

INTERIOR BOARD OF LAND APPEALS

F. Larry Bartee and Steven R. Talley

141 IBLA 55 (October 22, 1997)

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F. LARRY BARTEE
STEVEN R. TALLEY

IBLA 94-862, 95-37

Decided October 22, 1997

Consolidated appeals from a decision of the Phoenix Resource Area Office, Bureau of Land Management, issuing road access right-of-way grant. AZA 27291.

Set aside and remanded.

1. Environmental Policy Act—Environmental Quality: Environmental Statements—National Environmental Policy Act of 1969: Environmental Statements—National Environmental Policy Act of 1969: Finding of No Significant Impact

A BLM finding (based on preparation of an EA) that no significant environmental impact will occur as a result of issuing a right-of-way grant for an access road will be set aside on appeal where the appellant shows that BLM did not take a hard look at the environmental consequences of its action and presents evidence strongly suggesting that construction of a road could have environmental impacts that BLM did not address. Where BLM fails to consider or impose any specifications for siting, construction, maintenance, operation, use, or termination of the access road, it is impossible to confirm that the road's impacts will be minor or insignificant or that any impact will be mitigated.

APPEARANCES: F. Larry Bartee and Steven R. Talley, pro sese; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Steven R. Talley and F. Larry Bartee have each appealed from a July 25, 1994, Decision of the Area Manager, Phoenix (Arizona) Resource Area, Bureau of Land Management (BLM or the Bureau), granting a right-of-way to Robert G. and Barbara S. Nelson (the Nelsons) for a new road across public land in central Arizona.

By Order dated May 22, 1995, the two appeals were consolidated for decision, and the effect of BLM's decision granting the right-of-way was stayed pending review of the appeals.

On October 15, 1992, Robert G. Nelson filed an application for a right-of-way for road access to his private property in sec. 34, T. 8 N., R. 1 W., Gila and Salt River Meridian. ^{1/} He initially requested a right-of-way 66 feet in width and 7,400 feet in length, indicating that the right-of-way would be "graded only initially, paved to County standards eventually." In the portion of the application explaining his "technical and financial capability to construct, operate, maintain, and terminate [the] system for which authorization [was] being requested," Nelson stated: "I will contract with a licensed and bonded road contractor to grade in the road within a 66 ft. row. Eventually paving will be to County standards, also using a licensed and bonded road contractor. I will be responsible for maintaining the road as long as it remains private." Nelson set the cost of the proposal (construction, operation, and maintenance) at \$8,000.

Nelson indicated in his October 15, 1992, application that the proposal would have no environmental effects, stating that the route proposed would "follow an existing Jeep trail in place for over 60 years." The application contained a topographical map with a "pack trail" highlighted in yellow. The trail ran from southeast to northwest across the east half of sec. 11, covering approximately 7,400 feet.

The record indicates that, at the same time, the Nelsons filed an application with the State of Arizona for a 6,500-foot right-of-way across sec. 2, using the same pack trail, as well as a jeep trail that it joined. The State assigned No. 16! 52584 to that application.

On January 10, 1994, the Nelsons (acting through their agent, Dan Donahoe) notified BLM that they were willing to change their right-of-way application to modify the access road alignment:

Specifically, [the Nelsons] are willing to follow Castle Hot Springs Road until it intersects the west section line of Section 11. At that point, the R/W would follow the section line north to a point just short of its intersection with the southwest corner of Section 2 (this is to avoid crossing any of Section 3) and then would proceed northeast to enter Section 2.

The modified alignment resulted in a Federal right-of-way of only 1,500 feet long. A map prepared at that time (apparently by BLM) also depicts an alternate route along a jeep trail running roughly north-south in sec. 12.

^{1/} The application incorrectly indicated that the private land was in T. 7 N., R. 1 W.

On March 30, 1994, the Nelsons faxed a topographical map showing the "right of way alignment on Section 11." The document appears to be an effort to describe with some precision the route of the access road from its intersection with Castle Hot Springs Road to the Nelsons' private lands. The route was sinuous and, as depicted, clearly crossed the section line into sec. 10. The Bureau apparently advised the Nelsons that it could not grant a right-of-way as aligned, and, on May 3, 1994, they faxed a copy of a topographical map showing a less sinuous road entirely within sec. 11. The route, at its northernmost, appears to cross a gorge.

An Environmental Assessment (EA) was prepared by BLM and approved by the Area Manager on May 16, 1994. It contained two memoranda relating details of site visits and setting out brief analyses of impacts on protected plants and animals and cultural resources. The Bureau's wildlife biologist concluded that the proposed project would not impact any desert tortoise or Hohokam agave, but would impact "many state protected plants, including saguaro cactus." Its botanist, noting that the alignment of the right-of-way was approximate and had not been "staked and flagged," concluded, based on "walking [the] proposed alignment," that there would be no effect. Its archeologist found no prehistoric or historic sites on or in the vicinity of the proposed right-of-way. The EA stated BLM's conclusion that all critical elements except air quality would not be affected. (EA at 1.) The Bureau stated its conclusion that the impact to air quality would be "minor, and would occur only during construction" of the road.

The EA concluded that "there would be no residual impacts," and set out the following "mitigation measures":

1. All applicable regulations in accordance with 43 CFR 2800.
2. Any cultural and/or paleontological resources (historic or prehistoric site or object) discovered by the holder or any person working on the [holder's] behalf, on public or federal land shall be immediately reported to the authorized officer. The holder shall suspend all operations in the immediate area of such discovery until written authorization to proceed is issued by the authorized officer. An evaluation of the discovery will be made [by] the authorized officer to determine the appropriate actions to prevent the loss of significant cultural or scientific values. The holder will be responsible for the cost of the evaluation and any decision as to the proper mitigation measures will be made by the authorized officer after consulting with the holder.
3. Minimize the amount of vegetative destruction.
4. If any desert tortoises are found during construction, they should be avoided. If avoidance is not possible, they should be moved out of immediate danger and released unharmed. Tortoises should not be moved more than 100 feet from where they were found.

The Area Manager found as follows:

I have reviewed this environmental assessment including the explanation and resolution of any significant environmental impacts. I have determined that the proposed action with mitigating measures described above will not have any significant impacts on the human environment and that an EIS [environmental impact statement] is not required. I have determined that the proposed project is in conformance with the approved land use plan.

It is my decision to implement the project with the mitigation measures described above.

The right-of-way grant (incorporating the stipulations recommended in the EA) was offered to the Nelsons on May 16, 1994. The grant was issued, effective July 25, 1994, for a term of 30 years (subject to renewal), pursuant to Title V of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1761-1771 (1994). It provides for a right-of-way 33 feet wide and 1,700 feet long, crossing public land in the westernmost portion of the NW¼ sec. 11, T. 7 N., R. 1 W., Gila and Salt River Meridian, Yavapai County, Arizona. 2/ It permits construction, maintenance, and operation of a road, which (along with additional rights¹ of-way across State and private lands in sec. 2) provides access from the Castle Hot Springs Road to the Nelsons' private land in sec. 34, T. 8 N., R. 1 W., Gila and Salt River Meridian, Yavapai County, Arizona. 3/

Bartee and Talley, who own land near the subject right-of-way, appealed BLM's decision. They allege that construction, operation, and maintenance of a road along the right-of-way will result in damage to the fragile desert environment (particularly aesthetics), plants, soil, geologic features, and archaeological resources. They also allege that this will occur in part as a result of increased traffic attracted by improved access to off-road areas. They also express fear that the Nelsons will not be technically or financially capable of constructing or maintaining the road, and eventually restoring disturbed areas when the grant is terminated.

Bartee asserts that BLM made an insufficient effort "to insure that all pertinent issues with regards to local residents and land owners were covered." He opines that "we the people were severally cut short on our

2/ The lands within which the 33-foot right-of-way is situated are described in the grant as the W½W½W½NW¼ sec. 11.

3/ The access road runs roughly north-south from its intersection with Castle Hot Springs Road, which is approximately on the west section line of sec. 11, through sec. 2 into sec. 35, T. 8 N., R. 1 W., where it turns west into sec. 34, T. 8 N., R. 1 W.

notice of this project with regards to [its] potential detrimental characteristics." See Bartee Statement of Reasons (SOR) at 2. He also argues that BLM should not approve the road because a viable alternative route exists. He notes that there is an existing trail that could provide access from the east across land owned by the State and by the same individual with whom the Nelsons already have an access agreement. Id. at 4.

[1] Where BLM finds, based on preparation of an EA, that no significant environmental impact will occur as a result of approving issuance of a right-of-way grant and decides to grant approval without preparing an environmental impact statement, its action will be affirmed on appeal if BLM has taken a hard look at the environmental consequences of its action, considering all relevant matters of environmental concern, and made a convincing case either that no significant impact will result or that any such impact will be rendered insignificant by mitigating measures. Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140-41 (1992), and cases cited. A party challenging a finding that there was no significant impact must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal. Oregon Natural Resource Council, 139 IBLA 16, 22 (1997), and cases cited. The burden to demonstrate error falls on the appellant. Coy Brown, 115 IBLA 347, 357 (1990).

The record does not contain any specifications for siting, construction, maintenance, operation, or termination of the access road. No specifications were provided by the Nelsons and no specifications were imposed by BLM when it issued the grant. Compare, Gene Quigley, Jr., 112 IBLA 144 (1989). The Bureau merely provided that "all operations [shall be performed] in a good and workmanlike manner so as to ensure protection of the environment and the health and safety of the public." (Right-of-Way at 2.) Under 43 U.S.C. §§ 1764(c) and 1765 (1994) and 43 C.F.R. § 2801.2(b), BLM is authorized to include in a right-of-way grant terms, conditions, and stipulations regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination. Under 43 C.F.R. § 2802.4(h), BLM may include in a decision issuing a right-of-way grant a provision requiring that no construction on or use of the right-of-way shall occur until a detailed construction, operation, and rehabilitation and environmental protection plan has been submitted and approved by BLM.

Under 43 U.S.C. §§ 1764(c) and 1765 (1994), and 43 C.F.R. §§ 2801.2(b) and 2802.4(h), BLM is authorized to prescribe applicable terms and conditions in the right-of-way. Merely requiring that operations (presumably including construction, maintenance, operation, and eventual termination of the right-of-way) will proceed in a "good and workmanlike manner" provides inadequate guidance to the right-of-way holder.

In these circumstances, we cannot conclude that BLM has adequately assessed the environmental impacts of the road, as its decision does not address siting of the road; the manner in which the road will be built, maintained, or operated; or how the land would be rehabilitated if the grant terminated. As there is nothing to ensure that the road will be built, maintained, operated, or terminated according to any standards, it is impossible to confirm that the road's impacts will be minor or insignificant. Further, in the absence of terms governing siting, construction, operation, maintenance, use, termination, or restoration, we cannot hold that any impact will be adequately mitigated. The Bureau's Decision approving the right-of-way is accordingly set aside.

Appellant Bartee suggests that the Nelsons' project may be "a much larger scope project than the application indicates," (Bartee SOR at 2), and that the Nelsons' plan may seriously underestimate costs. On remand, BLM should evaluate those concerns.

Finally, we note that we agree with Bartee that BLM did not adequately involve the public in its consideration of the right-of-way request. In the absence of any justification for not doing so, BLM should have afforded some opportunity for public comment prior to authorizing the road. See Southern Utah Wilderness Alliance, 122 IBLA 334, 341-42 (1992).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside, and the case is remanded for further action.

David L. Hughes
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge