

NORTHWEST PIPELINE CORP.

IBLA 86-237

Decided November 3, 1987

Appeal from a decision issued by the Area Manager, White River Resource Area, Bureau of Land Management, which established, for the purpose of cost reimbursement, a category determination for repair work on right-of-way C 24402 W.

Affirmed.

1. Rights-of-Way: Generally -- Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Applications

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3) an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

APPEARANCES: Bernard L. Thomas and Gary Roberts, Land Specialists, Northwest Pipeline Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Northwest Pipeline Corporation (Northwest) appeals from a November 29, 1985, decision issued by the Area Manager, White River Resource Area, Bureau of Land Management (BLM), Meeker, Colorado. The decision stated that Northwest's application for a temporary use permit for repair work "falls within a category IV determination."

Regulation 43 CFR 2883.1-1(a)(1) requires that an applicant for a right-of-way or a temporary use permit reimburse the United States for "administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347)." Under 43 CFR 2883.1-1(a)(3), reimbursement of costs is established according to six general categories. The categories at issue in this case are set forth below:

(ii) Category II. An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which the data necessary to comply with the National Environmental Policy Act are available in the office of the authorized officer; and one field examination of the lands affected by the application to verify the existing data is required;

(iii) Category III. An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which the data necessary to comply with the National Environmental Policy Act are available in the office of the authorized officer; and two field examinations of the lands affected by the application to verify the data are required;

(iv) Category IV. An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which some original data are required to be gathered to comply with the National Environmental Policy Act; and two or three field examinations of the lands affected by the application are required;

A determination for category rationale, referenced by and attached to BLM's November 29, 1985, decision states as follows:

RE: NWP repair of sinkholes along Philadelphia Creek 6" cross over
line SE/4 Sec. 16 T2S R101W

Processing of this application shall require specific field input from the Realty, Surface Specialist and Archaeology Staff in the White River Resource Area.

Processing of this application should be accomplished as an amendment to right-of-way C-24402W, if construction of the water bars occurs outside of the existing right-of-way. Amending the right-of-way is thought appropriate, inasmuch as the erosion control features proposed are permanent, for the life of the pipeline, and considering that routine maintenance of these facilities would be necessary, for the remaining term of the right-of-way grant, to ensure continued protection of the Philadelphia Creek six inch cross over line.

The applicant's proposal involves lands within the Canyon Pintado National Historic District (CPNHD). An archaeological monitor is required for any surface disturbing activities within CPNHD.

Considering the amount of information available and the need for interdisciplinary involvement, this application is categorized as Category IV. A processing fee of \$600.00 is appropriate under Category IV. The respective monitoring fee is \$150.00.

Receipt of the \$600.00 processing fee is required before right-of-way processing can be initiated. Receipt of the \$150.00 monitoring fee is required prior to right-of-way issuance.

By letter dated December 19, 1985, filed with BLM, and prior to the filing of its notice of appeal, Northwest requested that the Category IV determination be reevaluated and contended that the determination was unrealistic for a repair project of such limited scope. Referencing a submitted drawing, Northwest stated that "the site of proposed disturbance is located within a previously highly impacted area" and that "this level of previous activity should have provided sufficient information to delete the need for the excessive interdisciplinary involvement as stated in the category determination." (Emphasis in original.)

On December 30, 1985, the BLM Area Manager responded to Northwest's December 19, 1985, letter. ^{1/} The Area Manager quoted 43 CFR 2883.1-1(a)(3)(iv) and stated:

Washington Office Cost Recovery Manual 1323 defines Category IV as follows:

"NEPA compliance requirements exceed Category III in that one or more (but not more than two) specific resources (e.g., Threatened and Endangered (T&E) species, cultural resources, fisheries or wildlife habitats, etc.) require assessment. In contrast to Category V, the majority of the assessment is developed from previously compiled data."

A Category III action is described as:

"Data necessary to comply with NEPA are available in the office of the Authorized Officer.

Two field examinations are required to verify existing NEPA compliance data. Each field trip is usually no longer than 1 day in duration and is made by no more than two specialists. An examination is conducted to:

(1) Familiarize the specialist(s) with the specific conditions of the area under application prior to preparation of the NEPA compliance document.

(2) Ensure that no unusual or unique resource conditions are present after preparation of the NEPA compliance document."

^{1/} We note that Northwest's notice of appeal filed with BLM on Dec. 30, 1985, is dated Dec. 26, 1985, several days prior to BLM's response. However, since Northwest's statement of reasons is dated Jan. 20, 1986, it is apparent that Northwest elected to pursue its appeal notwithstanding BLM's response.

The Area Manager's letter stated that the proposed project fell within a National Historic District very near two cultural resource sites recorded in the National Register of Historic Places, and that "[t]he sensitive nature and abundance of cultural resources within the Historic District necessitates the need for a cultural resource monitor to be present during all phases of surface disturbance." The Area Manager concluded:

In my opinion this action can be classified only as a Category IV based on the need for site-specific assessment by the Realty, Surface Protection and Archaeological staff in the White River Resource Area. Furthermore, this action cannot qualify as a Category III action since, on the basis of the extremely sensitive nature and concentration of cultural resources in Calf Canyon, I am entirely unable to ensure that "no unusual or unique resource conditions are present after preparation of the NEPA compliance document." In all likelihood there is a good probability that this particular project may encounter additional cultural resource sites or significant artifacts which may require onsite staff coordination with your contracted archaeologist or possibly even staff consultation with the State Historic Preservation Officer. Summarily, the Category and Fee Determination Record of November 29, 1985 shall stand.

In the statement of reasons for appeal, Northwest reiterates that the specific area has been previously highly impacted and states that Northwest wishes to avoid a duplication of effort which would result from the Category IV determination. Northwest also states: "A Category II determination requiring one field trip to verify existing data appears to apply in this specific situation."

The primary distinction between Category IV and Categories II and III is the availability of data. Under Category IV, "some original data are required to be gathered to comply with the National Environmental Policy Act." 43 CFR 2883.1-1(a)(3)(iv). Under Categories II and III, such data "are available in the office of the authorized officer." 43 CFR 2883.1-1(a)(3)(ii), (iii). Thus, in this case, if BLM already has such data from previous projects in the area of Northwest's proposed repair project, a Category IV determination cannot be sustained. The record, however, indicates the existence of an additional cultural resource site which was not assessed in previous projects.

The case file contains a memorandum from Mark Nelson, Realty Specialist, to Mike Selle, White River Area Archeologist, dated December 30, 1985. The memorandum has two photos attached and states that "[t]hese photos show a carrot man figure and a horse figure between two of the waterbars. Two recorded arch sites in the immediate vicinity * * * do not mention these figures. It appears that we have another National Register eligible site confirming your suspicions." In our view, this evidence, together with BLM's December 30, 1985, response, supports a Category IV determination.

The Board has held that a BLM decision denying a right-of-way application will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest. Charing Cross Associates, 83 IBLA 167 (1984). We believe the same standard of review is applicable here, and find that the record shows BLM's Category IV determination meets this standard. The arguments made by Northwest do not persuade us that BLM's determination was unreasonable or made without due regard for the public interest.

We therefore conclude that under 43 CFR 2883.1-1(a)(3), BLM properly determined that Northwest's application for a temporary use permit for repair work fell under Category IV.

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.

John H. Kelly
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge.