

SIERRA CLUB ET AL.

IBLA 89-356

Decided: May 19, 1989

Appeal from decisions of the Cedar City and Richfield, Utah, District Offices, Bureau of Land Management, making a finding of no significant impact for a proposal to improve the Burr Trail. EA # UT-040-89-6

Decision stayed pending appeal; expedited review granted.

1. Rights-of-Way: Revised Statutes Sec. 2477--Rules of Practice: Appeals: Effect Of

Under the regulation at 43 CFR 2804.1(b) decisions regarding rights-of-way under the regulations at 43 CFR Part 2800 are excepted from the automatic stay pending appeal provided by regulation at 43 CFR 4.21(a) and are effective pending appeal. No application was required for R.S. 2477 rights-of-way granted by statute for roads constructed over unreserved public lands and a decision finding no significant impact to adjacent public lands from improvement of an R.S. 2477 right-of-way is not a decision under the regulations at 43 CFR Part 2800 and, hence, is not excepted from the automatic stay pending appeal.

APPEARANCES: Wayne G. Petty, Esq., and William J. Lockhart, Esq., Salt Lake City, Utah, and Lori Potter, Esq., Denver, Colorado, for appellants; Ronald W. Thompson, Esq., and Barbara J. Hjelle, Esq., St. George, Utah, and Patrick B. Nolan, Esq., Garfield County Attorney, Panguitch, Utah, for Garfield County; and David K. Grayson, Esq., Assistant Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been filed by the Sierra Club, the National Parks and Conservation Association, the Southern Utah Wilderness Alliance, and The Wilderness Society from separate decisions of the District Managers, Cedar City and Richfield Districts, Bureau of Land Management (BLM), dated March 8, 1989. These decisions each constituted a "Finding of No Significant Impact" (FONSI) for the road improvement project proposed for the Boulder to Bullfrog road (Burr Trail) in southeastern Utah. The FONSI was based on an environmental assessment (EA) dated March 7, 1989 (EA # UT-040-89-6).

Appellants challenge the BLM decisions to allow Garfield County to proceed with the proposed improvements to those portions of the road located on public lands within their respective districts. They assert that the EA prepared by BLM improperly ignored environmental impacts which require preparation of an environmental impact statement (EIS). Further, appellants contend BLM erred in failing to consider any action necessary to avoid "unnecessary or undue degradation" of affected public lands as required by section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1732(b) (1982). Additionally, appellants dispute the conclusion of the Richfield District Manager, made without any factual findings or stated basis, that Garfield County has a "R.S. 2477" 1/ right-of-way for segments of the road located within the district.

The action studied was described in the 1989 EA as follows:

The County proposes to upgrade those portions of the existing Boulder to Bullfrog Road that are located on BLM administered or state lands. * * *

The current proposal calls for either a paved or gravel surface travel width of 24 feet with a design speed of 30 to 40 miles per hour. The project also involves moving the existing roadway from a riparian area to a bench area near "The Gulch" along with minor grade and alignment changes throughout the public lands involved (described as segments 1 & 3 in the 1985 EA 2/ and the 1988 draft EA). The project does not involve any activities within units of the National Park System, although Garfield County's purpose is to eventually construct a paved roadway from Boulder to the Bullfrog area of Lake Powell.

(1989 EA at 3). The segments of the road referred to which cross public lands administered by BLM stretch from Boulder to the western edge of Capitol Reef National Park (CRNP) within the Cedar City District (segment 1) and from the eastern boundary of CRNP to the north boundary of the Glen Canyon National Recreation Area within the Richfield District (segment 3).

The context of this appeal is complicated by prior litigation in the Federal courts regarding the earlier plans of Garfield County to improve (but not pave) the western 28 miles of the road (segment 1). This proposal was the subject of a lawsuit by appellants against BLM and Garfield County asserting that BLM had breached its responsibilities under section 102 of the National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. | 4332

1/ Act of July 26, 1866, ch. 262, | 8, 14 Stat. 253 (formerly codified at 43 U.S.C. | 932 (1982)), repealed by FLPMA, P.L. No. 94-579, | 706(a), 90 Stat. 2793. This statute provided that: "The right of way for the construction of highways over the public lands, not reserved for public uses, is granted."

2/ National Park Service and Bureau of Land Management, U.S. Department of the Interior, Draft Environmental Assessment on Paving the Boulder-to-Bullfrog Road (May 1985).

(1982), and FLPMA regarding management of the affected public lands. The litigation resulted in a remand of this matter to BLM to conduct an EA of the proposed action and generate either an EIS or a FONSI. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), aff'g in part and rev'g in part, 675 F. Supp. 594 (D. Utah).

Counsel for BLM and counsel for Garfield County have requested the Board to bifurcate the appeals from the Richfield and Cedar City Districts in view of the specific rulings of the court affecting the latter decision on remand. The Board has also been advised that pursuant to the terms of the Tenth Circuit's remand the injunction against construction of improvements on a part of segment 1 between the eastern boundary of the Steep Creek and the North Escalante Canyon Wilderness Study Areas in the Long Canyon Area and CRNP has been lifted and work has commenced. The injunction of the District Court remains in effect for the portion of segment 1 of the road between Boulder City and Long Canyon pending completion of administrative review before the Board. An April 14, 1989, letter from counsel for Garfield County to counsel for BLM appearing in the record indicates that completion of work on the stretch of roadway west of CRNP released from the injunction is imminent and that commencement of work on segment 3 administered by the Richfield District is contemplated at that time. Further, the County has requested that the Board grant an expedited review of this appeal.

Counsel for appellants has opposed the motion to bifurcate the appeals from the separate district office decisions, asserting that the proposed action has changed, both in scope and nature, from the proposal which was before the courts and which was the subject of the judicial remand. Further, appellants contend bifurcation of these appeals would perpetuate an improper segmentation of the scope of the proposed action in violation of NEPA obligations.

Appellants assert that the BLM decisions should be construed to be automatically stayed pending resolution of this appeal pursuant to the regulations at 43 CFR 4.21(a). Appellants recognize that the regulations governing rights-of-way issued by BLM at 43 CFR Part 2800 provide that decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise and that the provisions of 43 CFR 4.21(a) shall not apply to such decisions. 43 CFR 2804.1(b). Nonetheless, appellants contend that the application of the regulations at 43 CFR Part 2800 is properly limited to rights-of-way issued by BLM as distinguished from rights-of-way granted by R.S. 2477 for roads constructed on the public lands. In the alternative, appellants have moved this Board to issue a stay pending resolution of this appeal before the issues are mooted by the construction which is slated to commence within days.

In response to appellants' assertion that the BLM decisions are automatically stayed pursuant to 43 CFR 4.21(a), counsel for BLM contends that the regulation at 43 CFR 2804.1(b) provides an exception to the automatic stay. Counsel notes that the road is an R.S. 2477 right-of-way predating passage of FLPMA and that, although the regulations at 43 CFR Part 2800 no longer refer to R.S. 2477 rights-of-way since repeal of this authority by

FLPMA in 1976, regulations dealing with these rights-of-way were formerly codified at Part 2800. Garfield County has concurred in the contention that the stay provided by 43 CFR 4.21(a) does not apply. Further, the County has opposed the motion for stay pending resolution of this appeal.

[1] The threshold question presented is whether the BLM decisions recognizing the right-of-way and consenting to the planned improvements are excepted from the automatic stay of administrative decisions pending appeal provided by regulation at 43 CFR 4.21(a). The automatic stay provision is by its terms subject to exception where "otherwise provided by law or other pertinent regulation." 43 CFR 4.21(a). All decisions of BLM issued under the right-of-way regulations at 43 CFR Part 2800 "remain effective pending appeal unless the Secretary rules otherwise." 43 CFR 2804.1(b). Counsel for BLM has cited several right-of-way cases where the regulation at 43 CFR 2804.1(b) has been recognized as providing an exception to the automatic stay provision. *E.g., Ute Water Conservancy District*, 106 IBLA 346, 353 n. 6 (1989). We note that the cases cited have all involved rights-of-way issued by BLM. These cases are properly distinguished from those involving R.S. 2477 rights-of-way recognized for roads constructed over the public lands. No application was required to be filed for a right-of-way constructed across unreserved public lands pursuant to R.S. 2477. 43 CFR 2822.1-1 (1975). This is apparently an issue of first impression as those cases before the Department which have dealt with R.S. 2477 rights-of-way have generally involved appeals of different types of decisions the propriety of which have been affected by the issue of the existence of such a right-of-way. *E.g., Nick DiRe*, 55 IBLA 151 (1981) (the issue of the existence of a public right-of-way under R.S. 2477 was deemed relevant in an appeal from rejection of a conflicting private right-of-way application).

Reviewing the facts of the case in this context, we find that this is not an appeal of a decision regarding a right-of-way issued by BLM under the regulations at 43 CFR Part 2800. Rather, this is an appeal of a FONSI for a road improvement project and a determination that the associated impacts on the public lands do not merit the imposition of restrictions on the scope of the project other than those noted in the FONSI. This decision was reached by BLM pursuant to its responsibilities under NEPA and under FLPMA to avoid unnecessary and undue degradation of the public lands. Hence, the decision is properly construed to be stayed pending resolution of any timely filed appeal. 43 CFR 4.21(a). 3/

In the absence of an automatic stay under 43 CFR 4.21(a), we would be compelled to order a stay of the effect of the BLM decisions in this case pending resolution of the appeals. Factors deemed necessary to support a

3/ We wish to make clear that we are not preempting or ignoring the existing orders of the courts in this matter. Recognition of a stay of the effect of the administrative decisions under appeal pursuant to this regulation at 43 CFR 4.21(a) should not interfere with completion of those improvements which were the subject of the prior litigation to the extent already permitted by the courts on judicial remand, *i.e.*, to the extent the injunction has been lifted pending completion of the environmental review process.

stay request include: substantial likelihood of success on the merits; substantial threat of irreparable injury to the moving party if the stay is not granted; the threatened injury to the moving party must outweigh the potential harm the stay may do to the nonmoving party; and the stay must not be contrary to the public interest. Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11-12 (1986); see Sun Oil Co., 42 IBLA 254, 257-58 (1979). In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), quoted in Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895, 905 (N.D. Texas 1980). Application of these criteria to the present case leads to the conclusion that a stay is warranted. Appellants have raised issues of substance requiring careful consideration and have asserted that irreparable damage to the public lands will result from implementation of the decisions from which these appeals are taken. Although all sides in this controversy claim to represent the public interest, the primary adverse effect of a stay to the County is in the delay of road improvements which may foster future development. Hence, we must conclude that the threatened injury to appellants outweighs the threatened injury to Garfield County and BLM arising from a stay.

With respect to the motion of Garfield County to bifurcate these appeals for purposes of review by the Board and separately consider the appeals from the decisions of the Cedar City and Richfield District Offices, we find that the motion must be denied. We recognize that the Board is bound on judicial remand by the rulings of the court of appeals in Sierra Club v. Hodel, supra, and the district court on remand. Thus, to the extent the proposed action considered by BLM constitutes the action previously reviewed by the courts, the case under consideration does not come before the Board with a clean slate. This is not uncommon with appeals coming before the Board on judicial remand. However, apart from this significant qualification, no showing has been made that these appeals are so unrelated as to warrant separate review. On the contrary, it appears that the two decisions involved are separate segments of one larger road improvement project.

In ruling on the motion for expedited consideration, we note that the improvement of the Burr Trail, either in whole or in part, has been under consideration by the Department and by the courts for several years. In view of this rather lengthy history of administrative and judicial review, we find it appropriate to grant the motion for expedited consideration.

Finally, co-counsel for Sierra Club has filed a request for extension of time to file a statement of reasons for appeal in this matter. It appears that this request is now essentially moot in view of the statement of reasons and amended statement of reasons filed on behalf of appellants on May 5 and May 11, respectively. Any extension of time which may be necessary to render these filings timely is hereby granted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are stayed pending appeal and the motion for expedited review is granted.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge