

INTERIOR BOARD OF LAND APPEALS

Donna Charpied, et al.

137 IBLA 45 (November 14, 1996)

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Editor's note: appeal filed sub nom. Desert Citizens Against Pollution v. Bisson, Civ. No. 96-02011-RMB/JFSS (S.D. Calif.), dismissed for lack of standing, appeal filed, No. 97-55429 (9th Cir.), reversed and remanded, (Nov. 6, 2000), 231 F.3d 1172.

DONNA CHARPIED ET AL.

IBLA 96-304 thru 96-306, 96-335, 96-481

Decided November 14, 1996

Appeals from, and requests to stay, a record of decision issued by the El Centro, California, Resource Area Manager, approving a land exchange and right-of-way for the Mesquite Regional Landfill, CACA-34105 and CACA-29617.

Stay denied; record of decision affirmed.

1. Appraisals—Exchanges of Land: Generally—Federal Land Policy and Management Act of 1976: Exchanges—National Environmental Policy Act of 1969: Generally

Inclusion of an additional 400-acre tract of wilderness land in order to equalize appraised values between private and Government lands included in a land exchange was not so environmentally significant as to require supplemental environmental analysis.

2. Appraisals—Exchanges of Land: Generally—Federal Land Policy and Management Act of 1976: Exchanges

Appraisal reports based upon a reasoned market analysis and use of comparable transactions were properly used although they were more than 6 months old when relied upon by BLM, because there was no showing that property values had materially changed since the reports were prepared.

3. Environmental Quality: Environmental Statements—National Environmental Policy Act of 1969: Environmental Statements—Rights-of-Way: Generally—Rights-of-Way: Federal Land Policy and Management Act of 1976

Expressions of disagreement were insufficient to show error in an EIS and other documents prepared by BLM during planning for a right-of-way and land exchange proposed as part of a landfill project.

APPEARANCES: Donna and Larry Charpied, Desert Center, California, pro sese; William S. Curtiss, Esq., and Hank Bates, Esq., San Francisco, California for Sierra Club Legal Defense Fund; Edie Harmon and Lori Saldana, San Diego, California, for San Diego Chapter, Sierra Club; John Fitz-Gerald, Esq., Golden, Colorado, and Charles L. Kaiser, Esq., Denver, Colorado, for Gold Fields Mining Corporation and Arid Operations, Inc.; Harriet Allen, Valley Center, California, for Desert Protective Council, Inc.; and Jane Melanie Williams, Rosamund, California, for Desert Citizens Against Pollution.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Donna and Larry Charpied, the Sierra Club Legal Defense Fund, the San Diego Chapter of the Sierra Club, the Desert Protective Council, Inc., and Desert Citizens Against Pollution, have appealed from a February 14, 1996, decision of the California Desert District Manager, Bureau of Land Management (BLM), approving a land exchange and right-of-way grant in connection with construction of the Mesquite Regional Landfill. In an order issued on July 3, 1996, we denied a request to stay issuance by BLM of the right-of-way grant to Gold Fields Mining Corporation and Arid Operations, Inc. (Gold Fields) for construction of a railroad spur; therein, we also consolidated and suspended consideration of the four right-of-way appeals docketed as IBLA Nos. 96-304 through 96-306, and 96-335, pending action by BLM on protests lodged against the land exchange. Those protests were denied by BLM on June 25, 1996, and timely appeals taken therefrom are now docketed as IBLA 96-481. All five appeals are now consolidated for decision because they involve the same landfill project and raise similar and related issues. All parties agree that these appeals warrant expedited consideration as requested by BLM and Gold Fields, which requests are granted; having considered the merits of these appeals, the requests for stay of the land exchange are denied, and BLM's record of decision approving both the exchange and the right-of way is affirmed.

Division of the right-of-way question from the land exchange issue resulted from the operation of separate Departmental regulations governing what are generally discrete types of administrative action: differing times and procedures for appeals of exchanges and rights-of-way are provided by 43 CFR 2201.7-1(b) (45 days to protest land exchange), and 43 CFR 2804.1 (30 days to appeal right-of-way issuance). Nonetheless, the land exchange and the rail spur right-of-way are actions connected by the landfill proposal. The BLM decision here under review saw them in that way, and combined the decisions granting the rail right-of-way and the proposed land exchange into a single decision record.

The BLM record of decision was based in part on a joint environmental impact statement/environmental impact report (EIS) prepared by BLM and Imperial County, California. See Decision Record at 10, 20. The landfill is proposed to be a regional solid waste disposal facility constructed

and operated 35 miles east of Brawley, California, adjacent to the existing Mesquite Mine. It will encompass about 4,250 acres, including approximately 1,750 acres currently administered by BLM, which are the subject of the land exchange. The right-of-way grant issued by BLM for a term of 40 years is for construction and operation of a 5-mile long railroad spur connecting the landfill to the Southern Pacific railway near Glamis, California.

Still to be decided is a petition to stay that part of BLM's decision approving the transfer of Federal lands that will be used for the landfill project. About 2,640 acres of privately-owned land in Imperial and Riverside Counties are offered in exchange for the Federal property; the private lands include inholdings in wilderness areas and desert tortoise habitat. Gold Fields and BLM oppose the exchange stay petition, arguing that appellants have failed to carry the burden imposed by a four-part test customarily applied to requests to stay Departmental decisions pending appeal. See Jan Wroncy, 124 IBLA 150, 153 (1992) and authority cited therein. Nonetheless, appellants Sierra Club, Desert Citizens against Pollution, and Desert Protective Council contend that they have shown a likelihood of ultimate success on the merits of their appeals and will be irreparably harmed unless a stay of the right-of-way grant issues; they claim the threatened injury to appellants if a stay is denied is greater than any harm threatened to Gold Fields by a grant thereof, and urge that public policy favors a stay of the land exchange.

Appellants argue that the proposed exchange violates section 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1994), and implementing regulations at 43 CFR 2201.3 through 2201.6, because valuation for exchange purposes is based upon a flawed appraisal report that will allow Federal lands to be transferred at a loss. They contend that the appraisers failed to consider that the Federal land to be exchanged is proposed to be used as a landfill, and that, as a result, the land should be appraised as "a highly desirable landfill location" and valued in comparison to landfill sites, instead of being treated as mine support lands, an action that greatly undervalues the Federal property (Stay Petition at 12). Appellants argue also that the appraisal may not be currently relied upon because it was more than 6 months old when BLM, acting in reliance on the report, valued the properties to be exchanged (Statement of Reasons (SOR) at 2). Finally, appellants assert that the record of decision did not consider the effect of acquisition of approximately 400 acres of private lands that were later added to the proposed exchange in order to more closely approximate the appraised value of the Federal lands to be exchanged; the failure to include the additional acreage in the EIS, appellants contend, means the lands will escape needed environmental review unless BLM prepares an additional environmental analysis of the effect of bringing the 400-acre tract under BLM administration (SOR at 5).

Gold Fields and BLM have both filed answers to the SOR provided by appellants, and this appeal is now ripe for adjudication on the merits.

In considering the stay petition filed in IBLA 96-481 we have, of necessity, considered the challenge to the land exchange made by appellants on the merits; consequently, the petition for stay is denied and the decision to approve the proposed land exchange is affirmed on the merits, being supported by the record on appeal. See generally Texaco Trading & Transportation Inc., 128 IBLA 239, 241 (1994) (decision on the merits concerning valuation properly rendered when dealing with stay petition in right-of-way rental rate case).

As of August 1, 1994, the fair market value of the public lands to be exchanged was appraised at \$610,914.50, valuing each acre of the 1,745.47 parcel at \$350. See Appraisal Report of Nichols and Gaston dated Aug. 11, 1994, at 13. Also as of August 1, 1994, Nichols and Gaston set the fair market value of 321.48 acres of private (offered) lands in the Santa Rosa Mountains that were to be exchanged for public lands at \$150 for each acre, while 1,920.48 acres of offered lands on the Chuckwalla Bench were valued at \$230 an acre, or a total valuation of \$489,932.40 for the offered private lands, leaving a difference of \$120,982.10 between the private and Government lands to be exchanged. See Appraisal Reports dated Aug. 10 and 11, 1994, as modified by BLM appraisers on Oct. 14, 1994, and June 2, 1995. This difference in value was reduced, in conformity to 43 CFR 2201.6(a)(1), by adding 400.21 acres of additional private lands in the Chuckwalla Bench area. See Exhs. 1 and 2 to Gold Fields Answer in IBLA 96-481, Letters dated Dec. 12, 1994, and May 1, 1995, from BLM to Gold Fields concerning equalization of exchange land values. Regarding this additional land proposed to be transferred to BLM administration, Gold Fields offers the following explanation:

Gold Fields agreed that, rather than make a cash equalization payment to the BLM, it would include additional offered lands in the exchange. The added lands consisted of a 400 plus acre tract of private inholdings in the Little Chuckwalla Mountains Wilderness Area and the Chuckwalla Bench Area of Critical Environmental Concern ("ACEC"). The 400 acre tract consisted of lands which Gold Fields previously placed under option in order to use as desert tortoise compensation lands as required in the U.S. Fish & Wildlife Service's Biological Opinion. * * * The 400 acre tract was valued at \$300 per acre or approximately \$120,000 according to an area-wide appraisal for the ACEC conducted in 1995. By including the 400 acre tract in the offered lands, Gold Fields is now only required to make a cash equalization payment of \$919.10.

(Exh. 3 to Gold Fields Answer, Affidavit of Brian E. Donovan at 2).

[1] Inclusion of additional lands to equalize values in a land exchange is authorized by Departmental regulation 43 CFR 2201.6(a), which provides that "the parties to an exchange may agree * * * [t]o modify the exchange proposal by adding * * * lands." While appellants allege that adding 400 acres of land in the Chuckwalla Bench Wilderness and ACEC area require further environmental analysis, it seems unlikely that addition of 400 acres to the larger area already administered on the Bench by BLM

as wilderness and ACEC land can have any significant environmental effect; indeed, appellants have suggested none. While it is obvious that this 400-acre addition modifies the proposal considered by the environmental analysis that was before the decisionmaker when the record of decision issued, it does not appear to warrant preparation of additional environmental analysis. BLM is required to take such action only when confronted by new information that is "sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." Wyoming Independent Producers Association, 133 IBLA 65, 85 (1995), quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). Appellants have not identified any "impacts significantly more adverse than those identified" by the environmental analysis that was before BLM prior to addition of the 400-acre tract. See Wyoming Independent Producers Association, 133 IBLA at 87.

Moreover, since addition of the 400-acre tract will arguably operate to consolidate Federal ownership of lands within a wilderness area, it may be, as Gold Fields contends, that the proposed addition to the exchange will have a further mitigating effect on adverse environmental effects from the landfill project. Such changes do not require additional environmental analysis. See generally Township of Springfield v. Lewis, 702 F.2d 426, 436-38 (3d Cir. 1983) (changes implementing mitigation measures in a highway project did not require further environmental analysis). We find, therefore, that inclusion of the additional 400-acre tract in the exchange did not significantly affect the project at hand so as to require further environmental analysis by BLM.

[2] We find no merit in the contention that the appraisal report relied upon by BLM for comparing the values of lands to be exchanged was so stale it could not be used by BLM. Appellants have not submitted an independent appraisal showing the relative values of the properties offered in the exchange, but instead cite numerous perceived anomalies in the BLM appraisals and discussions of the appraisals in the EIS. See, e.g., Sierra Club Supplemental SOR filed in IBLA 96-305 at 3. Appellants argue that such reports have a "shelf life" of 6 months under BLM Manual H-2200-1, Draft Exchange Handbook Ch. VII, J. (Manual) (Mar. 13, 1994). See SOR filed in IBLA 96-481 at 2. The cited Manual section, however, states that "shelf life is an administrative, agency determination." While the Manual does assume that appraisals generally will be valid for at least 6 months, it makes clear that this is a matter of some flexibility, depending upon the circumstances of the appraisal itself. In this case, BLM made several administrative determinations concerning the appraisal reports made by Nichols and Gaston. The first came on October 14, 1994, when BLM appraiser John Horyza modified the reports as explained in detail in his appraisal review of that date. The second occurred on June 2, 1995, when David A. Reynolds, the Acting Chief State Appraiser reviewed the Nichols and Gaston appraisal reports and the modification thereof by Horyza. Therein, Reynolds not only approved the reports, as modified, but found that the valuations arrived at were, for agency purposes, "valid for a period of one year unless the market shows significant changes before that time."

Under these circumstances, appellants must show that the agency found in error that the appraisal reports continued to be a valid guide to valuation of the exchanged land. To do so, in this case, would require some showing that there had been a change in the market that escaped the notice of BLM's appraisers during their review of the reports. No such showing having been made, the argument that the reports were unusable because they were too old must be rejected.

Appellants also allege that the appraisal report should have considered the future effect the proposed landfill project would have upon the value of the Government property to be exchanged. See Stay Petition in IBLA 96-481 at 16-17. The Nichols and Gaston appraisal report dated August 11, 1994, recites that: "Currently, there are plans for the mine to become part of a major landfill facility that will serve primarily the Los Angeles Basin." *Id.* at 41. Appellants acknowledge this statement, but argue that it is inadequate. They argue that "the August 1994 appraisal prepared for Gold Fields by Nichols and Gaston utterly failed to discuss the possibility that the highest and best use of the affected public lands is a landfill site" (Stay Petition at 16). Elaborating on this argument, appellants observe that "the appraisal does not consider either: (1) the fact that this is one of a limited number of promising commercial landfill sites in Southern California; or (2) the fact that BLM intended those lands to be used as an essential part of a particular multi-billion dollar landfill project." *Id.* at 16, 17.

Appellants cite no authority for the proposition that the appraisal report should have been based on an enhanced value that the landfill project, if successfully prosecuted to completion, would confer upon the lands. Nor do appellants describe how such an appraisal method involving the prediction of future events might be applied in the context of the pending exchange transaction. The regulation governing appraisals for land exchanges, 43 CFR 2200.0-5(c), provides that an "appraisal report" must provide "an opinion as to the market value of the lands or interests in lands as of a specific date(s)." In this case, the specific date of the valuation made is August 1, 1994. In reaching the opinion offered concerning the Government land, the appraisers used 11 land transactions they found to be comparable, and considered that the highest and best use of the Government lands on August 1, 1994, was mining use (Appraisal Report dated Aug. 11, 1994, at 43). When BLM appraiser Horyza evaluated the Nichols and Gaston report, he found that they "correctly rely on the direct comparison approach as the only meaningful method of estimating market value" (Horyza Appraisal Review dated Oct. 14, 1994, at 2). After determining that the number of comparable transactions used was adequate to satisfy the purpose of the appraisal reports, Horyza concluded that, with some modification as described in his review, the Nichols and Gaston reports conformed to accepted appraisal practices and were suitable for use by BLM. Appellants have offered nothing to disprove this conclusion by the BLM appraiser concerning the method and substance of the appraisal reports at issue. Instead, in order to rebut BLM's appraisal of value based on comparable property transactions, appellants rely on a single transaction.

This allegedly comparable site, the Republic Imperial landfill, is described by appellants as "a small, non-hazardous commercial landfill that currently operates under a Stipulated Order of Compliance and Agreement with the County pending full permitting and approval of a proposed expansion" (Stay Petition at 12). The 120-acre property, without improvements, was appraised by the Imperial County Assessor at \$45,488,473, or about \$45,737 per acre, in 1992. See Curtis Declaration in Support of Stay Petition. The transaction that appellants rely upon does not, therefore, involve a sale or transfer of an interest in the alleged comparable property, but is an estimate of value made for tax purposes by a California official. A copy of the assessor's tax roll showing this valuation as established in 1992 is attached as exhibit B to the stay petition.

Departmental regulation 43 CFR 2201.3-3 establishes standards for appraisal reports for land exchange purposes. Such appraisals should describe (as do the Nichols and Gaston reports), "the physical characteristics of the lands being appraised; a statement of all encumbrances; title information, location, zoning, and present use; an analysis of the highest and best use; and at least a 5-year sales history of the property." 43 CFR 2201.3-3(d). The Republic Imperial landfill example suggested by appellants does not meet these standards.

The comparative market analysis used in the appraisal reports relied upon by the BLM decisionmaker does, however, conform to the appraisal methodology recognized by the Department. See 43 CFR 2201.3-3(f). Such appraisals properly include a description and analysis of comparable land transactions. 43 CFR 2201.3-3(g). The Nichols and Gaston reports do so. An appraisal report that conforms to Departmental regulations governing land exchanges may properly be relied upon by Departmental decisionmakers if no error is shown to have been made by the Government's appraisers. See Brent Hansen, 128 IBLA 17, 19 (1993) and cases cited therein. It is therefore concluded, for reasons stated above, that appellants' allegations of error and inadequacy in the appraisal are without foundation in fact or law and must be rejected.

[3] Arguments addressed to BLM's issuance of the railroad right-of-way grant allege that BLM acted contrary to a regulation implementing the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), in issuing the rail right-of-way, because the EIS failed to mention the fact there was pending litigation in state court. This circumstance is said to be a violation of 40 CFR 1506.3(d). See, e.g., Sierra Club Petition to Stay filed in IBLA 96-305 at 1. The cited rule, however, seems limited to cases "[w]hen an agency adopts a statement which is not final within the agency that prepared it." See 40 CFR 1506.3(d). That is not the situation here; in this case BLM prepared the Federal portion of the EIS in a joint effort with Imperial County. Adoption of a statement prepared by another agency was never a possibility in this case. Although appellants argue that proceedings in the California courts concerning compliance with provisions of state environmental law are

relevant to this appeal, they have not shown any actual connection between the California and Federal rules that is implicated in any of these cases. It cannot be assumed that, as appellants seem to argue, an interpretation of the California statute by a California court is necessarily relevant in these appeals before the Department. This argument must, therefore, be rejected.

While appellants suggest the railroad right-of-way grant was made without provision for proper and continuing oversight by BLM and will fragment desert tortoise habitat, the record does not support this assertion. The grant provides for renewal under certain conditions, and is conditioned upon conformity to stipulations imposed by BLM and oversight by other agencies, including a requirement to submit to a tortoise monitoring program prescribed by Biological Opinion 1-6-95-F-30. See Attachment 1 to grant. Appellants have not shown otherwise.

It is also suggested by appellants that the rail right-of-way might be put to unauthorized uses, or might be later modified for other purposes, and that adverse visual impacts to the landscape will occur if the spur is built. These possibilities, however, are dealt with in great detail in the EIS and the right-of-way application itself; appellants have not shown that the findings made by BLM that adequate mitigation measures will protect the environment from significant adverse impacts were in error in any way. While appellants suggest that harm will be done to tortoise habitat by construction of the proposed spur, the U.S. Fish and Wildlife Service concludes to the contrary that, as a result of mitigation measures proposed by BLM, the situation of the tortoise should improve (Biological Opinion for the Mesquite Regional Landfill dated Nov. 27, 1995, at 17). Appellants have not shown error in this finding.

We therefore conclude, on the consolidated record before us in these appeals, that appellants have failed to show error in the record of decision approving a land exchange and railroad right-of-way grant in connection with the Mesquite Regional Landfill project. To the extent not specifically addressed herein, appellants' additional arguments have been considered and rejected.

Accordingly, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to stay the land exchange is denied and the decision appealed from is affirmed.

Franklin D. Amess
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge