

LLOYD AND SUE HEGER

IBLA 90-170

Decided December 10, 1991

Appeal from decisions of the Area Manager, El Centro Resource Area, California, Bureau of Land Management, approving an amendment to a plan of development for Recreation and Public Purposes Act Lease CA 13188 to relocate a road running through the leasehold, and denying protest against the amendment.

Set aside and remanded.

1. Recreation and Public Purposes Act

Terms and conditions may be imposed in a Recreation and Public Purposes Act lease for the proper development of the land, for the protection of Federal property, and for the protection of the public interest. 43 CFR 2912.1-1(b). The public interest includes use of the public lands in a manner that does not unreasonably interfere with adjacent private uses.

2. Recreation and Public Purposes Act

Where BLM denies a protest against the relocation of a road and approves an amendment of the approved plan of development for a lease issued under the Recreation and Public Purposes Act to relocate the road, holding that dust from the relocated road will not unreasonably interfere with private use of adjacent lands for growing produce, its decisions are properly set aside and remanded where the record indicates that dust from the relocated road may render produce grown on adjacent private lands unmarketable. On remand, BLM should consider approving the amendment subject to a conditional protective stipulation that would require additional action to be taken to reduce dust from the road (such as using a dust retarding agent or sprinkling) only if it is shown that produce is being damaged by dust.

APPEARANCES: Lloyd and Sue Heger, El Centro, California, pro sese; Gilbert M. Rearic, Brawley, California, for intervenor Imperial Valley Rifle & Pistol Association. 1/

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Lloyd and Sue Heger (appellants) have appealed a November 22, 1989, letter decision of the Area Manager, El Centro (California) Resource Area, Bureau of Land Management (BLM), denying their protest against the relocation of Wheeler Road running through lands covered by lease CA-13188. That lease was issued to Imperial Valley Rifle & Pistol Association (IVR&P) for approximately 640 acres on February 5, 1985, under authority of the Recreation and Public Purposes Act (R&PP Act), 43 U.S.C. §§ 869 to 869-4 (1988). Appellants also appeal BLM's accompanying decision approving IVR&P's request for amendment to the approved plan of development for the R&PP lease to allow relocating the road.

The lands being used by IVR&P are situated directly to the north and northwest of lands being commercially farmed by appellants. 2/ At the heart of this dispute is appellants' fear that dust raised by traffic using the relocated road will ruin vegetable produce that they grow commercially as close as 200 feet from the relocated road.

Wheeler Road originally ran to the north of the shooting ranges planned by IVR&P, directly crossing the line of fire of those planned ranges. Thus, it obviously had to be relocated. IVR&P's original plan of development called for Wheeler Road to be relocated so that it ran approximately 1,200 feet north of the common boundary between the R&PP parcel and the northern portion of appellants' farm. However, in November 1988 IVR&P requested that BLM amend its lease to allow the relocating of Wheeler Road to within only 200 feet of appellants' fields.

Upon being notified of the proposed relocation of the road, appellants filed a formal protest with BLM raising several issues, including their concern that relocating the road close to their property would cause substantial damage to their produce. 3/

1/ Rearic signed the pleading of the Imperial Valley Rifle & Pistol Association as "Range Officer." It appears that he is an officer of this organization and that, as such, he is authorized to appear on its behalf. See 43 CFR 1.3(b)(3)(iii).

2/ The lands covered by the lease are S $\frac{1}{2}$ sec. 4, and lot 1, N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, and NW $\frac{1}{4}$ sec. 9, T. 15 S., R. 12 E., San Bernardino Meridian. Appellants' land appears to be located in the SE $\frac{1}{4}$ sec. 9, the SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 10, in the same township.

3/ Appellants also raised their concern that the road might increase vandalism of their irrigation equipment and the danger of damage from flooding due to torrential rains. Appellants also stated their opinion that IVR&P had ample space available to place the road and other planned facilities farther north, away from their fields. BLM responded to these

Following receipt of appellants' protest, BLM sought advice from the Agricultural Cooperative Extension, University of California, at Imperial County. The County Farm Advisor responded by letter dated October 25, 1989, which states:

I have been asked * * * for my opinion as to locating a county road 200 feet north of the Heger organic vegetable farm. I believe the road could be constructed without serious detriment provided that wind borne dust and contamination were minimized by coating the road with a dust retardant substance (as is used by the Glamis gold fields), the use of gravel and/or frequent wetting of the surface during the growing season.

Imperial County farmers produce crops commonly with dust problems coming from the dirt canal banks and roadways. The farmers water down these roadways and banks frequently during critical time periods such as head formation in lettuce and curd formation in cauliflower. Dirt in these commodities is unacceptable in the market. I have seen where several farmers have had to set up sprinkler systems to stabilize the fine soil as well as wash dirt out of heads. This practice helps but doesn't stop crop damage.

However, given all these scenarios I do not recall ever seeing a problem develop from a road located on a northern boundary of a field nor with a road located 200 feet away. The predominant wind direction is from the West.

If there were genuine cooperation by all parties (ie. Mr. Heger, the rifle club and the county, I believe the road dust problem could be minimized and the road constructed to meet public needs.

BLM has entered a note in the record indicating that the "dust retardant substance" referred to by the Farm Advisor is magnesium chloride.

The record also shows that the Farm Advisor stated in a telephone conversation with BLM on June 8, 1989, that crops such as lettuce, cabbage, cauliflower, etc., may experience adverse effects from dust whether organically grown or not.

BLM's letter decision denying appellants' protest conceded that the Farm Advisor had confirmed that "dust can be damaging to certain produce," but emphasized his accompanying statement that "a problem would not be expected to develop as a result of a road located 200 feet from the northern boundary of a field, with the prevailing west winds common to Imperial County." BLM also stated as follows:

fn. 3 (continued)

concerns in its decision rejecting their protest (see note 4) and appellants have not pursued these arguments on appeal.

Heavy traffic on Wheeler Road is infrequent. Increased traffic can be expected during the extraction of sand and gravel from pits to the west of the subject area. The term of that use was generally intermittent and of short duration. The road will also be used to access recreational areas. However, traffic will be sporadic, and mostly limited to weekends and holidays. On calm days, dust from traffic would not be expected to drift 200 feet. Otherwise, the prevailing west winds would minimize dust affecting [appellants'] property. The road will be graveled as required by County specifications. This measure will further reduce dust pollution. [4/]

Appellants filed timely appeals of BLM's decisions. By order dated February 23, 1990, we allowed IVR&P to intervene in these proceedings and accepted their answer to appellants' statement of reasons. Appellants have filed a reply to IVR&P's answer. BLM has not filed an answer.

Appellants aver that they will be adversely affected by the relocation of Wheeler Road because road dust from the relocated road would damage and render unmarketable commercial produce being grown on the land adjacent to the road. They state that they grow lettuce, cabbage, cauliflower, kale, and broccoli in the fall, which is also the heaviest recreational use period on Wheeler Road. They contend that the value of their fall-grown produce will be seriously affected by moving Wheeler Road to within 200 feet of their farm.

Appellants urge BLM and IVR&P to make arrangements with the Imperial County Road Department to have this section of Wheeler Road sprinkled down with water prior to all shooting matches, holiday recreation periods, and off-road racing events. They urge BLM to fence the road along its south side, noting that the area has been designated by the U.S. Soil Conservation Service as "highly erodible land." 5/

Appellants state that observing the dust drift from the existing Wheeler Road reveals that air drift for the month of December 1989 has produced more days with air drift from the northeast than from the west. They assert there was a period of 8 consecutive days with definite air movement in the mornings from the northeast. Appellants relate further:

4/ BLM also responded generally to appellants' concerns about flooding, noting that the Road Superintendent for the County of Imperial had offered "his opinion that the further south the road is located, the less impact flood waters would have on the road and the adjacent property." As to their allegations that there is sufficient space elsewhere on the site, BLM ruled that "[t]he entire acreage is necessary to accommodate the planned development, in addition to the safety zones required by the National Rifle Association."

5/ The abbreviation for this designation of land ("HEL") appears on the aerial map accompanying their statement of reasons.

Summer storms in this area develop from the south west Pacific Ocean area or on occasions from the SE New Mexico area. Winter storms seem to develop west of Alaska and travel in a southeast direction. In the fall and winter when we are growing produce in the Imperial Valley, cold air in the morning slowly flows in a down hill direction to the lower elevations. The slope of the land from the existing Wheeler Road to my property is definitely downhill.

IVR&P notes that, although appellants object to the relocation of the road within 200 feet of their property, the same road a short distance farther to the north is agreeable to appellants. IVR&P submits that the difference between the amount of dust appellants' crops would encounter from the proposed relocation and from one farther north would be minimal. 6/ IVR&P notes that with only one access road entering the range, range control and safety would be improved, that the road would be straightened, and that water damage problems would be eliminated.

Responding to IVR&P, appellants state their concern that the recreational use of the road will increase over the next few years as people become aware of an uncrowded recreation area to the west and north of the range. This hypothesized increase in use, they argue, will create more traffic on Wheeler Road, much of which will be motor homes towing trailers with off-road vehicles that will substantially increase potential dust damage to their vegetable crop. 7/

[1] The Department may impose reasonable stipulations in a lease issued under R&PP where necessary for the proper development of the land, for protection of Federal property, and for protection of the public interest. 43 CFR 2912.1-1(b). Terms, conditions, and stipulations designed

6/ IVR&P also disputes that appellants grow lettuce, but this fact does not appear to be in doubt.

IVR&P asserts that appellants have encroached upon the property it has leased from BLM and notes that, if appellants moved their "encroachments" (specifically, the road, berm, and drainage ditch) onto their own property, their cultivated field would be somewhat more than 200 feet from the proposed road and farther from the dust that appellants envision. Appellants dispute this assertion (see note 7, below).

7/ Appellants also dispute that they are encroaching on BLM land leased to IVR&P, based on a survey of their northwest field. The earthwork, road, and berm construction, appellants insist, was in place long before they purchased the property. They deny that the bank on the north side of the road creates a drainage ditch for agricultural water, asserting instead that the bank serves to divert flash flood water to a channel to the east which goes through appellants' property to an IVR&P irrigation drainage canal on the south side of the Filaree Canal.

The record before us is not adequate to resolve this question, but BLM may wish to consider it on remand. Of course, the question remains whether the relocation of Wheeler Road will adversely affect appellants' crops.

to serve the public interest in similar contexts have been held to embrace stipulations in rights-of-way designed to ensure protection of pre-existing rights-of-way, correlative rights, and compatible uses on the public lands. James W. Smith, 44 IBLA 275, 282 (1979). The public interest has been held to include the interest in ensuring the protection of private interests closely related to the public lands. See, e.g., The Montana Power Co., 72 I.D. 518, 521 (1965). This Board has also recognized BLM's authority to require a right-of-way applicant to take action relating to private lands as a condition of the grant of the right-of-way. Ute Water Conservancy District, 47 IBLA 71, 73 (1980); Grindstone Butte Project, 24 IBLA 49, 52 n.3 (1976). We hold that protection of the public interest in the context of the R&PP Act also includes consideration of how use of the public lands might unreasonably interfere with adjacent private uses.

[2] It is not disputed that dust could cause damage to appellants' crops or that damage is most likely to occur during the fall growing season, the period in which Wheeler Road is subject to its heaviest use. BLM apparently elected not to require lease stipulations in the R&PP lease protecting appellants because it believes that any dust from traffic on Wheeler Road will not drift 200 feet, and that winds are predominantly from the west.

BLM assembled data concerning weather conditions in the Imperial Valley from January 1987 through April 1989 and evidently compiled from these data information concerning wind conditions in the vicinity. It is significant that, as appellants' fields are located to the south and southeast of the proposed route of the relocated road, winds from the northwest would evidently blow any dust from the road toward appellants' fields. The wind data assembled by BLM indicates that in September, October, and November 1987, northwest winds were reported for a total of 3 days, and for the same period in 1988, northwest winds were reported for 4 days. The record indicates that any dust contamination may be harmful to the type produce being grown by appellants and suggests that one event during lettuce head or cauliflower curd formation might be enough to render the crops unmarketable. BLM acknowledges that Wheeler Road will experience increased use, so that the risk of damage will also increase.

On the other hand, it is far from clear that enough dust will be generated from the road to damage appellants' produce. As a practical matter, it is not possible to predict what the situation will be if the road is relocated and graveled as planned. According to the County Farm Advisor, damage to crops can be successfully minimized in growing seasons by using a dust retardant, by the use of gravel, and/or by frequent wetting of the surface. BLM has required only that the road be graveled. Although this is apparently less than what the County Farm Advisor considered necessary, it may well be enough to avoid the problem.

In these circumstances, we deem it appropriate to set aside BLM's decision and remand the matter to it to consider approving the amendment to a plan of development for the R&PP lease subject to a conditional protective stipulation that would require additional action to be taken to reduce dust

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(such as using a dust retarding agent or sprinkling) only if it is shown that appellants' produce is being damaged by dust.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded to BLM for further action consistent herewith.

David L. Hughes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge