

MARY LEE DERESKE, ET AL.

IBLA 98-461, et al.

Decided August 18, 2004

Appeals from a Decision Record/Finding of No Significant Impact, approving issuance of a contract for the sale of sand and gravel mined from public lands and the expansion of the East Santa Ana Mine, New Mexico. EA No. NM-017-98-013.

Affirmed

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

A BLM decision approving the expansion of an existing sand and gravel mining operation based upon an environmental assessment will be affirmed when the record establishes that BLM has taken a hard look at the environmental consequences of the proposed action and reasonable alternates thereto, considered all relevant matters of environmental concern, and imposed mitigation measures to ensure that no significant impact upon the human environment will result. BLM's determination that it is not necessary to prepare an EIS will be affirmed on appeal if an appellant fails to tender objective proof that BLM failed to consider an environmental consequence of material significance that would result from the proposed action, or otherwise failed to abide by the applicable statute.

2. Materials Act

When BLM determines that "it is impossible to obtain competition" because, among other things, the purchaser holds an exclusive right to the only reasonable means of access to the sales area and any potential competitor would be unable to

compete due to the prohibitive costs and environmental consequences of establishing independent access to the sales area, it is proper for BLM to sell more than 200,000 cubic yards of mineral material to a purchaser over a 12 month period without competitive bids.

APPEARANCES: Mary Lee Dereske and William L. Vreeke, pro sese; Judith E. Hendry, President, and Carol M. Parker, Corresponding Secretary, Las Placitas Association, Placitas, New Mexico, for the Las Placitas Association; Ida Talalla, Founder-Director, High Desert Conservancy, Placitas, New Mexico, for the High Desert Conservancy; David Plummer, President, Western Mobile New Mexico, Inc., Albuquerque, New Mexico, and Edmund H. Kendrick, Esq., Galen M. Buller, Esq., and Stephen S. Hamilton, Esq., Santa Fe, New Mexico, for Intervenor Western Mobile New Mexico, Inc.; William and Patsy Waltemath, pro sese (Amici Curiae); Grant M. Vaughn, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mary Lee Dereske and others have appealed a July 29, 1998, Decision Record/Finding of No Significant Impact (DR/FONSI) issued by the Acting Field Manager, Albuquerque Field Office, New Mexico, Bureau of Land Management (BLM), approving issuance of a contract for the sale of sand and gravel to Western Mobile New Mexico, Inc. (Western Mobile), resulting in the expansion of Western Mobile's sand and gravel mining operations onto public lands adjacent to land it leases in Sandoval County, New Mexico. ^{1/}

^{1/} Appeals were filed by Mary Lee Dereske and William L Vreeke (IBLA 98-461), The Las Placitas Association (Association) (formerly Committee for a Las Huertas Creek Nature Reserve) (IBLA 98-462), City of Albuquerque, New Mexico (IBLA 98-463), William and Patsy Waltemath, Sherrill Cloud and Gordon Ziemer (hereinafter, collectively, Waltemath, et al.) (IBLA 98-467), and the High Desert Conservancy (HDC) (IBLA 98-493). By Order dated Mar. 24, 1999, the City of Albuquerque appeal was dismissed at the City's request. In the same Order, the appeal filed by Waltemath et al. was dismissed and they were granted amici curiae status, and the remaining cases were consolidated. By orders dated Oct. 28, 1998, and Mar. 24, 1999, this Board denied the Dereske/Vreeke, Association, and HDC motion to stay the effect of the Acting Field Manager's July 1998 DR/FONSI.

On Dec. 7, 1998, BLM filed a motion to dismiss HDC's appeal because HDC
(continued...)

Since the 1970's Western Mobile has produced sand and gravel from its open pit mining operation known as the East Santa Ana Mine, located on land leased from the Santa Ana Pueblo Tribe of Indians in the Rio Grande Valley, near Albuquerque, New Mexico. In a request filed with BLM on October 15, 1996, Western Mobile asked BLM to enter into a mineral material sales agreement which would allow Western Mobile to expand its pit westward into approximately 276 acres of public land in secs. 14, and 23, T. 13 N., R. 4 E., New Mexico Principal Meridian.^{2/} The proposed expansion would allow Western Mobile to extend its operations for up to 10 years by mining larger material from BLM lands and blending it with smaller material extracted from the existing mine. ^{3/}

BLM specifically proposed to sell a minimum of 800,000 tons (592,592 cubic yards) of sand and gravel per year to Western Mobile, over a 10-year period pursuant to 43 CFR Part 3610. Topsoil and overburden would be removed and stockpiled and the material would be mined to a maximum depth of 45 feet, proceeding in cuts across the mined area. Reclamation, including regrading, replacement of overburden and topsoil, and revegetation would be ongoing, thereby limiting the area disturbed at any time. The mining operation would take place 12 hours a day, 6 days a week:

The planned mining process would initially open one 15 acre area for mining. When mining begins in that area, a second area of similar size would be prepared for mining. When mining begins on the second

^{1/} (...continued)

had failed to serve a copy of its original notice of appeal on BLM's legal representative (Regional Solicitor) or an adverse party named on the BLM decision (Western Mobile) as required by 43 CFR 4.413. Both BLM and Western Mobile received HDC's amended notice of appeal, and we can discern no prejudice resulting from the failure to serve the original notice of appeal. BLM's motion is denied. Red Thunder, Inc., 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990).

^{2/} The overall area of operation would consist of approximately 300 acres on a 4,000 acre block of public lands surrounded by private and Indian lands. Only about 276 acres would be disturbed by mining and related activity. A 23-acre fenced electrical substation owned and operated by the Public Service Company of New Mexico (PNM) lies along its eastern border, and a high voltage power line bisects the area.

^{3/} The BLM proposal provided for issuance of a 5 year contract with an option to renew for an additional 5 year term. This roughly coincides with the Western Mobile's lease of the adjacent Pueblo lands. See Memorandum to Area Manager, Rio Puerco Resource Area, New Mexico, BLM, from Solid Minerals Team, New Mexico, BLM, dated Feb. 18, 1997, at 1.)

area, reclamation would begin in the first area and a third area of the same size would be prepared. The length of time each area is open is dependent on the thickness of the materials being mined and any conditions such as weather, wind, and equipment problems that could potentially delay mining activities. The length of time a 15-acre area would be open from preparation through completion of mining is from 6 to 18 months. This method minimizes the area that is impacted at any one time and allows for a more rapid restoration of the area already impacted.

(Environmental Assessment (EA) dated May 1998, at 10.) At the conclusion of mining operations the disturbed area would be monitored to ensure successful reclamation.

Western Mobile's East Santa Ana mine and the "Placitas pit," another of its sand and gravel operations, are situated roughly north and south of two adjoining residential subdivisions, "Sundance Mesa" and "La Mesa," on the northwestern edge of the Village of Placitas, New Mexico. The two subdivisions border the Placitas pit to the north and east, and at the closest point, which is on the southern edge of the proposed expansion of the East Santa Ana mine, they are separated by about 1/3 mile of public lands.

The southeastern corner of the proposed expansion area is also about 1/3 mile from the northwest corner of a 560-acre area patented to the City of Albuquerque on December 27, 1966, pursuant to the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 to 869-4 (2000), for a park and recreation area. (Patent No. 30-67-0106 (Attachment 5 to Association Appeal and Petition for Stay dated August 29, 1998 (Appeal) at 1.) The City has designated that area as the "Placitas Open Space" (hereinafter Open Space). ^{4/}

Las Huertas Creek, an ephemeral stream about 15 miles long, borders the proposed mine area on the east. Las Huertas Creek has its headwaters on the Sandia Mountains to the south and flows from the Open Space northwest across the southeastern edge of the tract of public lands which includes the proposed mine area.

In May 1998, BLM prepared an EA to assess the environmental impacts of the proposed and alternative actions, including no action, to determine whether it would be necessary to prepare an environmental impact statement (EIS) pursuant to section

^{4/} The Open Space is situated in portions of secs. 24 and 25, T. 13 N., R. 4 E., New Mexico Principal Meridian, Sandoval County, New Mexico.

102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000). Its EA was made available for public comment for a period of 40 days.

The EA also considered a “Mitigative Alternative,” limiting sand and gravel mining operations to 197 acres and providing for mitigation of expected impacts in addition to those measures set forth in the proposed action. Among other mitigating measures considered was a 150 foot (rather than 75 foot) buffer zone along Las Huertas Creek, measured “from the upper edge of the terrace above Las Huertas Creek,” to keep excavation “far above” the groundwater, which is from 150 to 300 feet below the ground level. (Letter to Dereske/Vreeke from BLM dated July 13, 1998, at 2: see DR/FONSI at 1; EA at 10, 11, 20.) No operations would be allowed within 75 feet of the southwest project boundary. This would place most of the mining activity below a ridge shielding the operations from the residential area to the south. (DR/FONSI at 1; EA at 3, 11, 12; see photos Nos. 3 through 5 attached to Letter to the Board from Western Mobile, dated September 11, 1998.) Mining activity would not be visible from “most of the Open Space” to the southeast because of the topography and the 23-acre electrical substation. (Letter to the Board from Western Mobile, dated September 11, 1998, at 2: see EA at 3, 12: Photos Nos. 1 and 2 attached to Letter to the Board from Western Mobile, dated September 11, 1998.) Operations would be limited to from 8:00 A.M. to 7:00 P.M., Monday through Saturday. (DR/FONSI at 1; EA at 11.) Thus, no mining would occur at night, except for one or two hours during the winter months. (EA at 11.)

Based on the EA, the Acting Field Manager adopted the Mitigative Alternative, approving its 197-acre expansion of the East Santa Ana Mine.⁵ (DR/FONSI at 1.) He found that no significant impact was likely, and no EIS was required. *Id.* He also held that the proposed action comported with the Rio Puerco Resource Management Plan (RMP), as revised in October 1992. The RMP generally favored making mineral resources available for disposal and encouraging their development while striving to minimize environmental damage and provide for the reclamation of the lands affected.⁶ (October 1992 RMP at 23: see DR/FONSI at 1; EA at 5.)

⁵/ Henceforth, references to the “proposed action” will be to the Mitigative Alternative, which was the action originally proposed with mitigating measures added.

⁶/ The Association challenges BLM’s statement that the RMP deemed the proposed mine area available for mineral material sales: “[W]e can find no mention of such decision in the RMP.” (Amendment and Supplement to Appeal (Amendment), dated

On January 7, 1999, while the appeals were pending before this Board, BLM issued an “Addendum” to its July 1998 DR/FONSI. (Ex. A to Association Response to BLM Addendum to FONSI.) The preface to the Addendum states: “The City of Albuquerque, Lafarge Western Mobile NM Inc, and the Bureau of Land Management have entered into an agreement to provide additional mitigation measures to the original Finding of No Significant Impact prepared for the subject EA.” The Addendum reflects the conditions of the negotiated settlement on which the City conditioned the withdrawal of its appeal. We note that this settlement resolved issues of opposition initially raised by the two individuals (Judith E. Hendry and Carol M. Parker) who filed the Association’s Appeal and Amendment. (Letter to BLM, dated August 25, 1997, at 2.) The Addendum provides for further reduction of the total acreage encompassed by the mining operations from 197 acres to 175 acres and increases the distance between the mine and the Open Space to “nearly ½ mile.” (Addendum at 1.) The Addendum also provides that the mineral in the mine area nearest the Open Space would be mined at the end of the proposed mining schedule. *Id.*

When an appeal has been filed with this Board, BLM loses the jurisdiction to take any action with respect to the subject matter of the appeal. Clive Kincaid, 111 IBLA 224, 234 (1989); James C. Mackey, 96 IBLA 356, 362, 94 I.D. 132, 136 (1987). Based upon the settlement, which included the additional action set out in the Addendum, the City filed a request that its appeal be dismissed pursuant to the terms and conditions thereof. On March 24, 1999, the Board issued its Order granting the City’s request, and the Addendum became effective as between the signatories.

The Association and Dereske/Vreeke argue that the issuance of the Addendum demonstrates that the FONSI has a “fundamental defect * * * because the EA was inadequate.” (Association Response to BLM Addendum to FONSI at 2: see id. at 2-3, 7-8; Letter to the Board from Dereske/Vreeke, dated March 4, 1999, at 2.) It is their position that, by issuing the Addendum, BLM has admitted that when it issued its original FONSI the mitigating measures were not sufficient to reduce the significance of the impacts on the Open Space to insignificance. The Association states:

⁶/ (...continued)

Sept. 28, 1998, at 6.) The proposed mining area was included in that portion of the Rio Puerco Resource Area made available for mineral material sales, subject only to approval on a case-by-case basis. See October 1992 RMP (Attachment 26 to Amendment) at 36-37, 117; EA at 5.

[T]he proper procedure would have been for BLM to withdraw the prior FONSI, supplement the EA with respect to a discussion of * * * impacts on the Placitas Open Space, develop the mitigation measures sufficiently so that the agency could determine whether the mitigation would truly reduce the impacts on the Open Space to insignificance, provide an opportunity for public input, and then decide whether an EIS would be required.

(Association Response to BLM Addendum to FONSI at 8-9; see Letter to Board from Dereske/Vreeke, dated March 4, 1999.) We do not agree with this analysis.

When it issued the Addendum, BLM did not suggest that the findings and conclusions it had reached when it issued its July 1998 DR/FONSI were either premature or incorrect. The Addendum merely represented BLM's acquiescence in the settlement of an appeal. The terms of the settlement were not intended to and do not represent commentary on the status or adequacy of the FONSI. The argument the appellants advance does not demonstrate that the mitigation measures set out in the Addendum were necessary for a finding of no significant impact. The adoption of the additional mitigating measures did not raise a presumption that the additional measures were necessary to render the impacts insignificant. BLM is not required to address the additional effectiveness achieved by the implementation of these additional measures. Further, the Association has not demonstrated that the Addendum reveals an inadequacy in BLM's analysis of the impacts being further mitigated by the additional measures it adopted when it issued the Addendum. We now turn to the principal issues raised on appeal.

Noting that it has been over 15 years since BLM adopted the Rio Puerco RMP, the Association argues that BLM failed to comply with the requirement set out in 43 CFR 1610.4-9 that it evaluate whether an RMP amendment or revision is warranted. (Appeal at 13-15; Amendment at 6-7, 23-25.) Referring to the 1998 Annual Update (Attachment 27 to Amendment at "2") the Association asserts that BLM expected the RMP to be applicable for 10 to 15 years. (Appeal at 13.) The Update stated that the RMP is applicable "for the next 10 to 15 years." (1998 Rio Puerco Annual Update (Attachment 27 to Amendment), at "2," emphasis added.) We read this as meaning that BLM intended to rely on the plan for 10 to 15 years, commencing in 1998. BLM's original intent was to have the RMP applicable for the "next twenty years" from 1986. (Letter to Reader from Area Manager, dated November 1986 (Attachment 26 to Amendment).) The Association also asserts that BLM failed to comply with the 43 CFR 1610.3-2(a) requirement to maintain consistency with resource related plans of other Federal agencies, State and local

162 IBLA 309 IBLA 98-461 et al. governments, and Indian tribes. However, the Association does not identify any aspect of a plan which is inconsistent with the RMP.

The Association argues that the need to amend the RMP is evident from the increasing population and rapid development of the Placitas area and southern Sandoval County, and the higher than anticipated recreational use of nearby public lands experienced since promulgation of the RMP. (Appeal at 14-15; Amendment at 24-25; Motion to Supplement the Administrative Record at 3.) It contends that the need for revision is demonstrated by the County's changes to its management plan, and the fact that BLM recognizes the need to revisit the "management proscriptions in the [RMP]," before undertaking other mineral sales on the public lands in the resource area. (Amendment at 24 (quoting from Letter to Dereske/Vreeke from BLM, dated July 13, 1998 (Attachment 10 to Appeal), at 2.) The Association concludes that BLM must "begin a public process to reexamine the land-use alternatives in the Placitas area," including an updated RMP, before deciding "whether or not mining activities are appropriate in the Placitas area." (Appeal at 15; Amendment at 28.)

The Board does not have the jurisdiction to adjudicate the propriety of the Rio Puerco RMP, or the designation of the land use in the Rio Puerco Resource Area (now part of the Albuquerque Field Office). See Committee for Idaho's High Desert, 137 IBLA 92, 100 (1996); California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 141 (1989). The RMP concerns "management policy," and RMP approval is subject to review by the Director, BLM, who will render a decision which is final for the Department of the Interior. 43 CFR 1610.5-2. California Association of Four Wheel Drive Clubs, Inc., 108 IBLA at 141.

In ORNC Action v. BLM, 150 F. 3d 1132 (9th Cir. 1998), the court found nothing in the statute and regulations requiring revision of an RMP at a particular time. ⁷Id. at 1138-40. The court specifically rejected the notion that BLM is

⁷Sec. 202(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712(a) (2000), provides that the Secretary of the Interior "shall * * * when appropriate, revise land use plans." The Department's regulations provide that a land use plan "shall provide for evaluation" at an appropriate interval, to determine whether by reason of new data, sufficient cause exists to warrant amendment or revision. 43 CFR 1610.4-9. Amendment of an RMP "shall be indicated by the need to consider * * * evaluation findings." 43 CFR 1610.5-5. An RMP "shall be revised as necessary, based on * * * evaluation findings." 43 CFR 1610.5-6. BLM has a clear duty to determine whether amendment or revision is necessary. The final determination regarding whether one should be amended or revised rests with the (continued...)

precluded from taking specific action pending revision of an RMP, even when revision is warranted. *Id.* Thus, BLM could go forward with its July 1998 DR/FONSI, even assuming that a revision of the Rio Puerco RMP is warranted. Accordingly, we cannot order BLM to renew the land-use planning process before taking the action at issue.

BLM's overall management of the 8.6 million-acre Rio Puerco Resource Area, as set forth in the revised January 1986 RMP, is not at issue. What is at issue is BLM's approval of the proposed extension of the mine, as set forth in the July DR/FONSI, which will affect the use of a specific parcel of land. This is clearly subject to Board review. See Harold E. Carrasco, 90 IBLA at 41.

Noting that it has worked with the City, County, State, and BLM since 1995 promoting development of the Open Space, the Association contends that BLM violated section 102(2)(C) of NEPA by failing to adequately consider all of the potential environmental impacts of the proposed expansion of the mining operations in an EIS, because there are “substantial questions . . . regarding whether the proposed action may have a significant effect on the human environment.” (Amendment at 28 (quoting from Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518 (D. Hawaii 1991).)

The Association claims that active mining operations will adversely affect the character of the entire area, especially the nearby residential subdivisions and Open Space, by eliminating vegetation in the mine area for many years lessening the quantity of water sustaining riparian habitat in Las Huertas Creek, driving away birds and other wildlife, and generating noise, dust, and night lighting. It fears that these losses will have an immediate detrimental economic impact by lowering property values during the life of the mine. The Association also believes that the proposed mining will undermine the overall quality of life in the subdivisions, and hiking, horseback riding, and other recreational pursuits in the Open Space. Finally, it asserts that operations will destroy or damage cultural resources within the mine area.

Dereske/Vreeke challenge the adequacy of BLM's EA and its failure to prepare an EIS. They voice concern that the proposed mine operation will disturb the “relative peace and quiet” at their nearby home on Saturdays and evenings after work, and that “heavy truck traffic on the frontage roads will create unsafe driving conditions.” (Notice of Appeal, dated August 9, 1998, at 1.)

^{7/}(...continued)
Director, BLM.

[1] Section 102(2)(C) of NEPA requires consideration of potential environmental impacts of a proposed action in an EIS, if that action is a “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000); Sierra Club v. Marsh, 769 F. 2d 868, 870 (1st Cir. 1985). An EA is prepared to determine whether an EIS is necessary. 40 CFR 1504.4. When an agency issues a DR/FONSI, based on the EA, finding that it is not necessary to prepare an EIS before undertaking the proposed action, that decision will be deemed to be in compliance with section 102(2)(C) of NEPA if the record demonstrates that the agency has considered all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that any potentially significant impact will be reduced to insignificance by imposing appropriate mitigation measures. Cabinet Mountain Wilderness v. Peterson, 685 F. 2d 678, 681-82 (D.C. Cir. 1982).

The Association maintains that there is an inherent contradiction requiring mitigation of the impacts of the proposed action and simultaneously reaching a FONSI. (Appeal at 13.) If it is contending that BLM cannot render a FONSI after finding that, if unmitigated, a significant impact is likely, but that by imposing mitigating measures the impact is rendered insignificant, the Association is mistaken. The critical questions are whether BLM has fairly evaluated the likelihood that, if the mitigating measures are imposed, the impact of the proposed action will be rendered insignificant, and whether it has set out that analysis for agency and public scrutiny. Nez Perce Tribe Executive Committee, 120 IBLA 34, 42-45 (1991). If it has, BLM may properly issue a FONSI, even though that finding is based upon a conclusion that mitigation is required to render the impact of the proposed action insignificant.

An appellant seeking to overcome a FONSI decision must carry the burden of demonstrating, with objective proof, that BLM has failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(c) of NEPA. Southern Utah Wilderness Alliance, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); Red Thunder, 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); Sierra Club, 92 IBLA 290, 303 (1986). That an appellant has a differing opinion about the likelihood or significance of environmental impacts or prefers that BLM take another course of action does not establish that BLM violated the procedural requirements of NEPA. ^{8/}San Juan

^{8/} For example, the Association and Dereske/Vreeke prefer to have BLM limit Western Mobile’s hours of operation to Monday through Friday, 8:00 A.M. to 5:00 P.M., reroute truck traffic, and modify its reclamation plan to provide for more gentle slopes and greater vegetation diversity. This course of action may be more desirable. (continued...)

Citizens Alliance, 129 IBLA 1, 14 (1994). When BLM has completed the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at the potential environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by an appellant, this Board, or a court (in the event of judicial review). Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980); Natural Resources Defense Council v. Morton, 458 F 2d 827, 838 (D.C. Cir. 1972). As stated in Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1980):

Section 102(2)(C) of NEPA is a procedural statute. It does not direct that BLM take any particular action in a given set of circumstances and, specifically does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action. [Emphasis added.]

When deciding whether BLM has taken a hard look, this Board is guided by the "rule of reason," as expressed in Don't Ruin Our Park v. Stone, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992):

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature it is intended to be an overview of environmental concerns not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information." Blue Ocean Preservation Society v. Watkins, 767 F. Supp 1518, 1526 (D. Hawaii 1991) * * * . So long as an EA contains a "reasonably thorough discussion of . . . significant aspects of the probable environmental consequences," NEPA requirements have been satisfied. Sierra Club v. United States Department of Transportation, 664 F. Supp. 1324, 1328 (N. D. Ca. 1987) * * * quoting Trout Unlimited v. Morton, 509 F. 2d 1256, 1283 (9th Cir. 1974) [Footnote omitted.]

^{8/}(...continued)

(Association Response to Dereske and Vreeke submittal at 3; letter to BLM from Dereske/Vreeke dated Aug. 10, 1997, at 3-4.) However, BLM's failure to adopt these measures does not establish a NEPA violation.

See 40 CFR 1508.9; 46 FR 18026, 18037 (March 23, 1981); Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F. 2d 1079, 1092 (D.C. Cir. 1973); Missouri Coalition for the Environment, 124 IBLA 211, 219-20 (1992).

The Association contends that BLM failed to adequately consider all of the potential environmental impacts of the proposed action. Referring to a September 23, 1998, affidavit by William W. Dunmire (Attachment 22 to Amendment), it argues that BLM failed to consider potential impacts of the proposed mining operations on Las Huertas Creek. (Amendment at 13.) Dunmire, a professional biologist familiar with the ecology of the area, states that BLM's study of the flora and fauna was "inadequate" and is contradicted by a 1997 study of the Open Space he prepared for the City of Albuquerque. (Dunmire Affidavit at 2 (referring to 1997 "Biological/Environmental Survey. Placitas Open Space." (Biological Survey) (Attachment 39 to Amendment)).) He contends that BLM ignored "the fact that mining here would have a major negative impact on the biological community of the lower Las Huertas Creek drainage as a whole. (Dunmire Affidavit at 2.) Dereske/Vreeke raise a similar concern, asserting that mining will alter the flow of water from the mine area, diminishing the quantity of water in Las Huertas Creek. (Letter to BLM, dated August 10, 1997, at 2-3.)

BLM considered the potential impacts of proposed mine expansion on the Las Huertas Creek and its associated biological community. (EA at 22, 30-33, 37-38.) It concluded that the proposed operations would have no significant impact on Las Huertas Creek, as the operations would be no closer than 150 feet from that creek. Nor did BLM expect that the anticipated operations, situated above the creek, would adversely affect the quantity of the water in this ephemeral creek or its subsurface sediments by interrupting its lateral recharge during storm events, or that it would result in the flow of storm water from the mine pit to the creek, adversely affecting the quality of its water. *Id.* at 30. The EA reflects the BLM conclusion that proposed operations would generally have no significant adverse impacts on the surrounding area (including Las Huertas Creek and its associated biological community). See *id.* at 43. We note that BLM provided for "unforeseen impacts * * * to Las Huertas Creek," stating that Western Mobile would respond, in a timely fashion, with its best efforts to mitigate the problem." (DR/FONSI at 2.) It would appear that BLM went beyond the requirements of section 102(2)(C) of NEPA that it mitigate reasonably foreseeable impacts which might rise to the level of significant.

Dunmire has opined that BLM did not fully consider the impact of the proposed action on the ecology of the Las Huertas Creek, but he has not tendered supporting evidence and cites no particular portion of his 1997 study supporting his opinion that the contemplated operations would have a significant adverse impact on

162 Las Huertas Creek or its associated biological community, especially within the Open Space, which lies upstream from the minesite. Nor do we have the necessary supporting evidence to that effect in the 1997 study or other documents filed by the appellants. Dunmire does state that the “natural ecosystem” in the area of the proposed mining operations would be destroy[ed] * * * for at least a century,” because the flora and fauna are “sensitive and extremely slow to replace when disturbed.” (Dunmire’s Affidavit, dated October 20, 1998; see Las Huertas Creek Water Management Plan (Water Management Plan) dated May 14, 1998 (Attachment 36 to Amendment).) However, he made no effort to demonstrate how this represents a significant adverse impact on Las Huertas Creek or its biological community. We find no evidence that, if the proposed action is adopted, surface or subsurface flows in Las Huertas Creek would be lessened, thereby significantly impacting the creek or its biological community. ^{9/}The Association, which had stated that the mining threatened the quantity of water in the creek, and thus the creek and its biological community, asked for a 250-foot buffer to protect the creek. (Letter to BLM dated August 23, 1997, at 2.) The Association has failed to demonstrate that the 150-foot buffer adopted by BLM will not achieve the same end.

We have long held that a professional disagreement among experts is insufficient to show that BLM has erred in its analysis of a potential adverse impact. *G. Jon Roush*, 112 IBLA 293, 302 (1990); *The Sierra Club*, 104 IBLA 76, 85 (1988); See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 367 (1989). Unless there is a showing, by a preponderance of the evidence, that BLM’s reliance on a

^{9/}See Letter to BLM from the Association dated Aug. 23, 1997, at 2; Letter to BLM from the City, dated Sept. 19, 1997, at 2; Watershed Management Plan at 23. Permits West, Inc., surveyed the proposed mine area for animal/plant species in July 1997, and reported that “[t]here is no riparian strip along Las Huertas Creek.” Attachment 6 to EA at 1.) No evidence to the contrary is found in the record. Dunmire describes the area next to the stream as “semi-riparian habitat.” (Letter to the Association dated July 24, 1997, at 1. In his Mar. 1998, Placitas Open Space Bird Survey: March 1997 to February 1998” (Bird Study) (Attachment 34 to Amendment), Hart R. Schwarz reports at page 1 that Las Huertas Creek had surface flows for five months in 1997, but that this was unusual: “[It] occasionally has water, but sometimes only at intervals amounting to several years.” See Watershed Plan at 2. Most portions of the creek flow on the surface only during periods of snowmelt from April into May, and sometimes June. During extremely dry years such as 1996 the creek had no surface flow. See *id.*, at 12, Environmental Survey at 1, 4. But see “Planning for the Management and Use of City of Albuquerque Open Space on Las Huertas Creek in Placitas,” dated Aug. 14, 1995 (Attachment 50 to Amendment) which states at page 6 that “Las Huertas Creek * * * flows for much of the year.”

reasoned expert opinion concerning matters within the realm of expertise of the party rendering that opinion is arbitrary and capricious or that the opinion is based upon an error in methodology, data, or analysis, this Board will affirm the decision made in reliance upon that opinion. West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); Western American Exploration Co., 112 IBLA 317, 318 (1990). No such showing has been made in this case.

HDC also asserts that BLM inadequately considered impacts upon various aspects of the human environment by failing to engage in any “real analysis” and by substituting “qualitative discussions for quantitative analysis.” (Amended Notice of Appeal at 2.) However, HDC does not identify specific impacts ignored or minimized by BLM or offer supporting evidence that these impacts are likely to occur and therefore should have been considered. Thus, it has shown no error.^{10/}

Referring to a September 28, 1998, affidavit executed by Hart R. Schwarz, (Attachment 23 to Amendment), the Association contends that BLM failed to adequately consider the potential impacts of proposed operations on the birds in the nearby Open Space. (Amendment at 13.) Schwarz, a bird specialist with the Forest Service, U.S. Department of Agriculture, familiar with the Open Space and surrounding areas, states that proposed mining operations will have a significant impact in the mine area and in an considerable zone around the mine perimeter due to dust, exhaust, light, and noise. (Schwarz Affidavit at 2.)

Schwarz states that noise generated by the mine will have a negative impact on the Loggerhead shrike (Lanius ludovicianus), a Fish and Wildlife Service (FWS), U.S. Department of the Interior, “species of concern,” which is known to nest in the Open Space, because the noise would inhibit the shrikes’ ability to defend their territory and attract a mate.^{11/} (Schwarz Affidavit at 2.) He states that shrikes are especially sensitive to human intrusion and disturbance of their habitat, and mining would probably permanently displace them from the area of proposed operations,

^{10/} HDC has identified no material issue of fact which cannot be resolved on the present record, and HDC’s request for a hearing to address the “inadequacy of the EA” is denied. See 43 CFR 4.415; Woods Petroleum Co., 86 IBLA 46, 55 (1985).

^{11/} A “species of concern” is a species not being considered for designation as threatened or endangered, but which the FWS believes warrants further research to resolve its conservation status. (Letter to Permits West, Inc., from FWS, dated July 11, 1997. (Ex. D to Motion for Reconsideration) at 1; Bird Survey at 8.) A species of concern is not protected by section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. §1536 (2000)

shrinking their available habitat, and irreparably harming the species. (Schwarz Affidavit dated November 17, 1998 (Ex B attached to Motion for Reconsideration, at 2.) The Association further argues that BLM did not consider the likely impact resulting from a corresponding increase of wildlife in the Open Space resulting from the displacement of wildlife from the minesite. (Amendment at 17.)

BLM considered the potential impacts of proposed mine expansion on birds and other wildlife. (EA at 23-24, 32-33, 37-38, Attachment 6.) It was also aware that birds and other wildlife would be displaced to other areas, including the Open Space, during active mining operations. *Id.* at 32. However, we find nothing to suggest that the impact Schwarz describes is any greater than the impact BLM considered when preparing the EA. Assuming that the impact would extend a “considerable” distance from the minesite, there is no evidence that this impact would be significant, especially considering the limited area of active mining at any one point in time.

BLM did not directly address the impact of mining on birds and other wildlife in the Open Space resulting from displacement of the wildlife from the area of active mining. However, BLM specifically considered and found that the displacement would be mitigated by the ongoing reclamation which would allow the birds and wildlife to return to the mine “as reclamation takes place.” (EA at 32.) The Association has tendered no evidence to the contrary and does not show that the Open Space and other lands around the minesite could not absorb the displaced wildlife or that the environmental consequence of the displacement would have a significant adverse impact on the environment.

Schwarz has offered no evidence supporting his opinion that BLM erred in its analysis of the potential impact of the proposed mining operations on birds (including Loggerhead shrikes), or that the activity will affect a sufficient number of birds to give rise to a conclusion that this impact would be significant. Western Mobile offers the December 7, 1998, statement by Charles L. Black, a private wildlife biologist, that he found a single shrike during a July 1997 survey of the proposed minesite, and that the shrikes are a widespread resident species throughout New Mexico and the Four Corners region. (Ex. 1 to Response to Opposition to Motion for Reconsideration (Western Mobile Response) at 2.) Considering that shrikes are widespread and the number of shrikes observed at the minesite, it is doubtful that the displacement of shrikes from the minesite is a significant impact on the breed, even if the displacement is permanent. Schwarz has tendered no evidence regarding the number of birds that would be displaced or the extent that any displacement would go beyond mining and reclamation. Most important, he has tendered no evidence

162 IBLA 317 IBLA 98-461 et al. regarding the number of birds that might be displaced to the Open Area or that the Open Area will not be able to adequately absorb those numbers.^{12/}

At best there appears to be a disagreement among the experts. As stated previously, this is not sufficient to demonstrate error in BLM's analysis. G. Jon Roush, 112 IBLA at 302; The Sierra Club, 104 IBLA at 85. Further, we are not persuaded that a significant impact to any bird species, including the shrikes either in the mine or the surrounding areas will result from the contemplated action.

The Association argues that BLM failed to consider the impact on the Open Area that would result from the use by displaced recreational users. (Amendment at 17-18.) BLM recognized that the minesite was used for recreational purposes and that the users would be displaced by the mining and reclamation activity. However, it did not specifically address the impact on the Open Space. See EA at 29, 37. We find no error. The Association has submitted no evidence of either the increase in the number of recreationists who might be expected to use the Open Space or the impact of that use. There is no indication that any resulting additional use would be material, or that the use would result in a significant environmental impact. The probability that this increase will result in any significant impact on the environment is, at best, remote and highly speculative. It need not be considered by BLM. See Coeur d'Alene Audobon Society Inc., 146 IBLA 65, 70 (1998).

The Association and Dereske/Vreeke challenge BLM's finding that noise generated by mining activities, particularly the noise emitted by vehicles when backing up, will not travel more than 100 yards, stating that "sound from these alarms travels at least a mile. Setting them at the lowest allowable setting is a grossly inadequate remedy since the lowest allowable setting must exceed other ambient noise at the mine site in order to be effective." (Association Appeal at 10; see Dereske/Vreeke Letter to BLM dated June 27, 1998, at 2.) According to the Association, the "Open Space will be inundated with noise from the operations and the peace and tranquility will be destroyed." (Appeal at 10.) Dereske/Vreeke express the same concern regarding their residential neighborhood. (Notice of Appeal at 1.)^{13/}

^{12/} Schwarz reported that he had observed from one to four shrikes on fourteen visits to the Open Space and feels confident that they are nesting there. (Bird Survey at 8; see, however, Eco-Culture Overview at Appendices 4 and 6 (no mention of shrikes in Las Huertas Creek Basin).)

^{13/} Dereske/Vreeke also assert that BLM should have undertaken a scientific study, (continued...)

BLM assessed the noise impact of the proposed operation, noting that the “general equipment noise should not be heard more than 100 yards from the proposed site boundaries.” (EA at 36.) However, it recognized that there would be a greater impact from back-up alarms, which are the most audible noise emanating from Western Mobile’s existing operations. “Because they are pitched to be audible above heavy equipment noise in the working area, * * * the sound of back-up alarms is potentially audible at great distances and is a potential source of nuisance noise.” *Id.*; see *id.* at 26, 39. As a result, BLM provided that back-up alarms on operating equipment would be set at the “minimum allowable noise settings,” consistent with worker safety. (DR/FONSI at 2; see EA at 39; Letter to Dereske/Vreeke from BLM, dated July 13, 1998 (Attachment 10 to Appeal) at 1.) BLM noted its opinion that this action would “offset the nuisance noise,” presumably eliminating its being considered a nuisance in neighboring communities. (EA at 39.) BLM also recognized, however that “[o]n any given day, the atmospheric conditions may cause the sound to carry beyond anticipated boundaries and mitigation may not be completely successful.” *Id.*

The Association and Dereske/Vreeke have provided no evidence that BLM did not fully consider the noise impact of the contemplated operations and impose measures to minimize those impacts. We note that the observation that the sound of the existing alarms will travel at least a mile appears to have been based upon the sounds emanating from the existing workings, which have not been subjected to the lowest allowable back-up alarm setting restrictions being imposed upon the contemplated operations. (Association Appeal at 10; See Dereske/Vreeke letter to BLM dated August 10, 1997, at 1.)

Dereske/Vreeke also argue that BLM failed to adequately consider the impact of increased truck traffic on the frontage roads along Interstate Highway 25 that would result from the mine expansion. (Letters to BLM dated June 27, 1998, at 2, and August 10, 1997, at 2.) BLM considered the potential for increased truck traffic, and concluded that the overall truck and other traffic would remain “fairly stable at the current levels,” increasing only as the population of the area rises in the future. (EA at 37; See *id.* at 26, 39.) This observation appears to be reasonable, as the expansion of the pit is intended to allow Western Mobile to continue its operations at the present level. (BLM Response to Petition for Stay at 1; BLM letter to

^{13/} (...continued)

“recording * * * noise levels, in decibels, at varying distances , times and atmospheric conditions,” to properly understand the noise impact of mining operations. (Letter to BLM dated June 27, 1998, at 2.) However, they have not established that this study is necessary or offered evidence that, as a result of BLM’s failure to conduct such a study, BLM erred in its assessment of that impact.

Dereske/Vreeke, dated July 13, 1998; Western Mobile letter to New Mexico Highway Department, dated August 20, 1997.) Dereske/Vreeke merely opine that there will likely be an increase in traffic, but tender no evidence that there will be an increase in the number of vehicles on the highway as a result of the contemplated BLM action. They also fail to show that BLM has erred in its assessment of the impact of night lighting, which has been limited by the imposition of mitigating measures to an hour or two during the night during the winter months. Further, the layout of the operation takes advantage of natural terrain to block the visibility, and Western Mobile's plans to have any lighting pointing down and away from residential and Open Space areas. See EA at 38; Western Mobile letter to BLM dated May 31, 1998.)

The Association alleges that BLM violated section 102(2)(c) of NEPA by failing to prepare an EIS. It argues that the mandatory criteria promulgated by the Council on Environmental Quality at 40 CFR 1508.27(b), which are considered to be indicative of whether a proposed Federal action is likely to "significantly" affect the quality of the human environment, mandate the preparation of an EIS.

The Association points to BLM's April 22, 1994, letter to Longley Excavating (Attachment 1 to Appeal) and its July 13, 1998, letter to Dereske/Vreeke (Attachment 10 to Appeal) as supporting its allegation that a significant impact is likely. (Amendment at 8, 28.) It contends that BLM's letter to Longley Excavating noted that a proposed sale of sand and gravel from public lands, including those at issue, raised a "public controversy" regarding environmental impacts:

The rapid growth of the area has caused the Pueblos, state and local government organizations, and the Placitas residents concern over water quality and quantity, the loss of archaeological resources and open space on private lands. Also, residents are concerned with existing sand and gravel operations encroaching on residential areas.

(Attachment 1 to Appeal.) The Association states that the proposed action will have a significant impact because the geographical area in which the operations will occur has "[u]nique characteristics" by virtue of its "proximity to historical or cultural resources, park lands, * * * wetlands, * * * or ecological criteria areas." 40 CFR 1508.27(b)(3). According to the Association, the proposed mine area is one-third mile from the Open Space, and thus the proximate to "park lands."^{14/} (Amendment at 4.) Stating that the Open Space contains 72 archaeological sites, thirteen of which are considered eligible for listing on the National Register of Historic Places, it

^{14/} The Association initially claimed that the distance between the Open Space and the proposed operations was one-quarter mile. (Appeal at 9.)

contends that the proposed operation is proximate to “historic or cultural resources.” (Appeal at 9.) In addition, the Association claims that Las Huertas Creek is the “most significant watercourse drainage on the north end of the Sandia Mountains.” Id. It argues that this stream and its associated riparian areas attract “a very high number of bird species (75 in a recent survey).” Id. Based on these assertions the Association claims that the proposed operation is proximate to a wetland and ecologically critical area.

When it undertook the preparation of the EA, BLM was very aware of the proximity of the proposed operations to the Open Space, and the cultural resources that area contains. (EA at 4; Attachment 7 to EA at 8-9.) With this knowledge, it concluded that there was no meaningful likelihood that the contemplated operations would significantly impact cultural resources outside the area in which the operations would be conducted. See EA at 24, 33, 38, 43; DR/FONSI at 1. The Association has submitted no evidence to the contrary and has not demonstrated that the proximity of the area of operations to any portion of the Open Space that might be designated as “unique” would render the impact of the proposed operation significant. See Oregon Natural Resources Council, 116 IBLA at 361-62; Upper Mohawk Community Council, 104 IBLA 382, 386-87 (1988).

BLM concluded that there was no reasonable likelihood that the contemplated mining operations would significantly impact water resources in Las Huertas Creek or wildlife species (including birds) drawn to the stream or the habitat within the Open Space. See EA at 22, 30-33, 37, 38, 43; DR/FONSI at 1. The Association has submitted no material evidence to the contrary. It has not demonstrated that, by virtue of its water and wildlife resources, the Open Space is properly identified as either a wetland or an ecologically critical area, or that the proximity of the area of proposed operation to any portion of the Open Space that might be designated as “unique” creates an impact level that can be considered significant.^{15/} See Oregon Natural Resources Council, 116 IBLA at 361-62; Upper Mohawk Community Council, 104 IBLA at 386-87.

In its original appeal, the Association argued that BLM improperly issued a FONSI because there was widespread opposition to the proposed action by citizens groups, the public sector, the State, the County, and other community organizations supporting the protection and enhancement of the Open Space that would be adversely impacted by the proposed mine expansion, rendering its decision “highly

^{15/} Dunmire initially stated that he was unaware that “any unusual or special natural biological elements * * * would be impacted by the proposal.” (Letter to Association dated July 24, 1997, at 1.)

controversial.” (Appeal at 11; see *id.* at 8-11 (citing 40 CFR 1508.27(b)(4).) In support of this argument it states that the EA revealed that substantial concerns were raised by more than 500 people, and at a minimum, those people deserve to have their concerns addressed in an EIS. (Appeal at 13; Amendment at 23.) Dereske/ Vreeke and HDC have also adopted this argument. ^{16/} (HDC Notice of Appeal at 1; Dereske/Vreeke Notice of Appeal at 2.)

When determining whether a proposed action is to be deemed highly controversial, one weighs “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 CFR 1508.27(b)(4), emphasis added. A proposed action may be considered “highly controversial” when “a substantial dispute exists as to the size, nature or effect of the * * * [F]ederal action.” Rucker v. Wills, 484 F. 2d 158, 162 (4th Cir. 1973). This determination has little to do with the extent of public opposition to the project itself. Oregon Natural Resources Council, 116 IBLA at 362; Tulkisarmute Native Community Council, 88 IBLA 210, 219 (1985), aff’d in part, Civ. No. A85-604 (D. Alaska 1988). In this context, the Association, HDC and Dereske/Vreeke have misinterpreted the meaning of “highly controversial.”

Following receipt of the BLM and Western Mobile response to its original Appeal, the Association filed additional pleadings, and now argues that several substantial disputes exist regarding the effect of the proposed action, caused by BLM’s failure to consider all of the impacts of the proposed action on the Open Space and Las Huertas Creek. (Amendment at 16.) The Association specifically refers to Dunmire’s September 23, 1998, affidavit (Attachment 22 to Amendment), alleging that this opposition to BLM’s opinion regarding the impact on Las Huertas Creek gives rise to a substantial dispute regarding the effect of the proposed mine expansion. (Amendment at 16.) However, we find no supporting evidence that would cause us to believe that there was a substantial dispute. After review of the record and the allegations, we do not find the proposed action to be “highly controversial,” within the meaning of 40 CFR 1508.27(b)(4). The Association has raised questions regarding BLM’s analysis of the impact of the proposed mine expansion, but it has not presented sufficient independent evidence regarding those impacts to give rise to a substantial dispute regarding the effect of BLM’ approval on any aspect of the environment. Southern Utah Wilderness Alliance, 141 IBLA 85, 92-

^{16/} HDC and Dereske/Vreeke also assert that there will be numerous “significant” impacts on the environment. (HDC Amended Notice of Appeal at 2; Dereske/Vreeke Notice of Appeal at 2.) However, they offer no supporting evidence and make no effort to establish that the other significant criteria in 40 CFR 1508.27(b) have been met.

93; compare Sierra Club v. U.S. Forest Service, 843 F. 2d 1190, 1193-94 (9th Cir. 1988); Foundation for North American Wild Sheep v. U.S. Department of Agriculture, 681 F. 2d 1172, 1182 (9th Cir. 1982). The fact that a significant segment of the local population has substantial concerns about the impacts of the proposed action does not establish that there is a highly controversial dispute regarding the size, nature, or effect of the proposed action.

The Association argues that permitting expansion of the Western Mobile mine will set a precedent for mining the entire 4,000-acre parcel of public land, stating that “[i]f in fact the gravel on this parcel of public land is unique, (as asserted by Western Mobile) and the deposits found there are critical * * *, then it is inconceivable that other companies will not follow Western Mobile’s lead and file applications to mine additional areas.” (Amendment at 3; see *id.*, at 18.)^{17/}

In this respect, significant impact is determined by considering “[t]he degree to which the action may establish a precedent for future actions with significant effects * * *,” 40 CFR 1508.27(b)(6). Other than Western Mobile’s original proposal and an earlier proposal by Longley Excavating, the Association does not point to any specific evidence that other public land in the vicinity of the proposed mine expansion, or generally in the Placitas area, is likely to be sought for mineral material production.

^{17/} The Association argues that BLM’s decision to issue a FONSI is undercut by BLM’s expression of a “concern for the possibility of establishing a precedent for future actions about mining a larger portion of the BLM area.” (Appeal at 11 (emphasis deleted).) It refers to BLM’s statement in response to public concern that Western Mobile might be permitted to mine up to 900 acres of public land in support of this argument. This response noted that, because of the public concern regarding mining and the large number of homes being built in the Placitas area, BLM would not entertain additional requests for mineral material sales until the management proscriptions contained in the RMP had been reviewed. (BLM letter to Dereske/Vreeke dated July 13, 1998 (Attachment 10 to Appeal).) If BLM has committed to take no further action until after a review of the provisions of the RMP concerning mineral material sales in the Rio Puerco Resource Area is completed, no further operations will be approved pending review. The Association also states that BLM has retracted this comment. See response to Dereske/Vreeke Submittal at 2 n.1; Motion to Supplement Administrative Record at 2.) There is nothing in the record to verify this allegation that BLM has retracted its statement or to indicate that it is likely that there will be any sale proposal for mineral material from this area in the foreseeable future.

The record contains no evidence that there is any commercially viable sand and gravel in the area, other than that located in the 267-acre tract Western Mobile originally sought. Nothing in the record suggests a legitimate basis for believing that mining would extend to any significant portion of the 4,000-acre tract. On the other hand, the record does support BLM's conclusion that the sand and gravel in the East Santa Ana Mine, and the area of proposed expansion is unlike other deposits in the immediate area because it is high quality aggregate suitable for road building and other construction uses with little or no processing and pre-sale treatment. (EA at 1, 7, 14-18, Attachment 9; see Western Mobile Answer at 1.) Further, there is nothing in the file specifically indicating that "additional applications may be forthcoming." (Amendment at 18.) The original proposal by Western Mobile was not approved by BLM and there is no reason to believe that Western Mobile will resubmit that application if it gains approval for the operations now being considered by this Board. Longley Excavating's proposal was turned down in 1994, and there is no evidence that Longley remains interested.^{18/}

There is considerable question whether additional mining operations are likely. However, we are not prepared to conclude that approval of the Western Mobile operations will establish a precedent for future approval, especially when each subsequent mineral material sales proposal will also be subject to the same environmental review and decision making process. See Southern Utah Wilderness Alliance, 141 IBLA at 93. We find no indication of a BLM commitment to other mineral materials sales in the area pursuant to its discretionary authority under the Mineral Materials Act of 1947 and 43 CFR Part 3610 (1998).^{19/} There is ample evidence that BLM has expressly retained its discretionary authority and that it has the right to deny approval of similar operations in the general area that may be proposed. See EA at 42, BLM letter to Dereske/Vreeke dated July 13, 1998, at 2.

^{18/}The Association refers to two "inquiries" regarding mining on other public lands in the Las Placitas area. (Motion for Reconsideration at 8.) However, this is not tantamount to imminent submission or even active preparation of a proposal. Nor does the fact that there are other sand and gravel deposits in the area that could be made available "if other operators are interested" translate into active pursuit of mining in the immediate vicinity. (Memorandum to Area Manager from Deputy State Director, dated Apr. 3, 1997, at 1.)

^{19/}The regulations applicable to mineral material sales were amended after BLM issued its July 29, 1998, DR/FONSI. See 66 FR 58901 (Nov. 23, 2001); 67 FR 68778 (Nov. 13, 2002). The new regulations, are now codified at 43 CFR Subpart 3602.

The Association has failed to demonstrate that the proposed action is likely to have a significant effect because it may, in accordance with 40 CFR 1508.27(b)(6), act as a precedent for future action which is likely to have significant environmental effect.

Next, the Association argues that BLM improperly failed to consider the cumulative impact of proposed mining operations and other existing sand and gravel operations in the Placitas area (specifically the Placitas pit) prior to rendering a FONSI. (Appeal at 11-13). It states that BLM failed to consider the potential impact on the property values of nearby private landowners, when operations will occur in the middle of a rapidly developing residential area.” ^{20/} Id. at 13.

The determination of whether the cumulative impact of the proposed action and other activities will be significant is made by considering

[w]hether the action is related to other actions with individual insignificant but cumulative significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. [Emphasis added.]

40 CFR 1508.27(b)(7).

BLM concluded that the combination of the proposed action and other existing sand and gravel mining operations will not have a significant impact on the environment. An important factor in this determination was BLM’s finding that, as the proposed pit would be brought on-line, other pits (which are also owned and operated by Western Mobile) would be closed. EA at 42; see id. at 42-43; DR/FONSI at 1.) The market demand for sand and gravel produced by Western Mobile is steady, and the “[o]verall, the mining activity in the area [is] expected to remain fairly stable.” (EA at 42.) The Association provides no evidence to the contrary.

^{20/} In a later submission, the Association contends that the cumulative effect of the reduction in “open space” public lands available for multiple use, resulting from the proposed action, and BLM’s conveyance of other large blocks of public land “in the area” to Native American Pueblos will have an adverse impact. (Amendment at 19.) Assuming that such conveyance is likely to occur, there is no evidence that a significant impact would result.

The Association points to other sand and gravel operations in the Placitas area. However, it has made no effort to demonstrate that the impacts of the proposed operation and those conducted at existing operations will overlap in a manner that would cause the consequent impact to properly be considered cumulative or synergistic. See Southern Utah Wilderness Alliance, 127 IBLA 282, 285-90 (1993); Colorado Environmental Coalition, 108 IBLA 10, 16-18 (1989). The Association fails to identify the cumulative or synergistic impacts that must exist to support the requirement of a comprehensive EIS. Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257, 268 (1994). Peshlakai v. Duncan, 476 F. Supp. 1247, 1258 (D.D.C. 1979), makes it clear, citing Kleppe v. Sierra Club, 427 U.S. 390 (1976), that a regional EIS is required in two and only two circumstances: (1) when there is a comprehensive Federal plan for the development of a region, and (2) when various Federal actions in a region have cumulative or synergistic environmental impacts on the region. See also Southwest Resources Council, 96 IBLA 105, 116-17, 94 I.D. 56, 62-63 (1987). The Association has failed to show that a comprehensive plan exists for the development of sand and gravel operations or to describe the cumulative or synergistic impacts that would result from the various sand and gravel mining operations, and has failed to define a region that warrants an EIS. We find no basis for a finding that there will be a significant impact on the environment which results from an incremental impact of the proposed mine expansion “when added to other past, present, and reasonably foreseeable future actions.” 43 CFR 1508.7, emphasis added; see Landmark West! v. U.S. Postal Service, 840 F. Supp. 994, 1010-11 (S.D. N.Y. 1993), aff’d 41 F. 3d 1500 (2nd Cir. 1994).

The Sundance Mesa subdivision and most of the La Mesa subdivision are less than one-half mile from the existing Placitas pit. The East Santa Ana mine is from one to two miles northwest of the two subdivisions. Dereske/Vreeke, residents of the Sundance Mesa subdivision, assert that, based upon their experience as purchasers of subdivision lots near the existing East Santa Ana mine, lot prices increase as one goes further from the mining operations. (Letter to BLM, dated June 27, 1998, at 1; letter to BLM, dated August 10, 1997, at 1.) There is a good probability that the expanded mining operations, which will advance the pit closer to a residential subdivision, will have some negative impact upon the value of nearby residential property. It is not sufficient to say, as Western Mobile does, that the mining operations at its existing pit predate the nearest residential subdivision or to say, as BLM does, that the value of residential property has increased, even though the mining operations were active during the period of increase. (Letter to Board from Western Mobile, dated July 13, 1998, at 1; EA at 33-34, 38.) Neither response addresses the reasonably anticipated impact of the proposed operation on nearby property values.

The fact that the mining operations predate the construction of the residential area is an important factor in one respect. However, the question is not the negative impact of the existing sand and gravel operations on the value of the nearby property. It is the impact of the proposed expansion on those values. How much does bringing the operation slightly closer to the residential area adversely affect those property values? In this respect, Western Mobile states that the “likelihood of there being any reduced property values in the vicinity is minimal at best.” (Letter to the Board, dated September 11, 1998, at 7.)

The Association seeks to undermine BLM’s conclusion that the contemplated expansion is not likely to have any material adverse impact upon property values. (Appeal at 11-13 and Amendment at 20-21 (addressing BLM Letter to Dereske/ Vreeke, dated July 13, 1998 (Attachment 10 to Appeal), at 1, and EA at 33-34, 38).) We recognize that the proximity of mining operations did and will have an adverse impact in the value of the lots. As Dereske/Vreeke noted, lot prices increase as one goes further from the mining operations. The mining operations were in existence when the subdivisions were created. Thus, those who purchased lots took advantage of this negative impact by accepting the trade-off of being close to the pit, but paying less for the lot. Another part of this equation is that, because of the adverse impact which existed when they purchased the lot, it is reasonable to expect that the lot values will not increase as rapidly as the lots away from the operations. The mitigating measures imposed by BLM were, in great part, designed to reduce the adverse impact of the operations on the home owners. The area of mining operations was reduced. The visual impact of the expansion has been minimized. The hours of operation have been limited. Steps have been taken to reduce the noise. Based upon the arguments by appellants, it appears that the overall noise level is not a problem (save the noise of back up warning devices). As stated previously, it is not the presence of mining that is the issue. It is the impact of the proposed Federal action. Neither the Association nor Dereske/Vreeke have offered sufficient evidence that the impact of expansion of the Western Mobile Pit on the property values in the subdivisions will be significant.

Finally, the Association and Dereske/Vreeke have failed to show that the proposed and existing operations are likely to have a “cumulatively significant impact” on the property values or other aspects of the environment, within the meaning of 43 CFR 1508.27(b)(7). Thus, the Association and Dereske/Vreeke have not established that BLM erred in this respect when rendering a FONSI. Oregon Natural Resources Council, 116 IBLA at 362.

During the course of preparation of the EA a cultural resource survey was performed by Lone Mountain Archeological Services, Inc. (Lone Mountain), a

162 IBLA 327 IBLA 98-461 et al. contractor hired by Western Mobile, with BLM's approval. Lone Mountain's work was undertaken pursuant to BLM standards and reviewed by BLM. (EA at 24, Attachment 7.) The Association argues that BLM failed to adequately consider the potential impact of the proposed expansion of mining operations on cultural resources, questioning the adequacy of this cultural resource survey. (Appeal at 19- 20.) As proof, it points to two private surveys of the 560-acre Open Space that uncovered 72 archeological sites originally identified by the Forest Service in 1981, stating that Lone Mountain was able to uncover only six of the 25 sites previously disclosed on the proposed 276-acre area.^{21/}

The Association finds it "difficult to understand the paucity of sites found (by Lone Mountain) on the proposed mine area." (Appeal at 20.) However, there is nothing in the record to evidence that the difference is a result of any lack of technical expertise or care on the part of Lone Mountain or BLM. Further, we perceive no inadequacy or deficiency in the survey methodology which would undermine BLM's assessment of the potential impact of the proposed mine expansion on cultural resources. (EA at 24, Attachment 7.) Further, the Association admits that the 1981 Forest Service survey "collected" most of the uncovered artifacts. (Amendment at 25; see Association letter to BLM, dated August 23, 1997, at 2; Attachment 7 to EA at 14; *id.* at 14-17, Watershed Management Plan at 16.) This fact alone explains why a large number of the sites were not identified as sites of cultural resources during the course of the survey conducted 16 years later.

The Association states that subsequent surveys were still able to identify all 72 sites located in the Open Space, and that "uncollected cultural deposits ha[d] come to the surface through wind and water erosion." (Amendment at 25.) However, the Association has submitted no evidence that sites within the area of the proposed Federal action should have yielded any additional artifacts. The evidence is to the contrary. See Letter from the City to BLM, dated July 13, 1998, at 3; Attachment 7 to EA at 14. ("in the gravel terraces the soils are very stable and it is unlikely that many, if any additional sites remain. On the eastern edge of the project, the area is

^{21/}One of the private surveys, undertaken by the Archeological and Historical Research Institute (AHRI) under contract with the Association, examined two-thirds of the Open Space, and the other, by volunteers associated with the Albuquerque Archaeological Society (AAS), examined the remainder of the Open Space. (Appeal at 19.) The Association has offered to submit a copy of the AHRI survey, but seeks written assurance from the Board that it "can be and will be kept confidential." (Letter to the Board, dated Sept. 28, 1998, at 2.) It appears that this assurance may be required to obtain State approval of the disclosure of the document. *Id.* at 1 (citing N.M. Stat. Ann. § 18-6-11.1 (Michie 1999)).

characterized by shallow sediments and there is some possibility of buried materials.”). BLM is not required to assess the “potential for additional information to be gained” by undertaking a further cultural resource survey.

The Association notes that in an April 28, 1998, letter responding to its report of the AHRI and AAS surveys, David Cushman, Deputy State Historic Preservation Officer, New Mexico, stated that, although many of the lithic scatter sites

do not by themselves merit consideration [for listing on the National Register of Historic Places] because of their low information potential, collectively they may contain data about human behavior in the past that is informative on a landscape level. I am particularly interested in issues related to lithic raw materials selection and use that the prehistoric sites as an assemblage * * * could tell us about the past. Therefore, I recommend * * * the [Association] and the City of Albuquerque consider preserving these sites in place as a part of the ongoing preservation planning. [22/]

(Appeal at 20.)

The study funded by the Association focuses on sites in the Open Space. We find nothing in the Cushman letter that would suggest that there is a site or collection of sites in the area of the proposed Federal action that is suitable for listing on the National Register of Historic places. Cushman’s recommendations concerned the ongoing planning “for the Las Huertas Open Space project,” and did not address the site of the proposed Federal action.

We find it important that, in his July 1998 DR/FONSI, the Acting Field Manager stated that the State Historic Preservation Officer had “concurred” with BLM’s finding that the proposed Federal action would have no effect on any site deemed eligible for listing on the Federal Register of Historic Places, noting that (with one exception, which would be protected with a fence and 10-meter wide buffer zone) the 25 sites uncovered during the 1981 Forest Service survey were not eligible. (DR/FONSI at 1; see id. at 2; EA at 24, 33; Attachment 7 to EA at 17-18.) Further, Western Mobile is specifically required to protect any cultural resource uncovered by its mining and related activity, and cease operations pending consultation with BLM. (EA at 33.) In its decision BLM provided for the

^{22/}Cushman indicates that a group of sites, which are individually ineligible for listing on the National Register of Historic Sites may be collectively eligible. We find nothing in his letter to cause us to believe that any of these sites are “related to * * * nearby sites which are eligible for listing.

identification and preservation of any cultural artifacts that might be found within the proposed area of operations. BLM has adequately addressed the known cultural resources and included mitigating measures that render the impact of the proposed operation on those resources insignificant.

The Association and Dereske/Vreeke contend that BLM failed to consider reasonable alternatives to the proposed action, in violation of section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000). (Association Appeal at 3-4; Dereske/Vreeke Notice of Appeal at 2.) They specifically refer to BLM's failure to consider restricting use of the proposed area to recreation.

Section 102(E)(2) of NEPA requires consideration of "appropriate alternatives" to a proposed action, as well as their environmental consequences. 42 U.S.C. § 4332(2)(E) (2000); see 40 CFR 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). Alternatives to the proposed action which will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact should be considered. 40 CFR 1500.2(e); 46 FR at 18027; 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 53-54. One alternative that must be considered is the no action alternative. Bob Marshall Alliance v. Hodel, 852 F. 2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 468 U.S. 1066 (1989). The consideration of alternatives is required to insure that the decision maker "has before him and takes into proper account all possible approaches to a particular project." Calvert Cliffs Coordinating Committee v United States Atomic Energy Commission, 449 F. 2d 1109, 1114 (D.C. Cir. 1971.)

The alternative proposed by the Association and Dereske/Vreeke — to permit only recreational use of the proposed minesite area, precluding mining activity — is essentially the same as the no action alternative, which has received extensive consideration. (EA at 13-14, 39-42.)

It is often desirable, from a management standpoint, to consider alternative future uses of an area. As the Association points out, it has been over 15 years since BLM adopted the Rio Puerco RMP, in which mining was deemed to be a permissible use, and there has been considerable population growth in the area since that time. ^{23/} (Amendment at 23-25.) However, that question is beyond the scope of what

^{23/} The environmental impacts of alternative uses of the public lands in the Rio
(Continued...)

is required during the course of an environmental review. When preparing an EA, it is only necessary to address reasonable alternatives which have impacts that are less than those of the proposed action, including the no action alternative. BLM fulfilled this obligation.

The Association contends that BLM failed to define the No Action Alternative to the same level of detail as the proposed action, as required by Paragraph B.2.a. of Chapter IV of BLM's Handbook H-1790-1 (BLM Manual (Rel. 1-1547 (October 25, 1998) (BLM's NEPA Handbook). (Appeal at 15.) The Association refers to the possibility that Western Mobile could increase operations at "other Western Mobile pits in the immediate areas" if the no action alternative was adopted. The only pit identified is the Placitas pit, and the Association admits that due to time constraints it was only providing information about the Placitas pit. (Appeal at 15, 17.)

BLM stated that if the no action alternative was chosen, operations at the Placitas pit would increase. The Association states that Western Mobile's Placitas pit operations are limited by the State to 12 hours/day and 6 days a week, and are now generating, on an annual basis, 96 percent of the dust permitted by State air quality authorities, and that these limitations constrain further expansion of the rate of production at that pit. (Appeal at 16.) It also notes that, at the current rate of water usage at that pit, Western Mobile will reach the maximum limit of its existing water rights "some time in the middle of October, further restraining any expansion of the rate of production at that pit. Id. at 17. It also notes that expanded operations would be contrary to Western Mobile's January 11, 1988, Certificate of Nonconformance, issued by the town of Bernalillo Zoning Officer, which precludes any new uses (such as night mining) and expansion of existing uses. (Amendment at 22.) The Association states that it would take years to change these limitations, if they could be changed. Id. at 29. Dereske/Vreeke also assert that BLM must consider "legal requirements applicable to operations at the "other area pits." (Letter to BLM, dated June 27, 1998, at 4.)

The Association contends that BLM must consider the full extent of potential operations at the Placitas pit to understand the "true No Action Alternative." (Appeal

^{23/} (...continued)

Puerco Resource Area, including the area at issue, were addressed in an EIS undertaken in the course of preparing the RMP. (BLM Response to Petition for Stay at 6.) Questions regarding whether its RMP is out-of-date and whether BLM should undertake another environmental review as a part of its land use planning does not undermine the adequacy of BLM's assessment of the environmental impact of the proposed mine expansion and reasonable alternatives thereto.

at 16.) It claims that, by inaccurately portraying the likelihood and extent of negative impacts if the no action alternative is adopted, BLM biased its decision making in favor of expansion of operations at the East Santa Ana mine, rather than the Placitas pit. See Amendment at 21-22. According to the Association, “very real positive impacts” of the no action alternative, including “preservation of open spaces and valuable desert habitat are virtually ignored.” *Id.* at 21.

An appropriate understanding of the full ramifications of adopting a no action alternative is necessary for the proper assessment of the environmental impacts of the no action alternative. Therefore, BLM was required to know whether and to what extent sand and gravel would be available from other reasonably available sources (including the Placitas pit), if the no action alternative were adopted, precluding the expansion of the East Santa Ana Pit. We are not convinced that BLM erred in this respect.

BLM considered the impacts of adopting the no action alternative, including the likelihood that, in order to satisfy its need for a supply of sand and gravel, Western Mobile might continue longer than planned, or even increase its operations at other pits in the area. (EA at 14-15, 39-42.) In this respect BLM considered the East Santa Ana pit, the West Santa Ana pit, the Placitas pit and the Pena Blanca pit. In the case of the Placitas pit, BLM noted that Western Mobile would need to increase operations, including installing a second crusher and other heavy equipment and engage in night mining. *Id.* at 14. It then considered a no action alternative, concentrating on “what reasonably could happen,” based on what Western Mobile could do “if [it] were able to amend its current operating permit” for the Placitas pit. (BLM letter to Dereske/Vreeke, dated July 13, 1998, at 3.)

Western Mobile’s current operations at the Placitas pit are close to exceeding the State particulate emission standards. However, with one exception, the particulate concentrations were below State standard levels. (Attachment 32 to Amendment at 3.) The record indicates that the annual particulate concentration level would reach 96 percent of the State standard 300 meters from the crushing/screening plant. *Id.* There is no evidence that a second crusher could not be placed in a manner that would avoid having a cumulative effect exceeding the State standard, and BLM noted that a second crusher would not be precluded. (EA at 41.) BLM also recognized that particulate emissions from the mining operations could be reduced with the installation of additional dust suppression measures. (EA at 31-32, 38, 40.)

We find no basis for concluding that increased operations at the Placitas pit is absolutely precluded by the State air quality standards. Additional measures to

control particulate matter would most likely be required at the Placitas pit if that pit was expanded. BLM recognized these problems and correctly chose not to address this constraint on the expansion of operations at the Placitas pit as precluding expansion of that pit.

Nor are we persuaded that Western Mobile lacks sufficient water to expand its mining operations at its Placitas pit. BLM recognizes that additional ground water would be needed to expand operations. The material at that site must be washed to render it suitable for sale. (EA at 14, 41.) However, there is no evidence that Western Mobile is precluded from obtaining the necessary water, and BLM correctly interpreted this as not being a constraint on expansion of the operations at the Placitas pit.

The January 1988 Certificate of Nonconformance issued by the Town of Bernalillo Zoning Officer permitted “mining, extraction, stockpiling, removal, and processing of sand and gravel,” on part of the close to 1,000-acre tract encompassing the Placitas pit. (Certificate of Nonconformance (Attachment 11 to Appeal) at 1.) The Certificate represented a negotiated compromise of the position originally taken by Western Mobile’s predecessor-in-interest (Springer Building Materials) that the pit predated the Town’s zoning designation and it was therefore entitled to mine the entire 1,000-acre tract. See “Final Resolution of the Gravel Pit Issue and a New Challenge for the Concerned Citizens” (Attachment 11 to Appeal) at 1.

The Certificate precludes mining in a small area adjacent to the La Mesa subdivision, but permitted mining in the balance of the tract, including an area adjacent to the Sundance Mesa subdivision. See Attachment to letter from Western Mobile to Sundance Mesa subdivision residents, dated April 6, 1998 (Attachment 20 to Appeal). Thus, we find nothing in the Certificate that would restrict expanded operations in the area of permitted mining. BLM correctly considered this Certificate to not be a constraint on expansion of mining operations at the Placitas pit.

BLM was sufficiently knowledgeable of the importance of the instant sale to Western Mobile’s overall sand and gravel business and to the supply of sand and gravel available to the public in the area served by Western Mobile to make an informed analysis of the impact of adopting or rejecting the proposed course of action on the proponent and the general public.

The Association contends that BLM must understand the extent operations at the Placitas pit would increase in order to “negotiate the best possible price” for the sand and gravel from the East Santa Ana mine. (Appeal at 16.) By presenting this argument, the Association implies that the sales price will be arrived at through a

process of negotiation. It is not. By regulation, the price will be determined by BLM, based upon the “fair market value” of the sand and gravel, established by an appraisal. 43 CFR 3610.1-2(a) (1998). There is nothing to support the conclusion that Western Mobile will be able to obtain sand and gravel at any price less than the fair market value.

The Association contends that the proposed sale to Western Mobile violates 43 CFR 3610.2-1(b) (1998), which limits the amount of mineral material that may be sold noncompetitively to a single entity during a 12-month period to 200,000 cubic yards. ^{24/} (Appeal at 20.) It argues that the noncompetitive sale would defeat the purpose of a regulation intended to “strictly limit the discretion with which [BLM] can decide to sell substantial [F]ederal resources without competitive bid,” thus ensuring the highest return to the United States from the sale of its sand and gravel resources. ^{25/} (Appeal at 21.) It presents two arguments for finding error in BLM’s determination that the sale is excepted from the limitation because it is impossible to sell the material competitively. First, it contends that the ability to generate competitive interest in the sale is evident in the fact that BLM has declined to entertain additional requests for mineral material pending review of the RMP, asking: “What would be the point of such a commitment if competition were impossible?” (Appeal at 22.) Second, it points to evidence that in 1994 Longley Excavating had offered to purchase the mineral material, noting that in response to Longley Excavating’s letter BLM stated that “competitive interest does exist. (Id., Letter to Longley Excavation dated April 22, 1994 (Attachment 1 to Appeal).)

[2] Section 2 of the Mineral Materials Act, as amended, 30 U.S.C. § 602 (2000), requires BLM to dispose of mineral materials “to the highest responsible qualified bidder,” thus mandating sales by competitive bidding. See 43 CFR 3610.3 (1998); Roy Blake, 38 IBLA 151, 152 (1978). However, the statute also provides

^{24/} Dereske/Vreeke also question whether it is appropriate to approve a noncompetitive sale. (Letter to the Board dated Mar. 4, 1999.)

^{25/} Generally, under the new regulations found at 43 CFR Subpart 3602 (2003), to sell mineral material noncompetitively, BLM must determine that the sale is in the public interest, and that it is impracticable to obtain competition. The annual limitation is now 200,000 CY in any individual sale, and multiple noncompetitive sales in excess of 300,000 CY cannot be awarded to any one purchaser in any one State. However, the volume limitations noted above do not apply if BLM determines that circumstances make it impossible to obtain competition, or if there is insufficient time to invite competitive bids, because of an emergency situation affecting public property, health or safety.

that the material may be sold by negotiation (or noncompetitively) when it is “impracticable to obtain competition.” 30 U.S.C. § 602 (2000). We note, however, that 43 CFR 3610.2-1(d) uses the term “impossible.” Curtis Sand and Gravel Co., 95 IBLA 144, 160-61, 164 n.10, 94 I.D. 1, 10, 12 n.10 (1987); Mobil Oil Corp, 79 IBLA 76, 80 n.3 (1984). Thus, if BLM determines that it is “impracticable” (or “impossible”) to obtain competition, it may enter into a purchase and sales contract without seeking bids.

There is no question that a noncompetitive sale of the amount of mineral material contemplated in this case (up to 592,592 cubic yards a year and up to nearly 6 million cubic yards over a 10-year term if the contract is renewed) exceeds the 200,000 yards per year volume limitation set out in 43 CFR 3610.2-1(b) (1998). However, 43 CFR 3610.2-1(d) (1998) provides two exceptions to this volume limitation. The first is when circumstances make it impossible to obtain competition. The second is when there is an emergency situation affecting public property, health and safety and insufficient time to invite competitive bids.

The second exception does not apply in this case. However, if the Director determines that the existing circumstances make it impossible to obtain competition, BLM’s findings will not be overturned by this Board unless an appellant demonstrates by a preponderance of the evidence that BLM erred in some material way in its factual analysis or its ultimate conclusion. Lassen Motorcycle Club, 133 IBLA 104, 109 (1995); Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 129 (1990); Western American Exploration Co., 112 IBLA at 318-19; American Gilsonite Co., 111 IBLA 1, 31-33, 96 I.D. 408, 424-25 (1989).

BLM concluded that it would be impossible to obtain competition for the purchase of the sand and gravel. (BLM letter to Western Mobile, dated May 12, 1997.) There are a number of reasons that we believe this determination to be supported by the evidence. As noted previously, the proposal is to allow for an extension of Western Mobile’s East Santa Ana open pit gravel mining operations. The material from the BLM-administered lands is not suitable for sale without further treatment. As noted previously, the larger material from BLM lands will be blended with smaller material extracted from the East Santa Ana pit, and the term of the mineral material sales agreement is to roughly coincide with the term of Western Mobile’s lease of the adjacent Pueblo lands (the basis for Western Mobile’s existing right of access). This access is the strongest basis for BLM’s finding, however. Western Mobile’s East Santa Ana pit sits between the 175-acre tract and Interstate Highway 25. The only reasonable access to that tract is through Western Mobile’s operating mine. BLM thus concluded that it is not likely that a right-of-way would become available to another party, and if one could be made available, it would

contain such disadvantageous environmental and/or economic terms that it would take the holder of the right-of-way out of competition if the material was sold by competitive bidding. (Memorandum to Area Manager from Solid Minerals Team dated February 18, 1997, at 1-2; EA at 8.)

There is no question that Western Mobile has the only existing right of access to the tract. The Santa Ana Pueblo stated that the “only current access” to the area and the remainder of the landlocked public lands is “through the use of a * * * road easement owned by the Pueblo” and granted to Western Mobile. (Letter to BLM dated December 2, 1996.) The Pueblo is not precluded from granting access to another party, but it has informed BLM that it has no intent to do so: “[T]he Pueblo has a long term contract with Western Mobile, and the Pueblo feels letting a third party use tribal access to BLM lands would not be in their best interest. This effectively eliminates any company other than Western Mobile from using this route through the Pueblo.” (Memorandum to the Areas Manager from the Solid Minerals Team, dated February 18, 1997, at 1; see Santa Ana Pueblo letter to BLM dated December 2, 1996.)

Access could be gained across private or Indian lands to the north, west and south. BLM ruled out access from the south because access would be either through or adjacent to the Sundance Mesa residential development. None of the appellants in this case have objected to this conclusion. BLM also ruled out access from the north and east. The construction of a road from these directions would require the construction of a bridge over Las Huertas creek of sufficient size and strength to support transporting equipment essential to a sand and gravel operation and haulage of the produced mineral product. See EA at 3, 8-9. The Association points out that a bridge could be built, but ignores the fact that the cost of obtaining a right-of-way and constructing the road and bridge would have a serious negative impact upon a competitor’s ability to tender a meaningful bid.

We also question whether a bidder without access could be considered to be a “qualified bidder” under 30 U.S.C. § 602. BLM policy regarding issuance of rights-of-way is to deny a right-of-way application if the applicant cannot tender proof of access across private land to reach Federal land and a clear description of the location of this access right. Such proof of access could be in the form of either: (1) proof of an express agreement with the adjoining landowner or landowners to allow access across their private property, or (2) proof that a right-of-way exists from some point on an existing public road to the BLM parcel. Edward J. Connolly, Jr., 94 IBLA 138, 145 (1986). The issue of acceptance or rejection of a bid from a bidder not having access to the mineral material being sold is not before us. However, a refusal to accept a bid tendered by a party having no right of access to the mineral

material being sold might be warranted for the same reasons that the refusal to grant a right-of-way has been found to be justified.

We find no basis for overturning BLM's decision to authorize a noncompetitive sale of the mineral material to be mined from the extension of the East Santa Ana pit. There is no credible evidence that the material from that area could be sold by competitive means.

The Association argues that public support for the proposed expansion should be discounted because much of it came from residents who live near the Placitas pit, who were erroneously led to believe, based on misleading information provided by Western Mobile, that the pit would be mined up to their property lines, an additional crusher would be installed, and the pit would be mined at night. (Appeal at 17-19.) The Association also states that Western Mobile informed the same residents that it would be willing to sign agreements to provide a large buffer zone at the Placitas pit if the East Santa Ana mine expansion was approved. *Id.* at 18.

We find no reason to conclude that BLM's review of the environmental impacts of either permitting or denying the expansion of the East Santa Ana pit was affected in any way by either those voicing support or those voicing opposition to the proposed expansion. If public opinion was somehow tainted by misinformation, we find no basis for finding that either the environmental assessment or the DR/FONSI was swayed thereby.

Without further belaboring this decision with additional references to the appellants' contentions of errors and omissions in the EA, and other errors of fact and law, to the extent they have not been expressly or impliedly addressed in this decision, they were considered and rejected on the ground that they are, in whole or in part, contrary to the facts and law or are immaterial. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F. 2d 645, 652 (6th Cir. 1954).

In conclusion, we find that the Acting Field Manager properly approved the expansion of the sand and gravel mining operations at Western Mobile's East Santa Ana mine, as set forth in his July 1998 DR/FONSI, prepared in accordance with section 102(2)(C) of NEPA and 43 CFR 3610.2-1(d).

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. ^{26/}

R.W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{26/} The Association's request for reconsideration of our October 28, 1998 Order denying a stay of the July 29, 1998, DR/FONSI is hereby denied as moot.