

KENNETH W. BOSLEY

IBLA 86-1442

Decided May 19, 1988

Appeal from a notice of realty action issued by the Acting District Manager, California Desert District Office, Bureau of Land Management, notifying interested parties that a parcel of public land would be offered for direct sale. CA-17632.

Dismissed.

1. Federal Land Policy and Management Act of 1976: Sales -- Public Sales: Generally -- Rules of Practice: Appeals: Effect of

A notice of realty action issued by the Bureau of Land Management to notify the public of a proposed direct sale of public land and to solicit comments on the proposal is not a decision subject to appeal under 43 CFR 4.410, since it is merely an announcement of action proposed to be taken.

2. Federal Land Policy and Management Act of 1976: Sales -- Public Sales: Generally -- Rules of Practice: Appeals: Standing to Appeal -- Rules of Practice: Protests

Although a person who files a protest to a proposed direct sale of public land becomes a party to a case within the meaning of 43 CFR 4.410 when the protest is denied and a timely appeal is filed, in order to maintain an appeal, the person must show an interest which has been adversely affected by the decision.

APPEARANCES: Kenneth W. Bosley, Maryland, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Kenneth W. Bosley has appealed from a notice of realty action (NORA) issued by the Acting District Manager, California Desert District Office, Bureau of Land Management (BLM), dated May 30, 1986, notifying interested parties that a parcel of public land (CA-17632) would be offered for direct sale to Don Lee, Inc. (Lee).

That notice, published in the Federal Register on June 5, 1986 (51 FR 20556), stated that an 80-acre parcel of land, described as the W 1/2 SW 1/4 sec. 26, T. 17 S., R. 6 E., San Bernardino Meridian, San Diego County, California, had been found suitable for direct sale pursuant to sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1713, 1719 (1982). BLM proposed to sell both the surface and mineral estates. The notice required Lee to submit a portion of the appraised purchase price as a deposit by August 6, 1986, with the balance to be paid within 180 days of the sale date. Finally, the notice stated that interested parties would have 45 days from the date of publication of the notice to submit "comments" to the District Manager, and that: "Objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior." 51 FR 20556 (June 5, 1986).

[1] On June 27, 1986, Bosley filed with BLM a "notice of appeal" from the NORA. The California State Office, BLM, subsequently transmitted the case to the Board. While styled a "notice of appeal," it is clear that Bosley's June 1986 filing was a "protest" of an action proposed to be taken by BLM under 43 CFR 4.450-2, rather than an "appeal" of a final BLM decision under 43 CFR 4.410(a). Kenneth W. Bosley, 99 IBLA 327, 332 (1987); George Schultz, 94 IBLA 173, 177 (1983); Coastal States Energy Co., 80 IBLA 274, 280 (1984). Accordingly, BLM should have adjudicated the matter in the first instance, rather than forwarding it to the Board. See Randall J. Gerlach, 90 IBLA 338, 340 (1986); California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). However, we have on occasion declined to remand a protest to BLM for its consideration when to do so would serve no useful purpose and where initial consideration of the matter at the Board level would expedite ultimate resolution thereof. Kenneth W. Bosley, 101 IBLA 52, 55 (1988); see Beard Oil Co., 97 IBLA 66 (1987); Robert C. LeFavre, 95 IBLA 26 (1986).

In this case, remand would serve no useful purpose for two reasons. First, Bosley's objections lack merit and second, even if we were to return the case to BLM and after its review it denied Bosley's protest, such a decision would be subject to appeal to this Board. However, an appeal by Bosley would have to be dismissed. There is no indication that Bosley has a legally cognizable interest which would be adversely affected by a BLM decision denying his protest.

[2] As we have stated numerous times, 43 CFR 4.410 requires that one filing an appeal from a BLM decision must be a party to the case and must be adversely affected by that decision. Sharon Long, 83 IBLA 304, 307 (1984); Oregon Natural Resources Council, 78 IBLA 124 (1984); In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). One may become a party to a case by filing a protest to proposed action by BLM and by filing a timely appeal of the denial of such a protest. In Re Pacific Coast Molybdenum Co., supra. However, denial of a protest does not automatically confer standing to appeal on the protestant. The record must show that the person seeking to appeal BLM's decision has a legally cognizable interest which has been adversely affected. Sharon Long, supra at 308. The Board has held that such an interest is not limited to an economic or property interest but may include

use of the land in question or ownership of adjoining land. Id.; California Association of Four Wheel Drive Clubs, supra.

Bosley's statement of reasons (SOR) filed in this case fails to show that he has any legally cognizable interest which has been adversely affected. He asserts that he has two windfarm applications "just to the east" (SOR at 2). That is not such an interest which has been adversely affected.

