INTERIOR BOARD OF LAND APPEALS

Perfect Ten Industries

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Editor's note: Reconsideration denied by order dated Feb. 2, 1996.

PERFECT TEN INDUSTRIES

IBLA 92-499 Decided November 1, 1995

Appeal from a decision of the Arizona Strip District Office, Bureau of Land Management, dismissing a protest of the denial of a land-use permit application. AZA 25302.

Affirmed.

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

An application for a land-use permit to allow a survey of Federal land sought to be acquired for use as a land-fill and co-generation plant was properly rejected because the ultimate use proposed was not consistent with the Arizona Strip Resource Management Plan.

APPEARANCES: Robert Sparrow, Perfect Ten Industries, St. George, Utah.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Perfect Ten Industries has appealed from a May 26, 1992, decision of the District Manager, Arizona Strip District Office, Bureau of Land Management (BLM), dismissing a protest of his decision to deny release or sale of property sought in land-use application AZA 25302 because "it is inconsistent with [BLM's] land use planning and does not meet the sale criteria in the Code of Federal Regulations" (Decision at 1). On May 10, 1991, Perfect Ten Industries applied for permission to survey approximately 640 acres in secs. 35 and 36, T. 41 N., R. 16 W., and sec. 1 and 2, T. 40 N., R. 16 W., Gila and Salt River Meridian, Mohave County, Arizona. Perfect Ten Industries planned to build a land-fill and co-generation plant to burn tires on the land. The survey was preliminary to a grant of the land for such uses.

By letter dated May 5, 1992, the Shivwits Resource Area Manager, BLM, had returned the Perfect Ten Industries application to the District Manager with a finding that it was not consistent with the Arizona Strip Resource Management Plan (RMP). The Resource Area Manager also found that the land sought by Perfect Ten Industries was not planned for transfer from public ownership, and concluded that the application case file should be closed.

Perfect Ten Industries protested the proposed file closure on May 12, 1992, and demanded that BLM supply "a reason as to why you withdrew this 640 acre parcel."

In denying the protest, the District Manager found the land sought by Perfect Ten Industries was not identified for sale in the RMP because it did not meet disposal criteria set by 43 CFR 2710.0-3, inasmuch as the tract presently provided Category II habitat for the desert tortoise, a Federally listed threatened species, and comprised part of a larger parcel of public land making it easy and economic to manage.

In its notice of appeal, Perfect Ten Industries asserts that "[i]t is our opinion that our project is feasible." A subsequently filed statement of reasons recites the existence of a public need for the proposed services Perfect Ten Industries plans to provide to Mesquite, Nevada, and Beaver Dam and Littlefield, Arizona.

[1] Under Departmental regulation 43 CFR 2920.1-1, implementing section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1988), land-use permits may issue for "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law." Nonetheless, under section 302(b) of FLPMA, BLM has discretion to reject a proposal for use of public lands if it conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved. See 43 CFR 2920.0-6 (the proposed land use must "conform with [BLM] plans, policy, objectives and resource management programs"); see also Red Rock Hounds, 123 IBLA 314, 318 (1992), and cases cited therein. Unless compelling reasons for modification or reversal are shown, a BLM determination relating to its authority to issue permits under section 302(b) will be affirmed if the decision is supported by the record. See Stan Rachesky, 124 IBLA 67, 70 (1992).

Perfect Ten Industries has shown no compelling reason for modification or reversal of this decision, which rejected the survey application because it was to have been made in contemplation of a sale of public lands that was not consistent with Departmental regulations and resource management policy set by the RMP. In the record of decision (ROD) for the RMP, BLM found that it could make an adjustment in land ownership through disposal of "isolated tracts of public lands" (ROD at 1). BLM provided, however, that realty actions would be evaluated to determine, among other things, "the presence of threatened and endangered species" (ROD at 4). The management plan adopted by the ROD provided that all desert tortoise habitat identified as Category I or II would be retained in Federal ownership (Proposed RMP, Table II-1, at II-8). The RMP prohibited activities that would jeopardize the continued existence of the desert tortoise, or their essential habitat (Proposed RMP, Table II-1, at II-25; III-16, III-17). The land sought by Perfect Ten Industries is identified as Category II (essential habitat) for the desert tortoise (Proposed RMP, Map II-4). A sale

of the land would not, therefore, be consistent with the RMP so long as the land continued to be classified as Category II tortoise habitat.

It appears that Perfect Ten Industries ultimately plans to purchase the tract for which it applied, since it seeks a "deed from BLM" to the land (see Phase I Plan Summary filed April 11, 1991). A threshold question in determining whether a tract of public land is eligible to be transferred into private ownership is whether it has been identified for disposal in land-use planning documents. See 43 CFR 2710.0-6(a); 43 CFR 2711.1-1(a); Joyce & Tony Padilla, 119 IBLA 33, 43 (1991). The subject lands were not included in the RMP listing of lands identified for disposal (Proposed RMP, App. 7, at A-28, A-29). Public sale procedures outlined in BLM Manual section 2711.1 provide that "if the proposed sale is not in conformance with the land use plan but is believed to have merit," the authorized officer may initiate sales action through amendment of the land-use plan. However, where the proposed sale does not conform to the plan "or otherwise does not warrant further consideration," the authorized officer so notifies the applicant. In this case, BLM did not proceed with a plan amendment; instead, the decision under review was issued.

While Perfect Ten Industries disagrees with conclusions derived by BLM from an analysis of the effect of the RMP on the land-use application, no error in the BLM decision has been identified by Perfect Ten Industries. Regulations at 43 CFR 2710.0-6(c)(3)(iii) provide that a direct sale may be made of public lands under certain limited conditions, none of which have been shown to be present in this case. See, e.g., Mr. & Mrs. Michael Bosch, 129 IBLA 373 (1994). While Perfect Ten Industries argues there is a public need for the landfill facility proposed (which is one of the conditions for direct sale), this alleged need was considered by BLM in its RMP when a landfill for the Littlefield area was authorized on other public lands (Proposed RMP, Table II-1, at II-8). Since BLM did not consider the lands sought by Perfect Ten Industries to be necessary for the Littlefield site, and there has been no showing by Perfect Ten Industries to the contrary, the assertion that a need has been shown for the Perfect Ten Industries project lacks a foundation in the record. This being the case, there is no justification for a survey of the land, since a direct sale of the desired tract of land (the purpose for which the survey is desired) has not been shown to be consistent with present planning. Under the circumstances, therefore, no error has been shown in the BLM decision to deny the land-use application.

A hearing into this matter has been requested. An evidentiary hearing may be ordered when there is a material issue of fact remaining in dispute that requires resolution before a decision can be made. See Felix F. Vigil, 129 IBLA 345, 347 (1994), and cases cited. Upon review of the record in this case, we conclude it can be resolved upon the record now before us, no disputed material fact having been shown to exist.

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.

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Franklin D. Arness
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge