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Decision of the Deputy Regional Forester
In Response to Appeals of the Merits of
the Forest Supervisor's September 29,
1986, Decision to Approve a Modified
Operating Plan for Energy Fuels Nuclear's
(EFN) Canyon Mine.

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I. INTRODUCTION

As Deputy Regional Forester for Resources in the Southwestern Region and as Reviewing Officer, I have reviewed the entire administrative record and this is my decision under 36 CFR 211.18, regarding administrative appeals filed by recognized appellants on the merits of Forest Supervisor Leonard A. Lindquist's September 29, 1986, decision to approve a modified operating plan for EFN's Canyon Mine on the Kaibab National Forest. This modified operating plan [Alternative 5 in the Environmental Impact Statement (EIS)] is a modification of the original operating plan (Alternative 2) submitted by EFN. Appeals from the listed individuals and/or groups have been consolidated due to the similarities of the issues involved and relief sought. Appellants appeal the decision on the basis of issues raised pertaining to legal requirements, National Environmental Policy Act (NEPA) process and environmental impacts. EFN has intervened in the appeal process. This decision applies to all recognized appellants and the intervenor.

II. RELIEF SOUGHT

Most of the administrative appeals on the merits of the Supervisor's decision seek similar relief: to reverse the decision which approved a modified plan of operation for the Canyon Mine. As I will discuss, other appellants have taken issue with the adequacy of the environmental analysis, the chosen alternative, or other specific issues which were considered when the Forest Supervisor's decision was made.

III. BACKGROUND

The proposed mine site is located on three unpatented mining claims owned by EFN on the Kaibab National Forest. Exploratory drilling on these claims began in 1978 and recently confirmed the presence of a high quality deposit of uranium ore. In accordance with 36 CFR 228.4, EFN submitted a proposed plan of operations to the Forest Service for the Canyon Mine in October 1984, to develop and produce this deposit. In September 1986, following preparation of an EIS analyzing the environmental consequences of the proposal, Supervisor Lindquist approved a modified plan of operations. That decision was the subject of various administrative appeals and procedural requests for stay. Requests for stay resulted in my issuing a stay decision on November 21, 1986, which allowed continuing surface development at the mine site, while preventing sinking of a shaft or actual mining, while the appeals on the merits were being decided. The Chief of the Forest Service upheld my stay decision on appeal, issuing his own procedural decision on May 4, 1987. Appeals on the merits remain and are the subject of this decision.

A. Summary of events, actions

October 1984	EFN submitted proposed plan of operations to Forest Supervisor for Canyon Mine.
December 1984 - February 1985	Forest Supervisor review of proposal and beginning of public input.
February 28, 1986	DEIS submitted to EPA and public.
September 29, 1986	FEIS and Supervisor's record of decision submitted to EPA and public.

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November 10, 1986 EFN began surface development of Canyon Mine Site under a modified operating plan.

October 1986 -
November 1986 Twelve administrative appeals and five requests for stay were received on the FEIS/decision.

November 21, 1986 Deputy Regional Forester (DRF) issued a Decision granting a partial stay (of actual mining activities) at the Canyon Mine site.

January 30, 1987 DRF prepared a responsive statement and recommendation to the Chief in response to procedural appeals of his partial stay decision.

February 17, 1987 Forest Supervisor Lindquist prepared a responsive statement on the administrative appeals on his Decision, and transmitted it to the Regional Forester (RF) and the public.

February 25, 1987 Oral presentation before Mr. David G. Unger, representing the Chief of the Forest Service, by several appellants and intervenor (stay appeals to Chief).

May 4, 1987 Decision by Mr. Unger for the Chief, affirming the DRF's November 21, 1986, partial stay decision.

May 14, 1987 Oral presentation before Mr. David F. Jolly, DRF, by several appellants and intervenor.

June 18, 1987 Appeal record was closed.

IV. SCOPE

This decision will deal with the entire spectrum of issues raised by all appellants in the administrative (merits) appeals. For the sake of simplicity, different issues have been categorized into groups for easier reference, discussion, and comment. The format for discussion of issues is detailed in section VI. B. on p. 6.

Intervenor, EFN, has participated extensively, throughout the appeals process, by responding to and commenting on the various issues discussed by appellants. They have also offered independent submissions at the oral presentations. Because of the general support they have offered to the positions expressed by the Forest Supervisor in his responsive statement, and for the sake of brevity, I have chosen not to reiterate their position on each individual issue. These are readily available throughout the record.

The record regarding the present appeals has been extensively supplemented since the Forest Supervisor prepared his responsive statement of February 17, 1987. This decision is based on my review and consideration of the complete administrative record, including additional documents submitted for the record by appellants and the intervenor prior to closing the record on June 18, 1987.

In addition to conventional supplemental written documentation, an oral presentation was held before me on May 14, 1987, for the purpose of providing

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view points and information to clarify the record pertaining to various appeal issues. As a result of the oral presentation, a complete transcript was independently prepared and was submitted by Ms. Margaret J. Vick for Sparks and Siler, P.C., representing the Havasupai Tribe. The transcript became a part of the record which I reviewed. Written summaries of comments on the transcript and comments on the written summaries also became part of the record.

V. APPELLANTS/INTERVENOR/ISSUES

The following is a listing of recognized appellants who appealed the merits of the Forest Supervisor's decision of September 29, 1986:

<u>APPELLANT</u>	<u>APPEAL ISSUES</u>	<u>STAY ISSUES</u>
Ian Root	C, E	N/A
AZ Wildlife Federation	F, I, J, P, R, B	N/A
Tonantzin Land Institute Notice of Appeal Statement of Reasons	A, B, C, D, K, L, O, P, W	"The proposed mining must not begun until a full hearing of important issues presented by this case." B, C, E, W
Canyon Under Siege	F	N/A
Sierra Club Legal Defense Fund & Rev. Garrison Lee Notice of Appeal Statement of Reasons	F, G, H, I, K, M	N/A
Havasupai Tribe, J. Sparks attorney	A, B, C, F, H, I, K, N, O, Q, T, U, V, Y B, C, K	Requests a stay of ". . . all mining and exploration activity at this site" A, B, C, K
Mahoney/Hogan	J, S, Y	".. .that all activity . . . be stayed until a final decision is reached. . . ."
Friends of the River	A, E, F, G, H, K, L, X	". . . requests a stay of the decision and of development at the site pending all appeals" A, E, F, G, H, K, L, & X
Hopi Tribe, O'Connell	C, D, H, I, R	N/A
McDowell/Hansen	E (Withdrawn 2/1/87)	N/A
Bradford Cheff	E, Y	N/A

VI. REVIEW

A. Basis--My review of the administrative appeals filed by the appellants is based on the complete administrative record which includes the

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appeals and statements of reason filed by appellants, the responsive statement submitted by the Forest Supervisor, the oral presentations of February 25, 1987, and May 14, 1987, and written summaries offered by appellants and intervenor, and various supplemental information offered by appellants and intervenor before the appeal record was closed on June 18, 1987.

B. Organization of issues--A thorough analysis of the appeals issues revealed substantial repetition of contentions and allegations by the appellants. As a result, twenty-five subject areas of appeal were identified and summarized by the Forest Supervisor in his responsive statement. I have chosen to adopt that list of subject (appeal issue) areas, but have further organized the list into the following major categories:

<u>Legal</u>	<u>NEPA Process</u>	<u>Environmental</u>	<u>Other</u>
B. Compliance with the Native American Religious Freedom Act	I. Procedural Deficiencies	A. Ground Water	O. Impacts on Havasupai Tribal Economy
C. Religious Rights Guaranteed Under the First Amendment	F. Cumulative Impact Analysis is Deficient and a Regional Programmatic EIS is Required	K. Surface Water	L. Holding Ponds
N. Violation of Grand Canyon Enlargement Act	D. Cumulative Analysis of Impacts on Native American Beliefs and Practices	M. Selenium	U. Disposal of Waste
T. Fiduciary Responsibilities	G. Valuable Mineral Test	V. Air Quality	J. Wildlife
W. Violations of the Treaty of Guadalupe Hidalgo	H. No Action Alternative	S. Ore Truck Accident Analysis	R. Impacts of the Milling Process
E. Impacts to the Grand Canyon	P. Reclamation Plan and Bonding	Y. Miscellaneous	
Q. Non-Compliance With Other Statutes and Regulations	X. Mitigation Requirements		

C. My Comments--In the following sections I have stated appellants' contentions regarding the subject issue, followed immediately by my comments and conclusions.

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Legal

ISSUE: B. Compliance with the Native American (Indian) Religious Freedom Act (AIRFA)

Appellants contend:

1. that the decision to approve the development and operation of the Canyon Mine is substantively contrary to the American Indian Religious Freedom Act (AIRFA), and that the Forest's environmental analysis, to identify impacts on Native American religious beliefs, was fatally defective, unlawful, and unconstitutional.

2. that the Forest Service had decided, prior to preparing the EIS, that it lacked the authority to deny a plan of operation. Therefore, appellants contend that the Forest Service did not affirmatively seek to identify Native American religious concerns regarding the proposed action.

3. that the Forest Service did not follow its legal mandate to protect the inherent right of access and freedom for American Indians to believe, express, and exercise their traditional religious practices.

4. that comments from tribal members and other pertinent information were ignored or overlooked.

5. that traditional camps and sacred burial sites are located in the proposed mine area and that disclosure of information related to the nature and location of these sites, sought by the Forest Service, would compromise appellant's religious convictions to protect religious beliefs.

COMMENT: The American Indian Religious Freedom Act, and its implementing regulations, require that Federal Agencies consider Native American beliefs and practices in formulation of policy and approval of actions. However, it does not establish Indian religions as having a more favored status than other religions. The Act does not mandate protection of Tribal religious practices to the exclusion of all other courses of action. It does require that Federal actions be evaluated for their impacts on Indian religious beliefs and practices.

I have reviewed the complete administrative record and find that the Forest Supervisor sought Tribal input and review of the operating plan and environmental documents, from the appellants and from the Navajo Tribe, early in the scoping process and Forest Service environmental review. Religious concerns were not raised by appellants until after completion of the DEIS. All of the Tribal comments were responded to and the EIS was substantially revised to reflect the information provided by the Havasupai and Hopi.

The record reflects that the Forest Supervisor and his staff considered and evaluated Native American (Indian) religious beliefs and practices as part of their overall NEPA (environmental) review of the Canyon Mine project. In addition, the record indicates that the environmental documentation contained, or considered, available information on religious beliefs and practices when written. A decision was made on the basis of the information disclosed after adequate opportunity and time was made available. The record clearly displays the Forest's full commitment to and understanding of AIRFA and compliance with the law.

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As part of my review of the record, I have also considered Tribal testimony provided in the oral presentations, written summaries of comments, and in comments on the written summaries.

I continue to have utmost regard and appreciation for a people's religious beliefs and practices and have given serious consideration to all the information relating to this issue, made available to me in the administrative record. However, I conclude that operations at the Canyon Mine site, approved by Supervisor Lindquist in his September 29, 1987, record of decision, do not interfere with continued religious belief and practice in any manner prohibited by AIRFA.

ISSUE: C. Religious Rights Guaranteed Under the First Amendment

Appellants contend:

1. that implementation of the decision would violate rights to free exercise of their religion guaranteed under the First Amendment.

2. that development of the Canyon Mine, at a sacred religious site, would burden Tribal religious beliefs by destroying the Continuum of Life which is central and indispensable to the Havasupai religion.

3. that certain mining-related activities at the Canyon site would burden or prevent Havasupai and Hopi access to religiously significant areas.

4. that the Forest Service cannot properly judge the effect such mining might have on Native American religion. Appellants suggest that new legislation is necessary to prevent or lessen the burden on religious rights from such proposed activity.

COMMENT: The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The United States Supreme Court has interpreted the free exercise clause of the First Amendment as proscribing government action that burdens religious beliefs or practices unless the action serves a compelling government interest that cannot be achieved in a less restrictive manner. The Supreme Court has also held that a person asserting an unconstitutional burden on his free exercise right has the initial burden of proof to establish a burden on his religion. Only if a burden is proven does it become necessary to consider whether the government interest served is compelling.

Appellants have contended, in numerous ways, that the Forest Supervisor's decision to approve a modified plan of operations violates Tribal constitutional rights to the free exercise of their religion as guaranteed by the First Amendment. Nothing in the record on this issue appears to satisfy the appellants' burden of proof to show that development of the Canyon Mine would burden any free exercise rights. Precedent concerning free exercise claims uniformly establishes that Native Americans may consider an area sacred. However, this fact alone is insufficient to characterize a contemplated government (authorized) action affecting such an area, as a burden on Native Americans' free exercise rights. In the same sense, I have not seen any convincing proof that mining activities at the Canyon site will prevent the Tribe's Ritual of Annual Renewal or destroy the Continuum of Life which is claimed as indispensable and central to the Havasupai religion. Moreover, the

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record shows that the Canyon Mine site was disturbed by drilling some 38 exploratory core holes before EFN began its current surface development operations at the mine site. Therefore, while I recognize the general difference between core drilling and shaft sinking, it appears to me that the mine site has already incurred determinative subsurface impacts relative to this issue.

The record supports the Forest Supervisor's conclusion that no Tribal beliefs are penalized by this action. Individual members of the Tribe can continue to express and act on their beliefs without undue governmental interference. The record does not support the contention that identified religious practices will be prohibited. Contrary to appellant's opinion, I am under no obligation to refute any unsupported claims to the contrary.

The Forest Supervisor relied on numerous outside sources in his effort to obtain information on Havasupai religious beliefs and practices as they might apply to the Canyon Mine. In addition to Forest Archeologist Dr. Thomas R. Cartledge (See FEIS at page 5.2), the Forest Supervisor or his staff had extensive conversations with Dr. Robert C. Euler and reviewed numerous articles and publications (Exhibit #7 through 10). The Forest Supervisor discovered a considerable amount of information about the Havasupai which has been gathered and published by anthropologists in recent years, and which is readily available for study. Even though the information gathered by these anthropologists is not always consistent with information provided by the Tribal attorney, I feel it does represent a factual description of the Havasupai social and religious beliefs, notwithstanding the additional information and beliefs recently divulged by the Tribe. The record clearly demonstrates that the Forest Supervisor's judgement of the effects of mining is, therefore, as prudent and reasonable as possible.

I conclude, therefore, that the administrative record does not support any contentions that the Forest Service did not comply with the provisions of the First Amendment of the Constitution nor does it contain information of sufficient specificity to establish the First Amendment claim made by any appellant.

ISSUE: N. Violation of Grand Canyon Enlargement Act

Appellants contend:

1. that contemplated mining activity, including fencing the mine site, as is outlined by EFN in their approved modified operating plan, is contrary to the provisions of both AIRFA and the Grand Canyon Enlargement Act. Appellants also claim that the latter act provides in part that "(n)othing in sections 228a to 228j of this title should be construed to prohibit access by any members of the (Havasupai) tribe to any sacred or religious places or burial grounds, native foods, paints, materials, and medicines located on public lands not otherwise covered in sections 228a and 228j of this title."

2. that the Forest Service did not comply with the Grand Canyon Enlargement Act (16 U.S.C. 228a et seq.) which the appellant states: "guarantees access by any members of the Havasupai Tribe to any sacred or religious places or burial grounds located on public lands" and "requires that nothing detract from the existing scenic, natural and wildlife values of the land."

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COMMENT: The appellant did not provide any physical evidence that the Canyon Mine site has any special significance for the Tribe. General public access is, and will be, only restricted from the 17 acres within the mine yard. The gate, as part of the security fence, will be locked during times of inactivity at the mine site.

The issue of the propriety of constructing a fence at the Canyon Mine site, in light of the cited provisions of the Grand Canyon Enlargement Act, was not specifically raised by the Havasupai Tribe in their appeal on the merits of the Supervisor's decision. It was, however, raised before the Chief as part of the appeal of my stay decision. The administrative record lacks any substantive information on the specific contention other than the reference to AIRFA and the Grand Canyon Enlargement Act. My stay decision did not specifically address the subject, but I foresaw that constructing a fence would be allowed under that decision.

Appellants' second contention, that two sections of the Act require "that nothing detract from the existing scenic, natural and wildlife values of the land", is taken out of context. These sections only limit the uses that the Tribe can make both of the enlarged Reservation lands and those designated as Havasupai Use Lands.

I conclude, therefore, that the Forest Supervisor complied with any applicable provisions of the Act in reaching his decision to approve a modified operating plan for EFN's Canyon Mine and that approved mining activities on National Forest System lands are not contrary to the Act.

ISSUE: T. Fiduciary Responsibilities

Appellants contend:

1. that the United States Government, acting through the Forest Service, has not met its fiduciary responsibilities by approving the plan of operations.
2. that permitting the alleged deleterious activities on Federal lands adjacent to the Grand Canyon National Park and Havasupai Reservation frustrate the intent of Congress for establishing the Reservation and National Park.
3. that continuation of these activities will have a severe, detrimental, and irreversible impact on the Tribe and its activities.

COMMENT: Federal agencies may have statutorily established fiduciary duties associated with the management of Indian lands and resources. No such duties are at issue here since the lands embraced within EFN's mining claims are National Forest System lands, not Indian lands. There is nothing in the record to support the appellants' contention that the development and operation of the Canyon Mine on National Forest System land will have a deleterious effect on the Reservation or Park.

On review of the record, I have concluded that the Forest Supervisor recognized the limits of Federal fiduciary duties to Indians and properly considered the Federal role when he made his decision to approve the modified operating plan.

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ISSUE: W. Violations of the Treaty of Guadalupe Hidalgo

Appellants contend:

1. that implementation of the mining project would violate rights (trust responsibility) guaranteed by the Treaty of Guadalupe Hidalgo which they claim is a guarantee of protection of the "free exercise of their religion without restriction."

COMMENT: The appellant alleges that the Treaty of Guadalupe Hidalgo creates some special rights or trust obligations which have been violated by the Forest Service in the present circumstance. In fact, the Treaty on Peace, Friendship, Limits, and Settlement, February 2, 1848, United States-Mexico. 9 Stat. 922, T.S. No. 201 ("Treaty of Guadalupe Hidalgo") has no application here. The Treaty was an interim provision to protect the religious freedom of Mexican citizens in the ceded territory during the interim period between the Treaty and Statehood. At the time of the Treaty, the affected peoples were to receive the "enjoyment of all the rights of citizens of the United States according to the principles of the Constitution," and upon Statehood, the interim provisions were to lapse. Arizona was admitted as a State on February 14, 1912. Accordingly, all claims the inhabitants of Arizona have to religious freedom after 1912, fall under the protections guaranteed by the Constitution of the United States instead of under provisions of the Treaty.

There is nothing in the administrative record which convinces me the appellant should have any special rights as a result of the Treaty of Guadalupe Hidalgo and I conclude that the Forest Supervisor properly recognized that fact when he reached his decision.

ISSUE: E. Impacts to the Grand Canyon

Appellants contend:

1. that the Forest Service did not address the concern that the Canyon Mine would have impacts upon and within the Grand Canyon National Park. Appellants further allege that the potential impacts of the mining proposal have been "de-emphasized", and cite the incursion of roadbuilding activities and the access patterns thus created, which geometrically increase archeological vandalism and big game disruption in former pristine areas in support of their allegation.

2. that the environmental hazards posed by mining in this biologically, hydrologically and culturally sensitive area are too great to justify approval.

COMMENT: Potential impacts to the Grand Canyon were identified as a major concern in the initial scoping process. The Forest Supervisor's responsive statement (pp. 35-37) contains a detailed response to this concern and cites numerous references in the final Environmental Impact Statement where this issue is analyzed. I find his analysis to be complete and agree with his conclusions that the impacts of the proposal are expected to be small, localized near the mine site and should pose no threat to the Grand Canyon or the National Park .

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ISSUE: Q. Non-compliance with Other Statutes and Regulations

Appellants contend:

1. that the (modified) plan of operations for the Canyon Mine does not comply with the requirements of the Clean Water Act, the Atomic Energy Act, the Clean Air Act, the laws and regulations regarding mining, storing, and transporting hazardous materials, the Arizona Environmental Quality Act, and the special protection to be given to the Indians from hazards associated with uranium, pursuant to 25 U.S.C.A. S. 1676.

2. that the Draft EIS omits whether Energy Fuels Nuclear has obtained the required licenses from the NRC for the operation of the mine, the milling of the uranium ores, the transportation of the ore and the reclamation of the mine site.

3. that the Forest Service must insist upon these federal and state licenses prior to approving any activities on the site.

COMMENT: The FEIS at pages 1.10-1.12 and 2.22-2.24 identifies the legal and regulatory requirements that will be imposed by Federal and State law as part of the development of the Canyon Mine.

The approved modified operating plan requires that all Federal and State licenses will be obtained prior to initiation of the specific activity requiring the license at the mine. Specific lists of permits and approvals required are listed in the FEIS at 1.10-1.12.

From the record, I conclude that the Forest Supervisor gave proper consideration to the requirements of other statutes and regulations in reaching his decision.

NEPA Process

ISSUE: I. Procedural deficiencies.

Appellants contend:

1. that the Forest Service ignored or did not require compliance with certain regulatory and procedural requirements.

2. that the Forest Service did not consult with entities having knowledge and expertise regarding radioactive materials.

3. that the FEIS does not comply with CEQ's regulation dealing with missing or unavailable information.

4. that DEIS appendix material should be included in the FEIS.

COMMENT: The Forest Supervisor's responsive statement is a thorough and accurate reply to appellant's contentions. I agree with his statements and conclude that he followed the proper procedures in reaching his decision to approve the modified operating plan for the Canyon Mine. He was well aware of the fact that EFN could apply for and receive a patent to the mine site at any time thereby making moot the requirement for Forest Service approval of an operating plan.

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ISSUES: F. Cumulative Impact Analysis is Deficient and a Regional Programmatic EIS is Required

Appellants contend:

1. that the Forest Service has not adequately considered the potential cumulative impacts of the Canyon Mine with respect to both potential (now undeveloped) mines, and existing uranium mines located on lands administered by the Bureau of Land Management, Department of Interior, on the north side of the Grand Canyon. Appellants are requesting that a "regional or programmatic EIS" be completed which evaluates the cumulative impacts of uranium mining on both sides of the Grand Canyon and on the Canyon itself.

COMMENT: The Forest Supervisor completed a thorough and accurately responsive discussion on the subject issues, beginning on page 39 of his responsive statement. The final EIS did estimate those cumulative effects that were not speculative and conjectural. During my review of the complete administrative record, I did not uncover any new information related to this contention, beyond that considered by the Forest Supervisor.

However, it has recently come to my attention that on March 10, 1987, the Interior Board of Land Appeals (IBLA) handed down a decision on an appeal by Southwest Resource Council, of a decision of the District Manager, Arizona Strip District, BLM, which approved a plan of operations for EFN's Pinenut Project (96 IBLA 86-1217). I elected to add this information to the official record because of its application to this issue. A copy of pertinent documents is attached to this decision.

In its decision, IBLA referred to a district court summary of the United States Supreme Court holding that regional environmental impact statements are required in two and only two instances: (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 a Region. The IBLA decision went on to state: ". . . nor has the appellant shown that various Federal actions have had cumulative or synergistic environmental impacts on the region." The IBLA agrees with BLM's conclusion that a regional EIS is not now required. Based on reasonably foreseen future (development) impacts, BLM concluded, as did the Forest Service in the instant case, that, in the absence of any conclusive indication as to the locations of future mines, it is, and would be, totally speculative and conjectural to estimate the impacts from such mines.

Based on a lack of supportive information in the record, I conclude that the Forest Supervisor reached a correct conclusion in deciding not to conduct a regional EIS to assess (speculative) cumulative impacts.

ISSUE: D. Cumulative analysis of Impacts on Native American Beliefs and Practices

Appellants contend:

1. that the EIS both misstated aspects of Native American religious beliefs and did not consider the impacts of various mining and non-mining management activities on Native American religious beliefs. Specifically, they

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claim that the Canyon Mine EIS does not cumulatively analyze the interrelated impacts of several different recent Forest Service actions.

COMMENT: Potential cumulative impacts on Native American religious beliefs and practices were addressed in the EIS at page 4.44. The impacts at Bill Williams Mountain and the San Francisco Peaks are acknowledged on pages 3.59 and 9.6 of the EIS, which incorporates the discussion of those impacts, in the respective NEPA documents, by reference.

I have carefully reviewed the entire record concerning this issue. I greatly appreciated the oral presentations by Tribal leaders which went into more detail concerning their religious beliefs than they had previously. However, I conclude that operations at the Canyon Mine site, approved by Supervisor Lindquist in his September 29, 1986, record of decision, are not prohibited even though they constitute one more new use which impacts the general environment of the area and detracts from the area's religious significance to Tribal members. Moreover, as previously noted, the Forest Service is not required to protect Native American religious practices and beliefs to the exclusion of all other land uses, nor does AIRFA require that a cumulative effect analysis be done for individual project proposals.

ISSUE: G. Valuable Mineral (Validity) Test

Appellants contend:

1. that the Forest Service must initiate or require an economic analysis to determine whether a "valuable mineral deposit" exists within the meaning of the mining laws, and to determine whether the mining venture will likely be profitable enough to cover the costs of reclamation and mitigation.

COMMENT: In order to fulfill Forest Service responsibilities with regard to the Canyon Mine plan of operations, it was neither necessary nor appropriate for the Forest Supervisor to initiate or require a factual determination of the existence of a "valuable mineral deposit." However, the record does contain substantial economic and other evidence to support an opinion that the Canyon Mine deposit is a "valuable mineral deposit" within the meaning of the mining law. The record also supports the Forest Supervisor, who certainly was aware of reclamation costs and mitigation measures, in his recognition that "the claimant has shown substantial evidence that a successful mining operation can be developed."

Even if one granted the appellant's contention that the deposit does not currently meet an economic test of discovery, (i.e., prior to conducting the operations), one should not conclude that mining operations are not authorized under the mining laws. On the contrary, on Federal land, open to mineral entry, the mining laws allow for such operations in the pursuit of discovery of a "valuable mineral deposit." The mining claimant may conduct a wide range of exploration, development, and production operations in order to demonstrate a discovery of a "valuable mineral deposit." Implementation of the modified version of EFN's plan of operations would provide evidence (such as marketability and bona fide development) to demonstrate a discovery of a "valuable mineral deposit."

In any case, whether or not a "valuable mineral deposit" exists, the Forest Service's 36 CFR 228A regulations require that mining claimants conduct operations so as to minimize adverse environmental impacts. It is these

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regulations (and not the mining laws or validity tests) which provide the Forest Service authority and procedures to insure proper reclamation and mitigation. Mining claimants, whether or not they make a profit, must comply with Forest Service regulations for reclamation and mitigation. The Forest Supervisor's record of decision (ROD) provides that EFN post a reclamation bond before mining activities begin. The ROD also provides for numerous mitigation measures which will be monitored and enforced through existing Federal as well as State and local jurisdictions.

ISSUE: H. No Action Alternative

Appellants contend that:

1. the analysis of the no action alternative is not adequate.
2. additional alternatives that would effectively result in denial of the proposed mine should have been considered in the EIS.
3. the Forest Service did not recognize, and act on, their ability to implement the no action alternative.

COMMENT: In regard to the first contention, analysis of the record shows that the no action alternative was one of the five alternatives considered in detail in the EIS. This no action alternative was defined in the EIS as a "baseline alternative" defining the current situation against which all other alternatives would be compared. In addition, the Forest Supervisor's responsive statement (p. 46, 47) summarizes the careful and detailed consideration given to the no action alternative. I conclude that the environmental analysis of the no action alternative was appropriate and adequate.

In regard to the second contention, the record shows that other no action alternatives were considered, but then eliminated from detailed consideration. For an adequate environmental analysis and compliance with NEPA, only one no action alternative need be considered in detail.

Moreover, the record shows that the Forest Supervisor did consider the No action alternatives suggested by appellants (such as contesting the mining claims or seeking mineral withdrawals) and properly decided not to include them as alternatives considered in detail. Review of the record supports the Forest Supervisor's conclusion (responsive statement p. 45) that "the claimant has shown substantial evidence that a successful mining operation can be developed. The record, in this case, supports the Forest Supervisor's decision not to consider in detail the alternatives of mining claim contest or mineral withdrawal. He had sufficient supporting evidence for his conclusion that these alternatives would not invalidate the claims or result in denial of the proposed mine. In addition, a contest or withdrawal action regarding existing claims is an action of unknown outcome (claims may be valid or invalid) and therefore, would be an ineffective and indeterminate no action alternative.

In regard to the last contention, the EIS description of the no action alternative begins by recognizing and describing the general procedures the Forest Service would use to implement the no action alternative:

"The no action alternative, for the purposes of this environmental evaluation, would involve disapproval of the plan of operations for the Canyon Mine

project. The plan would be returned stating the reasons for disapproval and requesting that the proponent submit a new plan that would meet the environmental and administrative constraints." (FEIS p. 3.15).

At this point the EIS might have described potential situations in which the Forest Supervisor would disapprove unreasonable plans of operations. Instead, the EIS was written to describe the actual situation in which the environmental analysis of the Canyon Mine showed that a reasonable plan of operation was available as an action alternative.

Therefore, when documenting the analysis, it was appropriate to point out that the Forest Service does not have the authority to disapprove a reasonable operating plan. This point simply recognizes that if a plan of operations has been reviewed by an environmental analysis, has incorporated appropriate mitigation measures, and otherwise complies with Federal laws, then the Forest Service does not have a basis on which to disapprove it.

Therefore, I would like to clarify one point which the EIS implies but does not state directly. The Forest Service does have the authority to disapprove unreasonable plans of operations and, thereby, to implement a no action alternative. If all, or portions, of a plan of operations do not contain reasonable requirements for surface resource protection, and the operator is unwilling or unable to make the necessary changes, then the Forest Service has the authority to disapprove all, or portions, of the plan. The operator may submit other plans of operation for Forest Supervisor review; but he is not obligated to approve any of these plans if they do not contain reasonable requirements for surface resource protection. In such circumstances, operations would be effectively denied by virtue of the Forest Supervisor's decision not to approve original or subsequent plans of operation. The FEIS (p. 2.12) recognizes that open pit mining of the Canyon deposit, which occurs at a depth below 900', is not considered a reasonable alternative. The reason being, in part, because it would create unreasonable surface disturbance and environmental impacts. From my review of the record, I am satisfied that the Forest Supervisor recognized his authority to choose a no action alternative.

ISSUE: P. Reclamation Plan and Bonding

Appellant contends:

1. that the FEIS supporting the Supervisor's decision did not provide for adequate project reclamation and bonding.

COMMENT: Forest Service regulations (36 CFR 228.13) authorize (but do not require) reclamation bonding as a means of ensuring compliance with a reclamation plan. The amount of the bond is discretionary with the authorized Forest Officer.

The Forest Supervisor's responsive statement on P. 64-65 is a thorough and accurate reply to appellant's contentions. I agree with the Supervisor's statements and conclude that the EIS and decision to approve a modified operating Plan for the Canyon Mine adequately deal with reclamation and bonding.

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ISSUE: X. Mitigation Requirements

Appellants contend:

1. that mining-related activities have and will continue to place stress on species and habitat and that mitigation should begin as soon as possible. New meadow construction would not be responsive to needs.

COMMENT: Appellant's points are valid. The fact that wildlife populations have been displaced by ongoing activities without concurrent replacement of habitat could likely depress those populations since important habitat elements are no longer immediately available to them. I will direct the Forest Supervisor to seek ways to enhance existing meadow environments first, rather than concentrating on development of entirely new meadows.

2. that new or revamped meadow systems need to be compatible with species needs.

COMMENT: Appellant contends that "This type of meadow system cannot be adequately replaced or duplicated." The Forest plans to mitigate the loss by creating a replacement meadow. I will direct the Supervisor to consider alternative mitigation or compensation by enhancing other natural meadows in the project vicinity. This may be done by closing or obliterating roads through existing meadows subject to disturbance, seeding desirable food plants, and developing additional waters (dug tanks).

3. that replacement habitat through mitigation should be made available to affected species during construction/mining and not wait until through.

COMMENT: I believe appellant's point is valid. Replacement habitat to mitigate losses should be improved and made available to wildlife as soon as possible. The current year's productivity has already been lost or depressed as a result of surface disturbance activities within the project area. I will direct the Forest Supervisor to seek ways to expedite wildlife habitat enhancement or replacement which were requirements of the modified operating plan approval.

4. that mitigation measures, ascribed to the approved modified operating plan, are inadequate.

COMMENT: With the exception of my discussion of the above wildlife concerns, I conclude the Forest Supervisor's responsive statement is a thorough and accurate reply to appellant's contentions about inadequate mitigation. He has required appropriate mitigation of impacts from development and mining activities at the Canyon Mine site.

Environmental

ISSUE: A. Groundwater

Appellants contend:

1. that the EIS did not adequately address the effects of the proposed mine on groundwater quality and quantity.

2. that the proposed groundwater monitoring program is ineffective.

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COMMENT: Forest Supervisor Lindquist's Decision was appealed because of concern for the proposed mining effects on groundwater quality and quantity. The Supervisor responded to 19 specific points of appeal concerning groundwater in his responsive statement. The Supervisor and his staff relied heavily on consultation provided by the firm of Errol L. Montgomery and Associates, Inc. The Montgomery firm is a professional association of geologists, engineers, and hydrogeologists with considerable experience in Northern Arizona and, particularly, the area around the Grand Canyon. In addition, the Forest employed Mr. Jesse Thompson, a consulting hydrologist, to coordinate preparation of the FEIS.

Montgomery's analysis of the regional hydrogeology includes the review of five pertinent publications and the study of more than 150 pertinent wells and exploration bore holes in the proposed mine area. The publication and the well locations are listed in the EIS appendix. The conclusion, drawn by the Supervisor from the consultation provided by Montgomery, is that the proposed mining will have little or no impact on the quality and quantity of groundwater. Based on my review of the record, I agree with the Supervisor's conclusion.

Concerns remain about the possible effect of mining on groundwater, that the Supervisor never adequately addressed the concerns, and that the information needed to draw conclusions about groundwater impacts is not complete and lacks scientific integrity.

I understand and share the concerns for the groundwater. I also realize that groundwater hydrology is an extremely complex field. Rarely do managers have the luxury of complete hydrogeologic information. There is, however, no reason for me to find fault with the thoroughness or scientific integrity of the information provided by Montgomery.

Based on the preponderance of information provided by Montgomery, I conclude the level of risk to the groundwater is low, and that mining should not be prevented because of the expressed concern for groundwater.

The Havasupai are also concerned that the monitoring well was placed on the mine site without regard to information contained in the groundwater report.

The probability of needing a monitoring well is low. However, as Montgomery explained in his December 12, 1986, letter to Supervisor Lindquist, if drainage from the mine opening did reach the Redwall-Muav aquifer, the zone of downward percolation would resemble an inverted cone. The monitoring well is located within the basal area of this inverted cone of percolation.

The water monitoring well and mitigation plan for implementation of monitoring, designed for the unlikely event that any substantial quantity of groundwater is encountered percolating downward from the mine opening, are adequate to detect contaminants and prevent any degradation of groundwater. I agree with the conclusions reached by the Supervisor and with his decision as it relates to the groundwater and monitoring issues.

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ISSUES: K. & L. Surface water/holding ponds

Appellants contend:

1. that there was inadequate consideration of surface water (impacts) from proposed mining, reflected in the EIS and supporting the Supervisor's decision.

COMMENT: Included in the points of appeal were concerns for the adequacy of surface water considerations in the EIS. The responsive statement contains discussions addressing eight different points on surface water and holding pond considerations.

Supervisor Lindquist retained the services of Dr. Charles F. Leaf, P.E., in the preparation of the EIS, and further consulted with Dr. Leaf in responding to the points of appeal expressed by the appellants.

The availability and evaluation of complete hydrologic and meteorologic data specific to the mine site continues to be a point of concern for some of the appellants. Again, it is rare for a manager to have complete knowledge of the meteorology and hydrology in an area before making a decision. But the predictions made by Dr. Leaf are based on all the available information, and were derived using standard practices. The determination of design flows was made using two accepted methods. The Roeske method was developed specifically for Arizona.

Reference is made to a November 12, 1986, letter from Patricia Port, the Regional Environmental Officer for the U.S. Department of the Interior. Ms. Port expresses two concerns with the hydrologic analysis. Both concerns are addressed as well in the Forest Supervisor's responsive statement (p. 57).

Since the flood channels and perimeter berms are constructed to prevent water from a 500 year storm from either entering or leaving the mine site, I am satisfied the flood mitigation measures are adequate.

Concerning the transport of contaminated sediment, Dr. Leaf estimates that the effects of both general and local thunderstorms will be diminished by 98%, approximately 13-14 miles downstream. Therefore, in the unlikely event contaminated sediment leaves the site, it can be trapped and removed from the sediment in transit long before it reaches the Havasupai Reservation or the Grand Canyon National Park.

I can find no deficiency in the surface water projections or mitigation measure designs prepared by the Forest Supervisor. There is always some uncertainty associated with decisions involving water resources. However, I conclude that the design methods used are sufficiently conservative to reduce the risk to an acceptable level.

ISSUE: M. Selenium

Appellants contend:

1. that neither the FEIS nor Forest Supervisor's decision adequately considered the possibility of contamination of soils by selenium.

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COMMENT: The points concerning selenium are adequately addressed in the responsive statement (p. 60). Again, the Supervisor sought consultation with an experienced and reputable geochemist to assess the problem potential. Based on the July 15, 1986, report prepared by Mr. Allan R. Reid, Senior Geochemist with the Hantly Group, Ltd., I conclude that background selenium concentrations at the surface will not be adversely affected due to the mining operation, nor, is groundwater likely to be affected by selenium.

ISSUE: U. Disposal of Waste

Appellants contend:

1. that the draft and final Environmental Impact Statements do not adequately address a plan for the safe and permanent containment and disposal of waste.

2. that it is unknown whether the method of sewage treatment is safe under all circumstances. Appellants point out that sewage treatment in such a remote location is not only expensive and difficult, but critical.

COMMENT: The record supports the Forest Supervisor's conclusion on page 70 of the responsive statement that there is no information to support appellants' allegations regarding improper consideration of, and accounting for, disposal of waste.

ISSUE: V. Air Quality

Appellants contend:

1. that the proposed Canyon Mine is in a Class I airshed and that mining activity would result in air quality in violation of State of Arizona air quality standards.

COMMENT: The Forest Supervisor has provided an incomplete response to this contention in his responsive statement (p. 71). I will clarify this issue by saying that only the lands within the Grand Canyon National Park are in a Class I airshed. The proposed mine is in a Class II airshed.

Total estimated emissions from the proposed Canyon Mine are below the level required for the mine to be considered a major emission source under the State's Prevention of Significant Deterioration (PSD) permit regulations which apply to Class I airsheds. Even if the mine could be considered a potential minor emission source, air quality at the proposed mine would likely not exceed State of Arizona air quality standards or Class II PSD increments.

Based on the record, I conclude that there remains no basis for concern about air quality at the Canyon Mine.

ISSUE: J. Wildlife

Appellants contend:

1. that the EIS (and Forest Supervisor's Decision) did not identify or define critical wildlife habitats.

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2. that several assumptions used in the assessment of wildlife impacts are invalid.

3. that severe damage to wildlife habitats will result from the construction and operation of the mine.

4. that two turkey flocks, of some 18-30 birds each, have been resident to the mine site, raising a question as to the Forest's data on this species.

COMMENT: In general, the record reflects proper consideration of wildlife issues in the EIS and decision by the Forest Supervisor. Specific appeal issues related to wildlife, were addressed adequately in the Supervisor's responsive statement. Comments concerning adequacy of wildlife mitigation measures are discussed in issue X. Mitigation Requirements.

I agree that it is possible that two or more flocks could have been using the meadow (mine site) complex on a seasonal basis. There appears to be a professional difference of opinion regarding species numbers and habitat effects. I don't feel that alleged discrepancies in maps and documenting, if confirmed, would affect the decision to approve the modified operating plan. However, I will direct the Forest Supervisor to immediately adopt a plan to monitor the situation to determine the current limits of occupied turkey habitat in the mine area and to establish the degree of importance of this area for winter turkey range. He will then update the Forest's range maps, if warranted. I will also direct the Supervisor to immediately seek to determine measures to enhance turkey habitat in the area through coordination with other Forest habitat development projects and resource management.

ISSUE: S. Ore Truck Accident Analysis

Appellants contend:

1. that the threat and consequences of uranium ore being accidentally dumped or spilled during transport to the Blanding Mill have not been properly evaluated.

COMMENT: The possibilities of an ore truck accident resulting in a spill of uranium ore and the consequences of such an accident are thoroughly evaluated in the FEIS at 4.2.6 (page 4.27), Appendix E., pages 27 and 28 and Appendix G, Forest Service response 60-1 on page 70. Mitigation requirements, in the event of such an occurrence, are included in Section 2.55. A more detailed discussion is contained in the Forest Supervisor's responsive statement on pages 67-69. I agree, with the Forest Supervisor's conclusions that such a threat has no basis for concern.

ISSUE: R. Impacts of the Milling Process

Appellants contend:

1. that the FEIS does not address or consider the impacts from increased milling that will result from opening the Canyon Mine and subsequent mines, or the need for additional mills if more mines are developed.

COMMENT: The analysis for the FEIS is based on a site specific proposal. The Federal action specifically considered in the FEIS is the approval of a Plan of Operations for the Canyon Mine and the establishment of reasonable mitigation

measures. No proposal has been made for the construction of a new mill on the Kaibab National Forest, or in any other area in conjunction with the Canyon Mine proposal.

The Forest Supervisor considered the need for additional milling capacity, even though it is not part of the Federal action which was considered in the FEIS. He concluded that additional mills will not be necessary as a result of the operation of the Canyon Mine. The record supports his conclusion.

ISSUE: Y. Miscellaneous Points of Appeal

Appellants contend:

1. that the EIS omits any discussion of possible generation and spread of coccidiomycosis.
2. that the EIS does not discuss possible effects of blasting on aquifers.
3. that the EIS must include a worst case analysis of potential environmental effects.
4. that the granting of this permit will cause archaeological site damage.

COMMENT: the Forest Supervisor's responsive statement (pp. 74-76) is an accurate reply to appellants contentions. I agree with his statements regarding each of these miscellaneous points of appeal.

Other

ISSUE: O. Impacts on Havasupai Tribal Economy

Appellants contend:

1. That implementation of the Forest Supervisor's decision to approve the operation of the Canyon Mine would damage Havasupai Tribal economy.

COMMENT: I have reviewed the entire administrative record on this issue and conclude that the Forest Supervisor gave adequate consideration to it in formulating his decision and provided a thorough discussion of it in his responsive statement. There is no evidence in the record which would cause me to overturn or suggest a modification of the Forest Supervisor's decision with regard to this issue. He properly concluded that impacts from the mine would have no significant effect on Havasupai Tribal economy.

VII. MY DECISION

It is my decision, based on my analysis of the complete administrative record, that the current level of religious activity is not expected to be curtailed by the Supervisor's decision nor, will access to any known religious sites or areas be restricted. It is also my decision that no significant environmental impacts are expected from mining operations or ore transportation. Impacts are expected to be small and localized near the mine site. The mitigation measures adopted as part of the Forest Supervisor's decision further reduce the potential impacts to acceptable levels. Accordingly, I feel that the Canyon

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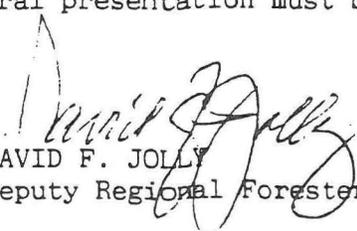
Mine can be permitted consistent with our responsibilities to minimize degradation of Forest resources. The Forest Supervisor reached a correct and well supported decision when he approved a modified operating plan for EFN's Canyon Mine. His decision is affirmed.

VIII. APPEAL RIGHTS

This decision is subject to administrative review in accordance with the provisions of 36 CFR 211.18. Notice of Appeal must be made in writing and submitted to:

David F. Jolly
Deputy Regional Forester, Resources
Forest Service, Southwestern Region, R-3
517 Gold Avenue, SW
Albuquerque, NM 87102

Appeal Notices must be submitted within 30-days from the date of this decision. A Statement of Reasons to support the appeal and any request for oral presentation must be filed simultaneously with the Notice of Appeal.


DAVID F. JOLLY
Deputy Regional Forester, Resources

Attachments:

Ltr. of 5/21/87
IBLA Decision 86-1217

00003950



MAY 21 1987

Honorable Richard Shelby
United States Senate
Washington, D.C. 20510

Dear Senator Shelby:

This is in response to your letter of April 17, 1987 regarding the concerns of Mr. Harold Stowell about current and future uranium mining around Grand Canyon National Park.

We appreciate the interest and concern relative to possible impacts to the environment on the public lands in the Grand Canyon area resulting from uranium mining. We likewise are concerned about this and have been making every effort to mitigate all impacts within the framework of existing laws and regulations.

Mr. Stowell indicates an interest in expansion of the Grand Canyon National Park. Expansion of the Park has already occurred as a result of the Grand Canyon National Park Enlargement Act of 1975 (Public Law 93-620). The expansion included adjacent National Park Service lands, as well as lands formerly under the jurisdiction of the Bureau of Land Management (BLM) and the U.S. Forest Service. The Park Service lands included two National Monuments in their entirety - Marble Canyon National Monument and Grand Canyon National Monument. Portions of the Lake Mead National Recreation Area were also included in the expanded Park boundary.

Implementation of the Act required the Department of the Interior to evaluate any lands that could be included in addition to the 1975 expansion of the Grand Canyon Park. The conclusion of the study, headed by the National Park Service, was that no lands should be added to the expanded Park.

Public lands in the vicinity of Grand Canyon National Park are undergoing exploration and development of uranium deposits. BLM has written several environmental assessments of mining plans in the Arizona Strip (public lands directly north of the Grand Canyon National Park) to date, which include analysis of cumulative effects of exploration and mining and required mitigation measures and reclamation actions. We have concluded that no significant adverse impacts to the environment have occurred and that an Environmental Impact Statement (EIS) is not necessary. These conclusions have been previously appealed and the Bureau's decision upheld by that of the Interior Board of Land Appeals (IBLA).

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The most recent of these Bureau decisions relative to a mining proposal was that of the Pinenut Mine by Energy Fuels Nuclear, Inc. This decision was appealed to IBLA by the Southwest Resource Council primarily on the contention that a comprehensive Environmental Impact Statement covering uranium development in the Arizona Strip should be done.

On March 10, 1987, the IBLA handed down its decision on this case (96 IBLA 105) which summarized the United States Supreme Court holding that "environment impact statements are required in two and only two instances: (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 a region."

The IBLA decision went on to state that "Clearly there is no comprehensive Federal plan for the development of the uranium resources located on the Arizona Strip, nor has the appellant shown that various Federal actions have had cumulative or synergistic environmental impacts on the region." The IBLA agreed with BLM's conclusion that a regional EIS is not now required.

BLM has worked very closely with the managers of the Grand Canyon National Park to address their concerns regarding exploration and mining on adjacent public lands administered by BLM. For example, our past efforts in regards to the Pinenut Mine resulted in a memorandum from Grand Canyon National Park stating that the final environmental assessment completely addressed any concerns that they had identified.

The National Parks and Conservation Association, a nonprofit group interested in maintaining the quality of our National Parks, has stated that the type of uranium mining currently planned and ongoing will have minimal impact to the vicinity of Grand Canyon.

We do recognize the concern and feeling of some groups and individuals that the overall impacts of mining activity in the Arizona Strip should be evaluated. We are planning to initiate a Resource Management Plan (RMP) for our Arizona Strip District this fiscal year. This is done in accordance with planning regulations to address the use and management of the public lands. As part of the process, planning issues are identified through public participation which are then addressed in the Plan. An Environmental Impact Statement is part of the RMP. We anticipate addressing the mining issue in the RMP due to the expressed interest. In the interim, we are assessing the impacts of past, present, and known future mines to determine cumulative effects as each new mining plan is submitted for development.

Sincerely,

7s/ D. Dean Bibles
State Director

cc: Your Alabama Office

cc: MO-150/MO-680
ARabinoff/sb/5-21-87/16200

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IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

DEPARTMENT OF THE INTERIOR

RECEIVED

MAR 16 1987

SOUTHWEST RESOURCE COUNCIL

OFFICE OF FIELD SOLICITOR
PHOENIX, ARIZONA

IBLA 86-1217

Decided March 10, 1987

Appeal from a decision of the District Manager, Arizona Strip District, Bureau of Land Management, approving a plan of operations for the Pinenut Project. AS 010-86-047.

Affirmed.

1. Mining Claims: Environment—National Environmental Policy Act of 1969: Environmental Statements

A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

2. National Environmental Policy Act of 1969: Environmental Statements

A regional environmental impact statement is required in only two instances: (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 impacts on a region.

3. Federal Land Policy and Management Act of 1976: Surface Management—Mining Claims: Surface Uses

Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the

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IN REPLY REFER TO:

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Impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

4. Federal Land Policy and Management of 1976: Surface Management—Mining Claims: Surface Uses

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining claim null and void and reject a proposed plan of operations submitted for that claim.

APPEARANCES: Lori Potter, Esq., Denver, Colorado, and Mark Hughes, Esq., Denver, Colorado, for appellant; Patrick J. Garver, Esq., Salt Lake City, Utah, for Intervenor Energy Fuel Nuclear, Inc.; Fritz L. Goreham, Esq., Office of the Regional Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southwest Resource Council (SRC) has appealed from a decision of the District Manager, Arizona Strip District Office, Bureau of Land Management (BLM), dated April 25, 1986, approving a major modification of a plan of operations submitted by Energy Fuels Nuclear, Inc. (EFN), for the Pinenut Project (AS-010-86-10P). After receipt of initial pleadings, this Board granted appellant's motion for expedited consideration by Order of October 30, 1986. Subsequent filings having been made, this case is now ripe for a decision on its merits. For the reasons set forth below, we hereby affirm the decision of the District Manager. Initially, however, it will be helpful to briefly describe the Pinenut Project and its environs.

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The Pinenut Project is one of a number of uranium properties being developed by EFN on the Arizona Strip. The Arizona Strip consists of those lands in Arizona lying north of the Colorado River as it descends to its outlet in the Gulf of California. Total acreage of the Arizona Strip is approximately 3,400,000 acres. Included in this figure, however, are substantial areas within Grand Canyon National Park, Grand Canyon National Game Preserve, various wilderness areas, and Indian reservations. Thus, the amount of land open to mineral exploration and development is substantially less than the total acreage in the Arizona Strip.

A total of five mines are presently being operated by EFN on the Arizona Strip. These five, together with the Pinenut mine, are all located within a 20-mile radius in an area north of the Grand Canyon National Park and west of the Kanab Creek wilderness area. The Pinenut mine, which is closest to the park boundaries, is roughly 3.6 miles from the north boundary of the park. In addition to these facilities, EFN has a considerable exploration program ongoing in the general area.

The uranium deposits in this area are typically found in structures known as "breccia pipes." These breccia pipes were created by the action of water dissolving parts of the deep Redwall Limestone formation millions of years ago. Over the passage of time, stratigraphically higher formations have collapsed forming narrow cylinders, which have been shown to be favorable areas for mineral deposition. One of the results of this phenomenon, however, is that while high-grade mineral deposits can often be found in these pipe structures, the mineralized body is normally quite small. This is borne out by the EFN experience in the area. Thus, all production from

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three mines, the Hack Nos. 1, 2, and 3, is scheduled to cease in 1987, at which point reclamation will commence. Production at the Pigeon mine commenced in 1985 and is expected to end in 1989. Commercial production is not scheduled to begin at the Kanab North mine until 1988 and based on known ore reserves, it is estimated that mining will be completed in 5 years. The Pinenut mine, itself, is not projected to go on-line until 1989, with production anticipated to last approximately 5 years from that date. It is also important to note that the nature of the ore bodies resulting from the localized breccia pipe accumulations also results in limited surface disturbances. Thus, the total surface disturbance associated with mining the Pinenut deposit (exclusive of access improvement and provision of power) is 20.1 acres.

Topographically, the area is characterized by gently sloping plateaus and mesas abruptly separated by deep canyons. Climatically, the area is semi-arid, with cool winters, warm summers, and light precipitation. However, while annual precipitation ranges only between 8 to 20 inches, the area is subject to intense localized summer showers. Historically, the inaccessibility of the Arizona Strip, occasioned by the Grand Canyon, has resulted in the remote and isolated nature of the area. To a large extent, it still retains a fundamentally remote character, though increased activities, including those associated with mining, have had some impact.

The Pinenut Project was initiated in July 1984, when EFN filed a plan of operations for purposes of exploration. Under the plan, less than 5 acres

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were to be disturbed. 1/ An Environmental Assessment (EA) was prepared at that time. Upon discovery of what EFN considered to be a commercially valuable uranium deposit, it submitted a major modification of the existing plan on January 10, 1986. Accordingly, BLM proceeded to examine the new proposal. In doing so, BLM prepared a new EA (EA No. AZ-010-86-015), based upon its own analysis and those submitted by EFN and interested third parties. The resulting document contains over 117 pages of text, including maps and charts. Particular attention was paid to possible air quality and acoustical impacts on Grand Canyon National Park, as well as any radiological effects which might result from the mining and transportation of the uranium ore. In addition, BLM examined the impacts that might occur as the result of upgrading 17 miles of existing access, including the possibility that this might lead to an increase in vandalism to cultural resources made more accessible. BLM also analyzed the visual impact that would result from the construction of a 8.3-mile power line running from Hack Canyon to the Pinenut site. BLM also consulted with the State Historic Preservation Officer (SHPO), who agreed that there would be no adverse impact on a recently discovered archaeological site, AZ B:6:44 (BLM), provided a recovery plan was implemented. Based on these analyses, BLM concluded that approval of the modified plan of operations, subject to various mitigating measures, 2/ would result in no

1/ Since less than 5 acres were to be disturbed, EFN was not required to file a plan of operations. Under 43 CFR 3809.1-3, a "notice of intent" would have sufficed. See generally Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985).

2/ Among the many mitigating measures imposed were requirements that the workers be bussed to the site to avoid impacts that might be generated were they allowed to individually drive their cars, that the powerline be dismantled upon completion of mining at the request of the authorized officer, and that EFN institute a dust abatement program during any period of prolonged drought.

significant impact to the environment. This finding of no significant impact (FONSI) made it unnecessary for BLM to prepare an environmental impact statement (EIS).

On April 25, 1986, BLM approved the plan of operations subject to the various modifications set forth in its Decision Record. Notification of this decision was sent to various interested parties including appellant. On May 22, 1986, appellant filed its notice of appeal.

Appellant presents three general arguments in seeking to have the Board reverse the decision of the District Manager. First, it argues that BLM failed to consider the cumulative and synergistic impacts of adding the Pinenut mine to other past, present, and reasonably foreseeable mining and exploration activities. Second, appellant contends that BLM must prepare a comprehensive regional EIS for uranium development in the Arizona Strip, pursuant to the mandate of section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982). Finally, it argues that BLM failed to consider potential profitability of the Pinenut mine in determining that it would not result in undue or unnecessary degradation. We will discuss these contentions seriatim.

Appellant argues that BLM either failed to consider or inadequately considered cumulative and synergistic impacts of uranium mining, particularly those which might result from what appellant referred to as "reasonably foreseeable uranium actions." Appellant contends that BLM ignored EFN's

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stated development plans for the area 3/ as well as concerns expressed by the Park Service relating to the problems which were being generated as additional areas on the North Rim were being made more accessible. Appellant also claims BLM's analysis of cumulative impacts associated with access roads was "utterly inadequate" (Statement of Reasons at 9).

In its answer, BLM takes issue with all of appellant's arguments. BLM notes that its entire discussion of the existing environment necessarily included consideration of cumulative past activities and their effect on the environment. Concerning reasonably foreseen future impacts, BLM notes that, for both minesite activities and general exploration, no such cumulative or synergistic impacts could be identified. This was a result of both the limited area of surface disturbance, and the fact that as all of the studies BLM had performed or commissioned had shown, such impacts as did exist dissipated dramatically over very short distances. Thus, BLM argues, only the addition of a minesite extremely proximate to the Pinenut site could be shown to have any synergistic effect. A view of the terrain and EFN's past exploration activities convinced BLM that there was no reasonable possibility of development of such a minesite in any meaningful time frame. 4/

3/ Appellant referred to a 1983 statement by the Vice-President of EFN declaring the company's hope of finding one new mine a year and also referenced a statement by the Park Service alluding to 30 to 40 additional ore deposits which EFN was said to have identified.

4/ BLM noted in its EA that the lowest probabilities for additional mining occurred south and east because of the existence of Grand Canyon Park and Game Preserve and the Kanab Creek wilderness area, areas which are closed to mineral location. Other factors, such as past exploration activities, indicated that the closest possible mining facility would be at least 3 miles west of Pinenut, a distance substantially greater than the range of effects for impacts emanating from Pinenut.

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Insofar as ongoing exploration activities were concerned, BLM noted in the EA that over 90 percent of those sites had already been rehabilitated.

BLM further points out that it considered the cumulative effects of upgrading and extension of existing roads in the area. It disagrees with appellant's characterization of its analysis as "utterly inadequate." Rather, BLM argues, it carefully analyzed this problem, and as a result, a number of mitigating measures were proposed to minimize impacts on the remote nature of the area. BLM states that, far from ignoring cumulative impacts, it added the discussion of such impacts to the final EA after various parties, including appellant, had criticized the draft EA for failing to address this possibility. BLM also notes that while the Park Service did, indeed, voice some objectives to the draft EA, BLM was able to satisfy its concerns by adopting numerous mitigating measures in the final EA.

EFN also filed an answer to appellant's statement of reasons challenging appellant's its contention that the EA inadequately considered reasonably foreseeable future cumulative effects and generally reiterating the arguments advanced by BLM. Pointing to the scheduled closing and commencement of reclamation at the three Hack mines, EFN notes that, unless three new mining sites are identified by early 1987, the current mining levels will not be maintained, much less increased. EFN argues that rather than showing any synergistic effects emanating from the operation of the Pinenut mine and other existing or reasonably foreseeable mines, appellant has merely indulged in argument with no supporting factual data or technical analysis. EFN contends that appellant has clearly failed to meet its burden as delineated

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in prior Board decisions such as Tulkisarmute Native Community, 88 IBLA 210 (1985), and John A. Nejedly, 80 IBLA 14 (1984).

[1] At the outset of our review, it is useful to set forth the standard which the Board has developed for reviewing challenges to FONSI declarations. Thus, in William E. Tucker, 82 IBLA 324 (1984), this Board stated that:

The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact. Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd as modified, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980). In such circumstances, we will affirm a finding of no significant impact. John A. Nejedly, 80 IBLA 14 (1984).

Id. at 327.

In the instant case, appellant has failed to challenge any of the site-specific studies which served as a predicate for BLM's finding of no significant impact. Rather, it has relied solely upon what it perceives as a failure to include analysis of cumulative impacts resulting from existing and reasonably foreseeable future developments. ^{5/} Insofar as impacts related to

^{5/} We recognize that appellant has also objected to the failure of BLM to consider the cumulative impact of five operating mines on surface water. The EA, however, noted that EPV had agreed to increase the capacity of its holding pond to withstand a 500-year event and further concluded that even if a discharge were to occur no significant impact could be expected because of the dilution of mineralized materials. Given the localized nature of a downpour necessary to trigger a 500-year event, the likelihood that one would occur simultaneously at all operating minesites must be considered extremely remote. Even should such a diluvian event come to pass, the dilution of minerals that would necessarily result underlines BLM's conclusion that no adverse cumulative impact will occur.

the minesite are concerned, it is clear from the scientific studies that have been performed and which are uncontradicted by any submission from appellant that there are no synergistic effects from specific minesites unless they are located in close physical proximity to each other. Moreover, the small size of the minesites (aggregating total of less than 120 acres, including the Pinenut mine) strongly supports BLM's conclusion of insignificant impacts as a result of actual mining activities. Inasmuch as there is absolutely no indication of any likelihood that a minesite will be located sufficiently close to Pinenut to generate synergistic effects, it is feckless to contend that BLM failed to adequately consider such impacts relating to minesite activities.

The possible cumulative impacts of road construction and upgrading, however, are a different matter. Clearly, as more and more roads are either constructed or improved, the possibility of adverse impact on the relatively remote nature of the area might be expected to increase. But, contrary to appellant's allegations on appeal, BLM did consider the cumulative impacts of roads in the area. See EA at 54-55. In order to minimize possible depredations associated with road upgrading (no additional roads are to be constructed), the EA recommended requiring the Pinenut access road to be returned to its original "pre-disturbed" condition at the discretion of the authorized officer when operations terminated, and also provided that the first three-eighths of a mile of the access road would be upgraded only to the minimum necessary to meet safety standards to discourage visitor use of the area (EA at 96). In the opinion of BLM, the limited nature of the road-upgrading, when viewed in conjunction with the mitigating measures adopted, resulted in no significant impact being created by the upgrading of access

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to the Pinenut mine. Appellant may disagree with the conclusions which BLM reached, but simple disagreement, absent a showing of error in BLM's analysis, is insufficient to overcome BLM's determination. 6/ See In re Otter Slide Timber Sale, 75 IBLA 380, 384 (1983).

While appellant argues that BLM failed to adequately consider the effect of future roads, appellant has not advanced any means by which BLM could have attempted such an endeavor. In the absence of any indication as to the situs of future mines, it would be totally speculative and conjectural to attempt to estimate how roads to such mines might impact upon the environment. Any such analysis would be so speculative that it would serve no useful purpose, even if it could be attempted. See Glacier-Two Medicine Alliance, 88 IBLA 133, 143 (1985). In view of the above, we must reject appellant's assertions that BLM failed to adequately consider cumulative and synergistic effects of uranium mining in the area.

Appellant also argues that BLM is required to prepare a comprehensive EIS covering uranium development on the Arizona Strip, 7/ a position which

6/ We also note that while any powerline would certainly constitute a visual intrusion, the powerline from Hacks Canyon to the Pinenut mine will not be visible from the Park. See EA at 48. Furthermore, as a mitigation measure, the plan of operations was amended to include a provision authorizing BLM to direct dismantling of the line upon completion of operations. See EA at 93. We are unable to discern any significant impact from this aspect of the plan of operations.

7/ There is a clear inconsistency involved in appellant's delineation of the "region" for which it argues that an EIS is required. Thus, at times it argues that there is "a well-defined geographic area bordering the Park, Kaibab National Forest, Grand Canyon National Game Preserve and the Kanab Creek Wilderness Area" (Statement of Reasons at 19). This specific area, shown on its Exhibit C, embraces approximately one-tenth the total Arizona Strip. Yet, when it seeks to discuss impacts, it includes activities throughout the entire Arizona Strip. See Exh. L. It is by no means clear just what "region" appellant contends the EIS should cover.

appellant contends has been supported by the Park Service and members of BLM's staff. Appellant states that Federal courts have required regional EIS's in comparable situations, which it characterizes as one involving "a steady flood of similar activities in a well-defined area" marked by "the inadequacy of previous project-by-project environmental analyses" (Statement of Reasons at 23). In support for its position, appellant relies on the decisions in National Wildlife Federation v. Benn, 491 F. Supp. 1234 (S.D.N.Y. 1980), involving issuance of ocean dumping permits, and Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), which concerned issuance of oil and gas leases in two national forests.

Both BLM and EFN contest appellant's factual predicates and legal analysis. They deny that there has been any "flood" of similar activities, EFN pointing out that only two new plans of operation were filed in 1986, one for the Pinenut and another which was subsequently withdrawn. See EFN's Response at 25-26. Both take exception to appellant's claim that the EA was inadequate. And both argue that appellant has misstated the applicable law which, they assert, clearly supports BLM's position that no regional EIS is required, citing Kleppe v. Sierra Club, 427 U.S. 390 (1976), Peshlakai v. Duncan, 476 F. Supp. 1247 (D.D.C. 1979), and LaRaza Unida v. United States, No. 80-208HB (D.N.M. Nov. 30, 1981).

[2] At the outset, we note that the controlling legal guidelines for determining when a regional EIS is required were established by the Supreme Court in Kleppe v. Sierra Club, supra. In Peshlakai v. Duncan, supra, the district court summarized the Supreme Court's holding as follows: "[S]uch

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environmental impact statements are required in two and only two instances: (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 a region." Id. at 1258.

Clearly, there is no comprehensive Federal plan for the development of the uranium resources located on the Arizona Strip. Nor has appellant shown that various Federal actions have had cumulative or synergistic environmental impacts on the region. We have previously discussed why the nature of the uranium developments within the vicinity of the Pinenut mine have minimal cumulative and synergistic effects. We will not repeat that discussion here. What we will focus on, however, is the nature of the "federal action" which occurs in the context of approval of mining plans of operations for unpatented mining claims.

Insofar as the location of mining claims is concerned there is, quite simply, no Federal action. Since 1866, it has been the policy of the United States that its public domain mineral lands are generally open to the initiation of claims by its citizens. Over the years, of course, Congress has seen fit both to limit the minerals which are subject to appropriation, as well as to restrict the areas in which the mining laws operate. But, the essential nature of the mining laws has remained constant, viz. individual citizens initiate rights by the discovery of valuable mineral deposits.

Soon after the passage of NEPA, this Board examined the question whether issuance of a mineral patent could constitute a "major federal action" such

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as could necessitate the preparation of an EIS. In United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973), we decided that question in the negative. The Board first reviewed the applicable law:

The discovery of a valuable mineral deposit within its limits validates a mining claim located on public land in conformance with the statute, and its locator acquires an exclusive possessory interest in the claim, a form of property which can be sold, transferred, mortgaged, or inherited, without infringing the paramount title of the United States. * * * Such an interest may be asserted against the United States as well as against third parties, * * * and may not be taken from the claimant by the United States without due compensation. * * * The holder of a valid mining claim has the right, from the time of location, to extract, process and market the locatable mineral resources thereon.

Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order. * * * The patent may contain no conditions not authorized by law. * * * The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. * * * The patent, if issued, conveys fee simple title to the land within the claim, but does nothing to enlarge or diminish the claimant's right to its locatable mineral resources. [Citations, footnotes omitted.]

Id. at 289-91, 80 I.D. at 542.

The Board then examined the statutory language of section 102 of NEPA and concluded that "[t]he plain meaning of the statutory language connotes an action proposed to be taken by a federal agency which is discretionary in character and to which there may exist a viable alternative." Id. at 294, 80 I.D. at 544. Noting that the location, perfection, and maintenance of a

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mining claim were all acts performed by the mining claimant, none of which constituted Federal action, the Board declared that issuance of a patent in response to these activities (an action which admittedly was a Federal action) was not discretionary within the meaning of NEPA, and, thus, an EIS could not be required. The Board's analysis was ultimately upheld in South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), cert. denied 449 U.S. 822 (1980).

We have spent considerable time reviewing the Kosanke decision because it brings into focus two considerations which impinge upon the issue whether a regional EIS is required: the question of what "federal action" is involved and, assuming some Federal action can be delineated, the scope of discretion which may properly be exercised by the Department.

It is clear that no Federal action is involved in the act of prospecting for minerals or locating claims. These activities occur through the volition of private entities acting under statutory authority. Nor do we perceive that any "federal action" within the meaning of section 102 of NEPA occurs when BLM receives a "notice of intent" filed pursuant to 43 CFR 3809.1-3, where less than 5 acres of land are being disturbed in any calendar year. ^{8/} As we noted in Bruce W. Crawford, 86 IBLA 350, 391, 92 I.D. 208, 230-31 (1985), BLM neither approves nor disapproves a notice. Accord, Sierra Club v. Penfold, A-86-083 Civil (D. Alaska, Jan. 9, 1987). It may consult with a mining claimant over aspects of his activities but, under the present regulatory scheme, it may not bar his planned activities, absent a

^{8/} We note that a plan of operations rather than a notice of intent must be filed for any activities other than casual use involving certain categories of land, enumerated at 43 CFR 3809.1-4(b). The lands involved in the instant appeal are not such special category lands.

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showing that unnecessary or undue degradation will occur. ^{9/} However, actions leading to unnecessary or undue degradation were never authorized under the mining laws. Id. at 366, 92 I.D. at 217-20.

When a mining claimant is required to file a plan of operations, however, BLM has considerably more leeway. It may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the property. BLM may require design changes in plant operation or in the route of access. BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim. ^{10/} See Utah v. Andrus, 486 F. Supp. 995, 1011 (D. Utah 1979). The reason, of course, is that such action would totally frustrate the congressional policy, as expressed in the mining laws, which accord a mining claimant rights, even against the Government, upon the discovery of a valuable mineral deposit. Thus, while BLM clearly has some discretion in the approval of mining plans of operations, there are parameters which establish the limits of its exercise. Nevertheless, because of BLM's ability to modify plans submitted, we agree that approval of a mining plan of operations is Federal action within the scope of 42 U.S.C. § 4332 (1982).

^{9/} Contrary to appellant's contentions, "unnecessary or undue degradation" assumes the validity of the use, such as actual mining operations, and relates only to the question whether the surface disturbance is greater than what would normally be expected when the activity was accomplished by a prudent operator performing customary and proficient operations. See 43 CFR 3809.0-5(k). This issue is explored in greater detail below.

^{10/} This discussion presumes the validity of the mining claim. Thus, if the claim is located on lands not subject to the operation of the mining law or for minerals which have been removed from location, BLM may prohibit mining and declare the claim invalid after providing such notice and opportunity to be heard as may be required by the dictates of due process. See Discussion, infra.

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Whether or not such approval constitutes "major federal action significantly affecting the quality of the human environment," however, is a question of fact determinable only within the confines of a specific case. It is to be expected that some plans of operations might have impacts of such a nature so as to compel the preparation of an EIS, even given the fact that BLM lacks authority to totally prevent mining in the context of approving a plan of operations. Indeed, the regulations clearly contemplate such an eventuality. See 43 CFR 3809.1-6(a)(4). We agree with appellant that there may be situations in which Federal-approval of discrete mining plans of operations ultimately necessitate the preparation of a regional EIS because the mining activities result in synergistic or cumulative impacts which are best considered in a unified document. However, under the guidelines established by the United States Supreme Court in Kleppe v. Sierra Club, supra, the existence of such impacts is the mechanism which triggers the necessity of filing a regional EIS, and it is on this issue that appellant has failed to carry the day. The record establishes that there is no realistic possibility of cumulative or synergistic effects related to the actual mining operations. And, insofar as access problems are concerned, BLM's imposition of mitigating measures clearly limits any short-term impacts and provides mechanisms for totally eliminating any long-term ones. It may be that, sometime in the future, the nature or pace of uranium mining on the Arizona Strip may change to such an extent that the cumulative or synergistic impacts of proposed plans of operations might be adequately examined only within the confines of a regional EIS. However, in view of the projects actually proposed at the present time, we agree with BLM's conclusion that a regional EIS is not now required.

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Appellant's final challenge to BLM's decision is that BLM cannot determine whether "unnecessary or undue degradation" is occurring absent a determination that a valuable mineral deposit has been discovered. Thus, appellant argues that "any degradation of the federal lands caused by the development or extraction of minerals is necessarily undue and unnecessary if there exists no right to enter such lands" (Statement of Reasons at 28).

BLM responds by arguing that appellant has totally misinterpreted the thrust of the prohibition against unnecessary and undue degradation. BLM notes that the express purpose of 43 CFR Subpart 3809 is "to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws." 43 CFR 3809.0-1. Operations authorized by the mining laws run the full gambit from prospecting, discovery, and assessment work to the development, extracting, and processing of the mineral. See 43 CFR 3809.0-5(f). BLM asserts that "[i]n recognition of this fact, it is not the policy of the Bureau of Land Management to determine profitability or validity of mining claims before approving plans of operations" (BLM Answer at 35-36). While we agree that determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use which is causing the impact, we do not agree with BLM that it is precluded from determining the validity of a claim and, upon a proper determination of invalidity, denying approval of a plan of operations therefor.

[3] Our decision in Bruce W. Crawford, supra, examined, at considerable length, the interrelationship between the determination whether a use

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was "reasonably incident to mining and the determination that a use resulted in "unnecessary or undue degradation." Therein, we concluded:

The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue assuming the validity of the use which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining. [Emphasis in original, footnote omitted.]

Id. at 396, 92 I.D. at 233. This analysis comports with the regulatory definition of "unnecessary or undue degradation," as being any

surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations.

43 CFR 3809.0-5(k). We reiterate our earlier conclusion that application of the "unnecessary or undue degradation" standard presumes the validity of the use.

[4] However, independent of any question of degradation, BLM always retains the authority to examine the validity of claims to Federal land and, if convinced that they are not well-founded, to take steps to nullify them. As an example, if the claims involved in the instant case were determined

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to be null and void because they were located after the lands had been closed to mineral entry, BLM would not be required to approve the mining plan of operations simply because it did not result in any unnecessary or undue degradation. On the contrary, the correct course of action would be to declare the claims null and void ab initio and reject the plan of operations. Similarly, if BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings. 11/

In the instant case, appellant argues that BLM has not established that the operations will be profitable. This is not the test. The mining laws do not require a showing that a mine will be profitable but merely that there is a reasonable expectation of success in developing a paying mine. See In re Pacific Coast Molybdenum Co., 75 IBLA 16, 28-30, 90 I.D. 352, 359-60 (1983). Moreover, appellant ignores the fact that, in this appeal, it is the party alleging that the claim is invalid. See In re Pacific Coast Molybdenum Co., supra at 22, 90 I.D. at 356. Thus, it is appellant's obligation to present evidence which, at a minimum, establishes a reasonable basis for a conclusion that the claims are not supported by a discovery. Id. Appellant has submitted no information, whatsoever, that would justify such a conclusion. Fanciful speculation will not suffice.

11/ During such a period, BLM would be required to allow the performance of any operations that are necessary (including assessment work) for timely compliance with the requirements of Federal and state laws. See 43 CFR 3809.1-6(d).

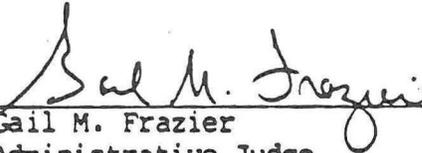
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We conclude, therefore, that appellant has failed to show that any unnecessary or undue degradation, as defined by 43 CFR 3809.0-5(k), will occur, or to provide any evidence in support of its allegation that these claims are not supported by a discovery.

Accordingly, 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 for the reasons stated herein.


James L. Burski
Administrative Judge

We concur:


Gail M. Frazier
Administrative Judge


R. W. Mullen
Administrative Judge

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