiction and its SOI, and that the effective land use policies have been established under Federal, State, and County jurisdiction. Id. at 7. Regarding consideration of the City's concerns, BLM asserts that these issues were raised and discussed in the FEIS at 1-23 to 1-31. (BLM Answer at 7.)

In considering the sufficiency of the FEIS with respect to its analysis of inconsistencies of the Project with State and local plans, the relevant regulation provides that an EIS shall discuss any inconsistency between the proposed action and any approved State or local plan and laws. 40 CFR 1506.2(d). Further, when an inconsistency exists, the EIS should discuss the extent to which the agency would reconcile its proposed action with the plan or law. Id.

In preparing the FEIS, BLM considered the relationship of the Project to the plans, programs, and requirements of the various relevant State and local agencies in section 1.4 of the FEIS. (FEIS at 1-25 through 1-33.) At the State level, the FEIS states that the Project site has been formally designated by the State Mining and Geology Board (SMGB) as a Regionally Significant Construction Aggregate Resource Area pursuant to the California Surface Mining and Reclamation Act (SMARA). Id. at 1-26. This designation requires that:

[L]ocal planning agencies must balance the mineral resource value against alternative land uses and consider the importance of the mineral resources to their market region as a whole and

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7/ 42 U.S.C. § 4332(2)(C) (1994).

not just their importance to the local planning agencies' area of jurisdiction. Prior to permitting a use that would threaten the potential to extract mineral resources in the state-designated area, local planning agencies must prepare a statement specifying the reasons for permitting the proposed use and forward a copy to the State Geologist and the SMGB for review in accordance with SMARA.

Id. The FEIS reveals that the County's Area Plan and County zoning ordinances provide planning guidance for unincorporated areas of the County, including the Project site. Id. Further, the FEIS states that the majority of the Project area is zoned for heavy manufacturing, allowing mineral extraction activities pursuant to a surface mining and reclamation permit and that the Project is consistent with the policy of the County Board of Supervisors to protect important mineral resources, as described in the Area Plan. Id. Noting the existence of a potential conflict with a 1990 update of the Area Plan, which allows consideration of a mobile home park in adjacent Bee Canyon, the FEIS points out that as a general matter the Area Plan proposes to locate mobile home parks in residential areas and exclude them from industrial areas such as the Project site. Id. at 1-30.

The FEIS acknowledges that following completion of the City's General Plan in 1991, portions of the unincorporated areas that contain BLM lands zoned for heavy manufacturing were included within a proposed expansion of the SOI boundaries for the City. Id. Subsequently, BLM submitted a request to the Local Agency Formation Commission (LAFCO) that planning for the area recognize Federal title to the minerals in the property, the existing mineral resource classification, and that mineral resource development is the highest and best use. Id. Thereafter, inclusion of the area within the City's SOI was denied by LAFCO. Id. at 1-31. The FEIS also reflects that the Project was reviewed for consistency with the Southern California Association of Governments (SCAG) Regional Comprehensive Plan and Guide and found to be consistent with the strategic goals and component strategies set in the Plan. Id. Accordingly, we find that the record contradicts the assertion by appellants that BLM failed to consider the consistency of the Project with State and local plans and laws and that BLM ignored the City's concerns.

The City further asserts that the EIS fails to adequately discuss the impact of connected actions and the cumulative impacts of the proposed action. Id. at 41. It argues that BLM erred in "piecemealing" this Project in that BLM prepared an EA and FONSI at the time the mineral materials sales contracts were issued 10 years ago and that it is necessary to go back and revise the present EIS to consider the impacts of the contracts themselves. Id. at 43. Further, the City faults BLM's failure to analyze potential impacts of another proposed large sand and gravel mining operation located in the vicinity. Id. The City asserts that BLM failed to adequately consider the cumulative impact of the Project on the health of residents of the Santa Clarita Valley, noting that it is classified as a non-attainment area. Id. at 44. It also argues that modeling the Project emissions using an urban rather than a rural dispersion factor has caused an underestimate of the health effects of the Project. Id. at 45.

In its answer, BLM denies that the Project was improperly segmented for purposes of the environmental analysis or that the analysis failed to properly consider the cumulative impacts of the Project. Id. at 17. Thus, BLM argues that the cumulative impacts of this Project together with other projects in the area, including the one mentioned by the City in its SOR, were considered and analyzed in the FEIS. Id. at 18.

The FEIS contains a substantial discussion of the cumulative impacts of the Project together with other potential development based on the County Department of Regional Planning's list of proposed projects in the area. (FEIS at 3-355 to 3-366.) Cumulative impacts considered included impacts to water resources including flooding, water quality, and the available supply of water. Also considered are the cumulative impact to air quality in an area which is out of attainment for both ozone and particulate matter with a diameter of 10 microns or less (PM-10 or fugitive dust). Id. at 3-363. Although appellants challenge the adequacy of the cumulative impacts discussion, they have failed to carry the burden of showing error in this aspect of the FEIS.

To the extent that appellants challenge the scope of the EIS on the ground that BLM improperly segmented the scope of the Project when it failed to prepare an EIS at the time the mineral material sale contracts were entered into, this objection is properly dismissed as untimely. There is no issue in the context of the present appeal regarding the proper scope of the Project to be analyzed.

The City further contends that the EIS for the Project was defective in that it failed to provide adequate analysis of the no-action alternative. (SOR at 47.) In describing the no-action alternative, BLM stated that "45 acres from previous mining would remain unreclaimed, and there would be no sedimentation basin or other flood control measures at the site." (FEIS at 2-71.) The City argues that the BLM analysis was misleading in that there are other options for reclamation of prior mining disturbances that might occur even if the proposed Project were not approved. Id. at 47-48.

We find that the FEIS analyzes the no-action alternative and compares the impacts of this option with the impacts of the proposed action and of other alternatives. Id. at 2-71, 2-76 to 2-81. <sup>8/</sup> In this discussion, it is recognized that the no-action alternative would have fewer direct impacts than the proposed action to such resources as water, site-specific air emissions, and biota. Id. at 2-71. It is also noted, however, that the impact to regional air quality emissions would be greater in that aggregate would have to be trucked from a further distance. Id. The discussion of the no-action alternative also notes that the steep slopes of

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<sup>8/</sup> Under section 102(2)(E) of NEPA, 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).

the prior mining operation would remain unreclaimed and resulting sedimentation of the Santa Clara River would adversely affect water quality and biota. *Id.* Appellants' speculation that reclamation may be accomplished by other actions does not render the discussion of the no-action alternative unreasonable. Thus, appellants have failed to establish that BLM did not adequately address the no-action alternative in the FEIS.

The City also takes issue with the discussion in the EIS of the economic impacts of the proposed Project. In particular, it asserts that there is no shortage of aggregate in Los Angeles County and that this has been misrepresented by TMC. *Id.* at 48-50. That misrepresentation, it argues, has resulted in an erroneous economic assumption for the Project. Additionally, it contends the economic costs of the Project will far exceed the economic benefits. *Id.* at 50-52. In its answer, BLM asserts that its finding of a need for further aggregate reserves in the area was based on extensive research completed by the California Department of Conservation, Division of Mines and Geology (CDMG), which has the responsibility for classifying and designating valuable deposits of sand and gravel in the State. (SOR at 20.)

With regard to the need for additional reserves of sand and gravel in the Los Angeles County area, the available reserves were totaled and compared with projected demand using figures developed by CDMG. (FEIS at 1-8 to 1-13.) Thus, the FEIS noted that in a 1994 report CDMG estimated existing reserves would be depleted by the year 2016. *Id.* at 1-12 and Table 1.1-3. A variation in actual demand of 20 percent could result in depletion as early as 2010. *Id.* at 1-12. Further, the cost and period of time required to open a new mine are stated to be increasing due to regulatory requirements to include 5 to 6 years for permitting and 1 to 3 years for construction and startup. *Id.* Appellants challenge this analysis, asserting that BLM errs in considering the projected shortage of "reserves" <sup>9/</sup> of sand and gravel as opposed to all deposits of sand and gravel located in the area. Given the obstacles associated with permitting a new mine, we find that appellants have failed to show that the analysis in the FEIS was unreasonable in this respect.

The City also argues that the EIS failed to adequately address mitigation of the impacts of the Project because it relied upon mitigation measures to be undertaken by TMC which appellant asserts does not "have a stellar environmental record." (SOR at 53.) It contends that BLM erred in failing to consider the environmental record of TMC's parent company, Southdown, Inc., with respect to various projects in other regions of the country. *Id.* at 21-24. It is asserted that this record vitiates BLM's reliance upon mitigation measures required of TMC to limit the impact of the Project. *Id.* at 53.

With respect to the environmental record of TMC or its parent company, TMC asserts that it has already paid a performance and reclamation

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<sup>9/</sup> "Reserves" are defined both by appellants and intervenor as aggregate deposits owned or controlled by a mining operator that have been permitted for extraction.

bond to BLM in the amount of \$1.4 million. (TMC Answer at 73-74.) In addition, TMC notes that it is obligated to comply with the terms of the mitigation and monitoring program as a condition of approval of the ROD for the Project. Id. at 74. Thus, it is contended that there is no requirement under NEPA to consider the environmental record of either TMC or its parent company. Id. at 75.

The contention that BLM erred in failing to consider the environmental record of TMC or its parent corporation in other situations is rejected in the context of this case. Appropriate mitigation measures were properly imposed upon TMC as a condition of approval. A very substantial sum in surety bonds to secure compliance with mitigation and reclamation requirements was also required. Surety bonds are a recognized means of ensuring compliance. There has been no showing that the amount of bonding is insufficient to ensure that impacts will be mitigated. Thus, this case is properly distinguished from National Wildlife Federation, 126 IBLA 48, 63 (1993), in which the Board set aside approval of a mining plan of operations since it was unclear from the record that the bond was adequate to ensure compliance with the mitigation measures required to establish successful reclamation of the land after mining.

The City asserts that BLM failed to analyze the adequacy of TMC's water rights to provide the necessary water for this Project. (SOR at 24-27.) With respect to water use, the City contends that the "safe yield," i.e., the rate at which ground water can be extracted without causing undesirable effects, has already been exceeded for the Acton Basin. Noting that TMC would withdraw its riparian and appropriated water from the Santa Clara River within the Acton Valley subunit of the Santa Clara River Valley Hydrologic Unit, it asserts that water used by TMC would exceed the safe yield. Id. at 28. In addition, the City charges that the record is inadequate to establish the availability of sufficient water to support the Habitat Protection Plan (HPP) proposed by TMC, citing the analysis provided in a memorandum dated October 17, 2000, from Willdan Associates to the City. (Ex. 19 to SOR.) Thus, appellant contends the United States Fish and Wildlife Service (FWS) biological opinion (BO) which hinges on the Plan is flawed. (SOR at 28-30.)

BLM contests the City's assertion that there may be insufficient water resources to support the mining Project, noting that TMC was the successful bidder at a competitive sale and was required to show sufficient potential water rights. (BLM Answer at 9.) Regarding the availability of water pursuant to TMC's riparian water rights, BLM states that most of the water usage will be on the riparian parcel and that the quantity of water use planned for the non-riparian parcel is less than the amount of the appropriated water rights for which TMC has applied. Id. at 9-10. Further, BLM contends that with the water rights mitigation shown in the FEIS at p. S-23, and the mitigation requirements of the HPP, the impacts to water resources are reduced to less than significant. Id. at 10. With respect to the safe yield of water and the impact on the Acton Basin, BLM asserts that the Project wells are not located in the Acton Basin which is situated approximately 7 miles upstream of the Project site and will not be impacted by water extractions for the Project. Id.

In its answer, TMC asserts that BLM took a "hard look" at the impacts of the Project on water resources. It points out that the FEIS analyzed water resource impacts in detail and concluded that water usage for the Project would be insignificant compared to available water resources and that the Acton Basin will not be impacted because it is located upstream and remote from the Project wells. (TMC Answer at 20.) Further, TMC asserts that the Acton Valley Subunit is made up of two areas, the Acton Basin and the Western Portion and that the Project wells are located in the Western Portion, not the Acton Basin. Id. at 22. While contesting the City's contention that the "safe yield" of the Acton Basin is exceeded by current use, TMC argues the "safe yield" of the Acton Basin is not relevant as it is located 6.5 miles away from and upstream of the Project wells. Id. Additionally, TMC asserts that Project water demands will not exceed the "safe yield" of the Western Portion of the Acton Valley Subunit. Id.

It is contended by TMC that the only potentially significant local water resource impact disclosed was the impact to sensitive ecological species during dry spells, particularly the unarmored threespine stickleback (UTS). Id. at 20-21, citing FEIS at 3-71, 3-245 to 3-246. In its answer, TMC notes that the Santa Clara River in the vicinity of the Project site is classified as an intermittent stream because surface flow in portions of the river is discontinuous over the course of a year. (TMC Answer at 24.) Surface flow at Old Lang gaging station (downstream of the site and upstream of the UTS habitat) is asserted to continue during the dry season, even when there is no surface flow at the Project site, due to "subsurface underflow from the alluvial aquifer upstream of Old Lang gaging station, and downstream of the Project Site." Id. Thus, TMC contends that as long as the alluvial aquifer between the Old Lang gaging station and the Project site is adequately recharged during the wet season, surface flow will continue at the Old Lang gaging station through the dry season. Id. If there is insufficient recharge of the aquifer during the wet season due to reduced surface flow, surface flow at Old Lang gaging station will be reduced during the following dry season which could potentially affect UTS habitat. Id. It is pointed out by TMC that groundwater monitoring wells which measure recharge by measuring groundwater level have been included as a mitigation measure, citing FEIS at p. 3-71. (TMC Answer at 24 n. 22.)

The Project is located on the north side of the Santa Clara River and on the western (downstream) side of the Acton Valley hydrologic subunit. (FEIS at 3-35.) <sup>10/</sup> In the area of the Project, the river flows through a narrow alluvium filled channel underlain by relatively impermeable bedrock and this alluvial deposit provides the main subterranean storage medium. Id. at 3-44. The source of water for the Project is the alluvial aquifer formed by the "deeply entrenched river channel in lower Soledad Canyon." Id. at 3-53. Water for the Project will be obtained by TMC through a series of well pumps. Id. at 3-64.

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<sup>10/</sup> The Acton Basin referred to in the briefs on appeal constitutes the eastern portion of the subunit and is located approximately seven miles east of the Project site.

With regard to the adequacy of TMC's water rights to support the Project, it appears that this issue has been previously resolved in litigation between several of the parties to this case in which Curtis challenged issuance of the material sales contracts by BLM to TMC. As part of the stipulated settlement of the trespass litigation regarding the sand and gravel previously mined by Curtis, BLM agreed to hold the competitive sale which resulted in issuance of the contracts to TMC as the high bidder. The high bidder was required to provide evidence of a present right to the required water. A subsequent challenge to BLM acceptance of the high bid was rejected by the courts. United States v. Canyon Country Enterprises, Inc., No. 90-55302 (9<sup>th</sup> Cir. filed Dec. 5, 1991)(Ex. 2 to TMC Consolidated Answer.) 11/

The record discloses that TMC has made application for a permit to appropriate 322 acre feet of water per year and to exercise its riparian right to 276 acre feet per year from the Santa Clara River. (Ex. 10 to City's SOR.) It also appears that projected water use on the non-riparian tract, parcel A (FEIS at Fig. 2.1-4), would be less than the total of the appropriated water rights in the application. See FEIS Technical Appendices at C-1; TMC Answer at 31.

The impact of Project water use on the availability of Santa Clara River water for ecological habitat was also analyzed in the FEIS. The Santa Clara River is classified as an intermittent stream (at least some sections of the river normally run dry for a few months during the dry

Accordingly, we find this argument establishes no basis to contest the ROD. season), but it has routinely maintained a measurable year round surface flow downstream of the Project at the Old Lang gaging station. Records at the Old Lang gaging station located just downstream of the Project site reveal that during the 20-year period from 1949 to 1970, no month reported a surface flow of less than 19 acre feet. Id. at 3-53. This surface flow is considered an indicator that the subsurface aquifer is fully saturated and flowing at a rate dependent on stream gradient. Id. at 3-57. Subsurface flows in the Project area "are the source of sustained surface flows in the permanent [UTS] habitat" downstream of the Project during the dry season. (FEIS, App. F6 at F6-14.) 12/ Readings taken at a monitoring well show that a relatively short period of time is required to recharge the aquifer even during periods of significant variation in seasonal rainfall. Id. at 3-60. At the end of the dry season, measured water levels reveal that the aquifer is not fully saturated at that time. During the wet season (November to April) and the first three months of the dry season (May to July) when the river flows on the surface, the aquifer recharges from rainfall on the porous alluvium and from sustained underflow from the

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11/ The surface owner, Curtis, has also challenged the ROD on the ground that the permitted activities are inconsistent with the rights of the surface owner. It appears from the record that the right of the permittee of the United States to mine the reserved minerals in this patented land has been clearly established in litigation between the parties.

12/ Appendix F6 to the FEIS is the HPP.

flanks of the river. Id. at 3-66. Estimates of downstream surface water flow after pumping to meet Project needs reflect a continued surface flow downstream. Id. at 3-67. <sup>13/</sup> Noting that surface flows would be reduced approximately 16 percent during Phase 2 operations, the FEIS proposed monitoring and mitigation (mitigation measure WR-1) to ensure maintenance of in-stream habitat. Id. at 3-67.

In analyzing the effects of pumping during the dry season, the FEIS recognized that during the late summer and fall months surface flow in the river upstream from the Pole Canyon fault (located between the Project site and Old Lang gaging station) would stop, but concluded that Project pumping would draw down the aquifer (which would be quickly recharged at the start of the ensuing wet season) and leave surface flow downstream unaffected. Id. at 3-68. The FEIS recognized that continued pumping of the aquifer without the anticipated recharge "could seriously reduce essential levels of flow during unusually dry periods and thereby create serious adverse environmental impacts." Id. at 3-69. To avoid such an impact, TMC was required to commit to a habitat monitoring program and to reduce or stop pumping in order to maintain habitat quality. Id.

Mitigation measure WR-1 requires TMC to maintain four existing wells to monitor water levels of the Santa Clara River underflow during the life of the Project. Id. at 3-71; ROD, App. A. Further, surface flows of the river will be monitored during the life of the Project at a location to be determined prior to the start of mining. Id. In addition, riparian and aquatic habitat along the reach of the river downstream from the Project where surface flows originate during the dry season will be monitored each year when the surface flow of the river at the Project site dries up. (FEIS, App. F6 at F6-14 to F6-15.) At selected monitoring sites, the river will be monitored for rate of flow, depth, oxygen content, and temperature. Id. at F6-16. Action thresholds include mean stream temperature above 27 degrees C, mean oxygen level below 3.0 mg/L, decrease of 25 percent of mean water depth, and decrease in flow of 25 percent or more, if the change in flow is significantly different from changes at the control site upstream of the Project. Id. Reduction or cessation of pumping from the aquifer will be required when any two of these action thresholds are met. Id. Thus, review of the FEIS and related documentation discloses that a careful analysis of the impact to water resources was made.

The City also contends that BLM erred in analyzing the adverse air quality impacts of the Project. (SOR at 30.) In particular, it asserts that the Environmental Protection Agency (EPA) questioned the use of an

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<sup>13/</sup> Pumping from the aquifer in the wet season during periods of surface flow would reduce the surface flow by the amount which would be required to recharge the aquifer. (FEIS at 3-67 to 3-68.) Thus the Willdan Associates report relied upon by the City in asserting Project water use would reduce surface flow of the river by 45 to 90 percent (City's SOR, Ex. 19 at 2) is misleading in that it fails to account for the seasonal fluctuation in surface flow in the Project vicinity and simply compares Project extraction against surface flow.

urban, rather than rural, model for analysis of air quality impacts. Further, the City argues that the air quality analysis in the FEIS underestimates Project emissions and, thus, the impact of these emissions on residents. Id. at 31-32. It also challenges the adequacy of the analysis to support the Federal conformity and state consistency determinations, asserting there is no evidence the Project is in conformance with the State Implementation Plan (SIP) and the Air Quality Management Plan (AQMP). Id. at 33-34.

In its answer, BLM contends that no State air quality standards will be violated by the proposed Project and that air quality in the Project area will be in conformity with Federal and State standards, citing § 3.1.7 of the FEIS. (BLM Answer at 13.) It is also asserted by BLM that the Project meets the conformity requirements of the AQMP and the SIP of 1994, citing the FEIS at 3-165, Appendix E5 and E6. (BLM Answer at 13.) In support, BLM asserts that the EPA, the South Coast Air Quality Management District (SCAQMD), and the Association of Governors have all determined that the Project meets conformity requirements. Id. With respect to use of the urban rather than the rural modeling standard for air quality analysis, BLM responds that use of the urban parameter was in accordance with SCAQMD standard policies.

Appellants also challenge the adequacy of the analysis of the impacts of the Project on air quality. The record of local monitoring discloses that levels of the pollutants ozone and PM-10 have exceeded the ambient air quality standards (AAQS) on a number of days during recent years and, hence, a SIP to attain compliance with the standards has been prepared. (FEIS at 3-163 to 3-165.) Projects which are inconsistent with implementation plans may not be authorized by BLM. See 40 CFR 93.150(a). The SCAQMD developed the 1994 AQMP, the principal air quality planning document in the Project area, and the 1997 AQMP which is pending approval. (FEIS at 3-165.)

In analyzing the air quality impacts of the Project, BLM considered both the impacts of construction of the facilities and of operating the plant. In reviewing nitrogen oxide levels during construction associated with exhaust emissions generated by commuting workers, delivery of materials to the site, and operation of construction equipment, the FEIS acknowledged that emissions may exceed the SCAQMD daily emission criteria which establish a threshold level of significance. Id. at 3-170 to 3-173, Table 3.1.7-4. With respect to the operations phase, the FEIS found that unmitigated exhaust emissions associated with operations (Phase 1) would exceed the SCAQMD threshold level for carbon monoxide, nitrogen oxides, and reactive organics. Id. at 3-176. For fugitive dust, analysis found that the impact of phase 1 operations would also be significant. Id. at 3-180. Phase 2 operations would also result in unmitigated exhaust emissions which would exceed the SCAQMD threshold level for carbon monoxide, nitrogen oxides, and reactive organics as well as fugitive dust emissions which would exceed limits. Id. at 3-180, 3-183 to 3-184. On a regional basis, the FEIS found that the no action alternative which would require an

increase in haul truck emissions to supply construction aggregate would have a substantially greater impact on air quality. Id. at App. E5-8.

The impact on air quality of numerous mitigation measures was also analyzed in the FEIS. Included in the mitigation measures to reduce exhaust emissions during the construction phase are careful tuning of engines, use of catalytic converters, and curtailment of construction during periods of high ambient pollutant concentrations (smog alerts). Id. at 3-184. To mitigate exhaust emissions during operations, measures include fine-tuning engines and operating trucks at off-peak hours to reduce exhaust emissions. Id. at 3-185 to 3-186. Several mitigation measures respecting PM-10 emissions included use of covered transfer points controlled by negative pressure vented to a bag, venting rock crushing equipment to a filter or using water spray bars, use of chemical dust suppressants on unpaved roads, watering and sweeping of paved roads, and use of covers to keep transported materials from blowing. Id. at 3-186 to 3-187. The impact of these mitigation measures on emissions during construction and operations (Phases 1 and 2) is shown in tables. Id. at 3-191 to 3-195.

Since onsite Phase 1 and 2 operations will create impacts that cannot be fully mitigated, dispersion modeling was conducted to determine the potential for significant impacts on offsite residential areas. The FEIS notes that onsite exceedance of the SCAQMD daily levels does not mean that offsite receptors will be subjected to unhealthful pollutant levels. (FEIS, Vol. 1, Responses to Comments at 2-31.) Explaining that the "SCAQMD daily criteria used as threshold levels were promulgated to bring the entirety of South Coast Air Basin into compliance [with] the Ambient Air Quality Standards by the dates listed in the Air Quality Management Plan," the FEIS states that the risk of exposure to unhealthful pollutants can only be demonstrated by air dispersion modeling. Id. The modeling predicted national AAQS will not be exceeded at or beyond the Project boundaries during Phases 1 and 2. The FEIS states that Project emissions for phase 1 and 2 operations will not exceed SCAQMD threshold at the offsite residential receptors modeled, although the model projects that when background levels of pollutants were added to phase 2 emissions for nitrogen oxide, the SCAQMD threshold level would be exceeded at the nearest dwelling unit. (FEIS at 3-197 to 3-198.)

