

NEVADA OUTDOOR RECREATION ASSOCIATION, INC.

IBLA 98-339

Decided July 13, 2000

Appeal from a Decision Record of the Assistant District Manager for Non-Renewable Resources, Las Vegas District, Nevada, Bureau of Land Management, approving issuance of a right-of-way grant for a water detention facility, and the subsequent grant. N-61717.

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal

An appeal to the Board is properly dismissed when the statement of reasons fails to affirmatively point out any ground of error in the decision from which the appeal is taken and addresses a decision over which the Board has no appellate jurisdiction.

APPEARANCES: Charles S. Watson, Jr., Co-Founder and Director, Nevada Outdoor Recreation Association, Inc., Carson City, Nevada, for appellant; Virginia S. Albrecht, Esq., and Fred R. Wagner, Esq., Washington, D.C., and Mary Alexander, Esq., Phoenix, Arizona, for the Del Webb Conservation Holding Corporation; John R. Payne, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Nevada Outdoor Recreation Association, Inc. (NORA), has appealed from a March 20, 1998, Decision Record (DR) of the Assistant District Manager for Non-Renewable Resources, Las Vegas (Nevada) District, Bureau of Land Management (BLM), approving issuance of a right-of-way grant, N-61717, for construction, operation, and maintenance of a water detention facility in southern Nevada. Appellant also appealed the subsequent issuance of the right-of-way on April 3, 1998.

On September 29, 1997, the Del Webb Conservation Holding Corporation (Del Webb) applied for issuance of a right-of-way grant, of indefinite term, for the construction, operation, and maintenance of a water detention facility (Detention Basin No. 2) on public land situated in secs. 17 and 20, T. 23 S., R. 62 E., Mount Diablo Meridian, Clark County, Nevada. Statutory authority for the right-of-way is found at Title V of

the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994), and its implementing regulations (43 C.F.R. Part 2800).

Del Webb's facility would consist of an 800-foot-long detention basin, with a 35-foot-high embankment, which would be capable of holding 170 acre-feet of water, and an 800-foot-long concrete spillway, both of which would be constructed over a period of 6 months. The basin is designed to provide flood control for a planned community containing a mixture of residential, recreational, and commercial uses which Del Webb is building. The planned community is located on an adjacent tract of public land totaling close to 5,000 acres, situated on the southern outskirts of the City of Henderson, Nevada (City). See Del Webb Conservation Holding Corp. v. Tolman, 44 F. Supp.2d 1105, 1108 (D. Nev. 1999). The basin, which would "facilitate" community development and "protect" downstream property from excessive storm flows, is considered, by Del Webb, to be "crucial" to its development plans, since the City will not permit Del Webb to complete any home sales downstream of that facility "if the basin is not complete or substantially near completion [at the time of closing]." (Del Webb Motion to Dismiss at 1; see id. at 3; Declaration of Calvin L. Black, Professional Civil Engineer, dated June 12, 1998, attached to Motion to Dismiss, at 1-2.)

Development of the planned community itself is dependent upon an exchange of public lands (N-60167), pursuant to section 206 of FLPMA, as amended, 43 U.S.C. § 1716 (1994), in which Del Webb would acquire the necessary public land adjacent to the proposed right-of-way. Phase I of the proposed exchange, which encompassed about 2,535 acres of public land located some distance from the proposed right-of-way, was analyzed in an environmental assessment (EA) designated NV-050-97-028 prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994). Based in part on a finding of no significant impact (FONSI) which would require preparation of an EIS, dated May 21, 1997, Phase I of the exchange was approved in a decision record issued on May 21, 1997. This portion of the exchange proposal has been completed. Phase II, which covers about 2,569 acres of public land (among them, public land adjacent to the right-of-way at issue here), is the subject of an EA (NV-056-99-07, dated April 15, 1999) compiled subsequent to the filing of this appeal. On May 10, 1999, BLM issued a DR/FONSI, approving Phase II of the proposed exchange. The tract of public lands included in the right-of-way is located between lands included in Phase II of the planned community development and the contiguous North McCullough Mountains Wilderness Study Area (WSA).

In his March 20, 1998, DR, the Assistant District Manager approved issuance of the right-of-way grant to Del Webb, subject to 22 special stipulations generally designed to mitigate the adverse environmental impacts of that action. He concluded that the environmental impacts had already been adequately analyzed in the September 30, 1996, Programmatic EA (NV-054-96-117), which had been prepared to address the environmental

consequences of issuing rights-of-way and other use authorizations for road and other infrastructure development on the checkerboarded Federal lands within the "Las Vegas Valley Disposal Area," which encompasses most of the public lands at issue here, and that issuance conformed with the existing land-use plan (Clark County Management Framework Plan). On April 3, 1998, the Acting Assistant District Manager executed the right-of-way grant.

On May 13, 1998, NORA appealed from both the Assistant District Manager's March 1998 DR, approving issuance of a right-of-way grant to Del Webb, and the Acting Assistant District Manager's April 1998 issuance of that grant. ^{1/} By order dated July 23, 1998, the Board denied motions by BLM and Del Webb to dismiss the appeal of the right-of-way for a water detention pond as untimely and for failing to serve an adverse party (Del Webb). We also rejected appellant's petition to stay the effect of BLM's March 1998 decision to grant the right-of-way and its subsequent April 1998 issuance of that grant, pending our decision on the merits of the appeal.

NORA has appealed the right-of-way grant on the ground that it improperly prejudices appellant's suit for judicial review of the public land exchange, Phase I and II. Appellant asserts that it first protested and then appealed the BLM FONSI issued in connection with the land exchange and associated residential development in May 1997. Appellant asserts that the exchange threatens environmentally sensitive public lands adjacent to the North McCullough Mountains WSA, a designated National Historic Site, and rare plant species. Appellant questions whether BLM can authorize facilities related to the land exchange while judicial review is pending.

In addressing appellant's stay request, we noted in our order of July 23, 1998, that the fact that litigation is pending regarding actions related to the Dell Webb residential project does not itself automatically stay the effect of administrative decisions made by BLM. Statutory authority is provided for obtaining relief from an administrative decision pending judicial review:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing

^{1/} Appellant also sought to appeal BLM's issuance of other right-of-way grants (N-61718, N-62059, N-62060, N-62155, and N-62285) for reservoirs and other facilities which would be used in conjunction with the Del Webb project. By letter dated May 28, 1998, BLM notified appellant that its notice of appeal was not filed timely with respect to these other grants and would not be considered. Under the relevant regulations, appeals filed after the 10-day grace period provided by 43 C.F.R. § 4.401(a) are not considered and the case is closed by the officer from whose decision the appeal is taken. 43 C.F.R. § 4.411(c). Appellant has not challenged this finding by BLM on appeal.

court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (1994). The courts have recognized that the institution of a lawsuit for judicial review of an administrative action does not, by itself, stay the effectiveness of the challenged action in the absence of a stay granted pursuant to this statutory provision. Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967) (effectiveness of a regulation); Winkler v. Andrus, 614 F.2d 707, 709 (10th Cir. 1980) (decision rejecting appellant's oil and gas lease application); Lone Star Steel Co., 117 IBLA 96, 99 n.6 (1990). Accordingly, we find that the fact that judicial review of the exchange decision was pending does not establish that the BLM right-of-way decision was precluded by the pending litigation.

[1] Appellant has presented no other grounds for error in the BLM right-of-way decision before us on appeal. While appellant continues to challenge the propriety of the public land exchange, we have no appeal of that decision before us which would give us jurisdiction to review the exchange. Departmental appeal regulations require that an appellant's statement of reasons for appeal affirmatively point out the asserted error in the decision being appealed. Since appellant has failed to present any basis of error in the right-of-way decision, the appeal is properly dismissed. See Oregon Natural Resources Council Action, 148 IBLA 186, 191-92 (1999); United States v. Reavely, 53 IBLA 320, 322 (1981).

Appellant also complains that, despite its acknowledged expertise and past working relationship with BLM, BLM has deliberately excluded appellant from participation in its decisionmaking process regarding the proposed exchange, and specifically undermined its status as an "affected interest" in this and other outdoor recreation resource proceedings. While this is a significant matter, we find that the issue is outside the scope of this appeal. The jurisdiction of this Board embraces the final decisionmaking authority with respect to appeals from decisions of BLM regarding the use of the public lands and their resources. 43 C.F.R. § 4.1. This Board has no general supervisory authority over BLM officials and we do not exercise authority over matters not before us on appeal. Animal Protection Institute of America, 118 IBLA 20, 25 n.3 (1991); see James C. Mackey, 114 IBLA 308, 315 (1990). The issue of appellant's status as an interested party generally is beyond the scope of this appeal, which concerns only the propriety of BLM's decision to issue the right-of-way grant for the particular water detention facility. Appellant has, by virtue of this appeal, been afforded ample opportunity to raise any and all challenges to BLM's decision before the Board, and thus received procedural due process. Colorado Interstate Gas Co., 110 IBLA 171, 178 (1989).

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 appeal is dismissed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge