

INTERIOR BOARD OF LAND APPEALS

Yates Petroleum Corp.

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YATES PETROLEUM CORP.

IBLA 2001-408

Decided October 29, 2004

Appeal from decisions of the Roswell, New Mexico, Field Office, Bureau of Land Management, determining cost recovery categories for right-of-way applications NM 105292 and NM 105293.

Set aside and remanded.

1. Administrative Practice: Decisions--Federal Land Policy and Management Act of 1976: Rights-of-Way--Mineral Leasing Act: Generally--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Oil and Gas Pipelines

Section 504(g) of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. § 1764(g) (2000), and section 28(l) of the Mineral Leasing Act, as amended (MLA), 30 U.S.C. § 185(l) (2000), require a right-of-way applicant to reimburse the United States for the reasonable administrative and other costs incurred in processing the application and in related inspection and monitoring of the right-of-way. BLM regulations for FLPMA and MLA rights-of-way establish cost recovery categories based upon the expenditure of government resources in processing the applications. BLM decisions determining that applications for an access road right-of-way issued pursuant to FLPMA, and for an oil and gas pipeline right-of-way issued under the MLA, covering exactly the same ground, both fall under cost recovery Category III will be set aside and remanded where (1) BLM's decisions do not explain how BLM determined that two field examinations were required for each application, and (2) the supplementary record provided by BLM documenting the performed field examinations does not establish what

examinations actually took place for each right-of-way application and/or were necessary to verify the data available in the BLM office or furnished by the applicant.

APPEARANCES: Ernest L. Carroll, Esq., Artesia, New Mexico, for appellant; Martha C. Franks, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Yates Petroleum Corporation has appealed two right-of-way cost recovery category and fee determination records (cost recovery category decisions) issued by the Roswell, New Mexico, Field Office, Bureau of Land Management (BLM), on August 21, 2001. The first decision determined that Yates' application for an access road right-of-way (NM 105292) fell within cost recovery Category III and required the payment of a nonrefundable application processing fee of \$550 as well as a \$100 monitoring fee. The second decision concluded that Yates' application for an oil and gas pipeline right-of-way (NM 105293) was a Category III application which required the payment of a \$350 nonrefundable application processing fee and a \$75 monitoring fee.

On August 21, 2001, Yates submitted initial applications for the two rights-of-way. Based upon these applications, BLM issued the cost recovery category decisions subject to this appeal. On August 27, 2001, Yates filed final applications for the two rights-of-way which differ in the estimated length of the rights-of-way and which apparently supercede the earlier applications. Yates explains that this procedure is customary when it applies for rights-of-way.

Yates provides the authorized officer with a map and verbally communicates [its] request. The authorized officer prepares the Right-of-Way Cost Recovery Category and Fee Determination Record and provides it to Yates. Yates then prepares its application including the Right-of-Way Cost Recovery Category and Fee Determination Record and submits it along with a check to [BLM].

(Statement of Reasons (SOR) at 3 n.1). Accordingly, we cite to the later filed application to describe the rights-of-way at issue here.

In its August 27, 2004, submission, Yates applied for an access road right-of-way pursuant to section 501(a)(6) of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. § 1761(a)(6) (2000). The purpose of the road was to provide access over Federal land from the Doris # 2 well located on BLM managed land in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 11, T. 5 S., R. 24 E., New Mexico Principal

Meridian (NMPM), Chaves County, New Mexico, to the Cobra “AXK” State Com. # 2 well which it intended to drill on State land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 14, T. 5 S., R. 24 E., NMPM, Chaves County, New Mexico. (SOR at 2.) According to the application, the proposed road would cross 998.3 feet of public land and would be 30 feet wide. (NM 105292 at 1 ¶ 7c.) The application stated that “Yates is filing for a pipeline right-of-way with BLM that will follow this road route.” *Id.* at 2 ¶ 14.

Yates’ August 27, 2001, application for an oil and gas pipeline right-of-way was submitted pursuant to section 28(a) of the Mineral Leasing Act, as amended (MLA), 30 U.S.C. § 185(a) (2000). The application covered an 1,800-foot long buried steel natural gas pipeline, 999.4 feet of which would cross Federal lands. (NM 105293 at 1 ¶¶ 7a and c.) Although the application requested a 50-foot wide construction right-of-way, it stated that the permanent right-of-way would be 30 feet wide. *Id.* at 1 ¶ 7c. The application stated that the “pipeline [is] to follow our access road and an application with BLM is being filed.” *Id.* at 2 ¶ 14.

As described above, BLM had issued the cost recovery category decisions for the access road and pipeline rights-of-way on August 21, 2001. These decisions consist of forms which direct the authorized officer to circle the “X” underneath the appropriate category for two processing activities, “NEPA documentation” and “Field Examinations,” and to use the highest numbered category containing a circled “X” to identify the category. In both cost recovery category decisions, under “NEPA documentation,” BLM circled the “X” under Category III on line “a” which states: “All existing data in office of Authorized Officer.” Both decisions also contain a circled “X” under Category III for “Field Examinations,” signifying that “[t]wo field examinations are required.” Based on the Category III determination, the decision for the access road right-of-way application directed Yates to pay a nonrefundable processing fee of \$550 as well as a \$100 monitoring fee for the access road right-of-way application. See 43 CFR 2808.3-1(a), 2808.4(a)(1). The decision for the pipeline right-of-way relied on the Category III finding to require Yates to pay a \$350 nonrefundable processing fee and a \$75 monitoring fee. See 43 CFR 2883.1-1(c).

Yates appealed both cost recovery category decisions. In its SOR Yates contends that BLM’s decisions are arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law because they were based on factors other than those established in applicable regulations. Yates asserts that 43 CFR 2808.2-1, addressing FLPMA rights-of-way including access roads, and 43 CFR 2883.1-1, governing MLA rights-of-way such as pipelines, establish the appropriate criteria for determining the amount of the cost reimbursement. Those regulations, Yates submits, limit the relevant criteria to the number of trips to the field required to verify data contained in the office of the authorized officer needed to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA). (SOR at

11-12.) Yates explains that the two rights-of-way cross the exact same lands, the area already has been visited numerous times because of prior oil and gas drilling activities, and, as Yates' cultural resource survey of the area points out, the topography of the area and its soils and gently sloping terrain present no environmental issues. *Id.* at 12-13. Under these circumstances, Yates maintains that it would be illogical to conclude that BLM needed to field examine the lands four or even two separate times to verify the data in BLM's offices. Yates insists that any determination that more than one trip would be necessary to simultaneously examine the joint site of the two right-of-way applications would be arbitrary. *Id.* at 13.^{1/}

On November 5, 2001, BLM supplemented the records for both right-of-way applications with documents reflecting activities transpiring since the filing of the appeals. The submitted documents include copies of both issued right-of-way grants, the rental determinations for the rights-of-way, the joint October 31, 2001, environmental assessment (EA# NM-060-02-010) and decision record and finding of no significant impact (DR/FONSI) for the rights-of way, and memoranda from resource specialists indicating whether field examinations were conducted.

The supplemented records for the right-of way applications contain identical October 31, 2001, memoranda from a rangeland management specialist and October 17, 2001, memoranda from a wildlife biologist asserting that each of those resource specialists conducted a field examination of the proposed rights-of-way. The records also contain October 18 memoranda from an archeologist that are silent as to whether a field examination took place, and October 22 memoranda from a recreation specialist indicating that no field examination was required. These documents provide clear evidence, therefore, that two field examinations took place. Whether any more took place is impossible to tell.

In its Response to the SOR and Motion to Dismiss (Response), BLM asserts that the events occurring since the filing of the appeal refute the arguments made by Yates and that the appeal should therefore be dismissed. BLM contends that the supplemented records show that "multiple trips to the field have already taken place" and that "further monitoring visits will be necessary." (Response at 2.) BLM asserts

^{1/} Yates relies on a conversation between BLM's authorized officer and Yates' agent to challenge the decisions. According to Yates, the BLM officer claimed that he was "instructed by his supervisor to change the determination for any right-of-way which requires a new disturbance of ground from a Category 2 to a Category 3." (SOR Ex. 7, Affidavit of Clifton May at 2 ¶ 8; see also SOR at 12.) Yates asserts that whether the right-of-way involves a new disturbance of land is not related to the verification of data found in BLM's offices for NEPA compliance purposes and cannot support BLM's cost recovery category decisions. (SOR at 13.)

that the submitted facts rebut any suggestion that the actual cost to BLM of processing the applications would require only one trip to the field. Id. at 1-2.

In a Reply,^{2/} Yates contends that BLM's action taken subsequent to the appeal can only be seen as a "self-serving" effort to justify the prior decisions. (Reply at 3.) Yates asserts that since these actions were not known to BLM at the time it rendered its decision, that information could not have formed a rational basis for the decision. Id. at 4. Yates points out that it is not possible to conclude from that information submitted that the wildlife biologist and range specialist each made two separate field trips to review the exact same area for the identical reason. Id. at 4-6. Yates submits that, while it may have been necessary for each specialist to conduct a field examination of the area to verify the existing data, one trip should have considered both applications, which would place each application into cost recovery Category II. Id. at 8. Alternatively, Yates posits that it would be efficient for the two specialists to conduct the field examinations simultaneously which would reduce the necessary trips to one and place one right-of-way application in Category II and the other in Category I. Id.

[1] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (2000), authorizes the Secretary to grant rights-of-way across public lands for roads. Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (2000), grants the Secretary the authority to "require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction, operation, and termination of the facility pursuant to such right-of-way." The regulations establish cost categories for right-of-way applications based entirely on the cost of processing the application. Monitoring fees are then established based on the category established for processing the application.

Departmental rules require nonrefundable fees for application processing:

An applicant for a right-of-way grant or temporary use permit under this part shall reimburse the United States in advance for the expected reasonable administrative and other costs incurred by the United States in processing the application, including the preparation of any reports or statements pursuant to the National Environmental Policy Act of

^{2/} Yates also filed a Motion to Strike the supplements to the administrative records, arguing that actions taken by BLM subsequent to the filing of an appeal are irrelevant to whether BLM acted properly in the first instance. (Motion to Strike at 4.) We deny this motion. The Board has a duty to view as complete a record as possible when it decides a case finally for the Secretary and has allowed BLM to supplement records on appeal. E.g., Wyoming Outdoor Council, 160 IBLA 387, 398 (2004).

1969 (42 U.S.C. 4321 et seq.) prior to the United States having incurred such costs.

43 CFR 2808.1(a) (emphasis added).

BLM rules then require that a right-of-way application be identified within one of five categories based on estimated expenditures of agency resources to process it. The first three categories have been raised here:

The following categories shall be used to establish the appropriate nonrefundable fee for each application * * *

(1) Category I. An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the data necessary to comply with [NEPA] and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and no field examination is required.

(2) Category II. An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the data necessary to comply with [NEPA] and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and 1 field examination to verify existing data is required.

(3) Category III. An application for a right-of-way grant or temporary use permit to authorize a use of public lands for which the data necessary to comply with [NEPA] and other statutes are available in the office of the authorized officer or from data furnished by the applicant; and 2 field examinations to verify existing data are required.

43 CFR 2808.2-1(a). Under 43 CFR 2808.2-2(a), after determining the appropriate category the authorized officer must collect the processing fee set out in 43 CFR 2808.3-1(a) before processing the application. That fee is defined as a “fee by category for processing an application for a right-of-way.” 43 CFR 2808.3-1(a). BLM must make a record of the category determination and provide it to the applicant. 43 CFR 2808.2-2(a). See John T. Alexander, 157 IBLA 1, 9 (2002).

BLM regulation 43 CFR 2808.4 then provides for a separate monitoring fee to be collected based not on the actual costs of monitoring, but rather on the category for processing the application established under 43 CFR 2808.3. This set fee covers the costs of “monitoring the construction, operation, maintenance and termination of authorized facilities on the right-of-way grant.” 43 CFR 2808.4.

In this case, BLM determined that the proper category for processing the application for the FLPMA road right-of-way was Category III. The corresponding fee for processing the application established in 43 CFR 2808.3-1(a) is \$550. BLM followed 43 CFR 2808.4 in establishing the monitoring fee for a Category III application at \$100.

Fees established for pipeline rights-of-way under the MLA follow a similar statutory and regulatory scheme. Section 28(a) of the MLA, 30 U.S.C. § 185(a) (2000), authorizes the Secretary to grant rights-of-way for oil and gas pipelines. Section 28(l) of the Act, 30 U.S.C. § 185(l) (2000), requires a pipeline right-of-way applicant to reimburse the United States “for administrative and other costs incurred in processing the application” as well as “for the cost incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way.” As with FLPMA rights-of-way, Departmental rules establish separate processing fees and monitoring fees based entirely on categories determined by the agency resources necessary to process an application.

Thus, in language almost identical to that in 43 CFR 2808.1(a), 43 CFR 2883.1-1 provides:

An applicant for a right-of-way grant or temporary use permit under this part shall reimburse the United States for the administrative and other costs incurred by the United States in processing the application, including the preparation of any reports or statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) prior to the United States having incurred such costs.

(Emphasis added.) The same regulation establishes “processing fees.”

(3) The applicant shall submit with each application a nonrefundable application processing fee in the amount required by a schedule of fees for this purpose contained in paragraph (c) of this section which shall be based on a review of the use of the Federal lands for which the application is made, the resources affected and the complexity and costs to the United States for processing required by an application for a right-of-way grant * * * .

(Emphasis added.) The rule goes on to establish cost categories. Categories I, II, and III are, in all respects pertinent here, identical to the same three cost categories established at 43 CFR 2808.2-1(a) for FLPMA rights-of-way. Under 43 CFR 2883.1-1(a)(4)(i), BLM must prepare and provide to the applicant a record of the

category determination, and collect the nonrefundable processing fee before processing an application. Id.^{3/}

The fee schedules for MLA right-of-way applications are found at 43 CFR 2881.1-1(c). The nonrefundable processing fee for a Category III pipeline application is \$350, and the separate monitoring fee corresponding to a Category III pipeline application is established as \$75. 43 CFR 2881.1-1(c)(1) and (2). These are the fees charged to Yates for its pipeline right-of-way.

In this case, BLM determined that both the access road right-of-way and the pipeline right-of-way applications qualified under Category III. It follows from the regulations that BLM must have concluded that, for each application, the information necessary to comply with NEPA and other applicable statutes was available in the authorized officer's office or had been furnished by the applicant and also that two field examinations were necessary to verify that information for each application. Neither category decision explains how BLM decided that two field examinations were necessary or which field examinations needed to be performed for the application in question.

A BLM cost recovery category decision will be affirmed when the record contains a reasonable explanation of why a particular category was assigned to the right-of-way application. Bradford R. Bean, 140 IBLA 42, 43 (1997) (FLPMA right-of-way); Northwest Pipeline Corp., 99 IBLA 364, 368 (1987) (MLA right-of-way). BLM may provide additional information to support its conclusion, but the Board need not guess at information not supplied. See, e.g., Silverado Nevada, Inc., 152 IBLA 313, 322-23 (2000) ("Our role is to review the record the agency compiled, not to coax it or coach it into providing a record that will adequately support the agency's decision."); Cf. Bradford R. Bean, 140 IBLA at 43 (additional information provided in BLM answer requested by the Board adequately explained rationale for requiring identified field examinations).

BLM does not dispute that its decisions fail to explain how it reached its category determinations. The supplementary information upon which BLM relies to support its decisions, however, does not validate them. As noted above, the most we can determine as a factual matter from the additional information submitted for each right-of-way application is that the wildlife biologist and the rangeland management specialist each conducted a field examination of each right-of-way application. Neither specialist stated the date on which the field examination took place or

^{3/} Both the FLPMA and the MLA right-of-way regulations provide for the refund or adjustment of the cost recovery fee if an applicant prevails on an appeal of the category determination. See 43 CFR 2808.6(a) (FLPMA rights-of way) and 43 CFR 2883.1-1(a)(4)(i) (MLA rights-of-way).

indicated that he conducted two separate field examinations of the same area, one for each right-of-way application. The supplemented records do not show that “multiple” field examinations occurred, as BLM suggests, nor do they indicate that four examinations took place or were necessary to verify the existing available data.

Nor does BLM accurately construe its own regulations in suggesting as a plausible construction of its decisions that “further monitoring visits will be necessary.” (Response at 2.) As detailed above, the proper cost category is by rule based on the agency resources required to process the application. 43 CFR 2808.1(a); 2883.1-1(a)(1). The number of monitoring visits is simply not a factor in reaching this category determination under 43 CFR 2808.2-1(a) or 2883.1-1(a)(3). Rather, the monitoring costs are established separately by fee schedule, and by charging monitoring fees of \$100 and \$75 for the respective rights-of-way, BLM has, by rule, already collected a set fee for the costs of monitoring. BLM may not now add the monitoring visits as a basis for bolstering its processing cost category decisions.

The difficult question presented here is whether, given that the right-of-way applications were filed pursuant to different authorizing statutes, each application may be categorized based upon the number of field examinations necessary to process it in the abstract, without consideration of a related application processed at the same time. Yates argues, effectively, that once the two field examinations are completed for one application, BLM may not again charge the same fees for the other application as if BLM were required to duplicate its efforts. BLM argues, effectively, that the cost category is to be determined based upon the factors in the regulations without consideration of the other application. We recognize that the regulations do not answer this question, precisely stated.

We note, however, that a common sense reading of the regulations supports Yates’ reading of them. The cost recovery processing fees for FLPMA rights-of-way are designed to compensate the United States for reasonable administrative costs of processing the applications. The cost recovery category definitions were based on actual work/cost information provided by various BLM field offices detailing the cost for each type of work performed on right-of-way applications of varying degrees of difficulty. See 52 FR 25802, 25804 (July 8, 1987) (preamble to final 43 CFR Part 2800 regulations). That information demonstrated that costs were related to “(1) [t]he amount of information needed to meet the requirements of [NEPA]; (2) whether this information was available in [BLM] files or must be collected on the ground; (3) the number of necessary field examinations of the proposed alternative areas to be utilized by the right-of-way grant * * *; and (4) the type of appraisal required to estimate the annual rental to be charged for the right-of-way.” Id. (emphasis added). The category definitions also stress the use of existing data when available and encourage the use of existing right-of-way corridors to the greatest extent possible. 52 FR 25807 (July 8, 1987). This suggests that the rules were not

intended to duplicate costs charged to applicants for applications which, by being processed together reduce the burden on the United States and increase processing efficiency.^{4/}

In this case, the record does not demonstrate that two separate field examinations were conducted for each right-of-way application nor do the extant circumstances evidence a necessity for a total of four field examinations. The record does not indicate that data gathered during the field examinations of one of the right-of-way application would not have translated directly for use in processing the other right-of-way application without duplication of effort, since the applications cover the same ground and are part of the same project. Nothing in either 43 CFR Subpart 2808 or 43 CFR Subpart 2880 mandates that noncompeting right-of-way applications using the same area each be separately charged for a field examination when one examination would verify the available data for both applications.^{5/} Accordingly, we set aside BLM's cost recovery category decisions as unsupported by the records and remand the matter to BLM for further action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are remanded.

Lisa Hemmer
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{4/} "Efficiency to the Government processing" is "the ability of the United States to process an application with a minimum of waste, expense, and effort." 43 CFR 2800.0-5(s).

^{5/} While 43 CFR 2883.1-1(a)(6) provides that when two or more right-of-way applications are in competition with each other, each applicant must reimburse the United States for the applicable processing costs, but some costs may be paid in "equal shares or such proration." Likewise, 43 CFR 2883.1-1(a)(8) specifies that when two or more noncompeting applications for right-of-way grants are received for what is one right-of-way system, all the applicants will be jointly and severally liable for the costs of the system. The same holds true for FLPMA rights-of-way under 43 CFR 2808.3-4.