Appellants have also challenged the use of an urban model instead of a rural model for analysis of air quality impacts. In responding to a comment on this matter, the FEIS noted that the choice of a model is not a function of the population, but rather is related to the relative "roughness" of the surrounding terrain. (FEIS, Vol. 1, Responses to Comments at 3-8.) Natural obstacles such as hills, valleys, ridges, rock outcrops, trees, and scrub brush which increase pollution dispersion support use of an urban model. Id. The FEIS indicates that in fact the standard practice in the SCAQMD is to use the urban model. Id.

To evaluate conformity of the Project with the SIP, a Draft Air Conformity Analysis was prepared. (FEIS Technical Appendices, App. E-5.) The record discloses that the Project is located in an area where compliance with AAQS for ozone (including nitrogen dioxide and volatile organic

compounds (VOC's)) is in extreme nonattainment and compliance with AAQS for both PM-10 and carbon monoxide is in serious nonattainment. Id. at E5-2. Levels of Project emissions with mitigation are expected to be sufficiently high for nitrogen dioxide during Phase 1 operations and for nitrogen dioxide and VOC's during Phase 2 operations to require a conformity determination. Id. at E5-8 to E5-9, E5-13; 40 CFR 93.153(b)(1). Hence, the FEIS addressed the conformity of the Project with the SIP. The FEIS applied the regulatory criteria for determining conformity with the 1994 SIP/AQMP and found Project emissions to be consistent with the SIP. FEIS Technical Appendices, App. E-5 at E5-14 to E5-21; 40 CFR 93.158(a) and (c). The draft conformity analysis was made available for public review and comment as part of the Supplement to the Draft Environmental Impact Statement (SDEIS). See 40 CFR 93.156(b). Notice of the conformity determination was also provided to the appropriate EPA Regional Office and to State and local air quality management agencies. See 40 CFR 93.155(b). Subsequently, BLM received the concurrence of the SCAQMD that, after review of the draft conformity determination, the finding of conformity was appropriate. (FEIS Technical Appendices, App. E-6 at Attachment 2 (Letter of March 22, 2000, from SCAQMD to BLM).) In a letter dated March 16, 2000, BLM received a similar concurrence regarding conformity with the 1994 SIP and the 1997 SIP (pending approval) from the SCAG. (FEIS Technical Appendices, App. E6 at Attachment 3.)

Accordingly, we find that appellants have failed to show error in the environmental analysis regarding the impacts to air quality. Although appellants have challenged the conclusion that the Project is in conformity with the SIP, they have not shown that the conclusion is erroneous or unreasonable. This Board has held that an appellant's judgment cannot be substituted for that of BLM on the basis of arguable difference of opinion. Blue Mountains Biodiversity Project, 139 IBLA 258, 265 (1997); Robert C. Salisbury, 79 IBLA 370, 379 (1984).

[2] It is well established that the adequacy of an EIS, under section 102(2)(C) of NEPA, must be judged by whether it constituted a "detailed statement," which took a "hard look" at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (1994); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Sierra Club Uncompaghe Group, 152 IBLA 371, 377 (2000); see 40 CFR 1502.1; Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1285-86 (1st Cir. 1996), cert. denied, 117 S.Ct. 2510 (1997); Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973); Colorado Environmental Coalition, 142 IBLA 49, 52 (1997); The Sierra Club, 104 IBLA 76, 83 (1988). The record before us supports a finding that BLM has taken a hard look at the environmental consequences of the Project, reasonable alternatives (including the no-action alternative), and relevant mitigation measures. Accordingly, the challenge to BLM compliance with NEPA is properly rejected.

With respect to the ESA, the City argues that approval of the Project violates the statute in that the biological assessment (BA) prepared for the Project is arbitrary and capricious. It contends the BA fails to

analyze the potential effects of the Project on several endangered species, including the unarmored threespine stickleback (UTS), the southwestern arroyo toad, the least Bell's vireo, and the southwestern willow flycatcher, despite the fact that the BA admits those species occupy areas in and around the Project area. (SOR at 55-57.) The City cites a November 8, 2000, letter from the California Department of Fish and Game (CDFG) asserting that the Project poses unacceptable risks to the continued survival of an endangered plant, the slender-horned spineflower. Id. at 57 and Ex. 16. Further, the City contends BLM's reliance on the BO issued by FWS is arbitrary and capricious for three reasons: (1) it did not adequately analyze the impact of the Project on the UTS; (2) the proposed reasonable and prudent measures are not likely to protect that species; and (3) it was based on an inadequate BA. Id. at 58-59. Additionally, it argues that the BO is based on an assumption of compliance by TMC with conditions imposed by FWS and that such reliance is improper given the environmental record of the parent corporation of TMC. Id. at 60-61. The City also contends that under ESA regulations new information regarding endangered species, which may be threatened by the Project, requires BLM to reinitiate consultation with FWS prior to approving the Project. The City asserts that the November 8, 2000, CDFG letter constitutes such information. Id. at 63-64.

In response, TMC contends that BLM took a hard look at the biological impacts of the Project when it prepared a BA of potential impacts on threatened or endangered species. Upon finding in the BA that the Project may affect the UTS, BLM initiated consultation with the FWS pursuant to section 7 of the ESA resulting in a FWS BO in January 1998 concluding that the Project was not likely to jeopardize the continued existence of the UTS. (TMC Answer at 34-35.) Further, TMC asserts that a FWS BO is not subject to administrative review by the Board. Id. at 35.

Additionally, TMC argues that BLM did not err in the BA by failing to analyze in greater detail the impacts to certain other species because BLM concluded that those species were not found on the Project site and were not subject to any adverse offsite impacts from the Project. Id. at 37-38. The BA did address potential impacts to the least Bell's vireo due to adjacent offsite impacts to riparian areas. Regarding the City's challenge to the BA on the ground that it failed to properly consider the impact on the slender-horned spineflower, TMC notes that the BA found that the population is outside the Project's impact zone and concluded that no indirect impact to the population will occur. Id. at 42, citing BA at 3-15, 4-3. Finally, TMC contends the City has not provided new information which would contradict the findings reached in the BA and justify a re-initiation of consultation with FWS. Id. at 43.

The City also filed a supplemental brief containing a renewed request for an evidentiary hearing. Subsequently, it filed a second supplemental brief stating that independent studies by two biologists conducted in May and June 2001, presented in reports dated June 2001, had revealed the presence of the southwestern arroyo toad, a Federally-listed endangered species, in the vicinity of the Project site. Based on this finding, the City asserts that BLM is required under the ESA regulations to re-initiate consultation with the FWS regarding affects on the southwestern arroyo

toad. Hence, the City requests that the ROD be vacated. The City also filed a renewed request for a stay of the BLM ROD based on this finding. In a later-filed additional brief, the City stated that in light of the recent discovery of the southwestern arroyo toad on the Project site, BLM had re-initiated its consultation with FWS under section 7 of the ESA. Attached to the brief is a copy of a press release dated July 6, 2001, in which BLM announced its intention to prepare a supplemental BA (SBA) evaluating potential impacts of the Project on the southwestern arroyo toad which will be submitted to FWS for preparation of another BO.

The City further asserts that other species disregarded by the BA, including the UTS and the slender-horned spineflower, were found by biologists on the Project site, and urges that further consultation with FWS is required for these species as well. In view of this development, the City requests the Board to vacate the ROD or, alternatively, stay the ROD and decertify the expedited review of the ROD. (Additional Brief filed August 3, 2001.)

In its responsive brief, TMC repeatedly contends that the Board has no jurisdiction to review BLM's decision and BA to the extent it is challenged as inconsistent with the ESA due to the lack of a survey for the least Bell's vireo, the southwestern willow flycatcher, the California gnatcatcher, and the California red-legged frog. (TMC Opposition at 3, 5, 7, 15.) Further, TMC asserts with regard to these species that this issue has been addressed in a June 5, 2001, letter to BLM from FWS in which the latter agency concurs with BLM's conclusions that the Project is not likely to adversely affect the slender-horned spineflower or the California gnatcatcher and that it will not affect the least Bell's vireo, the southwestern willow flycatcher, or the California red-legged frog. Id. at 5; Ex. D. With respect to impact on the UTS, it is noted by TMC that in the same letter the FWS further concurred with the BLM conclusion that the existing BA and BO remain valid. (TMC Opposition at 5; Ex. D.) Thus, TMC asserts that FWS effectively found that there were no potential impacts on these species, including the UTS, which would require re-initiation of consultation. (TMC Opposition at 5; Ex. D.)

Further, TMC contends that the re-initiation of consultation with FWS under the ESA regarding the arroyo toad does not establish error in the NEPA review process which culminated in the FEIS upon which the ROD was based. (TMC Opposition at 12-14.) It is noted by TMC that the re-initiation of consultation with FWS was prompted by discovery of new information regarding the presence of the endangered southwestern arroyo toad after the initial BA and BO were completed. Id. at 16. Specifically, TMC contends that the recently discovered presence of such toads does not establish that a significant environmental impact was overlooked in that it is not apparent that this will substantially affect the species. Id. at 18.

In its opposition, TMC also challenges the City's claims regarding other species or habitat reported to be discovered on the Project site. Thus, TMC notes that potential impacts to the Santa Ana sucker, the arroyo chub, and the yellow-breasted chat are analyzed in both the BA at 3-27 to

3-28 and the FEIS at 3-236, 3-239. (TMC Opposition at 26.) Hence, TMC asserts that while a future verification that the species are present may lead to a need for further consultation with FWS, the latter agency has determined this is not necessary at the present time. Id., see Ex. D to TMC Opposition. Further, TMC contends that the additional information provided by the City fails to show that the Project will affect the human environment in a significant manner or to a significant extent not already considered as required to justify preparation of a supplemental EIS. Id. at 36.

Responding to the renewed stay request, TMC opposes a stay noting that the Project is still undergoing review at the local level and features of the Project are being modified in this process to reduce environmental impacts. Thus, it is asserted that any request for a stay is premature. (TMC Opposition at 9.)

On August 27, 2001, BLM filed a final brief responding to all the City's additional briefs and opposing the City's renewed request for a stay, renewed request for an evidentiary hearing, and the request to vacate the ROD. The rein BLM contends that the impacts of the Project on two species, the UTS and the arroyo toad, have been addressed by prior and ongoing formal consultations between BLM and FWS including a June 5, 2001, reaffirmation by FWS of the validity of its 1998 BO with respect to the UTS. (BLM Final Brief at 2-3.) In addition, BLM states that it has conducted informal consultation with FWS regarding five additional species: California red-legged frog, coastal California gnatcatcher, least Bell's vireo, southwestern willow flycatcher, and slender-horned spineflower. These seven species, BLM asserts, are the only listed, proposed, or candidate species on the Project Species List which potentially may occur within the action area, and FWS confirmed the accuracy of the Project Species List on June 5, 2001. Id. BLM notes that in response to comments received from CDFG, it prepared a supplemental effects analysis dated April 24, 2001, supplementing the BA for the arroyo toad and the five additional species. In its analysis BLM concluded that the Project will have no effect on four of the species including the arroyo toad and that the Project may affect, but is not likely to adversely affect, two of the species, the coastal California flycatcher and the slender-horned spineflower. Id. at 3; see Ex. 2. BLM states that on June 1, 2001, it provided FWS with supplemental information concerning the effects determinations, advising FWS of an additional mitigation measure described in the Final Environmental Impact Report (FEIR) 14/ for the Project. Id. at 3-4; see Ex. 3.

Further, BLM notes that on June 5, 2001, FWS concurred with the BLM's effects determinations for the California red-legged frog, least Bell's vireo, southwestern willow flycatcher, California gnatcatcher, and slender-horned spineflower, id. at 4; TMC Opposition at Ex. D, and that, under the regulations at 50 CFR 402.14(b), formal consultation is not required if BLM determines with the concurrence of FWS that an action is not likely to

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14/ The FEIR, as well as a Draft Environmental Impact Report (DEIR), were prepared in conjunction with review of the Project under California State laws.

affect a listed species or its critical habitat. Id. at 4. BLM points out by that FWS withheld any conclusion regarding the arroyo toad pending receipt of further information from BLM and that BLM subsequently prepared the August 2001 SBA for the Project to analyze potential affects on the arroyo toad in view of the new information regarding their presence in the area obtained in June 2001. Id. at 4. Asserting that its responsibilities under section 7 of the ESA for consultation for the other species have been satisfied through prior formal and informal consultation with FWS, BLM notes that as a result of its SBA it has requested formal consultation with FWS regarding potential Project impacts on the arroyo toad. Id. at 5. Accordingly, BLM contends that once FWS has completed its review of the SBA and issued its BO concerning the arroyo toad, "BLM will determine whether any additional mitigation measures are needed to minimize potential effects to the arroyo toad and whether any further NEPA-related analysis or decision is required." Id.

In response to the City's request that the Board order BLM to reinitiate consultation with FWS, BLM opposes the request on the ground that the Board has no jurisdiction to review BLM compliance with the ESA and that, in any event, the request is moot since BLM has undertaken further consultation. Id. at 5-6. With respect to the renewed request for a stay, BLM points out that the Project is still undergoing revision in response to the pending application for approval at the County level and a stay would be premature. Id. at 7. Further, BLM asserts the City has shown no material issue of fact which would justify its renewed request for an evidentiary hearing. Id. In addition, BLM contends that any further environmental analysis which may be ultimately required as a consequence of the new information regarding the presence of the arroyo toad and the further consultation with FWS with respect to potential adverse impacts is not relevant to the adequacy of the administrative record to support BLM's initial ROD based on the FEIS. Id. at 9.

[3] Section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (1994), provides that:

Each Federal agency shall \* \* \* insure that any action authorized, funded, or carried out by such agency \* \* \* is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical \* \* \*. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

The court in Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985), describes a three-stage process for complying with the ESA. First, an agency must determine whether an endangered or threatened species is present. If such a species is present, the agency must prepare a BA to determine whether the species is likely to be affected by the action. The BA may be part of an EIS. If the species would likely be affected, the agency

must conduct a formal consultation with FWS, resulting in a BO prepared by FWS. The Sierra Club, 104 IBLA 76, 87 (1988).

[4] As a threshold matter, we find it important to clarify the issue of the jurisdiction of the Board in the review of BLM decisions challenged for noncompliance with terms of the ESA. It is well established that the Office of Hearings and Appeals does not have authority to review the merits of a BO issued by FWS under section 7 of the ESA, 16 U.S.C. § 1536 (1994). Daniel T. Cooper, 154 IBLA 81, 85 (2000); Southern Utah Wilderness Alliance, 128 IBLA 52, 59-60 (1993); Lundgren v. Bureau of Land Management, 126 IBLA 238, 248 (1993); Edward R. Woodside, 125 IBLA 317, 322-24 (1993) (quoting a January 8, 1993, memorandum from the Secretary of the Interior to the Assistant Secretary for Policy, Management, and Budget entitled "Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act"). The administrative review authority delegated to this Board encompasses decisions made by BLM, but does not include review of findings or decisions made by FWS. See 43 CFR 4.1(b)(3), 4.410. We have previously concluded that there is nothing in the Secretarial memorandum that purports to modify OHA's existing authority in any way, noting that the memorandum expressly states that "OHA is not authorized to 'second-guess' FWS when reviewing BLM's decision." Lundgren v. Bureau of Land Management, supra at, 243. Thus, we have held that on administrative review of a BLM decision the Board properly considers whether the record discloses that BLM has analyzed the potential impact to threatened or endangered species and determined whether its actions "may affect" listed species or critical habitat and prepared a BA as required under the ESA. Richard Rudnick, 143 IBLA 257, 266 (1998); see Wade Patrick Stout, 153 IBLA 13, 24 (2000); Southern Utah Wilderness Alliance, 122 IBLA 6, 15-16 (1991). It is also clear that remand of a case is required when the record does not show that BLM has consider the impact of a project on threatened or endangered species. Richard Rudnick, supra.

The City initially contended that the BA failed to analyze the potential effects of the Project on several endangered species, including the UTS, the southwestern arroyo toad, the least Bell's vireo, the southwestern willow flycatcher, and the slender-horned spineflower. (City's SOR at 55-57; City's reply brief at 21-25.) In particular, the City cited a November 8, 2000, letter from CDFG asserting that storage of fines in the Bee Canyon watershed poses unacceptable risks to the continued survival of the endangered slender-horned spineflower from air borne or water borne deposition of silt or dust. (Ex. 16 to the City's SOR at 6.) <sup>15/</sup> In that letter, CDFG concluded that the only acceptable alternative would be to forego placement of fines in the Bee Canyon watershed. (Ex. 16 to the City's SOR at 7.)

The June 1996 BA noted that although no occurrence of the slender-horned spineflower was found on the Project site, a large population was

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<sup>15/</sup> The letter of Nov. 8, 2000, was submitted to the Los Angeles Department of Regional Planning in response to the DEIR.

observed on benches within the alluvial wash in Bee Canyon outside the Project boundary. (June 1996 BA at 3-15.) Finding that runoff from the Project would be controlled by debris/desilting basins, the BA concluded that Project-generated silt and debris will remain on site and no indirect impacts to the spineflower population will occur. Id. at 4-3.

In response to comments provided by CDFG and others after the ROD issued, a supplemental effects analysis was developed by BLM for endangered species including the southwestern arroyo toad, the California red-legged frog, the coastal California gnatcatcher, the least Bell's vireo, the southwestern willow flycatcher, and the slender-horned spineflower. This analysis was provided to FWS in a memorandum dated April 24, 2001. (Ex. 2 to BLM Final Brief.) BLM expressly discussed the fact that runoff would be controlled by the desilting basins at the base of each watershed above Bee Canyon and that other measures would be taken to prevent the airborne escape of fugitive dust within the Bee Canyon watershed. Id. at unnumbered 8. BLM again concluded that the TMC Project was not likely to adversely affect the slender-horned spineflower. Id. at unnumbered 9. The supplemental effects analysis also concluded that the Project would have no effect on the southwestern arroyo toad based in part on the absence of evidence of its presence in the Project vicinity. Id. at p. 2.

In a followup memorandum to FWS dated June 1, 2001, BLM modified its analysis again. Therein, BLM pointed out that the Project had been changed in one important respect relative to the slender-horned spineflower in that the North Fines Storage Area had been eliminated in the FEIR developed during review of the Project under State laws. (Ex. 3 to BLM Final Brief.) Noting that BLM approval of the Project in the ROD was conditioned upon receipt by TMC of all required approval under State laws, BLM asserted that this mitigating measure obviated the need to further consider potential impacts from fugitive dust or water borne silt. Id.

Regarding impacts to the California red-legged frog, the supplemental effects analysis found that there is neither a known population nor critical habitat within the Project area. (Ex. 2 to BLM final brief at p. 2.) In view of this and the presence of African clawed frogs, a predator, <sup>16/</sup> BLM concluded that the TMC Project would have no effect on the California red-legged frog or its critical habitat. Id. at p. 3. With respect to the coastal California gnatcatcher, the supplemental effects analysis concluded on the basis of the absence of critical or suitable habitat in the Project area and the absence of known occurrences of the species in the area that the Project is not likely to adversely affect the gnatcatcher. Id. at pp. 3-4. The supplemental effects analysis further noted that a survey for the presence of the least Bell's vireo in the Project area disclosed no individuals present and that a search of the CDFG RareFind 2 database disclosed no record of occurrence within the immediate vicinity of the Project. Id. at 5. In view of this and of the absence of critical habitat within the area, BLM found that the TMC Project would have no effect on the least Bell's vireo or its critical habitat. Id. The supplemental effects

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<sup>6/</sup> FEIS at 3-236.

analysis also addressed the southwestern willow flycatcher. Noting that surveys yielded no occurrence in the Project area 17/, BLM concluded that the TMC Project would have no effect on the southwestern willow flycatcher. (Ex. 2 to BLM final brief at 6.)

With respect to the arroyo toad, the BA found that the Project site has no potential habitat for this species while noting that the toad could occur along the Santa Clara River and silt ponds south of the Project site. (June 1996 BA at 3-26.) The BLM supplemental effects analysis found that "given the absence of records for the arroyo southwestern toad at or near the project area, and the unlikelihood that the nearby reach of the Santa Clara River could support arroyo toads \* \* \* because of the presence of African clawed frogs, we have determined that the TMC project will have no effect on the arroyo southwestern toad or its designated critical habitat." (BLM Final Brief, Ex. 2 at 2.)

Regarding Project impacts on the UTS, BLM found no new information in the CDFG letter of November 2000 which would cause it to change its analysis of the impacts from that set forth in the June 1996 BA which led the FWS to find in its BO that the Project was not likely to jeopardize the continued existence of the UTS. Id. The BLM memorandum of April 24, 2001, requested the concurrence of FWS in this effects determination. Id. at 1, 8.

In a memorandum dated June 5, 2001, FWS advised BLM of its concurrence in the finding that the TMC Project is not likely to adversely affect the slender-horned spineflower or the California gnatcatcher. (TMC Opposition Ex. D at 2.) Further, the FWS concurred in the BLM finding that the least Bell's vireo, southwestern willow flycatcher, and the California red-legged frog would not be affected by the Project. Id. With respect to the UTS, FWS found that the recent information did not alter the conclusion previously reached in the original BLM BA or the initial FWS BO. Id. In that BA, BLM found that with the implementation of the designed Project mitigation features set forth, the Project would not impact UTS habitat and would not jeopardize the persistence of the species. (June 1996 BA at 6-1.) The BO issued by FWS, which was based in part on the BA, concluded that the Project was not likely to jeopardize the continued existence of the UTS. (FEIS Technical Appendices at F-11 (January 14, 1998, BO).) Regarding the arroyo toad, FWS withheld any conclusion pending review of May 2001 surveys finding arroyo toad tadpoles in the Santa Clara River downstream of the Project well sites. Id. Further, the FWS memorandum expressed the understanding that BLM would further evaluate this information and advise FWS of its determination regarding the arroyo toad. Id.

Subsequently in August 2001, BLM completed its SBA further addressing effects on the arroyo toad. (TMC Opposition, Ex. C.) Based on its analysis in the SBA, BLM found that the Project was likely to adversely

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17/ The June 1996 BA and the FEIS disclose that although suitable habitat exists along the Santa Clara River, no individuals of this species were seen during the surveys for the BA and a check of the California Natural Diversity Database revealed no record of this species in the vicinity of the Santa Clara River. (June 1996 BA at 3-29; FEIS at 3-241.)

affect the arroyo toad and, hence, requested further consultation with FWS to address potential impacts to the arroyo toad not previously considered. Id. at 25-26.

With respect to the City's assertion that BLM failed to conduct an adequate effects analysis with respect to listed species other than the arroyo toad, we find that appellant has failed to show error in the BLM decision. It is not enough for an appellant to merely assert in conclusory terms that BLM inadequately considered the effects of a proposed action on endangered species. Rather, an appellant must provide some basis in fact to support this assertion. Hoosier Environmental Council, 109 IBLA 160, 168 (1989); see, e.g., In re Lick Gulch Timber Sale, 72 IBLA 261, 311-13, 90 I.D. 189, 217-18 (1983). In this case, BLM prepared a BA (June 1996), a supplemental effects analysis, and an SBA (August 2001) with regard to the effects of the Project on listed species and their habitat. As noted above, FWS recently restated its concurrence with the BLM finding that the Project is not likely to affect or to adversely affect the listed species or their critical habitat in the Project area except for the arroyo toad. Federal agencies need not initiate formal consultation if FWS concurs in a finding that the proposed action is not likely to adversely affect any listed species or their critical habitat. 50 CFR 402.14(b).

Regarding the arroyo toad, the BLM decision is modified, as conceded by BLM on appeal, to reflect the necessity for BLM to further consult with FWS regarding Project impacts in view of the finding in the SBA that the Project is likely to adversely affect the arroyo toad. Further, the decision is modified to reflect that, after issuance of the BO, BLM will apply any further mitigation measures found to be necessary to mitigate impacts to the arroyo toad and determine whether any further NEPA analysis and decision are required.

Appellants have cited numerous grounds for questioning the sufficiency of the BLM decision in this case. We have addressed those which we found to raise material issues. To the extent that additional arguments have been made which have not specifically been discussed, they have been considered and rejected.

Upon consideration of the motions subsequently filed by appellants during the extended briefing in this case, we find that no material issue of fact has been presented which requires an evidentiary hearing. Accordingly, the renewed motion for a hearing is denied. With regard to the motion to revoke the order granting expedited review in this case, the motion is denied. The renewed motion to stay the BLM decision and the motion to vacate that decision are denied as moot in view of our decision on the merits in this case.

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 as modified.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge