

INTERIOR BOARD OF LAND APPEALS

Hacienda del Cerezo, Ltd., and Energy Conscious Home Owners

135 IBLA 277 (May 8, 1996)

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HACIENDA DEL CERESO, LTD.
ENERGY CONSCIOUS HOME OWNERS

IBLA 96-41, 96-42

Decided May 8, 1996

Appeals from a letter issued by the Area Manager, Taos Resource Area, New Mexico, Bureau of Land Management, to the Public Service Company of New Mexico notifying it to proceed with construction and operation of an overhead 115 kV electric transmission line in right-of-way NM-56154.

Appeals dismissed; petition for stay denied as moot.

1. Administrative Procedure: Administrative Review—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rules of Practice: Appeals: Generally

When a right-of-way grant is issued without a notice to proceed requirement, issuance of the right-of-way grant constitutes the notice to proceed. In such circumstances, a notice to proceed issued by BLM is not an appealable decision because such a notice is unnecessary and confers no rights on the grantee that it did not already possess.

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

In determining the necessity for a supplemental environmental impact statement, the initial question is whether there remains a major Federal action to occur. When the Department has prepared a final environmental impact statement for the issuance of a right-of-way for a private construction project crossing Federal lands, and the right-of-way has been granted, no major Federal action remains to occur. In such a case, no supplemental environmental impact statement is required.

APPEARANCES: Stephen Kirschenbaum, Santa Fe, New Mexico, for Hacienda del Cerezo, Ltd.; Kathleen Peters, Santa Fe, New Mexico, for Energy Conscious Home Owners; Kathleen A. Miller, Esq., Office of the Regional Solicitor, Albuquerque, New Mexico, for the Bureau of Land Management; Margaret E. Davidson, Esq., Keleher & McLeod, Albuquerque, New Mexico, for Public Service Company of New Mexico.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Hacienda del Cerezo, Ltd. (HDC), through one of its owners, Stephen Kirschenbaum, and Energy Conscious Home Owners (ECHO) have each appealed from a September 25, 1995, letter from the Area Manager, Taos Resource Area, New Mexico, Bureau of Land Management (BLM), to the Public Service Company of New Mexico (PNM). ^{1/} That letter stated that PNM should consider the letter "as a Notice to Proceed on the proposed project." That project was the construction and operation of an overhead 115 kV electric transmission line (known as the Norton! Tesuque powerline) in right! of! way NM-56154. ^{2/} BLM issued right-of-way grant NM-56154, effective November 12, 1986, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761! 1771 (1994), for an initial term of 50 years. The issuance was preceded by a review of the environmental consequences of authorized activities in a February 1985 draft environmental impact statement (DEIS) and a July 1985 final EIS (FEIS), prepared by the Bureau of Indian Affairs (BIA), as the lead agency, in satisfaction of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994). BIA acted as lead agency because approximately half of the 10-mile proposed transmission line crossed lands of the Tesuque Pueblo.

HDC also appeals from a September 19, 1995, letter from the Taos Resource Area Manager, BLM, responding to various inquiries from Stephen Kirschenbaum regarding the environmental review for the right-of-way and requesting further review.

The notice of appeal filed by ECHO, docketed with this Board as IBLA 96-42, contained no SOR. In accordance with 43 CFR 4.412(a), ECHO was required to file an SOR in support of its appeal within 30 days after its notice of appeal was filed with BLM. To date none has been filed; nor has any explanation been offered for this failure. Therefore, pursuant to 43 CFR 4.402, we dismiss ECHO's appeal. See Robert L. True, 101 IBLA 320, 324 (1988).

The notice of appeal filed by HDC, docketed as IBLA 96-41, included an SOR and also a petition for stay of the "Notice to Proceed." BLM and PNM each filed a response opposing the granting of a stay and each filed an answer to HDC's reasons for appeal. ^{3/} PNM filed a motion to dismiss the

^{1/} HDC, which is owned by Stephen Kirschenbaum and his wife, owns 336 acres of land in the County of Santa Fe (Affidavit of Stephen Kirschenbaum, dated Oct. 23, 1995 (Exh. E at 1, Statement of Reasons for Appeal (SOR))).

^{2/} The transmission line will cross BLM land, about 1 mile of HDC lands, and Tesuque Pueblo lands. HDC purchased its land in 1993. HDC's deed included an easement for the transmission line (Exh. 3, PNM Response to Petition for Stay).

^{3/} Although PNM did not request intervention in this case, it clearly would be affected by action on the petition or appeal adverse to its

appeal because BLM's "Notice to Proceed" did not constitute an appealable decision.

[1] The first issue that we must address in this case is whether or not the "Notice to Proceed," which is, in part, the subject of HDC's appeal, is a decision which is appealable to this Board. PNM argues that, because the "Notice to Proceed" is not an appealable decision, the appeal should be dismissed.

In Southern Utah Wilderness Alliance, 122 IBLA 17, 20 (1992), we stated:

This Board's appellate review authority cannot be invoked simply because someone may object to something BLM is doing. Departmental regulation 43 CFR 4.410 provides in relevant part that: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right of appeal to the Board." Thus, there must be an identifiable decision, the appellant must be a "party" to the case, and the appellant must be "adversely affected."

Under 43 CFR 4.410, the first prerequisite for an appeal to this Board is that there be a written "decision." Mesa Sand & Rock, Inc., 124 IBLA 243, 245 (1994). However, the written form used by BLM in announcing its actions is not controlling on whether or not the Board will consider it to be a "decision" for purposes of entertaining an appeal. The Board has construed letters issued by BLM to be decisions subject to appeal. See, e.g., Robert E. Oriskovich, 128 IBLA 69 (1993); Keith Rush d/b/a Rush's Lakeview Ranch, 125 IBLA 346 (1993). In addition, whether BLM has included the appeals information is not dispositive because the Board has stated that failure to include the appeals paragraph will not deprive a party of its right of appeal. Texas Oil & Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981). Likewise, BLM's inclusion of the appeals paragraph will not create an appeal right where none exists. Phelps Dodge Corp., 72 IBLA 226 (1983).

The regulations provide at 43 CFR 2803.2(a) that "[i]f a notice to proceed requirement has been included in the grant * * *, the holder shall not initiate construction, occupancy or use until the authorized officer issues a notice to proceed." By implication, where BLM does not place such a requirement in the grant, the grantee may proceed with authorized activities even without issuance of a notice to do so. No such requirement appears in PNM's grant. Thus, issuance of the right of way grant constituted the notice to proceed in this case. See V. Irene Wallace, 122 IBLA 349, 352 (1992). Accordingly, a notice to proceed was not necessary in this case and the letter issued by BLM, which it stated should be construed as a "Notice to Proceed," did not confer on PNM any rights that

fn. 3 (continued)

interests. Accordingly, we grant PNM intervenor status and consider the pleadings it has filed in the case.

it did not already possess through issuance of the right-of-way grant. Under such circumstances, the notice was not a decision subject to appeal to this Board.

In addition, even if the notice were considered to be appealable, HDC's appeal therefrom would be subject to dismissal for lack of standing because HDC could not be considered to be adversely affected by a "decision" which did not confer any additional rights on PNM.

Likewise, HDC's reliance on the receipt of the Area Manager's September 19, 1995, letter to support its appeal is misplaced. That letter responded to a series of inquiries from Kirschenbaum regarding various aspects of the environmental review conducted for the right-of-way and requesting further environmental review. BLM's September 19, 1995, letter was merely informational and explanatory of actions already taken. It was not an adjudication.

The fact that PNM waited a period of nearly 10 years before proceeding with its project does not negate the grant. The regulations provide at 43 CFR 2803.4(b) that the authorized officer may suspend or terminate a right-of-way grant if he determines that the holder has failed to comply with applicable laws, or regulations, or any terms, conditions, or stipulations of the grant, or has abandoned the right-of-way. Under 43 CFR 2803.4(c):

Failure of the holder of a right-of-way grant to use the right-of-way for the purpose for which the authorization was issued for any continuous five-year period shall constitute a presumption of abandonment. The holder may rebut the presumption by proving that his failure to use the right-of-way was due to circumstances not within the holder's control.

A right-of-way does not terminate automatically by operation of law upon the conclusion of a given period of nonuse. Rather, if BLM desires to terminate the right-of-way, it must take affirmative action to do so. See Theron E. Coon, 129 IBLA 30, 32 (1994). In addition, suspension or termination is not mandatory, but is discretionary with the authorized officer.

While the presumption set out in 43 CFR 2803.4(c) arises merely from the fact of nonuse, it is a rebuttable presumption, meaning that, if BLM sought to invoke the presumption in this case through a procedure to terminate the right-of-way grant under 43 CFR 2803.4(d), PNM would be given, according to that regulation, "a reasonable opportunity to cure such noncompliance." Counsel for BLM asserts that the presumption would be easily rebutted in this case "in light of PNM's payment of rent and continued indications of intent to construct the right of way" (BLM Answer at 11).

While the regulation appears to require an affirmative showing that the failure to construct was beyond the control of the holder, there is no evidence in the record that BLM sought to terminate the right-of-way in

this case in accordance with the procedures set forth in 43 CFR 2803.4(d). In the absence of suspension or termination of the right-of-way, PNM was entitled under the grant to proceed at any time in accordance with the grant.

[2] Appellant argues that a supplemental EIS (SEIS) is needed before PNM can be allowed to construct the transmission line. In this regard, appellant is simply wrong.

HDC's principal concern with construction of the transmission line is that there no longer exists any need for the project. It asserts that the load forecasts have failed to materialize. Clearly, such an assertion does not support preparation of an SEIS. In Anson v. Eastburn, 582 F. Supp. 18 (S.D. Ind. 1983), plaintiffs brought a suit challenging the adequacy of an EIS prepared by the United States Army Corps of Engineers for a proposed coal plant. Plaintiff's principal contention was that the Corps had failed adequately to investigate and/or evaluate the need for the project. The court addressed that argument, stating:

It should be noted at the outset that no provision of NEPA (42 U.S.C. § 4321 *et seq.*) mandates an independent evaluation by the agency involved of the need for a project. In fact, the only place where need is mentioned is in the provisions of the Code of Federal Regulations which deal with the environmental impact statement. 40 CFR § 1502.13 provides that the environmental impact statement:

...shall specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

Such provisions cannot be interpreted as requiring that the agency make a *de novo* determination of need, but only that the agency include such statement of purpose and need so as to put into context what the EIS is addressing.

Id. at 21-22.

If an agency is not required independently to assess in an EIS the need for a particular project, clearly there is no basis for claiming that a change in the circumstances concerning a project mandate the preparation of an SEIS. See Friends of the River v. Federal Energy Regulatory Commission, 720 F.2d 93, 109 (D.C. Cir. 1983).

In Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989), the Supreme Court discussed the standards used in determining when an SEIS is needed:

The parties are in essential agreement concerning the standard that governs an agency's decision whether to prepare a supplemental EIS. They agree that an agency should apply a "rule of

reason," and the cases they cite in support of this standard explicate this rule in the same basic terms. These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, and as the petitioners concede, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. See Brief of Petitioners at 36. Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affect[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. Cf. 42 U.S.C. § 4332(2)(C). [Footnotes omitted.]

Id. at 373-74.

Applying that language of the Supreme Court to the facts in this case, it is clear that no SEIS is required. In Marsh, the Court's principal concern was formulating a test for determining the value of new information to NEPA analysis. In doing so, it made clear that even before examination of that information, the initial question must be whether there remains any major Federal action "to occur." New information only has value for NEPA analysis purposes to the extent it may affect "the still pending decisionmaking process." In this case, no major Federal action remains to be considered. As counsel for BLM relates, "[t]his is not a federal project, but is private construction upon a federally-granted right-of-way" (BLM Answer at 5). The major Federal action which precipitated the environmental review undertaken in the DEIS and the FEIS compiled by BIA was PNM's application for a FLPMA right-of-way. The decisionmaking process on whether or not to grant that right-of-way was completed in 1986 with issuance of the grant. No "still pending decisionmaking process" remains in this case. 4/

4/ The record shows that in a letter dated Sept. 11, 1995, an attorney representing "Private Landowners and Santa Fe Neighborhood Associations" requested that BIA prepare an SEIS. In a letter dated Oct. 6, 1995, the Area Director, Albuquerque Area Office, BIA, declined to do so stating: "As you acknowledge in your letter an updated review of Threatened and Endangered Species in the project area has been completed. The results of this survey confirm that no endangered species will be affected by the proposed action. Given that this is the only potentially significant information which the BIA has received, even if there were a pending

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed; HDC's petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

James L. Burski
Administrative Judge

fn. 4 (continued)

federal action, an SEIS appears unwarranted at this time." (Emphasis added.)

In his affidavit, Kirschenbaum stated that his attorney, who was also the attorney who signed the Sept. 11, 1995, letter would "enter an appearance in this matter on behalf of myself and the citizens[] group known as ECHO" (Exh. E at 1, SOR). That attorney has not made an appearance.