



OREGON NATURAL DESERT ASSOCIATION

174 IBLA 26

Decided March 5, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

OREGON NATURAL DESERT ASSOCIATION

IBLA 2007-48

Decided March 5, 2008

Appeal from a decision of the Andrews Resource Area Field Manager, Burns District (Oregon), Bureau of Land Management, approving a right-of-way application. OR 63580.

Affirmed.

1. Environmental Quality: Environmental Statements: Categorical Exclusions--National Environmental Policy Act of 1969: Environmental Statements: Categorical Exclusions--Rights-of-Way: Applications

BLM's decision to approve a right-of-way grant without preparing an environmental assessment or an environmental impact statement, based on its determination that such grant falls within the scope of a categorical exclusion specified in the Departmental Manual, will be affirmed if it is reasonable and supported by the record.

2. Environmental Quality: Environmental Statements: Categorical Exclusions--National Environmental Policy Act of 1969: Environmental Statements: Categorical Exclusions--Rights-of-Way: Applications

BLM's determination that a right-of-way grant for a wind energy testing site, for an original term of less than three years, fits within the scope of categorical exclusion E(19), which, as defined by the Departmental Manual, generally covers "issuance of short-term (3 years or less) rights-of-way for land use authorizations," will be deemed to be reasonable and supported by the record, even though the grant may be renewed, where the grant provides that renewal is governed by Instruction Memorandum 2006-216 or current prevailing law,

regulation, and policy at the time of renewal. Instruction Memorandum 2006-216 provides that a project area right-of-way holder may seek to extend or renew the initial term for a period to allow for continued site testing and monitoring, but only if a separate ROW application and plan of development, which would be subject to NEPA review, is submitted for a wind energy development project prior to the end of the initial term of the grant.

APPEARANCES: Kristin F. Ruether, Esq., Portland, Oregon, for Oregon Natural Desert Association; Beth S. Ginsberg, Esq. and Jason T. Morgan, Esq., Seattle, Washington, for Horizon Wind Energy Northwest X LLC; Mariel J. Combs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Oregon Natural Desert Association (ONDA) has appealed from the November 13, 2006, decision of the Andrews Resource Area Field Manager, Burns District (Oregon), Bureau of Land Management (BLM) (Decision), notifying Horizon Wind Energy Northwest X LLC (Horizon) of the approval of right-of-way (ROW) grant OR 63580, effective November 13, 2006, for a wind energy testing site in the Pueblo Mountains of southeastern Oregon.¹ We affirm BLM's Decision.

Background

1. The ROW

ROW OR 63580 authorizes Horizon to use less than one acre of public land for a wind energy testing site, for an original term of less than 3 years, from November 13, 2006, until December 31, 2008.² Specifically, the ROW provides

¹ By Order dated Jan. 30, 2007, this Board granted Horizon's Motion to Intervene, denied Horizon's Motion to Dismiss (finding ONDA had satisfied the standing requirement of 43 C.F.R. § 4.410), and denied ONDA's Petition for Stay.

² Horizon originally filed an Application for Transportation and Utility Systems and Facilities on Federal Lands on Apr. 28, 2006. Administrative Record (AR), tab 14. After receiving the application, BLM completed a "Categorical Exclusion Environmental Review and Approval" (CEERA), finding that the proposed ROW qualified under categorical exclusion E(19). BLM issued a decision on Aug. 8, 2006, which granted ROW OR 63580 for a term of *more than 3 years*, lasting from Sept. 1, 2006, until Dec. 31, 2009. ONDA appealed this decision, claiming that the

(continued...)

Horizon the exclusive right to construct, operate, maintain, and terminate two meteorological (met) towers (or poles) in Meridian, County, Oregon, within an exclusive wind energy testing project area.³

The ROW grant identifies measures required by BLM to prevent or mitigate any adverse environmental effects, including requiring Horizon to administer the ROW in conformance with BLM's Wind Energy Development Program Policies and Best Management Practices (BMPs).⁴ Activities under the ROW grant must conform with Horizon's Plan of Development, dated May 10, 2006, for the overall wind energy testing project. Decision at 1. However, despite the fact that the ROW is contemplated as part of a larger wind energy testing project, BLM clearly states, in its Decision approving the ROW grant, that "[t]he grant does not authorize any additional commercial wind energy development," adding that "[a]ny future development within the project area will require separate application, analysis, and approval." *Id.* Importantly for our present purposes, the ROW grant states that the ROW is subject to renewal. The ROW grant states that renewal of the ROW must be "in accordance with BLM's Wind Energy Development Policy, Instruction Memorandum No. 2006-216 or in accordance with the current prevailing law, regulation, and policy at that time" (ROW, Ex. A, at I), and subject to "any other terms and conditions that the Authorized Officer deems necessary to protect the public interest." ROW, Ex. A, ¶ 2.d.

The met towers or poles, authorized by the ROW, are temporary structures, approximately 50-60 meters high, which are erected using sections of 6-8 inch diameter non-reflective silver/gray steel tubes. They require no excavation for a below-ground foundation. Each sits on a flat base, approximately 3 feet by 3 feet and is supported in four equidistant directions by 100-foot long guy wires. Horizon Plan of Development at 1. Towers are erected in 1 day, by a crew using existing roads and trails and one authorized cross-country route. ROW Grant, Ex. A, at k.

² (...continued)

categorical exclusion was inapplicable because the term of the ROW was longer than 3 years. Order, IBLA 2006-297, dated Nov. 6, 2006, at 2. BLM asked the Board to remand the decision to permit amendment of the term. *Id.* The Board vacated the decision and remanded the matter to BLM. *Id.* at 2-3. Thereafter, BLM issued the Nov. 13, 2006, Decision now before the Board.

³ A project area map, identified as Exhibit B to the ROW grant, shows the specific location of the met site, within the overall project area.

⁴ The BMPs are included as Attachment A to the "RECORD OF DECISION Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments" (Wind Energy Development ROD), dated Dec. 15, 2005. See 71 Fed. Reg. 1768 (Jan. 11, 2006).

Once installed, the met poles remain in place for the duration of the ROW, recording weather information including “wind speed, direction, gusts, temperature, etc. that can be used with regional reference station data, such as the kind recorded at airports, to characterize the long-term wind resource at the site.” *Id.* at 1. Data is saved to a memory card in the met poles or transmitted via cell phone each day to an offsite location, enabling crews to limit visits to the met site to once per season. Horizon Plan of Development at 3. In the event of inadequate cell phone signals, Horizon will collect memory cards manually, visiting the site a maximum of 4 times per year, excluding times of wet soil and sage grouse lekking seasons. *Id.* Removal, like installation, will take less than a day. *Id.* Upon termination of testing operations, Horizon must remove all equipment, and take specified measures to rehabilitate the site to a natural condition. ROW Grant, Ex. A, ¶ 4.b, and ROW Grant, Ex. A, Terms and Conditions, ¶ q.

2. Wind Energy Program

In 2003, BLM began preparation of a programmatic Environmental Impact Statement (EIS) to study the impacts of the future development of wind energy resources on public lands. IM No. 2006-216 at 1. In 2005, BLM published its “Final Programmatic Environment Impact Statement and Wind Energy Development on BLM-Administered Lands in the Western United States” (PEIS). Based on the PEIS, BLM issued the Wind Energy Development Record of Decision (ROD), dated December 15, 2005, which, *inter alia*, authorized BLM to amend the Andrews Resource Management Plan (RMP), which governs land use programs and activities in the Andrews Resource Area. The ROD permitted BLM to adopt wind energy development program policies and BMPs, and to identify specific areas where wind energy development would be forbidden.⁵ ROD, Attachment B. Importantly, it provided, in the BMPs, for BLM’s use of categorical exclusion E(19) for wind energy site monitoring and testing activities: “The Categorical Exclusion (CX) applicable to the issuance of short-term ROWs or land use authorizations *may be applicable to some site monitoring and testing activities.*” ROD, Attachment A, at A-4 (emphasis added).

IM No. 2006-216, which was issued in 2006, provides specific guidance for implementing the ROD. Among other things, the IM describes the three types of wind energy projects for which BLM is authorized to grant ROWs:

⁵ The Department’s wind energy policy is consistent with Executive Order No. 13212 (which provides that executive departments and agencies “shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy”) and section 201 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 650 (2005) (codified at 42 U.S.C. § 15851) (which encourages development of renewable energy resources, including wind energy).

- 1) a site-specific wind energy site testing and monitoring right-of-way grant for individual meteorological towers and instrumentation facilities with a term that is limited to 3 years;
- 2) a wind energy site testing and monitoring right-of-way grant for a larger site testing and monitoring project area, with a term of 3 years that may be renewed consistent with 43 C.F.R. § 2807.22 and the provisions of this IM beyond the initial term of the grant; and
- 3) a long-term commercial wind energy development right-of-way grant with a term that is not limited by the regulations, but usually in the range of 30 to 35 years.

IM No. 2006-216 at 3. The IM also states, at page 9, that use of a categorical exclusion “for the issuance of short-term right-of-way authorizations *may be applicable to some site testing and monitoring locations.*” (Emphasis added.)

Regarding renewals, the IM states in several places that the term “can be extended or renewed (43 C.F.R. § 2807.22) for a term not to exceed an additional 3 years to allow for continued site testing and monitoring, only if a separate [ROW] application and POD is submitted for a wind energy development project prior to the end of the initial term of the grant.” *Id.* at 5; *see also Id.* at 8-9.

Following receipt of Horizon’s ROW application, BLM determined that the proposed action described in Horizon’s application fell within the second type of ROW identified in IM No. 2006-216.

3. *Categorical Exclusion E(19)*

In its May 18, 2006, CEERA, BLM also determined that the ROW fell within the scope of categorical exclusion E(19), thus excluding it from the statutory and regulatory requirements to prepare an environmental assessment (EA) or EIS.⁶

Under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations (40 C.F.R. Chapter V), a Federal agency is directed, by regulation, to prepare an EA in order to determine whether it is obligated, by statute, to prepare an EIS because the proposed Federal action is a major Federal action that is likely to significantly affect the quality of the human environment, *unless such action falls within a categorical exclusion.* 42 U.S.C.

⁶ The CEERA also found that “[t]he Proposed Action is in conformance with the Andrews Management Unit RMP and ROD.” CEERA at unpaginated 1.

§ 4332(2)(C) (2000); 40 C.F.R. §§ 1501.4, 1507.3(b) and 1508.9. Categorical exclusions are defined by NEPA's implementing regulations as

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an [EA] nor an [EIS] is required. . . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 C.F.R. § 1508.4.

The Departmental Manual at 516 DM 2.3, which was adopted through the "procedures" envisioned in 40 C.F.R. § 1508.4, similarly defines categorical exclusions. It refers to the categories of actions listed in Appendix 1 to that chapter that are categorically excluded, Department-wide, from the preparation of EAs or EISs, and to the list of categorical exclusions specific to bureau programs found in the DM bureau chapters, beginning with Chapter 8. In determining whether an action is categorically excluded, BLM first must consider whether the action fits within the meaning of any exclusionary category and then, if it does, whether it falls within an exception requiring NEPA analysis, due to "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4; 516 DM 2.3A(3); see *Utah Environmental Congress v. Bosworth*, 443 F.3d. 732, 740-41 (10th Cir. 2006); *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 403 (2007); *Dineh Alliance and Maxine Kescoli v. OSM and Peabody Western Coal*, 136 IBLA 319, 332 (1996), citing *Oregon Natural Desert Association*, 125 IBLA 52, 57-58 (1993); *Utah Chapter Sierra Club*, 120 IBLA 229, 232 (1991). The list of categorical exclusions for BLM programs is provided in 516 DM 11.5.

In the present case, BLM considered the applicability of the categorical exclusions listed in the "Realty" category of 516 DM 11.5 and determined that the grant falls within the scope of categorical exclusion E(19): "[I]ssuance of short-term (3 years or less) rights-of-way for land use authorizations for such uses as storage sites, apiary sites, and construction sites where the proposal includes rehabilitation to restore the land to its natural or original condition." CEERA at unpaginated 1. BLM also screened for exceptions, determining that the ROW did not meet any of the 12 extraordinary circumstances that might except this action from categorical exclusion E(19), including "significant impacts on public health or safety." *Id.*

Arguments of the Parties

In its Statement of Reasons (SOR) and Supplemental Statement of Reasons (SSR), ONDA principally contends that Horizon's ROW does not qualify under categorical exclusion E(19) because the ROW can be, and indeed is likely to be, renewed, such that renewal will extend the term beyond the 3-year limit permitted by that categorical exclusion. SOR at 16-18; SSR at 5-7. ONDA argues that, since categorical exclusion E(19) cannot be applied to renewable ROWs, BLM's decision to grant the ROW, without preparing an EA or EIS, violated section 102(2)(C) of NEPA because BLM failed to take the requisite hard look at the environmental consequences of granting the ROW.⁷ SOR at 7-15; SSR 2-5.

BLM responds that “[c]ontrary to ONDA’s assertion, there is no indication that the BLM ‘is likely to extend the ROW into an extended term,’ and there is no basis for ONDA’s argument that, if renewal does occur, there will be ‘no further NEPA analysis.’” Answer at 7-8.

⁷ ONDA asserts that BLM was required, in an EA or EIS, to address the likely environmental impacts on wilderness resources if the ROW is renewed and eventually results in development of the wind energy resources at the met site. SOR at 18-22. It specifically asserts that the ROW area stretches across three proposed wilderness study areas (WSAs), Bear Dog Springs, Babes Canyon, and Mahogany Rim, documented by ONDA in its citizen wilderness inventory recommendations, submitted to BLM on Sept. 1, 2002 and Nov. 1, 2002. *Id.* at 4, 7. ONDA also challenges the RMP to the extent it failed to assess wilderness resources. *Id.* at 14-16.

Horizon is correct in noting that, in considering the appropriateness of invoking a categorical exclusion, BLM considered comments ONDA submitted regarding potential adverse impacts to potential wilderness values. Horizon Answer at 3-4. A BLM interdisciplinary team reviewed those comments and concluded, consistent with BLM's inventories of the late 1970s and early 1980s, “that the area lacks wilderness characteristics.” AR 21. Given our determination that BLM did not err in finding that the action does not individually or cumulatively have a significant effect on the human environment and therefore was exempt from additional review under NEPA, we will address appellant's NEPA challenges no further.

To the extent ONDA raises concerns with BLM's consideration of wilderness values in the RMP process as issues in this appeal, as we stated in our Jan. 30, 2007, Order, “[t]o the extent ONDA raises concerns with BLM's consideration of wilderness values in the RMP process as issues in this appeal, those concerns are untimely and not addressed to the proper forum.” See 43 C.F.R. § 1610.4; *Rainer Huck*, 168 IBLA 365, 396 (2006). We note, in conclusion, that the Court in *Oregon Natural Desert Ass'n v. Shuford*, No. 06-242, AA, U.S. Dist. Lexis 42614 (June 8, 2007), rejected ONDA's arguments regarding the adequacy of the RMP.

ONDA asks the Board to vacate the Decision, and order BLM to comply with section 102(2)(C) of NEPA, before deciding whether to grant an ROW at the proposed met site. SOR at 2; SSR at 3.

Analysis

[1] When BLM decides not to prepare an EA or EIS, because the proposed action qualifies for a categorical exclusion, we have long held that the decision will be affirmed on review where it is reasonable and supported by the record. *Dineh Alliance and Maxine Kescoli v. OSM and Peabody Western Coal*, 136 IBLA at 332; *Colorado Open Space Council*, 73 IBLA 226, 232 (1983). An agency's interpretation of its own categorical exclusions must not be plainly erroneous or inconsistent with the terms of 43 C.F.R. § 1508.4 because the activity at issue does not fit within one of the categories of actions due to its significant effect on the human environment. See *Alaska Center for Environment v. U.S. Forest Service*, 189 F.3d 851, 857 (9th Cir. 1999).

ONDA's sole argument against BLM's application of categorical exclusion E(19) to the ROW at issue relates to the possibility that BLM will, in accordance with the terms of the ROW grant, renew the ROW, thus bringing the ROW outside the scope of the categorical exclusion for ROWs "issu[ed] [for] . . . 3 years or less." We disagree.

[2] BLM approved a grant for an ROW with an initial term of just over 2 years, which may be extended or renewed only as allowed by IM 2006-216 or by current prevailing law, regulation, and policy at the time of renewal. As discussed, IM 2006-216 provides that an ROW holder such as Horizon seeking to extend or renew the initial term to allow for continued site testing and monitoring beyond 3 years must submit a separate ROW application and plan of development for a wind energy development project. See IM No. 2006-216 at 5, 8-9. In this way, BLM encouraged due diligence and notified Horizon that it would evaluate any request to extend or renew an ROW application beyond an initial 3 years and the accompanying plan of development in accordance with its responsibilities under NEPA.

The record in this case clearly demonstrates and ONDA does not dispute that, upon receiving Horizon's application for the short-term ROW at issue, BLM carefully reviewed the proposed action, finding that it conformed with the RMP, that there would be minimal disturbance from construction and operation of the temporary met poles, and that, upon termination of approved activity, the poles would be removed and the area restored to its natural condition. BLM recognized that the Wind Energy Development ROD and IM No. 2006-216 contemplate that short-term ROWs for wind energy monitoring and testing activities, which, like the ROW at issue, fall within the second type of ROW identified in IM No. 2006-216, ordinarily are within the scope of

categorical exclusion E(19). Recognizing further that IM 2006-216 provided conditions required for continued site testing and monitoring beyond 3 years, BLM was careful to make any renewal of the grant at issue subject to those conditions. See ROD, Attachment A, at A-4; IM No. 2006-216 at 9; ROW Grant, Ex. A, at I. Finally, BLM determined that there were no extraordinary circumstances that might militate against application of categorical exclusion E(19). ONDA has not demonstrated otherwise.

Against the backdrop of these specific facts, we conclude that BLM did not exceed its discretion to construe this short-term wind energy testing site as falling within categorical exclusion E(19).⁸ BLM was not required by section 102(2)(C) of NEPA or its implementing regulations to prepare an EA or EIS, taking a hard look at the likely environmental impacts of granting the ROW and, therefore, ONDA's arguments in favor of such NEPA review must fail.

We have considered all of the arguments raised by ONDA, including any not specifically addressed in this decision, and find them to be without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
R. Bryan M^cDaniel
Administrative Judge

⁸ We note that renewal of the ROW at issue for a term that, when added to the initial term, would equal 3 years or less might be categorically excluded under E(19), and that under the terms of the due diligence provisions of IM 2006-216 a request for such a limited renewal would not require the applicant to submit a plan of development that would undergo separate analysis, including NEPA review, and approval. In the event, however, that the applicant were to seek renewal for a term that, when added to the initial term, exceeded 3 years, E(19) would no longer apply, and the applicant must submit a separate ROW application and plan of development to BLM for analysis, including NEPA review, and separate approval for any future wind energy development.