

Editor's note: Appealed -- aff'd, Civ. No. F92-018 (D. Alaska July 27, 1993), rev'd, remanded to IBLA, No. 93-35841 (9th Cir. March 30, 1995), 51 F.3d 220

STATE OF NEVADA
DIVISION OF STATE LANDS

IBLA 90-343

Decided October 21, 1993

Appeal from a decision of the Las Vegas District Office, Nevada, Bureau of Land Management, rejecting right-of-way application N-50543.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way-- Rights-of-Way: Applications

Use of public lands for the purpose of a National Guard Maneuver Area is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1988).

APPEARANCES: David S. Pennington, Esq., for the State of Nevada, Division of State Lands.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The State of Nevada, Division of State Lands (State), has appealed from an April 20, 1990, decision of the District Manager, Las Vegas District Office, Bureau of Land Management (BLM), rejecting its right-of-way application N-50543, filed on behalf of the State of Nevada Military Department for a National Guard Maneuver Area.

The State filed its application on February 6, 1989, pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1988), for approximately 8,310 acres of land located in Ts. 22 and 23 S., R. 62 E; and T. 23 S., R. 63 E., Mount Diablo Meridian, in Eldorado Valley, Clark County, Nevada. The application was filed in part on Standard Form 299 (10-87) entitled "Application for Transportation and Utility Systems and Facilities on Federal Lands," and was accompanied by an Environmental Assessment of the proposed activity. In its cover letter dated January 31, 1989, the State explained that it was applying for a right-of-way to allow continued state use of certain lands in Eldorado Valley which were previously used by the Nevada Military Department under a use permit. The State advised that the application was being submitted pursuant to BLM Instruction Memorandum (IM) No. NV-88-138. The Nevada Army National Guard proposed to use the land for nine 3-day training weekends

per year. As described in the application, the National Guard's training weekend exercises would include up to 50 tracked vehicles and 500 soldiers training for their deployment mission in case of a national emergency.

The subject of IM No. NV-88-138, issued by the Nevada State Director, BLM, on January 15, 1988, was "Military Maneuvers on Public Lands." Therein, the State Director explained that while section 302 of FLPMA, 43 U.S.C. § 1732 (1988), did not provide authority to approve military maneuvers on public lands, BLM had a large demand for use of the public lands by Department of Defense agencies and the Nevada National Guard.

He pointed out that the Department of Defense had proposed legislation to amend FLPMA to allow BLM to authorize such uses, and that a bill was introduced as H.R. 2806 on June 26, 1987, to accomplish this purpose.

The State Director stated that until legislation was enacted to specifically authorize such uses, the most appropriate means to allow military activities on public lands was by issuance of a FLPMA right-of-way.

Section 302 of FLPMA was amended on November 3, 1988, by P.L. 100-586, 102 Stat. 2980. As amended, section 302 would allow the Secretary of the Interior to permit temporary use of certain public lands in Alaska by a military department or the Coast Guard for training or related purposes. The case file contains a memorandum dated April 6, 1990, from the State Director to the District Manager which discusses the State's application and addresses the rationale behind IM No. NV-88-138. The Memorandum states in part:

When IM No. NV-88-138 was written, we knew that issuance of a right-of-way grant was inappropriate to authorize military maneuvers on public lands. However, the Department of Defense was proposing legislation to authorize low impact maneuvers by a Section 302 permit. Direction was developed to issue a right-of-way grant as the least objectionable method to authorize military activities on public land. However, the uses contemplated in IM No. NV-88-138 to be authorized by right-of-way included such things as search and rescue training, temporary radar sites, small unit camping, etc., not major surface disturbing activities such as armored vehicle maneuvers.

* * * * *

There is currently no authority to issue a grant in response to right-of-way application No. N-50543 or for a similar use in another area. To do so, would be a clear violation of FLPMA. Section 501(a) of FLPMA specifically identifies seven categories of uses to be authorized by a right-of-way which do not include armored vehicle maneuvers over a wide area by the military.

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Uses to be approved by right-of-way grant related to armored vehicle maneuvers are for communication and transportation related purposes such as ingress and egress to support an exercise on

lands not administered by BLM. As contemplated by IM No. NV-88-138 for the U.S. Military, we could also authorize the National Guard to conduct similar activities which cause minimal damage to the land and its resources.

In his decision, the District Manager explained that BLM is authorized to issue rights-of-way pursuant to section 501(a) of FLPMA, 43 U.S.C. § 1761 (1988). He informed the State that categories of uses identified, for which a right-of-way is authorized do not include the use for an armored vehicle maneuver area. In support of his decision, he cited the Board's decision in Department of the Army, 95 IBLA 52 (1986).

In its statement of reasons, the State refers to section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), and argues that it has met the requirements for a right-of-way because a properly trained military is in the "public interest" and because the right-of-way is "required."

The State asserts that the primary authority for withdrawal of land for military training or other defense purposes is the Engle Act, 43 U.S.C. § 155 (1988), but that this Act is expressly limited to Department of Defense withdrawals, and acknowledges that it does not qualify. Thus, the State concludes that a right-of-way is the only course available to it to obtain use of the land. ^{1/} The State goes on to argue that the right-of-way provision should be construed in such a way as to allow approval of its application. In distinguishing Department of the Army, *supra*, from the case in issue the State asserts that in Department of the Army a right-of-way was not "required" because the Army, as a Federal entity, qualified as a withdrawal applicant under the above statutes.

[1] Section 501(a)(7) of FLPMA, 43 U.S.C. § 1761(a)(7) (1988), provides that "the Secretary [is] authorized to grant * * * rights-of-way over, upon, under, or through [public] lands for * * * (7) such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such lands." In Department of the Army, 95 IBLA 52 (1986), the Department of the Army Corps of Engineers appealed a decision of the Las Vegas District Office, Nevada, BLM rejecting its application for a right-of-way filed under section 501 of FLPMA, 43 U.S.C. § 1761 (1988), for approximately 8,310 acres

^{1/} Appellant's argument is based on a fundamental misconstruction of the Engle Act, Act of Feb. 28, 1958, 72 Stat. 1958, 43 U.S.C. §§ 155-58 (1988). The Engle Act did not provide authority for military withdrawals. On the contrary, it limited then-existing withdrawal authority under both the Pickett Act (43 U.S.C. §§ 141-43 (1970)) and the implied authority based in Congressional acquiescence as enunciated in the decision in Midwest Oil Co., (236 U.S. 459 (1915)). See 1958 U.S. Code Cong. & Admin. News at 2227-56. Both the Pickett Act and the implied authority were repealed by section 704(a) of FLPMA, 90 Stat. 2792. All withdrawals must now be based on the general withdrawal authority delineated by section 204 of FLPMA, 43 U.S.C. § 1714 (1988).

of land in Clark County, Nevada, to be used for "maneuver and tactics training at tank platoon and battalion level." *Id.* at 52. The Board affirmed BLM's rejection of the application stating that "it is clear that [the use contemplated] is not among the purposes authorized under FLPMA right-of-way provisions."

We are not persuaded that Department of the Army, *supra*, is distinguishable from this case and find that it is controlling and dispositive of the issues in this appeal. The fact that the Federal applicant could seek a withdrawal to permit a similar contemplated use is irrelevant. The sole question is whether or not armored vehicle maneuvers can be authorized under a right-of-way issued pursuant to 43 U.S.C. § 1761 (1988). We agree with the State Director that they cannot.

Therefore, 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.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge