

INTERIOR BOARD OF LAND APPEALS

El Paso Electric Co.

146 IBLA 145 (October 23, 1998)

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EL PASO ELECTRIC CO.

IBLA 98-162

Decided October 23, 1998

Appeal from a decision of the Acting Area Manager, Mimbres Resource Area, Bureau of Land Management, approving right-of-way to the City of Las Cruces, New Mexico. NMNM 98522.

Affirmed.

1. Administrative Procedure: Administrative Review–Rules of Practice: Appeals: Standing to Appeal

An adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

2. Environmental Quality: Environmental Statements–Rights-of-Way: Generally–Rights-of-Way: Applications–Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision to issue a right-of-way grant for an electric transmission line and associated structures on Federal land will be affirmed on appeal when based on a reasoned analysis of all relevant factors, where the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

APPEARANCES: Raul A. Carrillo, Jr., Esq., Las Cruces, New Mexico, for Appellant; Nann Houliston, Esq., Utility Counsel, City of Las Cruces, New Mexico, for the City; Grant L. Vaughn, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Southwest Region, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

El Paso Electric Company (Appellant or EPE) has appealed the December 31, 1997, Decision of the Acting Area Manager, Mimbres Resource Area, New Mexico, Bureau of Land Management (BLM), approving right-of-way NMNM 98522 to the City of Las Cruces (City), New Mexico, to construct, operate, and maintain 115kV electrical transmission lines, 25kV electrical distribution lines and a service road on public lands. Appellant, a public

utility, previously obtained right-of-way NM 94744 for the purpose of constructing a substation and transmission lines on public lands in the same general area of the requested right-of-way.

The right-of-way granted to the City is a 60-foot wide electric transmission easement through sec. 21 of T. 23 S., R. 1 W., a 30-foot wide electric distribution easement through secs. 3 and 4 of T. 24 S., R. 1 W., and a 25-foot wide electrical distribution easement through the West Mesa Wellfield and parallel to the utility pipeline along sec. 25 of T. 23 S., R. 1 W., and sec. 30 of T. 23 S., R. 1 E. This electric utility would provide the main power source for the electric motors driving the turbine pumps of the West Mesa Wellfield. (July 1997 City of Las Cruces Plan of Development (PD) at 2.)

The request for a right-of-way across public land was submitted to BLM by the City in order to promote growth at the West Mesa Industrial Park. The City planned the construction of an electric substation within the industrial park to provide reliable, low cost electricity. Under the PD, this substation would receive its power supply from an electric power transmission line which connected into an existing power line located just north of the industrial park. In addition to the transmission line and substation, the PD called for the City to build electric distribution lines to supply power to certain City facilities and other customers in the area. These facilities include the West Mesa Wellfield, the Las Cruces Airport, the industrial park, and the Southern New Mexico Correctional Facility. (PD at 2.)

In his December 1997 Decision, the Acting Area Manager stated that he was issuing a 25-year right-of-way grant to the City for the transmission lines, distribution lines, and accompanying service road, subject to renewal. A copy of the grant is appended to the Decision. As granted, the right-of-way is 8.44 miles long and contains 29.37 acres.

Appellant has appealed BLM's Decision because of numerous claimed errors in the Environmental Assessment (EA) and the Finding of No Significant Impact (FONSI). (Notice of Appeal (NOA) at 1-2; Stay Petition (Stay Pet.) at 3.) Appellant claims BLM failed to properly scope this project, take into consideration important points of view, or give adequate notice of the project, and that these are deficiencies which subject BLM's Decision to reversal. (NOA at 2-3; Stay Pet. at 5.) Further, EPE claims BLM did not mandate, nor does the record reflect, consideration of reasonable alternatives. (NOA at 3-4; Stay Pet. at 5.) Third, Appellant claims the EA contains inadequate and insufficient data to support the stated purpose and need for the project. (NOA at 4-6; Stay Pet. at 6.) Fourth, Appellant claims the EA inadequately considers, or addresses, visual resources as well as existing and planned land uses. (NOA at 6-7.) In addition, EPE claims the EA does not accurately address the project itself, and that there are inaccuracies in the descriptions of the project segments and their lengths. (NOA at 7; Stay Pet. at 9.) Finally, Appellant claims the BLM determination should be reversed because of the inadequately documented and supported Decision. (NOA at 8; Stay Pet. at 10.)

In response, the City argues that the EPE has failed to substantiate its claim that the EA conducted by BLM is inadequate, or that there were any serious errors in processing the City's right-of-way application. (Las Cruces Response to Stay (LC Stay Resp) at 2.) Further, the City urges that EPE lacks standing to bring the appeal because it is not adversely impacted by the Decision. Id. The City claims that EPE maintains no assets in or on the right-of-way granted, maintains no assets contiguous to the right-of-way, maintains no assets inter-connected to the assets of the City which will occupy the right-of-way, and nowhere does EPE allege that its service to its customers will be impaired as a result of the grant of the right-of-way. (LC Stay Resp at 2-3.)

The BLM Response to the Petition for Stay explains that the City "will commit significant resources for valid purposes and ought not be frustrated in its attempts to pursue legitimate interests that will also benefit the general public." (BLM Response at 3.) BLM further states that it made diligent efforts to address and resolve the concerns of Appellant as it raised issues during the public comment period of the EA, the FONSI, and the Record of Decision preparation. (BLM Response at 4.) BLM states that the concerns of Appellant have been addressed in the environmental documents themselves, and that the right-of-way grant was issued in compliance with Federal regulations. In fact, BLM explains, the EA addressed the proposed action and numerous alternatives, how such proposed action and alternatives would affect the environment, the environmental consequences of the proposed action and alternatives, and the persons, groups and agencies consulted. (BLM Response at 5.)

[1] We have stated that in order for an appellant to have standing to appeal from a BLM decision under 43 C.F.R. § 4.410(a), the appellant must be both a party to the case and have a legally cognizable interest that is adversely impacted by that decision. See Blue Mountains Biodiversity Project, 139 IBLA 258 (1997); Laser, Inc., 136 IBLA 271 (1996); Stanley Energy, Inc., 122 IBLA 118, 120 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). If either of these two requirements is absent, an appeal must be dismissed. See National Wildlife Federation v. BLM, 129 IBLA 124 (1994); see also Mark S. Altman, 93 IBLA 265, 266 (1986). To be a "party to a case" a person must have actively participated in the decisionmaking process regarding the subject matter of the appeal. The Wilderness Society, 110 IBLA 67, 70 (1989); Utah Wilderness Association, 91 IBLA 124 (1986); see also Sharon Long, 83 IBLA 304, 307-08 (1984). The purpose of limiting standing to appeal to a party to the case is to afford an intelligent framework for administrative decisionmaking, based on the assumption that BLM will have had the benefit of such party's input in reaching its decision. See Utah Wilderness Association, supra, at 128-29; California Association of Four wheel Drive Clubs, 30 IBLA 383, 385 (1977).

In addressing the City's claim that Appellant lacks standing to appeal, we find that EPE is clearly a "party to a case." Appellant participated in the decisionmaking process resulting in this Decision, and its concerns were considered. The issue is whether it is "adversely affected." The interest of Appellant affected by the Decision under review must be a legally cognizable interest and the allegation of adverse effect must be

colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. National Wildlife Federation v. BLM, supra, at 127; Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). While the interest affected need not be a property or economic interest, a deep concern for a problem is not enough. Robert M. Sayre, 131 IBLA 337 (1994). This Board has recognized that the use of the land involved or ownership of adjacent land may encompass a sufficient interest. The Wilderness Society, 110 IBLA 67, 70 (1989). Nevertheless, we have held that the threat of injury and its effect on the Appellant must be more than hypothetical. Missouri Coalition for the Environment, 124 IBLA 211 (1992); George Schultz, 94 IBLA 173, 178 (1986). The threat of injury must be real and immediate before standing will be recognized. Salmon River Concerned Citizens, 114 IBLA 344 (1990).

In the case before us, and based upon our review of the record and the parties' pleadings, we find that Appellant has carried its burden of demonstrating that it will be adversely impacted economically by BLM's decision. Contrary to the City's assertions, BLM, in its Response to the Appellant's Petition for Stay filed with the Board on February 17, 1998, explained: "Appellant and the City of Las Cruces have some competing interests in the provision of electrical services and have disputed matters pending before the Federal Energy Regulatory Commission (FERC)." (BLM Response to Stay Petition at 1.)

We have held that an adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal. For example, in John D. Archer, 120 IBLA 290 (1991), we entertained the appeal of a person who complained that BLM's grant of a right-of-way for a phosphate slurry pipeline should have required the grantee to operate the pipeline as a common carrier so that owners of nearby phosphate mines could use it to ship their ore upon payment of the appropriate costs. See also Allen D. Miller, 125 IBLA 139, 141 (1993).

Although Appellant has established standing, our review of the decisional process undertaken by BLM in developing the EA convinces us that BLM took the required "hard look" before determining that the requested right-of-way would create no significant environmental impact. 1/

1/ Our review of the environmental issues is confined to the propriety of the Acting Area Manager's December 1997 Decision authorizing electric transmission and distribution lines, and a service road, on public land under right-of-way grant NMNM 95822, and specifically the adequacy of BLM's assessment of the environmental consequences of granting that right-of-way. We do not review the pending action before the Federal Energy Regulatory Commission (FERC) concerning the priority sought by Appellant in power distribution services. See 43 C.F.R. § 4.1(b)(3). For this reason, we find no merit in Appellant's request that the BLM Decision here under appeal be held in abeyance until the FERC rules on the dispute involving these parties presently pending before it.

In order to consider the environmental consequences of the proposed right-of-way on Federal land, BLM prepared an EA pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994). On December 30, 1997, based on the EA and the FONSI, BLM approved a right-of-way grant for the proposed transmission and distribution lines and accompanying service road. A Decision advising the City of the BLM Decision was then issued on December 31, 1997.

[2] Section 501(a)(4) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(4)(1994), grants the Secretary of the Interior authority to issue rights-of-way on public lands for generation, transmission, and distribution of electric energy. See also 43 U.S.C. § 1761(a)(7) (1994). Approval of rights-of-way is, generally, a matter of Departmental discretion. Platronics Communications, 142 IBLA 156, 157 (1998); John M. Stout, 133 IBLA 321, 327-28 (1995), and cases cited. Such cases are evaluated to determine if the BLM decision is reasonable. Id. One seeking to show error in a grant of a right-of-way must show by a preponderance of the evidence that the agency decision is unreasonable. Stewart Hayduk, 133 IBLA 346, 354 (1995).

In addressing the right-of-way request by the City, BLM examined three alternatives as part of its environmental review. The proposed alternative, the City's proposal described above, called for construction activities within permanent easements and no requirement for temporary construction easements. Construction would consist of limited blading to clear vegetation, drilling and backfilling necessary to install power poles, and installation of electrical transmission lines. Remediation measures within the permanent easements would include reseedling of the easement according to accepted procedures. A complete plan of development was filed for this proposal by the City of Las Cruces with the Las Cruces District Office of the BLM and was made available for public review. The proposed development plan would impact a total of 29.37 acres of land under BLM administration. (EA at 1-3.)

The "no action" alternative would have rejected the City's proposal. BLM determined this alternative was not warranted given the high rate of population growth now evident in Las Cruces and the long-term need for electrical power at the City's Industrial Park and Wellfield, as well as at the Southern New Mexico Correctional Facility. All of these facilities required additional power and the no action alternative was determined by BLM to have deleterious socio-economic impacts on long-term growth in the City's service area. (EA at 5.)

The "alternate partial alignment" alternative would have required an additional 2.75 miles of easement clearing, an additional 2.75 miles of pole locations and transmission lines, and four additional specially designed corner poles in order to accomplish a detour around BLM holdings. This alternative would have doubled the cost of constructing electrical transmission lines across this segment of the proposed project. (EA at 5.)

BLM's environmental review examined the affected environment in great detail. Affected resources were carefully considered. A cultural resources study, for example, included a review conducted in 1997 of an archaeological clearance survey of the proposed project corridor, which determined that one pre-historic archaeological site and 30 isolated occurrences were found within the proposed right-of-way. Livestock grazing allottees using the area encompassed by the project were advised by BLM of the proposed transmission lines, and wildlife and vegetation within the area were reviewed to ensure no special status wildlife or vegetation would be affected. It was determined that no special status vegetation or wildlife species were known to exist in the project area. (EA at 7.)

The socioeconomic impacts studied within the EA reflect that the proposed service area for the City is currently undergoing rapid population expansion. The BLM review determined that completion of the proposed electrical transmission and distribution line project would allow growth in the region and enhance the social and economic characteristics of the Las Cruces, New Mexico, area. Id. It was further determined in the environmental review that Areas of Critical Environmental Concern, prime and unique farmlands, floodplains, Native American concerns, air quality, drinking and groundwater quality, solid or hazardous wastes, wetlands or riparian areas, wild and scenic rivers, wilderness values, and minority or low-income populations or communities would not be affected by approval of the proposed right-of-way. Id.

In gathering the facts and developing the conclusions required to provide a complete and accurate EA, BLM sought the comments of the public, including Appellant. The FONSI, which resulted from the EA, noted that each of the critical elements described above had been addressed, and further concluded that the right-of-way was in conformance with the Mimbres Resource Area Management Plan. (FONSI at 1.)

As noted above, EPE, upon receipt of the December 1997 Decision, filed a Notice of Appeal. The Appellant's concerns, described above, were adequately addressed in the EA. Comments were solicited and received from the public. In fact, Appellant was provided additional time to comment on the draft EA, at its request. Reasonable alternatives were considered and adequately addressed in the EA, and the proposed alternative was found to clearly be the most supportable. Appellant's other claims are without merit.

We have noted in the past that professional disagreement by non-Federal commentators with the findings and conclusions reached by the Federal personnel charged with responsibility for the accomplishment of an environmental review is insufficient to discredit the effort. Sierra Club, 80 IBLA 251, 266 (1984).

A BLM decision exercising the discretion described above will be affirmed on appeal where the record demonstrates that it is based upon a reasoned analysis of all relevant factors, was made with due regard for

the public interest, and sufficient reasons for disturbing the decision are not shown. Daryl Richardson, 125 IBLA 132, 134 (1993); Coy Brown, 115 IBLA 347, 356 (1990). That is the case here. The fact that Appellant would have preferred that no right-of-way grant issue does not establish error in the Acting Area Manager's December 31, 1997, Decision to issue right-of-way grant NMNM 98522 to the City. Therefore, we consider the Decision under review was proper.

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 affirmed.

James P. Terry
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge