INTERIOR BOARD OF LAND APPEALS

Haines Borough Assembly, et al.

145 IBLA 14 (June 30, 1998)

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HAINES BOROUGH ASSEMBLY, ET AL.

IBLA 95-496, etc. 1/ Decided June 30, 1998

Consolidated appeals from a Decision of the Anchorage District Office, Bureau of Land Management, Alaska, approving issuance of commercial special recreation use permits AA-76601 and AA-77475.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

   The Bureau of Land Management has discretion under 43 U.S.C. § 1732(b) (1994) and 43 C.F.R. Subpart 8372 to issue special recreation permits for commercial helicopter landings on public lands and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority. Mere differences of opinion provide no basis for reversal, and the Board will affirm a decision exercising this authority if the decision is reasonable and supported by the record.

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

   A BLM finding of no significant impact for a proposed action (allowing landings of helicopters on glaciers on BLM lands) will be affirmed on appeal where BLM took a

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1/ This Decision disposes of the following appeals: Haines Borough Assembly, IBLA 95-496; Lynn Canal Conservation, Inc., IBLA 95-509; City of Skagway, IBLA 95-531; George Figdor, IBLA 95-540; Timothy R. June, IBLA 95-541; Chilkat Indian Village, IBLA 95-542; Fred M. Beeks, IBLA 95-571; Eva J. Beeks, IBLA 95-572; Lani S. Hotch, IBLA 95-573; and L. Dale Cobb, IBLA 95-574.

> "hard look" at the environmental consequences of that action, identified the relevant areas of environmental concern and made a reasonable finding that the impacts studied were insignificant or would be reduced to insignificance by mitigation measures.

APPEARANCES: Debra J. Schnabel, Member, for Haines Borough Assembly; Nancy Berland, Executive Committee, for Lynn Canal Conservation, Inc.; George Figdor, Timothy June, Fred M. Beeks, L. Dale Cobb, pro se; H. Clay Keene, Esq., Ketchikan, Alaska, for TEMSCO Helicopters, Inc.; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management. 2/

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Haines Borough Assembly (Haines), Lynn Canal Conservation, Inc. (Lynn), the City of Skagway (Skagway), George Figdor, Timothy R. June, Chilkat Indian Village (Chilkat), Eva J. and Fred M. Beeks (the Beeks), Lani S. Hotch, and L. Dale Cobb have appealed from the May 10, 1995, Record of Decision (ROD) of the District Manager, Anchorage District Office, Bureau of Land Management (BLM or Bureau), approving issuance of two commercial special recreation use permits (SRUP's) (AA-76601 and AA-77475, respectively) to TEMSCO and L.A.B. Flying Service, Inc. (LAB). 3/ The SRUP's authorized helicopter landings on seven glaciers on BLM-administered public lands in the area of the neighboring communities of Skagway and Haines in southeastern Alaska over a 5-year period from 1995 through 1999. 4/

In May 1995, the U.S. Forest Service (USFS or Forest Service), Department of Agriculture, together with BLM, prepared an environmental assessment (EA), which considered the environmental impacts of permitting proposed helicopter glacier landings on Federally-owned lands near Haines, Alaska, as well as three alternatives. 5/ In that EA, BLM and USFS

2/ On Feb. 20, 1996, H. Clay Keene, Esq., notified the Board that he was withdrawing as counsel for TEMSCO.

3/ The various IBLA docket numbers for these appeals are set out in note 1.

4/ TEMSCO, which currently operates out of downtown Skagway near the waterfront, would be permitted landings on five glaciers west/northwest of the city across the Taiya Inlet: West Creek, Ferebee, Grand Canyon, Chilkat, and Norse. LAB, which proposed to operate out of the Haines airport (about 2 miles northwest of Haines), would be permitted landings on two glaciers southwest of the city across the Chilkat Inlet: Garrison and Summit of Davidson. The flight paths used to access these glaciers are depicted on maps in the EA.

5/ The Forest Service was the lead agency in preparing the EA. The proposed action and alternatives also involved its issuance of special use permits to land on glaciers within the Tongass National Forest, also in the Haines/Skagway area.

considered the action as proposed by TEMSCO and LAB in their applications as Alternative B, involving issuance to them of 5-year permits. 6/ This alternative would permit TEMSCO and LAB, respectively, to make a total of 3,400 and 190 landings in 1995, increasing to 5,400 and 3,100 landings by 1999. 7/ (EA at 2-5.) The average number of daily flights associated with these landings would be about 25 (TEMSCO) and 2 (LAB) in 1995, increasing to about 39 (TEMSCO) and 22 (LAB) in 1999. See EA at 2-12. Landings would be between 8 a.m. and 7:30 p.m. each day, 7 days a week from early May through late September. (EA at 2-4.) TEMSCO proposed to use three flight paths:

> The flight path used to access the West Creek, Grand Canyon, Norse, and Chilkat Glaciers proceeds in a northerly direction up the Taiya River valley past Dyea and eventually to the intended landing site. To access the Ferebee Glacier they fly in a westerly direction up the Burro Creek drainage. The third flight path proceeds in a northwesterly direction past Parson's Peak towards the West Creek Glacier.

(EA at 1-5.) LAB's flight paths would "follow the Takhin River to the west of Haines and then proceed towards the south following the individual glaciers to the eventual landing site." (EA at 1-6.)

The EA also considered two alternatives that would preclude requested landings and restrict the season and hours of landings on certain glaciers. Alternative C would deny permission to land on the Norse, Bertha, McBride Pass, and Takhin glaciers, shifting the landings to other glaciers. (EA at 2-6.) The number of landings did not change under this alternative, as landings denied TEMSCO on the Norse Glacier would be distributed equally among the Schubee, Denver, and East Fork glaciers, situated on USFS land east of the Taiya Inlet, and landings denied LAB on the Bertha, McBride Pass, and Takhin glaciers would be distributed equally among the Garrison and Summit of Davidson glaciers, situated on BLM land. (EA at 2-6.) Under Alternative C, landings would be permitted on the West Creek, Ferebee, Grand Canyon, Chilkat, Garrison, and Summit of Davidson glaciers, and the season and hours of landings would not be changed. (EA at 2-6.) This alternative would permit TEMSCO and LAB, respectively, to make a total of

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6/ The EA also addressed the effects of issuance of a proposed special use permit to Packer Expeditions. That permit would authorize helicopter transport to and from the Laughton Glacier Trailhead on USFS lands. (EA at 1-5). That permit is not involved in the present appeals.

7/ In the 5 years from 1995 through 1999, TEMSCO sought permits for 3,400, 4,000, 4,600, 5,000, and 5,400 landings, and LAB for 190, 375, 1,525, 2,200, and 3,100 landings on BLM land. (EA at 2-5.) TEMSCO sought permits to land on the West Creek, Ferebee, Grand Canyon, Chilkat, and Norse Glaciers. LAB sought permits to land on the Bertha, McBride Pass, Takhin, Garrison, and Summit of Davidson glaciers.

3,000 (down from 3,400) and 190 landings in 1995, increasing to 4,300 (down from 5,400) and 3,100 landings by 1999. (EA at 2-7.) The average number of daily flights associated with these landings would be about 22 (TEMSCO) and 2 (LAB) in 1995, increasing to about 31 (TEMSCO) and 23 (LAB) in 1999. See EA at 2-12.

Alternative D would also deny permission to land on the Bertha, McBride Pass, and Takhin glaciers, shifting the landings to other glaciers. (EA at 2-9.) Landings denied LAB on the Bertha, McBride Pass, and Takhin glaciers would be distributed equally among the Garrison and Summit of Davidson glaciers. (EA at 2-9.) Landings would be permitted on the West Creek, Ferebee, Grand Canyon, Chilkat, Garrison, and Summit of Davidson glaciers. (EA at 2-8.) The season and hours of landings would not be changed. (EA at 2-8.) Landings would also be permitted on the Norse Glacier, but only at a stable annual level (400), below that permitted in 1993 and 1994, over the entire 5-year period. (EA at 1-2, 2-8.) Landings denied TEMSCO on the Norse Glacier would be distributed equally among the Schubee, Denver, and East Fork glaciers, situated on Forest Service land. (EA at 2-9.) The season of landings would be shortened, beginning later, from June 15 through late September of each year. (EA at 2-8.) Landings would generally be permitted between 8 a.m. and 7:30 p.m. each day, except during the month of September when landings would be restricted to between 8 a.m. and 6 p.m. each day. (EA at 2-8.) Alternative D would permit TEMSCO and LAB, respectively, to make a total of 3,400 and 190 landings in 1995, increasing to 4,700 (down from 5,400) and 3,100 landings by 1999. (EA at 2-10.) The average number of daily flights associated with these landings would be about 25 (TEMSCO) and 2 (LAB) in 1995, increasing to about 34 (TEMSCO) and 23 (LAB) in 1999. See EA at 2-12.

Finally, BLM and USFS considered a no-action alternative (Alternative A), which would not permit any landings on any glaciers on public land. (EA at 2-4.) However, BLM and USFS noted that, under a no-action alternative, helicopter "flight-seeing" tours of glaciers (without landings) might still continue, since BLM had no authority to prevent them.

Based on the EA, the District Manager issued his May 1995 ROD, selecting Alternative D. See ROD at 2. The alternative was modified from that set out in the EA only to push back the start of the season of use in the case of the Norse Glacier from June 15 to early May. See ROD at 2. In addition, the District Manager adopted various measures designed to mitigate the immediate environmental impacts of the helicopter glacier landing tours and to monitor those impacts as a basis for making future adjustments to the authorized use. See ROD at 2. These measures, which are attached to the ROD, are entitled "Mitigation Measures for Helicopter Glacier Tours in the Haines/Skagway Area" (Mitigation Measures). The number of landings on the Norse Glacier was set below those past levels (pending the gathering of additional data), in view the importance and sensitive nature of that area for mountain goats. (EA at 3-22; ROD at 3.)

According to the ROD, BLM adopted Alternative D because it best met anticipated public demand for helicopter tours and established levels of use acceptable to local residents and recreationists and protective of mountain goats and other wildlife, and because it did not result in any unnecessary or undue degradation of the environment. (ROD at 2.) Alternative A (No Action) was rejected because it did not meet anticipated public demand for helicopter glacier landing tours. (ROD at 3.) Alternative B (Proposed Action) was rejected because it would result in increased impacts to residents, recreationists, and wildlife. (ROD at 3.) Alternative C (Modified Proposed Action) was rejected because it precluded all landings on the Norse Glacier without any evidence that landings there, which had been permitted in 1993 and 1994, had had any adverse impacts. (ROD at 2-3, 3.) The ROD also included a finding that no significant impact to the quality of the human environment would result from permit issuance, so that no environmental impact statement (EIS) was required. See ROD at 2.

On the same date as issuance of the ROD, BLM issued one of the SRUP's (AA-76601) to TEMSCO. Issuance of the other SRUP (AA-77475) to LAB had not occurred as of the date of the filing of BLM's Answer. Nevertheless, as the BLM Decision under appeal authorized issuance of the SRUP to LAB, it is appropriate to consider the propriety of issuance of both SRUP's.

Appeals were timely taken from the District Manager's May 1995 ROD. With one exception, all of the Appellants challenge his decision to adopt Alternative D and assert that no helicopter glacier landing tours should have been permitted. Skagway contends that the District Manager should have adopted Alternative B, thus permitting the maximum number of landings with no restrictions on the season or hours of use.

On appeal, BLM reports that the helicopter landings will be in remote, unpopulated areas, with the closest at least 12 miles from any human habitation. See Memorandum to Board from District Manager, dated June 20, 1995. All landings will be on glacial ice, with no associated biotic communities, and BLM expects that they will not result in any damage to the surface. Id.; EA at 3-1.

[1] The Bureau has discretion under 43 U.S.C. § 1732(b) (1994) and 43 C.F.R. Subpart 8372 to issue special recreation permits for commercial helicopter landings on public lands and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority. Mere differences of opinion provide no basis for reversal, and the Board will affirm a decision exercising this authority if the decision is reasonable and supported by the record.

Appellants do not object to the landings on the glaciers. Rather, they are concerned that helicopter overflights to take tour participants to and from glacier landing sites will disrupt residential, recreational, and wildlife use of surrounding Federal, state, and private lands, due to

the production of noise and visual intrusion. 8/ They contend that BLM's approval of helicopter glacier landing tours violates the land use planning and permitting provisions of sections 202 and 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1712 and 1732 (1994); the subsistence use procedural requirements of section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a) (1994); the environmental impact assessment requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994); and applicable Federal regulations.

The Department of the Interior has no jurisdiction to regulate helicopter flights. See EA at 1-10; ROD at 3. Therefore, it has no direct authority to determine the routes, altitudes, or other aspects of the flights. However, the exercise of Secretarial discretion to issue special use permits also includes the authority to set permit conditions. Patrick G. Blumm, 121 IBLA 169, 171 (1991); Four Corners Expeditions, 104 IBLA 122, 125 (1988); Don Hatch River Expeditions, 91 IBLA 291, 293 (1986); Osprey River Trips, Inc., 83 IBLA 98 (1984). Under 43 C.F.R. § 8372.5(b), a special recreation permit should contain stipulations the authorized officer considers necessary to protect the lands and resources and the general public interest. Thus, the Bureau may indirectly regulate flights by conditioning the grant and continuing validity of landing permits on the permittees' compliance with restrictions on routes, altitudes, and other aspects of the flights.

It did so here. Particular routes were proposed by TEMSCO and LAB to access the various glacier landing sites. Approved routes set forth in the EA (see EA at 1-5 and 1-6; EA, Maps 1 and 2) were effectively incorporated by the District Manager's adoption of Alternative D, as a condition of conducting glacier landings on public lands. He also expressly incorporated restrictions on flight routes, altitudes, and helicopter operations specifically designed to protect mountain goats and other wildlife. See ROD at 2 (adopting mitigating measures); Mitigation Measures at 1-2.

Lynn contends that BLM's May 1995 ROD was arbitrary and capricious in that it denied landings on the Bertha, McBride Pass, and Takhin glaciers precisely because of the likely adverse impacts to wildlife from noise reverberations (due to the narrowness of the valleys leading to the glaciers), but yet permitted landings on the West Creek, Ferebee, Norse, Grand Canyon, Garrison, and Summit of Davidson glaciers even though there are similar conditions. See Lynn Statement of Reasons (SOR) at 3. BLM was well aware of the narrow valleys leading to all of these glaciers.

8/ Lynn claims that TEMSCO and LAB "illegally" landed on public lands without the benefit of any SRUP's prior to 1993 (TEMSCO) and 1995 (LAB), and that neither has been charged back permitting fees or penalties. (Lynn SOR at 12.) The Board lacks jurisdiction to address these matters since they were not the subject of BLM's May 1995 ROD.

See EA at 3-16 to 3-19. It was also aware of the potential impacts of noise reverberations, but held that they "would be of short duration which would decrease any detrimental effects." (EA at 3-22.) Further, it is evident that the District Manager did not deny landings on the Bertha, McBride Pass, and Takhin glaciers for that reason. Rather, taking a conservative approach, landings were denied in order to move helicopter activity away from habitat "with known high capability to support mountain goats," at least "until more data are available on possible impacts from access routes to these glaciers." (EA at 3-24; ROD at 3.) It is clear that BLM did not similarly regard the habitat along the flight routes to the other glaciers as of "high capability." Lynn has presented no evidence to the contrary.

Appellants further contend that BLM violated both the sustained yield and multiple use mandates of section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (1994), in that the approved helicopter glacier landing tours may lead to a permanent impairment of the quality of the environment (particularly to the numbers of mountain goats found on surrounding lands) and an exclusive use by helicopters. See Haines SOR at 6; Lynn SOR at 11.

The Bureau is required to manage public lands for "sustained yield." 43 U.S.C. § 1732(a) (1994). This means that BLM must achieve and then maintain in perpetuity a "high-level annual or regular periodic output of the various renewable resources" on such lands, including wildlife. 43 U.S.C. § 1702(h) (1994). Appellants assert that this will not occur in the event there are local extinctions of mountain goats. While the EA refers to this possibility, it is clear that it meant simply the displacement of goats from certain lands as a result of helicopter overflights. See EA at 3-11. There is no evidence that such flights will cause the extermination of any goats or diminish their reproductive capability, thus adversely affecting the future yield of goats. 9/ In any case, there is no indication that BLM considered local extinctions likely here.

The Bureau is also required to manage public lands for "multiple use." 43 U.S.C. § 1732(a) (1994). This means that BLM must provide for a "harmonious and coordinated management of the various resources [on the public lands] without permanent impairment of * * * the quality of the environment." 43 U.S.C. § 1702(c) (1994). Appellants assert that permanent

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9/ We are also not persuaded that permitting the helicopter tours, and thus some or all of the related flights, will result in a significant restriction on subsistence uses by rural Alaska residents on the public lands overflown, due to the extermination of mountain goats or other wildlife. BLM concluded that this would not occur. See ROD at 3. Appellants have provided no evidence to the contrary. Therefore, we conclude that BLM was not required to follow the procedures mandated by section 810(a) of ANILCA before issuing the permits. In addition, if the State selections of these lands are valid, they would no longer be considered public lands subject to that statutory provision. See EA at 3-14; 16 U.S.C. § 3102 (1994).

impairment will occur to wildlife resources. There is no evidence that helicopter overflights will permanently affect mountain goats or other wildlife, or their overall populations. Appellants also assert that such flights will lead to an exclusive use by helicopters by driving hikers and other recreationists from the affected areas. Again, there is no evidence that this will occur.

We reject Appellants' contention that BLM improperly decided to permit helicopter glacier landing tours without the benefit of prior land use planning in violation of section 202 of FLPMA and its implementing regulations. See Haines SOR at 5-6; Lynn SOR at 10-11. We know of no requirement that BLM must engage in land use planning before permitting any activity on the public lands. Section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (1994), provides that management shall be in accordance with land use plans "when they are available." In addition, as BLM stated in its EA, the Department's regulations that implement the land use planning requirements of FLPMA plainly envision management decisions even in the absence of a land use plan. 43 C.F.R. § 1610.8(b)(1).

[2] Appellants contend that BLM inadequately considered the environmental impacts of the helicopter glacier landing tours, especially in terms of the impact of overflights on residential, recreational, and wildlife use of surrounding lands. Appellants also contend that BLM has chosen to proceed with issuance of helicopter glacier landing permits in the absence of any evidence regarding the current abundance, distribution, and condition of mountain goats and other wildlife and the current quality of their habitat in areas that will be overflown by helicopters. See Haines SOR at 7; Lynn SOR at 2-3. Appellants also generally contend that there will be significant impacts to the human environment, thus requiring preparation of an EIS pursuant to section 102(2)(C) of NEPA. See Haines SOR at 4; Lynn SOR at 7-8; Figdor SOR, dated June 26, 1995, at 4.

An EA is prepared in order to allow an agency to assess whether an EIS is required under section 102(2)(C) of NEPA. Where BLM finds, based on an EA, that no significant environmental impact will occur as a result of approving issuance of a use permit and thus decides to go ahead with approval in the absence of preparation of an EIS, such action will be affirmed on appeal where BLM has taken a hard look at the environmental consequences of its action, considering all relevant matters of environmental concern, and made a convincing case either that no significant impact will result or that any such impact will be rendered insignificant by mitigating measures. See Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Oregon Natural Resources Council, 131 IBLA 180, 183 (1994); Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140-41 (1992); Yuma Audubon Society, 91 IBLA 309, 312 (1986), and cases cited therein. As a general rule, the Board will affirm a finding of no significant impact (FONSI) with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Oregon

Natural Resources Council, 131 IBLA 180, 186 (1994); Owen Severance, 118 IBLA 381, 392 (1991); G. Jon Roush, 112 IBLA 293 (1990); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984).

The burden to show error falls on the appellant. See Coy Brown, 115 IBLA 347, 357 (1990). One challenging a FONSI must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. G. Jon Roush, supra, at 298; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof; mere differences of opinion provide no basis for reversal. Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); G. Jon Roush, supra, at 297-98.

The Bureau was required to, and did, consider the environmental impacts associated with such flights. Under 40 C.F.R. § 1508.25(a)(1), actions are deemed "connected," and thus should be considered in a single EIS or EA, "if they: (i) Automatically trigger other actions * * * [;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." The concern evident in the regulation is to avoid segmenting interrelated projects such that cumulatively significant environmental impacts are overlooked or, worse, deliberately ignored, in violation of section 102(2)(C) of NEPA. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987).

There is no doubt here that the helicopter flights are "connected actions" with the helicopter landings within the meaning of 40 C.F.R. § 1508.25(a)(1). Plainly, the helicopter landings cannot or will not proceed unless the helicopter flights are taken previously or simultaneously. 40 C.F.R. § 1508.25(a)(1)(ii). Cf. James Shaw, 130 IBLA 105 (1994) (where BLM did not have to consider environmental effects of construction of a housing subdivision in connection with considering an application for a right-of-way for a road across public land because the former would proceed regardless of the latter). Further, the helicopter landings and flights are interdependent parts of the helicopter flight-seeing and glacier lands tour, as described by TEMSCO and LAB in their applications. As such, the helicopter flights are part of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(ii).

The EA did consider such impacts from the helicopter flights, as opposed to the helicopter landings. See ROD at 3. Using a "Habitat Capability Model" prepared by the Forest Service and the Alaska Department of Fish and Game (ADF&G), BLM determined the location of suitable habitat for late winter/early spring and summer use by mountain goats, in the areas of the proposed helicopter flights. See EA at 3-11 to 3-12, 3-14, 3-16 to 3-19; EA, Maps 3-A through 3-Q. There is evidence that the model reliably predicts actual habitat. See EA at 3-14. Appellants have provided no evidence to the contrary. The Bureau also assessed the presence of suitable

habitat for bear and other large mammals. See EA at 3-11, 3-16 to 3-19. Nonetheless, it is true that BLM did not have any specific data regarding the abundance, distribution, and condition of mountain goats and other wildlife or the quality of their habitat in the overflight areas. In assessing the impact of flights, BLM proceeded on the assumption that the identified habitat areas were suitable and that there were populations of mountain goats and other wildlife using them. In most cases, BLM relied on the documented presence of such wildlife in the areas. See EA at 3-11, 3-16 to 3-19.

Appellants also contend that BLM improperly decided to approve helicopter glacier landing tours in the absence of adequate knowledge regarding the impacts of overflights on mountain goats. There is some scientific information regarding potential impacts that was relied upon by BLM. See EA at 3-12 to 3-13. However, it is true that the state of knowledge regarding such impacts (especially over the long-term) is not complete. See EA at 3-12. Indeed, in a May 15, 1995, letter to the Forest Service, the ADF&G acknowledged:

> [W]e know little about goat populations that will be exposed to helicopter flights under the proposals and less about the effects those activities will have. The literature concentrates on acute disturbance resulting from close approaches rather than chronic effects of increased traffic. Even in the case of acute disturbance little information is specific to population level effects.

However, it is also clear that little or no knowledge will be gained regarding the impacts of helicopter flights on mountain goats unless such flights are conducted. Only in the event that routine overflights are undertaken will researchers be able to assess the long-term impacts of continuous and concentrated helicopter activity in mountain goat-populated regions of the Haines/Skagway area.

As part of permitting such activity, BLM made a commitment to monitor any impacts 10/ and reserved the authority to make adjustments in authorized use should it detect any adverse effects on mountain goats and other wildlife as a result of such use. (ROD at 2.) The mitigating measures adopted by the District Manager specifically instruct BLM to

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10/ Haines objects to the participation of TEMSCO and LAB flight crews in monitoring activities, asserting that they are neither qualified nor in a position (given their flight duties) to properly participate. See Haines SOR at 8. We note that TEMSCO and LAB will be requested only to report annually all sightings of mountain goats, including their numbers, location, and behavior. See Mitigation Measures at 2. The Bureau, however, will not rely entirely on such efforts. It is clear that there will also be ongoing monitoring by BLM and State personnel concerning the impacts of helicopter flights on mountain goats. See Mitigation Measures at 2.

> [j]ointly develop a monitoring plan with the [ADF&G] to monitor wildlife, particularly mountain goats for habitat use area fidelity, population productivity, stability of numbers and habitat occupancy, distribution in and adjacent to the affected areas annually for the first three years, [and] every three years thereafter. Appropriate changes in operations will be coordinated with operators and may include a wide range of options (For example: rotational use of glacier landing sites as necessary to achieve occupation of available habitat goals).

(Mitigation Measures at 2.) In addition, the number of authorized landings will increase each year, thus permitting adjustments to be made before the maximum level of utilization is reached. The State has endorsed such an approach. See May 15, 1995, Letter to Forest Supervisor, Tongass National Forest, Forest Service, from Regional Supervisor, Division of Wildlife Conservation, ADF&G, at 2. We generally find no fault with it. See 40 C.F.R. § 1505.2(c); Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 993, 994 (9th Cir. 1993); Town of Norfolk v. EPA, 761 F. Supp. 867, 889 (D. Mass. 1991), aff'd, 960 F.2d 143 (1st Cir. 1992); Red Thunder, Inc., 124 IBLA 267, 279 (1992).

Nor is there any evidence that monitoring will not be adequate to detect adverse effects on mountain goats, or that BLM will not make appropriate and timely adjustments in authorized use in response thereto. Appellants contend that, before permitting helicopter overflights, BLM must collect baseline data regarding the numbers and distribution of mountain goats since the flights will somehow skew the data. Even accepting that BLM does not have comprehensive baseline data, we are not persuaded that BLM cannot simultaneously assess the presence of mountain goats in the Haines/Skagway area and the resulting impacts of overflights since they are expected to become apparent only over time.

Lynn further contends that BLM failed to analyze the site-specific impacts on people of increased noise as a result of helicopter operations in the Haines/Skagway area, given the essential quietude of the area and its unique acoustic terrain. See SOR at 4-5. We note that BLM relied in part on a study of the impact of such noise on people in Juneau, Alaska, given the ambient background noise. See EA at 3-2. There is no evidence that BLM determined the level of ambient noise in the Haines/Skagway area. However, it was clearly recognized to be generally quiet. Also, BLM was well aware of the amount of noise emitted by the helicopters that would likely be used by TEMSCO and LAB. See EA at 3-2 to 3-3. Thus, BLM could properly assess the particular effect of the noise from helicopters in that area.

The true impact will only become apparent once the current plan is implemented, and BLM has provided for monitoring the impact to residents and recreationists in the area and for making adjustments (where warranted) in flights paths and landing site use in response thereto. See EA at 2-2; ROD at 2; Mitigation Measures at 2.

Referring to several studies dealing with noise annoyance, the EA notes that, in a 1989 sound survey taken in the Skagway area, it was found that the "loudness level" of the White Pass & Yukon Train whistle, as well as that of the Fairweather cruise ship when docking, was higher than that of a Hughes 500 helicopter taking off. As of the time the EA was prepared, TEMSCO was using A-Star helicopters, shown by a 1989 noise study conducted by TEMSCO to have noise and sound pitch levels "far less irritating to the human ear" than the Hughes 500 helicopter. (EA at 3-2, 3-3.) Under Alternative D, the noise impact to residents of Haines would be mitigated because of restricted landing times, reduced number of landings, and prohibition on flights on weekends. Also, limiting the requested number of landings on the Norse Glacier would reduce noise impacts to the residential area of Dyea as well as to recreationists. (EA at 3-3 through 3-11.)

Appellants postulate that there will be a significant impact to mountain goats and other wildlife because overflights may temporarily or permanently displace individuals or groups of animals to less desirable habitat, disrupt their foraging and reproductive activity, and otherwise stress the animals (thereby increasing the risk of injury and vulnerability to disease and predation). See Haines SOR at 7, 13-16; Lynn SOR at 1, 4; Figdor SOR at 4. BLM recognized that overflights may have one or all of these impacts. See EA at 3-12 to 3-13. Thus, it required that all flights and other operations (including landings) maintain a 1,500-foot horizontal and vertical clearance from all key mountain goat areas, mountain goats, bears, other large mammals, and sensitive bird nesting sites (except when safety and adverse weather conditions dictate otherwise). See EA at 2-2, 3-13, 3-20; ROD at 2; Mitigation Measures at 1. BLM further provided that, wherever possible, the permittees should attempt to increase the clearance. See EA at 2-2; ROD at 2; Mitigation Measures at 1.

Lynn challenges the 1,500-foot minimum clearance on the basis that there is evidence that it should be greater, on the order of about 1 mile. See Lynn SOR at 2. However, the studies on which Lynn relies concerned a continuous disturbance or actual human presence. See EA at 3-12, 3-20. Neither is the situation in the case of overflights. Further, there is support for the clearance adopted by BLM. Studies of helicopter activity in the Grand Canyon National Park have revealed that Rocky Mountain bighorn sheep are not disturbed by aircraft that fly over 1,312 feet overhead, and recommended that flights maintain altitudes of at least 1,312 to 1,640 feet. See EA at 3-13. In the case of landing sites, we note that BLM was well aware of the studies referred to by Lynn, and yet concluded that no significant impact would occur as a result of maintaining only a 1,500-foot clearance when landing and discharging passengers on glaciers. 11/ Lynn has provided no evidence to the contrary.

11/ The Bureau was also aware that a number of the landing sites are very close (from less than 200 feet to 0.6 miles) to goat habitat. See EA at 3-16 to 3-18. However, it is clear that BLM did not regard these as key areas, and thus entitled to the minimum clearance. See EA at 3-21 to 3-22. Appellants have not rebutted this conclusion. In any event, animals must receive minimum clearance when found near the sites.

Also relying on available scientific studies, BLM required that flight paths avoid known mountain goat kidding areas from May 15 through June 15. See EA at 2-2, 3-13, 3-20; ROD at 2; Mitigation Measures at 1. Further, helicopters must not hover, circle, or harass wildlife in any way. See EA at 2-2; ROD at 2; Mitigation Measures at 2. Further, all of the mitigation measures can ultimately be enforced by modification or even cancellation of the use permits in the event of noncompliance.

Appellants further contend that there will be a significant impact in the form of an adverse economic effect on commercial recreational use of lands along the flight paths, because such use depends on a quiet wilderness experience (including kayaking, hunting, hiking, and bicycle touring), so that the local tourist economy will be significantly affected. See Haines SOR at 10-11; Lynn SOR at 6. Appellants also assert that there will be a significant impact to the quality of life in the Haines/Skagway area that similarly values quietude. 12/ See Haines SOR at 11-12; Lynn SOR at 6.

In view of the record herein, Haines' characterization of itself on appeal as a "rural, residential community" is not entirely accurate. A substantial "commercial" element predates BLM's action here, given that Haines is a port of call for cruise ships, and is plainly increasing, as an additional docking facility is contemplated. There are also commercial enterprises offered by those engaged in providing other recreational opportunities, such as hiking, kayaking, wilderness tours, etc.

BLM considered the impact of approved helicopter glacier landing tours on residential and recreational use under all of the alternatives. See EA at 3-3 to 3-11. Appellants have failed to identify any deficiencies in

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12/ Haines also argues that BLM should have considered the physiological impact on humans of increased noise from helicopter flights associated with the permitted glacier landing tours. See SOR at 16-17. There is no evidence that the flights will have such an impact. BLM is not required to consider remote and highly speculative impacts. See Trout Unlimited v. Morton, 509 F.2d 1276, 1283-84 (9th Cir. 1974).

Haines is also concerned that BLM failed to consider the possibility that the community will be financially burdened or held liable in the event of helicopter accidents. See SOR at 17. Again, there is no evidence that this will occur. The permit itself (Form 8370-1 (Nov. 1992)) dictates that the holder of the permit is responsible for any damage caused and must "indemnify, defend, and hold harmless the United States and/or its agencies and representatives." The SRUP is also subject to special stipulations, one of which relates to insurance coverage. Minimum amounts of general liability, bodily injury, and property damage are specified. Thus, the risks of accidents are carried by the operator's insurance company, and present no special burden for the community since the permittees are required to carry adequate insurance to protect the public. See 43 C.F.R. § 8372.5(d).

that analysis. 13/ It is clear that helicopter flights by TEMSCO and LAB will not fly over residential areas of Skagway, Haines, or Dyea (which is situated up the Taiya Inlet from Skagway). See EA at 3-4, 3-5. Also, it must be noted that it is virtually impossible to determine whether future recreational use in the surrounding areas will be deterred by helicopter flights, since that impact is largely subjective. That will only become apparent when the current plan is implemented. In this case, BLM has provided for monitoring the impact to recreationists, and making adjustments in authorized use where warranted. See EA at 2-2; ROD at 2; Mitigation Measures at 2. Appellants have presented no evidence that there are likely to be any significant impacts to individual businesses, the local tourist economy, or the overall quality of life in the Haines/Skagway area. It is not sufficient to point to the fact that certain businesses expect a significant impact or even a sizeable segment of the population simply objects to the BLM action.

Appellants further contend that BLM failed to consider reasonable alternatives to the proposed action by not considering alternatives that avoid or minimize impacts to residents, recreationists, and wildlife. See Haines SOR at 8-9; Lynn SOR at 9; Figdor SOR at 1. 14/

The Bureau considered alternatives at either end of the spectrum of potential impacts to residents, recreationists, and wildlife (No Action and Proposed Action). This was sufficient to provide BLM with an assessment of all of the likely impacts from proceeding with either the proposed action or any lesser alternative, and thus comported with NEPA. See In Re Blackeye Again Timber Sale, 98 IBLA 108, 111-12 (1987), and cases cited therein. We are not persuaded that, following preparation of the EA, the District Manager was not in a position to adopt one of the alternatives specifically analyzed or any other reasonable modification thereof, with

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13/ Haines has set forth what it believes will be the daily cumulative impact from helicopters tours, given the expected number of flights per hour during the course of most days during the operating season. See Haines SOR at 12. It states there will be 3.5 flights each hour from 8 to 9 a.m., 6.1 flights each hour from 9 a.m. to 4 p.m., and 3.5 flights each hour from 4 to 7:30 p.m. This translates to about 58 flights each day. According to the record, the maximum total number of daily flights out of Haines will reach only 30 in 1999. See EA at 2-12.

14/ Appellants also contend that BLM improperly considered the No Action alternative because it erroneously assumed that impacts would be the same as under the Proposed Action since helicopter glacier sightseeing tours would proceed at the same level as helicopter glacier landing tours. See Haines SOR at 9; Lynn SOR at 8-9. It is true that BLM stated that the number of flights would be the same whether or not glacier landings were permitted. See EA at 3-4, 3-20. However, this was not unqualified. See EA at 2-4 ("[T]hese helicopter tours may still occur even if no landings are authorized," (emphasis added).) BLM was also aware that the number of flights might be less, thus minimizing any impacts. See EA at 3-4, 3-20.

a complete understanding of the impacts that might occur from doing so. For instance, we have no doubt that he could, with full knowledge of the environmental consequences, have decided to curtail or delete landings at any of the glaciers, thus eliminating the use of particular flight routes. That he chose not to do so does not undermine the adequacy of the EA. In the end, BLM fully complied with the dictate of the court in Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972), that, before deciding to go forward, it have "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."

We, therefore, conclude that BLM has taken a hard look at the environmental consequences of permitting glacier landings on public land, including the particular impacts of associated helicopter flights over surrounding land, and properly concluded that there will be no significant impact requiring preparation of an EIS. Appellants have failed to persuade us to the contrary.

We also reject Haines' argument that BLM did not provide adequate opportunity for public participation. Under the heading "Scoping," the EA lists the efforts made by FS and BLM to encourage public participation. (EA at 1-6, 1-7.) Thus, 167 letters were mailed to individuals, organizations, and agencies. Forty-two people attended an "open house" meeting held in Haines on February 2, 1995. A second "open house" meeting was held on March 23, 1995, in Skagway, with 21 people attending. The agencies received a total of 99 letters, 25 phone calls, and 2 office visits in response to their request for public input. (EA at 1-7.) The file before us contains a binder of public correspondence and responses approximately 2 inches thick. A public comment period was advertised in local newspapers and comments were solicited. The file also includes numerous newspaper articles, evidencing vigorous public participation and enthusiastic debate allowing BLM and USFS to target and assess areas of public concern.

In a letter of April 11, 1995, to the Honorable Jerry Mackie, House of Representatives, USFS District Ranger Kenneth E. Mitchell explained that he did not conduct a large formal public hearing because "[m]ost people are more comfortable in small, more productive group discussions." The District Ranger explained that "public hearings are a very poor technique for obtaining public input because they are confrontational" and "do not allow for one-to-one informal feedback." The District Ranger noted that the FS experience had shown that written comments and informal dialogue were much more effective scoping techniques than large formal hearings.

There is no regulatory requirement to conduct a formal public hearing during the scoping process. See 40 C.F.R. § 1501.7. BLM's involvement of the public in this matter via informal meetings met all relevant legal requirements.

Further, BLM, together with USFS, clearly provided ample opportunity for public input into the decision to permit helicopter glacier landing

tours. See EA at 1-6 to 1-7. However, all of this was prior to preparation of the EA, and BLM did not provide a copy of a draft or final EA to interested members of the public and solicit comments for a specified period of time, prior to issuing its ROD. We know of no specific statutory or regulatory requirement that it do so. Still, BLM failed, without any apparent justification, to provide a full measure of public participation in the environmental review process, as generally required by NEPA. See Southern Utah Wilderness Alliance, 122 IBLA 334, 341-42 (1992). However, in view of the effort made to solicit public input (as well as the response thereto) before preparation of the EA, we hold that this failure was not fatal. 15/ Moreover, BLM's May 1995 ROD was widely distributed, and interested members of the public have had an opportunity to dispute it before the Board. This satisfied due process requirements. See Richard S. Gregory, 96 IBLA 256, 258 (1987); Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986).

To the extent that Appellants have raised other objections to the District Manager's May 1995 ROD, they have been considered and rejected.

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

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David L. Hughes
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge

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15/ Lynn specifically notes that BLM improperly included two glacier destinations (Chilkat and Grand Canyon) after it had completed the public review process. See SOR at 10. Landings by TEMSCO had been authorized on these glaciers under its 1994 SRUP. See EA at 1-2. We accept the fact that BLM inadvertently failed to notify the public that TEMSCO desired to continue this authorization in its 5-year permit. See EA at 1-5; "Casefile Report," dated Feb. 27, 1995. That inclusion did not affect the total level of proposed use of which the public had already been informed. See EA at 1-5. In any event, the public was duly notified of inclusion in the EA and subsequent ROD, and has been able to object ever since.