



MATANUSKA ELECTRIC ASSOCIATION

174 IBLA 35

Decided March 7, 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

MATANUSKA ELECTRIC ASSOCIATION

IBLA 2006-298

Decided March 7, 2008

Appeal from decision of the Anchorage Field Office, Bureau of Land Management, offering an amendment of right-of-way grant AA-70133.

Affirmed.

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

BLM properly offers an amendment to a right-of-way to rebuild and upgrade portions of a hydroelectric project, where the amendment application is submitted by the operating committee, established by agreement of its three members, that is responsible for the operation, maintenance, and repair of the hydroelectric project.

APPEARANCES: James L. Walker, Esq., Palmer, Alaska, for appellant; John Andrew Lehman, Esq., Anchorage, Alaska, for Anchorage Municipal Light and Power; James R. Mothershead, Esq., Office of the Regional Solicitor, U. S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Matanuska Electrical Association, Inc. (MEA), has appealed from an August 14, 2006, decision of the Anchorage (Alaska) Field Office, Bureau of Land Management (BLM), offering an amendment of right-of-way (ROW) grant AA-70133 to rebuild and upgrade a portion of the Eklutna Transmission Line and construct two switchyard bypass circuit routes on the Fort Richardson Military Reservation, notwithstanding MEA's objection. BLM offered the ROW amendment in response to an application filed by the Municipality of Anchorage d/b/a Municipal Light and Power (ML&P) on behalf of the "Eklutna Purchasers, Eklutna Operating Committee." For the reasons that follow, we affirm BLM's decision.

I. BACKGROUND

The Eklutna Transmission Line is part of the Eklutna Hydroelectric Project (Project), a United States Bureau of Reclamation project, and includes a dam and two generating units located northeast of Anchorage and south of Palmer, Alaska, on Eklutna Lake. The Project includes 44 miles of 115 kV transmission lines extending to Palmer and Anchorage. Administrative Record (AR), File 1 at 175-76. The land embraced by the Project and ROW AA-70133 is held by ML&P, Chugach Electric Association, Inc. (CEA), and MEA as tenants in common.¹

Prior to its acquisition by ML&P, CEA, and MEA, the Project was administered by the Alaska Power Administration (APA), United States Department of Energy. On August 2, 1989, ML&P, CEA, MEA, and APA entered into the Eklutna Purchase Agreement (Purchase Agreement) for the stated purpose of setting out the terms and conditions to be implemented if and when Congress authorized transfer of the Project from APA to ML&P, CEA, and MEA. The Purchase Agreement referred to ML&P, CEA, and MEA collectively as “Purchasers” and required them to “[e]stablish organizational, functional and staffing arrangements for operations, maintenance and administration of Eklutna to be in effect on or before the Transaction Date including,” *inter alia*, to agree by the Transaction Date “to have an effective organization responsible for the sale of power, operation and maintenance” of the Project. Purchase Agreement, § 10(c)(1).

The legislation anticipated by the Purchase Agreement was not enacted until November 28, 1995, when Congress passed the Alaska Power Administration Asset Sale and Termination Act, Pub. L. No. 104-58, 109 Stat. 557-61 (the 1995 Act). See 42 U.S.C. § 7152 note (2000). Section 103(a) of that Act provided for the transfer of the Project from APA “to the Eklutna Purchasers in accordance with the terms of this Act and the Eklutna Purchase Agreement.” 109 Stat. 557. The Act defined “Eklutna Purchasers” and “Eklutna Purchase Agreement,” the former being ML&P, CEA, and MEA, and the latter being the August 2, 1989, Agreement between APA and the Eklutna Purchasers.

To facilitate the transfer, the Eklutna Purchasers and APA adopted a Transition Plan on May 28, 1996. AR, File 2 at 03. That Plan included Exhibit E which sets forth the “Manner of Acting, Functional Responsibilities, and Staffing”

¹ ML&P, which provides electrical power to downtown Anchorage and some surrounding areas, holds an undivided 16/30 interest in the Project and the ROW; CEA, which delivers power to south Anchorage and areas to the south, including the community of Whittier, holds an undivided 9/30 interest; and MEA, which supplies power to north Anchorage and populated portions of the Matanuska-Susitna Borough, holds an undivided 5/30 interest. AR, File 10 at 307.

of the Eklutna Purchasers. Exhibit E provides a “general delineation of responsibilities for the Eklutna Project” with the expectation that “these responsibilities will normally be carried out by the utility so assigned in this Exhibit F.”² Exhibit E called for the formation of the Eklutna Operating Committee (EOC), consisting of “one representative from each of CEA, MEA, and ML&P.” Exhibit E, § (A)(3). The EOC would make decisions by “double majority (a vote of two of the three Eklutna Purchasers whose shares total at least 51% of the Eklutna Project shares), unless otherwise agreed to by the . . . Purchasers in the Ownership and Operating Agreement to be executed by and among” them.³ *Id.* Responsibilities assigned to EOC include oversight, preparation of a Project budget and reports, and other planning matters. On the other hand, “Functional Responsibilities” such as “Transmission Line and Substation Operation, Maintenance, and Repair” were assigned to specific individual utilities, with maintenance activities to be “performed in accordance with the plans approved by the EOC.” *Id.*

In the 1995 Act, Congress directed the Secretary of the Interior to issue rights-of-way to APA, for subsequent reassignment to the Eklutna Purchasers, for lands sufficient for the Project’s operation, maintenance, repair, and, placement, and for access to Project facilities located on military lands and lands managed by BLM. 109 Stat. 559. Consistent with the Act, as well as section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (2000), BLM granted ROW AA-70133 to APA on September 15, 1997. By decision dated October 2, 1997, BLM approved assignment of the ROW to the Eklutna Purchasers, who, on the same day, executed an agreement to extend (Extension Agreement) the Transition Plan, as modified. That agreement specifically endorsed language in the Transition Plan stating that “[d]ecisions of the EOC will be by double majority” vote, but deleted the reference to development of a separate “Ownership and Operating Agreement.” AR, File 10 at 276-79. The Transition Plan, as modified by the Extension Agreement, continues to govern management of the Project.

By Order dated December 19, 2006, the Board denied MEA’s petition for a stay of BLM’s decision, ruling, *inter alia*, that it is not “evident from the present record that MEA is likely to succeed on the merits of its claim.” Order, IBLA 2006-298, at 6. In our Order, we provided a detailed review of the specific facts regarding the application to amend ROW AA-070133 and BLM’s approval of that application. The relevant portions of our Order are set forth below:

² The Transition Plan contains no Exhibit F; “this” exhibit can only mean Exhibit E.

³ During the transition period, EOC decisions were merely advisory to APA, unless otherwise determined by APA under mutually agreeable terms. AR, File 2 at 92.

On March 3, 2004, the EOC approved, by a double majority vote, a Resolution to rebuild the Eklutna Transmission Line. (AR, File 10 at 305-06.) According to that Resolution, the transmission line is part of a critical transmission network tying the Eklutna Power Plant to the electric power supply system; the wooden poles supporting the single circuit line, which were constructed in the early 1950s, and the line itself are in need of repair; and the transmission line would be rebuilt as a double circuit on single steel poles insulated at 230 kV and operated at 115 kV using \$19,300,000 in funds granted by the Alaska Legislature. MEA did not concur with the EOC's March 2004 Resolution, but maintained, as it still does, that the transmission line upgrade in fact overbuilds capacity and is an unnecessary expenditure of public funds. (E.g., AR, File 10 at 264-67; File 9 at 51-52, 70-71.)

On December 1, 2005, ML&P filed an application seeking an amendment of the ROW to allow, *inter alia*, the rebuilding and upgrading of approximately 22.5 miles of the Eklutna Transmission Line and the construction of two switchyard bypass circuit routes at two substations, all on the Fort Richardson Military Reservation. (AR, File 9 at 300, 308; File 11 at 3-5.) In various letters to BLM and the other purchasers, MEA emphatically opposed the application to amend the ROW, voicing its opinion that, under the various agreements between the Eklutna Purchasers, the EOC has no authority to bind MEA to such a construction project, and that the decision to upgrade the transmission line will diminish MEA's resources and dilute its power relative to the other purchasers. (E.g., AR, File 9 at 11-13, 48-58, 63-71, 262-63; File 10 at 252-67.)

ML&P disputed MEA's contentions, claiming that MEA's practical concerns are unfounded and that the EOC and ML&P have authority to undertake the rebuilding and upgrade. (E.g., AR, File 10 at 219-24, 270-73.) In a letter to Federal officials dated April 14, 2006, ML&P asserted that the EOC was trying to reach an agreement that would require unanimous consent to "change the voltage of the Substation Circuit from 115 kV." (AR, File 10 at 220.)

Thereafter, on May 18, 2006, the EOC approved, by a double majority vote, a "Resolution Requiring Unanimous Consent to End 115kV Service." (AR, File 10 at 207-08.) That Resolution provides, *inter alia*, that \$19,300,000 in grant funds from the Alaska Legislature will be used to "rebuild the Eklutna Transmission Line from Fossil Creek to the Eklutna Power Plant as a double circuit on single steel poles insulated at 230 kV and operated at 115 kV," but that the

Eklutna Project will “continue to transmit power at 115 kV at all locations between Fossil Creek and the Eklutna Power Plant where 115 kV power is presently available.” *Id.* at 207. The Resolution further provides that “[s]o long as a single-circuit is dedicated to carrying power at 115 kV,” the EOC can “transmit power on a second circuit at voltages up to 230 kV.” *Id.* at 207-08. While changes in the operating voltage in the 230 kV circuit will not require unanimous written consent, the Resolution expressly provides that “[a]ny proposed change to the operating voltage of the single circuit dedicated to supplying power at 115 kV . . . will require the unanimous written consent of all Purchasers.” *Id.* at 208.

MEA’s representative to the EOC opposed the May 2006 resolution on the ground that, in passing the measure, the EOC had exceeded its authority as an “advisory committee to the Eklutna Purchasers” pursuant to the 1996 Transition Plan, Exhibit E, Section A(3). (AR, File 10 at 203.)

Order, IBLA 2006-298, at 2-4 (footnotes omitted).

Faced with the dispute among the Eklutna Purchasers as to the propriety of ML&P’s applying for the ROW amendment on behalf of the Eklutna Purchasers and EOC, BLM sought the legal advice of the Office of the Solicitor, Alaska Region. The Assistant Regional Solicitor concluded that ML&P had the authority to act on behalf of the Eklutna Purchasers in filing the application, based upon the October 2, 1997, Extension Agreement. Memorandum of the Assistant Regional Solicitor, Alaska Region, to the Field Manager, Anchorage Field Office, BLM, dated Aug. 14, 2006 (AR, File 11) (Solicitor’s Opinion).

On August 14, 2006, BLM issued its decision offering amendment of AA-70133 to “Eklutna Purchasers, Eklutna Operating Committee.” MEA filed a timely appeal, petitioning for a stay of approval of the amendment.⁴

⁴ MEA argued that it is likely to succeed on the merits of its appeal because governing documents do not authorize the EOC to undertake expansion projects or to apply for ROWs from third parties; moreover, it charges, the actions undertaken by the EOC violate State law governing tenancy-in-common. Petition for Stay (Petition) at 7, 10-11 (AR, File 12 at 36, 39-40). MEA maintained that, if ML&P is allowed to complete the project “at a 230 kV design, with access to Chugach’s 230 kV transmission line at Fossil Creek, ML&P could effectively force MEA to spend substantially more than \$30 million to acquire the . . . equipment necessary to accept
(continued...)

In our Order denying MEA's petition for stay, we concluded, *inter alia*, that it was not evident from the record that MEA is likely to succeed on the merits of its claim. We stated: "The question before the Board is whether BLM properly amended the ROW; the disputes between the Purchasers vis-a-vis each other and their respective interests are not properly before us." Order, IBLA 2006-298, at 6. Our present review of the record, including the arguments of the parties summarized below, demonstrates that we correctly framed the question before us, and, further, that BLM's decision to offer the ROW amendment was appropriate.

II. ARGUMENTS OF THE PARTIES

In its Statement of Reasons (SOR), MEA argues that under Section 22 of the Purchase Agreement no Purchaser is an agent of or has the power to bind the other Purchasers without their express written consent. SOR at 3. MEA argues that EOC's authority under Exhibit E of the Transition Agreement is limited to maintenance and operations concerns, and that nothing in Exhibit E authorizes construction except for section (B)(4)(a)(iv), which provides that the costs for construction, maintenance, and operation of taps and facilities owned individually by the utilities are to be borne by the individual utility. *Id.* at 5-6. MEA points out that under 43 C.F.R. § 2807.20 an amendment is required when "there is a proposed substantial deviation in location or use" of the transmission lines and that maintenance does not include the upgrades for which amendment of the ROW was proposed. *Id.* at 7-9.

MEA contends that "EOC is only authorized to act based upon a double majority vote with regards to maintenance and operations concerns," and that "[a]s a matter of law in Alaska, maintenance of transmission lines does not include the replacement of poles, does not include adding circuits to existing lines, and does not include re-insulating existing lines to comply with standards for higher voltage operation than the original design." *Id.* at 9. MEA asserts that "EOC could not authorize ML&P to serve as MEA's agent in obtaining the easements or rights-of-way necessary for construction of the Eklutna Project Transmission line enlargement and improvement project discussed in the March 3, 2004, EOC Resolution." *Id.*

ML&P responds that a tenancy-in-common is not suited to the operation of a complex hydroelectric project and that EOC was created to govern the operation and

⁴ (...continued)

energy at 230 kV for service to MEA's customers in north Anchorage." AR, File 12 at 38.

maintenance of the Project. ML&P contends that MEA “reads too much into Section 22 of the Purchase Agreement,” asserting that “Section 22 does not address how the Eklutna Project will be managed, operated, and maintained.” Opposition at 2. Citing *Tally v. Commonwealth Edison Co.*, 347 N.E.2d 74 (Ill. 1976), ML&P argues that the term “maintenance” commonly includes work like what was described in the disputed ROW amendment. ML&P contends that “[o]perating and maintaining the Eklutna Project must include the right to replace worn-out property, such as the dangerously deteriorated power poles and cross-arms.” *Id.* at 3. ML&P points out that “[p]ast Eklutna Project upgrades, including CEA’s upgrade of the Baxter Substation line, have also been approved by a double majority of the Eklutna Operating Committee over MEA’s objections.” *Id.* ML&P emphasizes that EOC is specifically given the following responsibility: “The prompt and effective attention of the EOC shall be given to major maintenance and operating concerns or other conditions interfering with the safe and efficient operation of the Eklutna Project.” *Id.*

ML&P states that the Solicitor’s Opinion correctly recognizes that the provisions of the Agreement “provide a contractual mechanism for the Purchasers’ collective action (as tenants in common) in the management of the Eklutna Project. . . .” Opposition, *quoting* Solicitor’s Opinion at 3. ML&P agrees with the Assistant Regional Solicitor “that the authority to act as manager and take care of major maintenance or other conditions that could interfere with the safe and efficient operation of the project included the authority to apply for governmental permits necessary to accomplish those tasks.” Opposition at 7. ML&P agrees further with the Assistant Regional Solicitor that the Eklutna Purchasers, acting through the EOC, “have the right to maintain, repair, and in this case rebuild, a facility nearing the end of its physical life.” Opposition at 7-8, *citing* Solicitor’s Opinion at 4-5.

BLM agrees with ML&P that Exhibit E of the Transition Plan, as modified by the October 2, 1997, Extension Agreement, provides the “contractual mechanism for the Purchasers’ collective action . . . in the management of the Eklutna Project” Answer at 8. BLM asserts that each of the Purchasers “is contractually bound by the Extension Agreement to honor and abide by any action adopted by a double majority vote of the three purchasers as prescribed by paragraph A(3) of Exhibit E in such [Transition Plan].” *Id.* at 9. BLM argues that the scope of EOC’s responsibility under Exhibit E to address “major maintenance and operating concerns or other conditions interfering with the safe and efficient operation of the Eklutna Project” includes “those incidental powers . . . necessary to . . . maintain and operate the Eklutna Project, and of a kind ordinarily performed in a hydroelectric project.” Answer at 9-10, *citing* 2A C.J.S. *Agency* § 138 (2003), at 408. BLM states that “EOC necessarily had implied authority to obtain on behalf of the Eklutna Purchasers an amendment of the right-of-way grant (AA-70133), authorizing such maintenance work.” Answer at 11.

III. ANALYSIS

[1] As noted, BLM offered the ROW amendment to the “Eklutna Purchasers, Eklutna Operating Committee” pursuant to section 501 of FLPMA, 43 U.S.C. § 1761 (2000), and the 1995 Act. Under section 501(a) of FLPMA, a decision to accept or reject an ROW application is discretionary. *See, e.g., Wiley F. & L’Marie Beaux*, 171 IBLA 58, 66 (2007); *Mark Patrick Heath*, 163 IBLA 381, 388 (2004); *Douglas E. Noland*, 156 IBLA 35, 39 (2001), and cases cited therein. The Board will affirm a BLM decision approving an ROW application, in this case an amendment to an application, where the record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and where no reason to disturb BLM’s decision is shown. *Mark Patrick Heath*, 163 IBLA at 388; *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *James Shaw*, 130 IBLA 105, 115 (1994). As we have said, to successfully challenge a discretionary decision,

[t]he burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

Wiley F. & L’Marie Beaux, 171 IBLA at 66; *International Sand & Gravel Corp.*, 153 IBLA 293, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999).

Thus, our present objective is to determine whether BLM properly exercised its discretionary authority in offering the amendment of ROW AA-70133 requested by ML&P. There is no question among the Eklutna Purchasers that the May 18, 2006, Resolution approving the application to amend ROW AA-70133 was adopted, as a technical and procedural matter, in accordance with the Transition Plan, pursuant to which EOC presently manages the Eklutna Project. The dispute among the Eklutna Purchasers concerns the narrow question of whether the specific actions defined in the application fall within or outside the ambit of EOC’s authority to maintain and operate the Eklutna Project. The dispute between the Eklutna Purchasers as to the coverage of the Transition Plan is private in nature and does not directly involve BLM. We need not resolve the issues presented by that dispute to affirm BLM’s decision to offer the ROW amendment under section 501 of FLPMA. *See, e.g., John L. Stenger*, 170 IBLA 206, 214 (2006), and cases cited.

In 1997, when BLM issued ROW AA-70133 to APA, and when APA assigned the ROW to the Eklutna Purchasers, the regulations at 43 C.F.R. Group 2800 were applicable to “[i]ssuing, amending or renewing right-of-way grants for . . . [s]ystems

for generation, transmission and distribution of electric energy” 43 C.F.R. § 2800.0-7(a)(4) (1996). The Secretary’s stated objective was to grant ROWs “to any qualified individual, business entity, or governmental entity” 43 C.F.R. § 2800.0-2 (1996). An “applicant” was defined as “any qualified individual, partnership, corporation, association or other business entity, and any Federal, State or local governmental entity including municipal corporations which applies for a right-of-way grant” 43 C.F.R. § 2800.0-5(e) (1996). The application form for an ROW “require[d] . . . [t]he name and address of the applicant and the applicant’s authorized agent, if applicable[.]” 43 C.F.R. § 2802.3(a)(1) (1996).

Similarly, the current regulations, promulgated on April 22, 2005 (70 Fed. Reg. 21058), in effect when BLM granted the disputed ROW amendment, provide: “To hold a grant under [43 C.F.R. Group 2800], you must be . . . [a]n individual, association, corporation, partnership, or similar business entity, or a Federal agency or state, tribal, or local government[.]” 43 C.F.R. § 2803.10(a) (2005). The “business entity” applying for an ROW must provide the information specified at 43 C.F.R. § 2804.12(b), including, *inter alia*, “[t]he name and address of each participant in the business.” BLM may deny an ROW if the applicant is “not qualified to hold a grant.” 43 C.F.R. § 2804.26(3).

We see no basis for questioning EOC’s representation that it has authority to seek an amendment of ROW AA-70133 under these regulations. Nor do we find authority for requiring BLM to refrain from acting upon an otherwise properly filed application for amendment because a private dispute has arisen among members of EOC, acting as the “similar business entity” as required by the rule. We conclude that BLM’s issuance of the ROW amendment was proper.

MEA has also failed to demonstrate error in BLM’s factual analysis, or that BLM’s decision generally is not supported by the record. To the contrary, BLM gave due consideration to all relevant factors, including MEA’s challenge to EOC’s authority to seek the amendment application, in determining to approve the ROW amendment. *E.g.*, *Wiley F. & L’Marie Beaux*, 171 IBLA at 66, and cases cited.

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/
James F. Roberts
Administrative Judge

I concur:

_____/s/
Lisa Hemmer
Administrative Judge