

INTERIOR BOARD OF LAND APPEALS

Melluzzo Stone Company, Inc., and Wayne Melluzzo

154 IBLA 23 (October 19, 2000)

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MELLUZZO STONE COMPANY, INC.  
WAYNE MELLUZZO, PRESIDENT

IBLA 99-104

Decided October 19, 2000

Appeal from a decision of the Phoenix District Office, Arizona, Bureau of Land Management, denying an application for a noncompetitive mineral material sale. AZA-30697.

Affirmed.

1. Materials Act

Under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations, 43 C.F.R. Part 3600, BLM has considerable discretion to dispose, by sale or other means, of mineral materials from the public lands. BLM must, in the exercise of its discretionary authority, refuse to authorize the sale where it is "detrimental to the public interest." 30 U.S.C. § 601 (1994).

2. Materials Act

In challenging the denial of a mineral material sale request, the appellant must show, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors, including less stringent alternatives to the decision, and acted on the basis of a rational connection between the facts found and the choice made.

APPEARANCES: G. Lee Crosby, Jr., Esq., Phoenix, Arizona, for appellant; 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 HEMMER

Melluzzo Stone Company, Inc. and its president Wayne Melluzzo (hereinafter Melluzzo) appeal from a decision of the Phoenix District Office, Arizona, Bureau of Land Management (BLM), dated October 26, 1998.

The decision denies Melluzzo's application N-62278 for a noncompetitive mineral material sale of landscape boulders from a 95-acre plot of land in which the minerals are Federally owned.

### Background

On June 8, 1998, Melluzzo submitted a plan of operations for the "[e]xcavation of surface landscape boulders" from "all of section 10 but for existing patented mining claims." (June 3, 1998, Letter from Melluzzo to BLM.) After resolving certain encumbrance issues, BLM proceeded to consider the letter as a request to purchase mineral materials within portions of sec. 10 unencumbered by unpatented mining claims.

The property on which the proposed boulder sale lies is identified as Category III habitat for the desert tortoise, a "species of special concern" identified by the United States Fish and Wildlife Service under the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531-1544 (1994). Under section 6840.06(C) of the BLM Manual (Rel. 6! 116 Sept. 16, 1988), with respect to "candidate species" (species formerly identified as Category 1 and 2, and reclassified as "special concern" species), BLM will "carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and \* \* \* ensure that actions authorized \* \* \* do not contribute to the need to list any of these species as [threatened/endangered]." See Native Ecosystems Council, 139 IBLA 209, 219 (1997); Edward R. Woodside, 125 IBLA 317, 324 (1993). <sup>1/</sup>

In the Strategy for Desert Tortoise Habitat Management on Public Lands in Arizona, October 1990, BLM established 3 categories of desert tortoise habitat, depending on various qualities. Category III was the least valuable of the 3 categories, yet the document established a policy with respect to Category III areas to "[l]imit tortoise habitat and population declines to the extent possible by mitigating impacts." (Strategy for Desert Tortoise Habitat Management on Public Lands in Arizona, October 1990, at page 4.) This policy for Category III habitat was strengthened in the Compensation for the Desert Tortoise, November 1991, adopted by an Arizona State Office Instruction Memorandum (IM) AZ-92-46. The 1991 document, at pages 5 and 15, ensured that BLM would treat Category III habitat as if classified within Category II, if effects on the Category III site could adversely affect adjacent habitat of a higher quality.

BLM conducted a biological survey of the proposed project area on July 7, 1998. In a report on this survey dated August 3, 1998, biologist Tim Hughes from the Phoenix Field Office, concluded that the project would

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<sup>1/</sup> Under section 6840.06(E), BLM Manual (Rel. 6! 116 Sept. 16, 1988), BLM must "carry out management for the conservation of state listed plants and animals," and "the State Director will develop policies that will assist the State in achieving their management objectives for those species."

"significantly alter the habitat for desert tortoise" and two other species of special concern — the chuckwalla and rosy boa — throughout the project area. Hughes noted that the entire surrounding area was high quality tortoise habitat, but had been listed as Category III because of the "limited BLM ownership and manageability of the area." (August 3, 1998, Memorandum at 1.) Hughes recommended that the sale be denied because "it will result in the destruction of a significant amount of Category III desert tortoise habitat that would be classified as Category II if the BLM administered a large block of land in the area." Id. at 2. He determined that the destruction of habitat on the proposed site would have the effect of "reducing the quality of the remaining habitat by fragmentation and peripheral impacts. On site mitigation is not feasible. \* \* \* There is still a net loss of habitat for the desert tortoise." Id.

On October 26, 1998, the Field Office Geologist submitted his conclusions. Based upon Hughes' report, the geologist reached the same conclusion and recommended against granting the sale request.

BLM denied the application on October 26, 1998. Citing and quoting the conclusion of biologist Hughes, the Field Manager concluded that he would deny the sale of boulders "in accordance with 43 C.F.R. § 3600.0-4. The rule provides that a mineral material sale may be denied if "the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale." (Decision at 1.)

In its Statement of Reasons (SOR), Melluzzo argues that BLM's decision should be overturned because of alleged BLM "misconceptions." (SOR at unnumbered p. 2.) The primary misconception, according to Melluzzo, is that BLM vastly overstated Melluzzo's plans. In its SOR, Melluzzo claims that "only 15% of the boulders in the area will be removed," that it is only seeking boulders of particular "aesthetically pleasing" value, and that only those of the 300-1000 pound range in size "are of interest." Id. Elsewhere, Melluzzo argues that BLM erred in choosing mitigation to prevent impacts. Melluzzo claims that "BLM had the authority and discretion to apply [other] mitigation techniques to an approval of the application." Id. at unnumbered p. 3. Finally, Melluzzo appears to complain of BLM's treatment of Category III habitat, suggesting that BLM erred in mentioning that the category might have been different if BLM owned greater portions of the habitat area. Id. at unnumbered pp. 1-3.

#### Analysis

[1] As background, it is important to restate the authority under which we operate in considering a mineral material sale. We recently stated this background in Echo Bay Resort, 151 IBLA 277, 280 (1999), in the following quote:

Under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations, 43 C.F.R. Part 3600, BLM has considerable discretion to dispose, by sale

or other means, of mineral materials from the public lands. See 30 U.S.C. § 601 (1994); 43 C.F.R. § 3610.1-1; Jenott Mining Corp., 134 IBLA 191, 194 (1995); Glen B. Sheldon, 128 IBLA 188 (1994). No disposal is authorized by the statute where it would be "detrimental to the public interest." 30 U.S.C. § 601 (1994); see Curtis Sand & Gravel Co., 95 IBLA 144, 160, 94 I.D. 1, 10 (1987). BLM is required, by 43 C.F.R. § 3600.0-4, to deny such a request when it justifiably "determines that the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale." See Glen B. Sheldon, 128 IBLA at 189.

A BLM decision, made in the exercise of its discretionary authority, generally will be overturned by the Board only when it is arbitrary and capricious, and thus not supported on any rational basis. Utah Trail Machine Association, 147 IBLA 142, 144 (1999); Glenn B. Sheldon, 128 IBLA at 191.

[2] In Glenn B. Sheldon, 128 IBLA at 191, this Board reiterated for mineral material sale cases the rule regarding the burden on an appellant to demonstrate error in a BLM decision. The appellant must show, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors, including less stringent alternatives to the decision, and acted on the basis of a rational connection between the facts found and the choice made. E.g., Utah Trail Machine Association, 147 IBLA at 144 (authorized use of new trail). We restated the applicability of this burden on the appellant in two mineral material sale cases issued within the last year. Echo Bay Resort, 151 IBLA at 277; International Sand & Gravel, 153 IBLA 295 (2000).

Neither party to this case appears to understand this burden or its own posture before this Board. In analyzing how we should look at this case, the Office of the Field Solicitor cites as applicable the standards set forth to govern judicial review by Article III courts. (Respondent's Answer at 5.) However, this Board's review is not governed by the Administrative Procedure Act at 5 U.S.C. § 706(2)(A) (1994). Rather, that standard is one imposed on the Federal courts in reviewing an administrative decision such as this one. Conversely, while the Secretary's decision resulting from the delegation to the Board is reviewed under the standards in 5 U.S.C. § 706 (1994), a BLM decision appealed to the Board is not so governed. This Board is delegated the executive authority of the Secretary of the Interior. For example, if more evidence is necessary, we may seek it.

Melluzzo's comprehension of our review process and its burden of proof is no better. Melluzzo's principal contention appears to be that BLM erred for failure to consider a limited proposal, the written version of which does not appear in this record. It is true that the above-stated

precedent permits the Board to find, based on an appellant's showing, that a record supports the conclusion that BLM did not adequately consider "less stringent" alternatives. But this is not the record on which to make such a finding.

In this case, we will not hold BLM in error for its lack of clairvoyance on the plan for boulder removal Melluzzo now describes. Melluzzo's claim that "only 15%" of the "aesthetically pleasing" rocks in "the 300-1000 pound range" would be taken (SOR at unnumbered p. 2), appears for the first time in its SOR. <sup>2/</sup> The record does not show that the details of the proposal on which Melluzzo asks the Board to reverse BLM was ever presented to BLM. The letter that BLM construes as the request for a mineral material sale describes the scope of the work as "excavation of surface landscape boulders." (June 3, 1998, Letter at 1.) The letter contains none of the above-stated limitations. To the contrary, it states:

The material to be excavated is lying above ground throughout the entire property. The terrain is fairly flat with out-croppings of rock scattered throughout. Access roads will be pushed using a track-type dozer to areas where there is sufficient quantities of rock to remove. Crane pads will be built using the dozer in these areas to allow the set-up of a rough terrain hydraulic crane and 45 ft. semi tractor trailer flatbeds. The boulders will be strapped and lifted using cable rigging onto the flatbed trailers and transported to a staging area where highway trucks shall drop empty trailers and pick up loaded trailers for transport \* \* \*.

Id.; see also handwritten "Mining Plan of Operation." According to the June 3 letter, the operations would be proposed for 15 hours a day in summer, and 11 hours a day in winter, 6 days a week. Id. Nothing in the record suggests how the limitations on aesthetics and amounts Melluzzo suggests now would affect this plan.

Moreover, when the opportunity arose to advise BLM of the company's limited planning it now explains to the Board, Melluzzo took no such opportunity. Instead, while Melluzzo was somehow informed about the concern with the tortoise habitat, its response demonstrated a lack of comprehension of habitat issues or how alternatives and limited grants would affect Melluzzo's plan. In a letter dated August 3, 1998, he stated:

During the past 10 years we have taken surface boulders off of the Thomson Ranch-approx. 300 acres [sic] which

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<sup>2/</sup> The only reference to such a limitation derives from a comment in Melluzzo's SOR at unnumbered page 3. There, the SOR states vaguely that a BLM employee "was told that the interest in the boulders in the subject area is limited as set forth above." The SOR does not describe when or how this happened, and the record, containing a number of phone and conversation logs, contains no document referencing any such conversation.

immediately adjoins the above referenced BLM land. During that period and ongoing at the present time we have experienced no incident concerning the Desert Tortoise or any of their habitat. Although, [sic] sightings of a minimal amount of tortoises occurred none of these were in any way harmed, but instead were moved to a safer place.

(Letter from Melluzzo, August 3, 1998, to BLM.) Melluzzo in no way suggested limiting its plan when the time was relevant to do so.

It is not enough for Melluzzo to say BLM should have considered less stringent alternatives without specifying that the alternatives indicated by the appellant would have lessened the impact. In Echo Bay Resort, we refused to set aside a BLM mineral material sale decision because the appellant did "not elucidate how [its] plans could go forward and also avoid the habitat and sites." 151 IBLA at 283.

This failure is apparent here as well. Melluzzo makes no effort to explain even to the Board how the stated reduction in boulders taken would affect the tortoise habitat. According to Melluzzo's application letter of June 3, 1998, it must nonetheless establish access roads "using a track-type dozer to areas where there is [sic] sufficient quantities of rock to remove. Crane pads will be built using the dozer in these areas to allow the set-up of a rough terrain hydraulic crane and 45 ft. semi tractor trailer flatbeds." The plan remains. Melluzzo fails to suggest how limiting the removal of boulders in number, size, or color would change effects on habitat.

Our concern with Melluzzo's disconnection between the planned operations and their effects is enhanced by the letter of August 3 quoted above. Melluzzo suggested there that not seeing a tortoise constitutes "no incident concerning the Desert Tortoise or any of their habitat." (Melluzzo's August 3, 1998, letter to BLM.) Likewise, Melluzzo equated moving observed tortoises "to a safer place rather than a roadway," id., with a solution to BLM's concerns regarding tortoise habitat. Moving a tortoise out of the way of a "dozer" is not equivalent to ensuring that the dozer, the other machinery, and removal of rocks do not destroy the habitat. We would not reverse BLM for failing to consider a plan, the specific limitations of which were never conveyed to BLM, without some showing that BLM's lack of consideration of the issue likely changed the outcome. Glenn B. Sheldon, 128 IBLA at 191. Thus, Melluzzo has failed to meet its burden of proof that BLM erred.

Melluzzo goes on to assert that "BLM had the authority and discretion to apply any of these mitigation techniques" other than avoiding impacts, "and chose not to even explore these options." (SOR at unnumbered p. 3.) Citing Council on Environmental Quality (CEQ) regulations promulgated to implement the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994). Melluzzo claims that BLM should have considered three "mitigation" options as defined in 40 C.F.R. § 1508.20: "b) limiting the degree or magnitude of the action, c) repair and

rehabilitation, d) preservation and maintenance during the operation." Id. But as Melluzzo concedes, id., subpart (a) of the definition of "mitigation" includes "[a]voiding the impacts altogether by not taken a certain action or parts of [it]." 40 C.F.R. § 1508.20(a). Nothing cited by Melluzzo in the CEQ regulations or any BLM rule prevents BLM from considering this mitigation alternative. In the absence of even an attempt by Melluzzo to show how alternatives (b)-(c) would improve this situation or suggest how the habitat would be affected in the long run, we cannot fault BLM for failure to choose one of them.

In short, Melluzzo's claim is entirely procedural. Melluzzo argues BLM should have considered something, the outcome of which Melluzzo does not proffer. To meet its burden of proof and show this Board it should overturn BLM's decision, Melluzzo must do more than this. It is up to Melluzzo to explain how BLM erred in choosing its option. BLM's record contains pictures of the site as well as impacts resulting from rock removal on adjacent lands. Melluzzo fails to explain how "mitigating impacts" by means other than avoiding them would maintain desert tortoise habitat.

Melluzzo's failure to meet its burden is crucial in a discretionary mineral material sale. Faced with such a request, BLM is required by 43 C.F.R. § 3600.0-4 to deny it when BLM justifiably "determines that the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale." See Glen B. Sheldon, 128 IBLA at 189. Melluzzo argues nothing about this balancing act required of BLM, and no reason other than disagreement to show that BLM erred in failing to consider anything that would prevent "aggregate damage to public lands and resources." Melluzzo has failed to show that BLM abused its discretion or erred in focusing on impacts to the tortoise. Echo Bay Resort, 151 IBLA at 277.

Finally, Melluzzo's statements which effectively challenge BLM's reliance on tortoise habitats in the surrounding vicinity do not change the outcome here. Melluzzo complains that BLM erred by "basing the impact upon the perceived impact to private property where a more comprehensive removal scheme has been employed." (SOR at unnumbered p. 3.) First, Melluzzo does not fairly state BLM's decision in this respect. That decision relies on the biological opinion to state:

The tortoise habitat in this area is classified as Category III habitat area. The entire area is high quality desert tortoise habitat which would be worthy of management as Category I or II habitat, if BLM had more ownership in the area. The BLM's goal for Category III habitat is to limit tortoise habitat and population declines to the extent possible by mitigating impacts. Authorization of the boulder sale would result in the destruction of a significant amount of Category III desert tortoise habitat. The proposed action is discretionary and the intent

of existing tortoise management policy is to use the BLM's discretion to avoid adversely impacting desert tortoise habitat.

(Decision at 1-2.) The quoted opinion does not suggest that it relied on destruction of adjacent areas to reach its decision. However, to the extent Melluzzo raises the point that adjacent property has been subject to a "more comprehensive removal scheme," and theoretically subject to more habitat loss, this would only support BLM's exercise of discretion to protect the public interest.

While in another case, we might examine in greater detail BLM's correlation of Category III to Category I or II habitat given related surroundings, on this record Melluzzo has failed to identify any means by which BLM erred in reaching its discretionary determination. As noted above, the policy for Category III habitat was strengthened in the Compensation for the Desert Tortoise, November 1991, adopted by Arizona State Office IM AZ-92-46. Whether or not that IM remains in effect, the 1991 policy ensured that BLM would treat Category III habitat as Category II if effects on the Category III site could adversely affect adjacent habitat of a higher quality. Biologist Hughes found that this was a likely result of the sale. (August 3, 1998, Memorandum at 2.) Melluzzo has not shown that this biological conclusion should be reconsidered or that the interrelationship between tortoise habitats is affected by land ownership. Melluzzo fails to allege a biological contradiction to Hughes' analysis, let alone one that would show error on BLM's part, and again fails to meet its burden of proof. Blue Mountain Biodiversity Project, 139 IBLA 258, 267 (1997).

#### Conclusion

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.

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Lisa Hemmer  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge