

NEVADA POWER CO.

IBLA 96-550

Decided January 14, 1997

Appeal from a decision of the Las Vegas, Nevada, District Office, Bureau of Land Management, rescinding in part right-of-way grant and rejecting the application for right-of-way in part. N-59499.

Affirmed in part as modified, set aside in part, and remanded.

1. Administrative Procedure: Adjudication—Public Lands: Administration

As a general rule, in adjudication of conflicting applications requiring BLM discretion with respect to whether approval of either application is in the public interest, a decision to approve an application requires notice to a conflicting applicant and an opportunity to appeal an adverse decision. A decision of BLM to rescind approval of an application approved inadvertently without notice to a conflicting applicant in order to allow BLM consideration of the conflicting applications in determining what is required in the public interest will be affirmed on appeal.

2. Administrative Procedure: Adjudication—Rights-of-Way: Applications—Rights-of-Way: Generally

A decision to reject a right-of-way application in the discretion of BLM on the ground that approval is not in the public interest is properly set aside and remanded when the BLM decision fails to reflect any analysis of relevant factors to determine what is required in the public interest.

APPEARANCES: Kenneth G. Lee, Esq., and Claude E. Zobel, Esq., Washington, D.C., for appellant; Virginia S. Albrecht, Esq., and Fred R. Wagner, Esq., Washington, D.C., for respondent Del Webb Corporation; and John R. Payne, Esq., Office of the Regional Solicitor, Sacramento, California, for respondent BLM.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Nevada Power Company appeals from an August 19, 1996, decision of the Las Vegas, Nevada, District Office, Bureau of Land Management (BLM), rescinding in part and rejecting in part right-of-way grant N-59499. With

its statement of reasons Nevada Power also filed a request to stay the BLM decision pending appeal. ^{1/} The stay petition was opposed by BLM and by Del Webb Corporation, a party with a conflicting land exchange application pending before BLM embracing some of the same public lands. In view of the apparent failure of BLM officials to serve a copy of their initial opposition on petitioner as required by regulation (see 43 CFR 4.27(b)) and the request of petitioner for an opportunity to respond to the answer filed on behalf of Del Webb, this Board issued an order dated October 31, 1996, serving the BLM response on all parties, allowing petitioner an extension to reply to Del Webb, and providing all parties an opportunity to respond to the BLM submission. By the terms of this same order, the petition for stay was expressly taken under advisement pending completion of briefing in this case. Subsequently, by order dated December 19, 1996, the stay was granted pending a final decision on the merits in this case.

Counsel for BLM has entered an appearance and filed a brief. Further briefs have also been filed on behalf of petitioner and Del Webb. Nevada Power seeks to have the case expedited due to the fact that BLM has been proceeding with a proposed land exchange which, if completed, could moot the appeal. ^{2/} Del Webb asserts that delay of the land exchange beyond January 1997 would eliminate the business justification for the exchange. In consideration of these factors, we have expedited our review of this case on the merits.

In order to understand the decision at issue it is necessary to set out the facts of the right-of-way application in some detail. On December 15, 1994, Nevada Power filed an application under 43 U.S.C. § 1761(a)(4) (1994) for a right-of-way for an overhead 230/138kV transmission power line across Federal land in Clark County, Nevada. BLM

^{1/} As the BLM decision noted, under the provisions of 43 CFR 2800 the decision remained in full force and effect during review of an appeal unless a stay is granted. The general stay provision at 43 CFR 4.21(a) is not applicable in this case. A specific regulation governing appeals from rights-of-way decisions is provided by 43 CFR 2804.1. That regulation provides the exclusive procedure for rights-of-way cases, and makes all rights-of-way decisions effective pending appeal unless otherwise ordered. 43 CFR 2804.1(b); see *Texaco Trading & Transportation, Inc.*, 128 IBLA 239, 240 (1994).

^{2/} On Nov. 4, 1996, BLM issued a decision record (DR) approving the environmental assessment (EA) and finding that the exchange of the lands in Phase I of the exchange would be in the public interest. However, this decision is not final and does not moot the appeal. After the DR there is a 45-day period in which protests may be filed and then there is a right of appeal if the protest is denied. 43 CFR 2201.7-1(b) and (c). In any event, we note that a stay of the effectiveness of the rescission of the right-of-way has subsequently been entered in this case.

assigned serial number N-59499 to the application. The route of the proposed right-of-way projected on a map forms a "U" shape, running south on a line through the middle of secs. 29 and 32, T. 22 S., R. 61 E., Mount Diablo Meridian (MDM), secs. 5, 8, and 17, T. 23 S., R. 61 E., MDM; then east through the extreme northern portions of secs. 20 through 24, T. 23 S., R. 61 E., and sec. 19, T. 23 S., R. 62 E., MDM; then north through the middle of secs. 6, 7, and 18, T. 23 S., R. 62 E., MDM. Only the portions of the right-of-way located in sec. 24, T. 23 S., R. 61 E., MDM, and secs. 6, 7, 18, and 19, T. 23 S., R. 62 E., MDM, i.e., the eastern portions of the application, encompass lands in the proposed Del Webb exchange. See Del Webb Answer at Exh. 2.

Nevada Power notified BLM by letter dated January 5, 1995, that Clark County had granted it a use permit for the construction of the line. The Stateline Resource Area completed an EA, reaching a finding of no significant impact (FONSI) on October 3, 1995, and recommended approval of the right-of-way as described in the permit application. Another EA was prepared by the District Office and, on May 6, 1996, the Acting Associate Las Vegas District Manager issued a FONSI and a DR which recommended approval of the proposed action.

At the same time BLM was processing the Nevada Power right-of-way application, it was also processing Del Webb's land exchange application (N-60167), which encompassed some of the land covered by the right-of-way application. Del Webb is seeking to exchange lands it owns for certain public lands. Right-of-way N-59499 would effectively bisect the land Del Webb seeks to acquire in the exchange. Del Webb intends to construct a master planned community on the selected BLM lands and asserts that the value of the public land at issue and its plans would be adversely affected by the granting of the right-of-way. The case record shows that approval of the right-of-way was delayed to allow the right-of-way applicant and the land exchange proponent to negotiate a resolution of the conflicting applications. Del Webb and Nevada Power held negotiations to relocate a portion of the power line, but as of July 25, 1996, no agreement had been reached. On July 25 the Acting Assistant District Manager concurred in a recommendation by the Realty Specialist, Non-Renewable Resources, to grant the right-of-way application except for the portion within the proposed Del Webb exchange. Unfortunately, the BLM adjudicator obtained an incomplete description of the lands embraced in the exchange application and, as a result, BLM inadvertently issued the right-of-way across a portion of the exchange tract by decision of August 6, 1996. See Exh. E to BLM Brief.

This mistake was promptly discovered and on August 8, 1996, a meeting was held at the Las Vegas District BLM office with representatives of Del Webb, Nevada Power, and BLM to discuss alternative locations for the power line across the public lands being considered for disposal to Del Webb as part of the land exchange. A document in the case record titled "Meeting Highlights" and dated August 9, 1996, noted that at this meeting BLM stated it had inadvertently granted a portion of the power line right-of-way to Nevada Power and would be issuing a decision rescinding that portion of the right-of-way that had been inadvertently granted. Although the BLM

document also indicated that Nevada Power had no problem with this rescission, this assertion is contradicted by an affidavit from a Nevada Power participant at the meeting stating that the consent was conditioned upon selection of an alternative route for the right-of-way (Nevada Power Reply, Exh. 7).

BLM issued the decision under appeal on August 19, 1996. The decision was in two parts. The first part rescinded part of the right-of-way issued on August 6, 1996, as to lands in secs. 20 through 24, T. 23 S., R. 61 E., and sec. 19, T. 23 S., R. 62 E., MDM. A part of those lands are included in the land exchange proposal. The sole reason given for this rescission was that the right-of-way for those portions crossing the land included in the Del Webb land exchange had been granted inadvertently.^{3/} The decision also stated that Nevada Power did not object to the rescission of this portion of the right-of-way grant.

The second part of the BLM decision rejected the right-of-way application in part, as to those lands for which BLM had rescinded the grant, as well as other portions included in the application that BLM had not previously adjudicated which were located within the proposed exchange. The reason given for this rejection was that BLM did not intend to encumber the lands identified in the proposed Del Webb exchange because issuance of a transmission line right-of-way could lower the value of the lands involved and would likely result in a reappraisal of the property. An appeal of the decision was filed by Nevada Power.

The BLM adjudication of the conflicting applications in this case has been characterized by a series of miscues including a mistake regarding the land descriptions for the conflicting applications (by the agency with responsibility for maintaining the public domain land records) and the subsequent granting of one of two conflicting applications without notice to the conflicting applicant. When BLM attempted to rectify these mistakes by adjudicating the right-of-way to the extent of the conflict with the exchange application, the problem was compounded by the failure of the BLM decision to articulate a rational basis for the exercise of its discretion. Consequently, we find that this appeal raises two major issues. The first issue raised by this appeal is the authority of BLM to rescind an issued right-of-way grant on the ground that BLM intended to exercise its discretion to reject the right-of-way application. If such authority is found, the further issue presented is whether the record before BLM supports the exercise of discretion to reject the right-of-way.

[1] As a general rule, when adjudicating conflicting applications which require BLM to exercise its discretion to determine whether approval is in the public interest, it is error to approve one application without notice to the conflicting applicant and an opportunity to be heard. See

^{3/} In a response filed Nov. 19, 1996, BLM explained that the employee who wrote the decision believed she had the legal description for the entire proposed exchange when in fact she only had the description for a portion of the exchange.

generally Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1946) (granting one of two mutually exclusive applications without affording the other a hearing effectively deprives the latter of the right to a hearing). This Board has previously found this doctrine applicable to adjudications involving mutually exclusive conflicting applications. E.g., State of Alaska, 40 IBLA 79 (1979). Further, the application of this principle has not been limited to cases involving a statutory right to an evidentiary hearing before an Administrative Law Judge. Thus, for example, this Board has remanded to BLM a decision rejecting an application for proposed land exchange without analysis because a decision had been made to approve a conflicting exchange proposal. Havasu Heights Ranch & Development Corp., 94 IBLA 243 (1986). In the Havasu case, we remanded the case to BLM for adjudication of the conflicting claims with opportunity for protest and appeal. Accordingly, it was error in the instant case for BLM to issue a decision approving appellant's right-of-way application without, at the least, notice to the conflicting exchange applicant providing an opportunity to protest and appeal the decision prior to an irrevocable grant of the conflicting application. Hence, to the extent the BLM decision under appeal rescinded the prior approval of the right-of-way application for lands in conflict with the proposed exchange without addressing the conflict between the applications, that decision is affirmed.

[2] However, to the extent that BLM's decision effectively rejected appellant's right-of-way application, it cannot presently be affirmed. Approval or rejection of a right-of-way application is committed to BLM's discretion by section 501(a) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1761(a) (1994). It is well established that a decision rejecting an application may be affirmed only where the record demonstrates that it was made after a reasoned analysis of all relevant factors, with due regard for the public interest. See 43 CFR 2802.4(a); SMR Network, 131 IBLA 384, 386 (1994); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988). Under 43 CFR 2802.4(a)(2) BLM may deny a right-of-way application if it determines that the proposed right-of-way is not in the public interest.

The record shows that BLM initially believed that appellant's right-of-way application was in the public interest. The sole basis given in the appealed decision for rejecting the right-of-way application was the intention to avoid encumbering the lands identified in the proposed exchange with Del Webb by issuance of the transmission line right-of-way which would lower the value of the lands to be exchanged and "likely" require a reappraisal. While it thus appears that BLM has determined that the land exchange better serves the public interest than the right-of-way, there is no analysis in the decision under appeal to support that decision.

Contrary to Nevada Power's initial petition for a stay, the fact that the right-of-way application was filed prior to other applications has not been shown to establish any preference or priority. Further, BLM properly

considers alternative uses of the public lands when adjudicating a right-of-way application, as pointed out by the Solicitor on appeal. The issue on appeal is not whether BLM has discretion, after weighing the public interest, to reject the right-of-way application, but rather whether the BLM decision has articulated a rational basis for the exercise of its discretion here in view of the competing benefits provided by the two applications. BLM must provide some analysis and show what factors it considered in concluding that the public interest was better served by the land exchange, in order that its decision reflect a proper exercise of its discretionary authority.

BLM contends in its November 19, 1996, brief that its decision does reflect its consideration of the public interest and its determination that the public interest favors a land exchange unrestricted by the proposed right-of-way (Brief at 4). In support, BLM enclosed a copy of the November 4, 1996, DR for the Phase I of the exchange proposal containing an analysis of the public benefits of the proposed exchange and finding that it is in the public interest to complete the exchange (Att. C to Brief). ^{4/} Del Webb also asserts that BLM's decision is based on a determination that the land exchange would serve a number of public interests and contends that public benefits would be compromised by granting Nevada Power a right-of-way through the selected lands by reducing the appraised value of the land and, consequently, the amount of offered lands to be provided by Del Webb in exchange (Del Webb Brief (Nov. 12, 1996) at 3-4).

The approval of a right-of-way application is a discretionary action by BLM, but it must consider the public interest in making its decision. 43 U.S.C. § 1761 (1994); 43 CFR 2802.4(a). BLM may reject a right-of-way application if it determines the proposed right-of-way would not be in the public interest, but the record must demonstrate that the rejection is based on a reasoned analysis of the facts and was made with due regard for the public interest. J.E. Peletich, 129 IBLA 255 (1994); Glenwood Mobile Radio Co., *supra*. This Board will not ordinarily substitute its judgment for that of the BLM official duly authorized to exercise the discretion where the basis for that decision is clearly set forth in the decision and the record before BLM. ^{5/} However, the record must reflect an analysis by BLM of what is required in the public interest to support the exercise of

^{4/} Contrary to BLM's assertion, nothing in the BLM decision or the case record before BLM at the time show what factors were considered in determining what the public interest was or how it favored the proposed land exchange. The only information in the case record as to what public interests would be served by the land exchange is found in the DR for Phase I of the proposed exchange, dated almost 3 months after BLM issued the decision rejecting the right-of-way as an encumbrance on the land exchange.

^{5/} "Where conflicting uses of the public lands are at issue and the matter has been committed to the discretion of the BLM, the Board will uphold the

discretion. While the factors raised subsequent to the appeal in this case may support such an exercise of discretion, this is a determination which BLM must make initially, via a formal decision fully setting out the basis of its conclusion. ^{6/}

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 affirmed in part as modified, set aside in part, and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

fn. 5 (continued)
decision of the BLM unless appellant has shown that the BLM did not adequately consider all of the factors involved." California Association of Four-Wheel Drive Clubs, Inc., 38 IBLA 361, 367-68 (1978), quoted in American Motorcycle Association, 119 IBLA 196, 199 (1991).

^{6/} BLM may wish to coordinate reissuance of that decision with its expected decision concerning the land exchange.