Thus, if we were to consider Bosley's protest to be an "appeal" of the NORA, it would be subject to dismissal as an interlocutory appeal. See Beard Oil Co., supra at 68. And even if we were to ignore the interlocutory nature of the "appeal," it would be dismissed for lack of standing. In addition, if we were to remand and BLM denied the protest, an appeal of that decision by Bosley would be dismissed for lack of standing. We conclude, under the circumstances, that the proper disposition of the present "appeal" is to dismiss it.

Even if the objections raised by Bosley in his SOR had been presented in a proper appeal of a decision by BLM to deny his protest and proceed with the sale to Lee, they would not support overturning the sale. We will review those objections.

Bosley's principal objection to the direct sale of the 80-acre parcel of land to Lee is that the sale should not take place at all or, in the alternative, if the sale goes forward, it should be by competitive bidding, rather than by direct sale. 1/

Bosley states that the sale should not take place because the land should be classified as containing "valuable mineral, or other resources" and, therefore, should be retained in Federal ownership (SOR at 1). In particular, he refers to the fact that the area has good potential for wind energy and that the parcel provides the necessary set-back, in accordance with county restrictions, 2/ for the siting of wind turbines on the "prime windland hill" of the adjacent Campo Indian Reservation to the west. Id. at 2. Given these restrictions, Bosley concludes that conveyance of the 80-acre parcel

1/ Bosley objects to the BLM decision to grant to Lee an "option to purchase" an additional 230.28 acres (SOR at 1). The June 1986 Federal Register notice makes no mention of this 230.28-acre parcel. The record shows, however, that BLM considered this 230.28-acre parcel (parcel A), described as lots 3, 5, 7 and the N 1/2 S 1/2 sec. 35 and lots 6 and 9 sec. 36, T. 17 S., R. 6 E., San Bernardino Meridian, San Diego County, California, for sale in conjunction with the 80-acre parcel (parcel B), and that in a May 21, 1986, Land Report, at page 5, BLM recommended the direct sale of the 80-acre parcel to Lee and stated that the 230.28-acre parcel "may also be disposed of at a later date to [Lee] in the event he decides to purchase said parcel." However, the June 1986 Federal Register notice did not concern that parcel, and we express no opinion on Bosley's arguments concerning that parcel.

2/ Bosley states that the set-back would be between 800 and 1,800 feet for 200-foot high wind turbines currently in commercial use.

out of Federal ownership would reduce or eliminate windfarm development on reservation land. 3/

Under section 203(a) of FLPMA, 43 U.S.C. § 1713(a) (1982), the Secretary or his delegated representative may decide to sell a tract of public land where the tract meets one of several "disposal criteria." One of the alternative criteria is where a tract "because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency." 43 U.S.C. § 1713(a) (1982).

The record indicates that the 80-acre parcel is surrounded on three sides by private land owned by Lee and on the remaining side by the Campo Indian Reservation. In its May 1986 Land Report, at page 5, BLM described the parcel as an "isolated tract of public land without legal access to it and too small for cost-effective Federal resource management." Accordingly, in its June 1986 Federal Register notice, BLM concluded that the parcel was suitable for sale "because of location, lack of administrative access and small size, makes it difficult and uneconomic to manage as part of the public land and not suitable for management by another Federal agency." 51 FR 20556 (June 5, 1986).

Furthermore, under section 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), the Secretary or his delegated representative may convey mineral interests owned by the United States where the surface will be in non-Federal ownership where he finds that there are "no known mineral values in the land." Otherwise, the United States must reserve the mineral interest. 43 U.S.C. § 1719(a) (1982); Port Kendall, Inc., 93 IBLA 221 (1986). In an August 1, 1985, Mineral Report, at page 1, a BLM geologist concluded that the 80-acre parcel has "low potential" for the occurrence of locatable, salable or leasable minerals. Accordingly, in its June 1986 Federal Register notice, BLM concluded that the parcel has "no known mineral values." 51 FR 20556 (June 5, 1986). Bosley has not pointed to the presence of any mineral values in the subject parcel which would preclude conveyance of the mineral interest. Potential for wind energy development is not a mineral value in the land. 43 U.S.C. § 1719(b)(1) (1982).

It clearly is within the discretion of BLM to convey the 80-acre parcel out of Federal ownership, even where the parcel may have some potential for wind energy development. That choice was committed to BLM's discretion. See Dean M. Anderson, 94 IBLA 88, 91 (1986).

Although Bosley alleges that the Campo Indians have expressed interest in wind energy development, there is no evidence that they have objected to

3/ Bosley states, in addition, that the 80-acre parcel should be retained in Federal ownership in order to protect public access to the reservation. However, Bosley provided no evidence that there is any form of existing public access to the reservation across the subject parcel which would be adversely affected by a conveyance.

the proposed sale. 4/ Further, Bosley provided no evidence that county setback restrictions would be applicable on reservation land. 5/ Finally, any concerns Bosley has expressed regarding the impact of a sale on the Campo Indians are of no moment since he has not provided evidence that he has any special relationship with that group such that he may act in their behalf.

Bosley challenges BLM's decision to sell the 80-acre parcel by direct sale, rather than by competitive bidding. Bosley states that the circumstances dictate a competitive sale in accordance with 43 CFR 2710.0-6(c)(3)(i), which provides that a competitive sale is the

general procedure for sales of public lands and may be used where there would be a number of interested parties bidding for the lands and (A) wherever in the judgment of the authorized officer the lands are accessible and usable regardless of adjoining land ownership and (B) wherever the lands are within a developing or urbanizing area and land values are increasing due to their location and interest on the competitive market.

Bosley has provided no evidence that any of the enumerated conditions for a competitive sale obtain in the present case. There is no evidence in the record that there are "a number of interested parties" willing to submit bids for the parcel. Not even Bosley has asserted that he would bid on the parcel. 6/ As noted supra, the record indicates that the parcel is not "accessible and usable regardless of adjoining land ownership." Nor is there any evidence that the parcel is in a "developing or urbanizing area." Rather, the September 1985 Appraisal Report, at 2, states that the area is "rural in character, focusing on rural residential, grazing, and recreational uses."

Section 203(f) of FLPMA, 43 U.S.C. § 1713(f) (1982), provides that the Secretary may sell public land "without competitive bidding" in order to recognize equitable considerations, including a "preference to users." See 43 CFR 2711.3-3. The May 1986 Land Report states that BLM decided to sell the subject parcel to Lee by direct sale, in order to recognize Lee's historic use of the parcel as part of its grazing lease, as well as Lee's ownership of

4/ The record contains a copy of a letter from the Area Manager, Indio Resource Area Office, to Ms. Valacia Thacker, dated May 30, 1986, informing the Campo Indians of the proposed sale.

5/ Bosley also challenges the sale because it might result in the development of new homes, whose owners could lobby for zoning restrictions on Bosley's windfarm projects "in the area" (SOR at 4). This concern is speculative at best and is not a relevant concern for purposes of determining whether to proceed with the sale.

6/ This would be another basis on which to dismiss Bosley's "appeal" since in Kenneth W. Bosley, 101 IBLA 52, 55 (1988), we held that one who objects to a direct sale of public land complaining that the land should be sold competitively lacks standing to appeal absent an allegation that the person desired to make a competitive bid for the tract.

adjacent private land. The record supports BLM's decision to proceed by direct sale. 7/

The appraised price for the 80-acre parcel, which was set at \$ 48,000 (\$ 600 per acre), is too low, Bosley complains. He contends that there was no explanation provided by BLM for the reduction from the \$ 900 per acre price originally set in the September 1985 Appraisal Report. He is wrong. An explanation is provided in the January 1986 Supplemental Appraisal Report, which indicates that the change was primarily due to a review of comparable sales by another BLM appraiser.

As proof that the subject parcel should have been appraised at a higher value, Bosley refers to the sale of a nearby 21-acre parcel for \$ 38,000 (\$ 1,843 per acre). However, he fails to demonstrate how this parcel is comparable to the subject parcel. Overall, Bosley has not shown that there was any error in the appraisal methods used by BLM or that the appraised value is inaccurate.

Bosley has not demonstrated any reason why the proposed sale of the 80-acre parcel to Lee should not proceed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Bruce R. Harris
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

John H. Kelly
Administrative Judge

7/ Bosley also makes reference to an Apr. 1, 1985, letter from the State Director, California State Office, to United States Congressman Duncan Hunter as further proof that the subject parcel should be sold by competitive bidding. This letter states that various parcels adjacent to Southern California Indian reservations, which were identified by BLM for sale "[i]n 1984," would be advertised for competitive sale "[s]hould no further [Indian] interest in these tracts be shown" (SOR, Exh. 1 at 1). There is no indication that this April 1985 letter applied to the 80-acre parcel involved herein, and even if it did, it would not preclude the direct sale in this case where Lee owns adjacent land and holds a grazing lease for the sale parcel, and the criteria for a direct sale are otherwise satisfied.