



UINTAH COUNTY, UTAH

182 IBLA 191

Decided May 9, 2012



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

UINTAH COUNTY, UTAH

IBLA 2011-170

Decided May 9, 2012

Appeal from a decision of the Utah State Office, Bureau of Land Management, modifying its earlier decision on State Director Review of a Finding of No Significant Impact and Decision Record by the Vernal Field Office approving an oil and gas development proposal. SDR UT-08-06; EA UT-080-07-671.

Motion to dismiss denied; decision affirmed.

1. Oil and Gas Leases--Rights-of-Way: Revised Statutes Sec. 2477

Even if the roads in a project area for an oil and gas development are R.S. 2477 rights-of-way, BLM may restrict the operator's use and modification of the roads.

2. Federal Land Policy and Management Act of 1976: Land Use Planning--Public Lands: Generally--Rights-of-Way: Revised Statutes Sec. 2477

BLM has no authority to make binding determinations on the validity of R.S. 2477 rights-of-way, but it may consider their asserted validity for its own purposes of planning and administration.

3. Federal Land Policy and Management Act of 1976: Land Use Planning--Public Lands: Generally--Rights-of-Way: Revised Statutes Sec. 2477

BLM is not required to determine the validity of R.S. 2477 claims in developing a travel management plan that designates routes as open or closed to use by motorized vehicles. In determining whether a valid R.S. 2477 right-of-way has been created, there is a presumption in favor of the property owner and the burden of establishing public use for the required period of time is on those

claiming it. Thus, in developing a travel management plan, BLM is entitled to rely on this presumption and only recognize those R.S. 2477 rights-of-way for which claimants had previously carried their evidentiary burden.

APPEARANCES: Constance E. Brooks, Esq., and Michael E. Marinovich, Esq., Denver, Colorado, for appellant; Kathleen C. Schroder, Esq., and Rebecca W. Watson, Esq., Denver, Colorado, for Enduring Resources, Intervenor; Stephen Block, Esq., and David Garbett, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance, Intervenor; John Steiger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Uintah County, Utah (the County), has appealed from an April 8, 2011, decision of the Utah State Office, Bureau of Land Management (BLM), modifying its earlier decision of February 1, 2008, on State Director Review (SDR) of a December 17, 2007, Finding of No Significant Impact and Decision Record (FONSI/DR) by the Vernal Field Office. This FONSI/DR approved on a programmatic level the Saddletree Draw Leasing and Rock House Development proposal by Enduring Resources (Enduring) on the basis of Environmental Assessment (EA) UT-080-07-671 (Rock House EA). The project involves the development of up to 60 oil and gas wells from 24 drill pads within a 4,826 acre project area in the Uintah Basin. In the project area, Enduring would construct up to 8.4 miles of road, up to 8.9 miles of surface gas pipeline, and a water pump and pipe system within the White River corridor adjacent to the Saddletree Draw and Atchee Wash roads. Because the EA was programmatic in nature, each facility would require separate authorization.

Various organizations sought judicial review and an injunction of BLM's 2007 decision, but the suit was dismissed in March 2011 after the parties reached a settlement agreement that required modification of the earlier decision. The modifications induced by the settlement are not the subject of this appeal. However, BLM also modified the earlier decision due to other administrative actions that occurred while the litigation was pending, including the Record of Decision (ROD) approving the Resource Management Plan (RMP) (ROD RMP) for the Vernal District that BLM approved in October 2008 (2008 RMP).

Pertinent to this appeal, BLM's SDR Decision states that under the RMP, "portions of the Saddletree Draw and Atchee Wash roads located within the White River corridor as shown in Figure 15a of the RMP are closed to motorized travel unless authorized by BLM." SDR Decision at 3. The County makes clear that its appeal does not involve approval of Enduring's proposal but "objects to the

findings in the Modified SDR that identify portions of the Atchee Wash and Saddle Tree Class B county roads within the project area as closed to motor vehicle use.” Statement of Reasons (SOR) at 2. The County asserts that the roads are “valid, longstanding R.S. 2477 county rights-of-way” (ROWS)¹ over which the county “exercises sole jurisdiction and control . . . and is responsible for their management[,] maintenance, construction, and reconstruction.” SOR at 5-6.

BLM’s MOTION TO DISMISS

BLM and SUWA have moved to dismiss this appeal, arguing that the County is not adversely affected by the 2011 SDR Decision which establishes the conditions under which Enduring will carry out the project. Motion to Dismiss at 2. BLM asserts that the 2008 RMP, not the SDR Decision, closed these roads. In essence, BLM believes that the County’s appeal of a decision to which no other party objects is an attempt to hijack this case to make a “collateral attack” on the RMP. BLM notes that the ROD RMP was signed by the Assistant Secretary for Land and Minerals Management so that this Board has no jurisdiction over the issues raised by the County.² *Id.*

The County responds that it is adversely affected because of its interest in the county roads that the SDR Decision states are closed to motorized use. Response at 3-7. The County asserts that it is not challenging the RMP but BLM’s *interpretation* of the RMP in the 2011 SDR Decision. *Id.* at 7-12. The County argues that RMP decisions differ from implementation decisions, and that BLM never prepared an implementation plan to effect road closures. *Id.* at 9-10. The County argues that closure designations under 43 C.F.R. Part 8340 pertain to *off* road vehicle use, not to

¹ R.S. 2477 was an official codification in the 1875 *Revised Statutes* of a provision of the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253. That provision was later codified as 43 U.S.C. § 932 (1970). The statute was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 2793, effective Oct. 21, 1976, but valid existing rights were preserved. 90 Stat. at 2786; *see* 43 U.S.C. § 1701 note (a) (2006). The statute simply provided: “[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” The Tenth Circuit Court of Appeals has noted: “[T]he establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.” *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA v. BLM)*, 425 F.3d 735, 741 (10th Cir. 2005).

² SUWA was one of the organizations involved in the litigation over the project and has filed a motion to dismiss on grounds similar to those advanced by BLM.

public access to established roads.³ *Id.* Even though the Assistant Secretary may have approved the ROD RMP, the County points out that the Board has jurisdiction to determine whether it has been properly implemented in the 2011 SDR Decision. *Id.* at 13; see *Mouat Nickel Mines*, 165 IBLA 305, 312 (2005).

[1] Although the County focuses on the statement in the SDR Decision that portions of the Saddletree Draw and Atchee Wash roads are closed to public use, it is not the SDR Decision that effects the closure. The SDR Decision establishes the conditions under which Enduring, not the public, is to conduct operations in the project area. In this context, it is important to note that even if the roads in question are R.S. 2477 ROWs, that does not necessarily mean that BLM erred in restricting their use and modification by the operator of a mineral development project. See *Clouser v. Espy*, 42 F.3d 1522, 1538 (9th Cir. 1994); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988). In this case, the operator filed no appeal from the restrictions imposed by BLM's decision. Thus, in order to have standing to appeal, it is not sufficient to point to the statement in the decision that the RMP closes the roads to public use; the County must show how the County's interest in the roads is adversely affected by something that Enduring is required to do or is precluded from doing by the SDR Decision.

In its SOR, the County refers to comments concerning road use and access that it submitted to BLM when it was developing the EA for the project and BLM's responses to those comments. SOR at 3-4. The original ROD adopted Alternative A from the Rock House EA, which contained specific provisions for the operator's use of roads claimed by the County, and called for construction of new roads, and upgrades to existing roads, that involve 30-foot wide ROWs. The new roads and upgrades would be reclaimed to 18-foot wide crowned surfaces as well as drainage ditches. The modified decision expressly authorizes Enduring "to travel without impediment on the existing and proposed roads shown on Map 1 within the Project Area as necessary for the orderly development of the project and maintenance of project facilities." Decision at 9. It also withdrew the original ROD's approval of a pump and pipe system for transporting water from the White River to Enduring's approved activities, based on its authorized use of water supply trucks (except for the period from May 7 through June 21). The decision expressly stated that "[t]his authorization to use water supply trucks may not be construed as allowing any improvement activities on the closed portions of the Saddletree Draw and Atchee Wash roads." *Id.* The County's participation in the process of developing the Rock House EA makes it a party to the case under 43 C.F.R. § 4.410. Because the modified SDR Decision alters the conditions for Enduring's use and improvement of

³ BLM's regulations define "off-road vehicle" as "any motorized vehicle capable of, or designed for, travel on or immediately over land, water, or other natural terrain," subject to certain exclusions. 43 C.F.R. § 8340.0-5(a).

roads in the project area claimed by the County, the County is adversely affected by the decision. Accordingly, we conclude that the County has standing. BLM's motion to dismiss the appeal is denied.

ROUTES ALLEGED TO BE R.S. 2477 ROWs

[2] The County asserts that it “exercises sole jurisdiction and control” over the Atchee Wash and Saddle Tree Draw roads under State law, pursuant to its Notice of Acceptance of R.S. 2477 Grants for County Road #4240 (Dec. 12, 2006) and County Road #4230 (Dec. 14, 2006), and contends that BLM therefore exceeded its authority by closing these County roads. SOR at 5-6. Routes claimed as R.S. 2477 ROWs has led to much litigation over the past few years, especially in Utah. BLM has no authority to make binding determinations on the validity of the ROWs under R.S. 2477, but it may consider the validity of asserted R.S. 2477 ROWs for its own purposes of planning and administration. *SUWA v. BLM*, 425 F.3d at 750-57; *see County of San Bernardino*, 181 IBLA 1, 4-19 (2011) (discussing history of Departmental policy on R.S. 2477 claims). Whether an R.S. 2477 ROW was actually established prior to repeal of the statute, and has not been abandoned, is a matter to be decided by a court under Federal law, “borrowing” appropriate portions of state law. *SUWA v. BLM*, 425 F.3d at 757, 762-63; *id.* at 768; *see Kane County v. Kempthorne*, 495 F. Supp. 2d 1143, 1154-55 (D. Utah 2007), *aff'd sub nom. Kane County v. Salazar*, 562 F.3d 1077 (10th Cir. 2009).

[3] Although BLM may consider the validity of asserted R.S. 2477 ROWs for its own purposes of planning and administration, we have held that BLM is not required to do so in developing a travel management plan that designates routes as open or closed to use by motorized vehicles. In *Rainer Huck*, 168 IBLA 365, 398-99 (2006), for example, we affirmed a BLM decision adopting a travel management plan that closed asserted R.S. 2477 ROWs to use by motorized vehicles, holding that BLM did not need to decide the validity of the R.S. 2477 assertions in order to make its route designations, especially since it did not intend its analysis to affect any R.S. 2477 validity determinations and indicated that the plan would be adjusted to reflect any R.S. 2477 decisions. In affirming this decision, the court stated:

In *SUWA v. BLM*, 425 F.3d 735 (10th Cir. 2005), the Tenth Circuit explained that, in determining whether a valid R.S. 2477 right-of-way has been created, “the presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it.” *Id.* at 768. Thus, in developing the Travel Plan, the BLM was entitled to rely on this presumption and only recognize those R.S. 2477 rights-of-way for which claimants had previously carried their evidentiary burden.

Williams v. Bankert, 2007 WL 3053293 (D. Utah 2007) at *6; accord, *Kane County v. Kempthorne*, 495 F. Supp. 2d at 1157; *San Juan County v. United States*, 2011 WL 2144762 at *5 (D. Utah 2011).⁴ This is not a case where the County has “previously carried [its] evidentiary burden” to establish that the routes in question are “valid existing rights” within the meaning of the RMP.⁵ We conclude that the County has shown no error in BLM’s interpretation or implementation of the RMP that requires any modification of the SDR Decision under appeal.

The County states that the Vernal RMP does not affect valid existing rights; that the RMP expressly commits BLM to a process for identifying R.S. 2477 ROWs; and that FLPMA requires RMPs to be consistent with state and local land use plans to the extent practicable. SOR at 13-14; Vernal ROD at 21; see 43 U.S.C. § 1712(c)(9). The County contends that BLM would not have found such consistency if the RMP had closed the roads. SOR at 15-16. The problem with this argument is that even if the County has done all that is required to establish these roads as valid existing rights under R.S. 2477, we would still lack authority to review decisions made by the Assistant Secretary when he approved that RMP. See *Robert L. Bayless Producer*, 177 IBLA 83, 84-85 (2009), and cases cited. Moreover, the County does not contend that the plan approved on SDR did not conform with the Vernal RMP or that the limitations and conditions on Enduring’s use of and improvements to roads in the project area otherwise exceeded its authority. See 43 U.S.C. § 1732(a) (2006); 43 C.F.R. § 1610.5-3(a); *Western Industrial Minerals*, 182 IBLA 11, 21 (2012); see also *Clouser v. Espy*, 43 F.3d at 1538; *United States v. Vogler*, 859 F.2d at 642. We therefore conclude that BLM did not unlawfully intrude upon County prerogatives or exceed its authority when it approved Enduring’s programmatic development proposal.

The County contends that BLM failed to comply with 43 C.F.R. Part 8340 in closing roads claimed by the County; BLM responds that since the roads were closed by the Vernal RMP, BLM was not required to comply with those rules. Regardless of what roads the RMP closed and whether they were closed to all vehicles (or only off-highway vehicles) the SDR decision did not close them; it only restricted their use by

⁴ Appellant argues that the State and County officially declared these roads to be valid R.S. 2477 ROWs, creating a presumption in favor of right-of-way existence under Utah Code Ann. § 72-5-302(3)(a). SOR at 5. One court recently rejected this argument as follows: “Not having been formulated until many years after the opportunity to accept the R.S. 2477 grant had been terminated by Congress, this *post hoc* presumption cannot serve to satisfy the plaintiffs’ burden of proof in this case.” *San Juan County v. United States*, 2011 WL 2144762 at *5 n.9 (D. Utah 2011).

⁵ The nature of that burden and the quantum of evidence needed to sustain it are illustrated in *San Juan County v. United States*, 2011 WL 2144762 (D. Utah 2011).

Enduring. Since the County does not contend that those restrictions were unreasonable, arbitrary, or capricious, its appeal seeks an advisory opinion on whether a statement made in that decision properly and correctly stated that certain roads were closed. We review decisions as fully and finally as might the Secretary; we do not render advisory opinions. *E.g., Robert E. Lewis v. BLM*, 173 IBLA 284, 294 (2008). As no roads were closed by the SDR decision, we decline the County's invitation that we determine whether the roads it claims as R.S. 2477 roads are or may have been closed by other Departmental actions, including the Vernal RMP.

CONCLUSION

If the analysis above demonstrates that BLM was under no obligation to make an administrative determination concerning the validity of the County's R.S. 2477 claims in developing its RMP, the same conclusion applies with even greater force in the instant appeal in which the only matter before us involves the terms and conditions of actions authorized under the Rock House EA. It is well-established that BLM may limit use of R.S. 2477 ROWs by the operator of a mineral development project. *Clouser v. Espy*, 42 F.3d at 1538; *United States v. Vogler*, 859 F.2d at 642.

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 motions to dismiss are denied,⁶ and the decision appealed from is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

⁶ BLM and SUWA requested that if we deny their motions to dismiss, they be allowed to file an Answer to the County's SOR. However, their motions addressed the merits of BLM's interpretation of the RMP. Furthermore, the Department's position on the arguments raised by the County have been articulated and accepted in numerous judicial decisions cited in this opinion, making it clear that BLM's decision must be affirmed with respect to the issues raised by the County. Neither has been prejudiced by the lack of an opportunity to file answers, and issuing a decision at this time accommodates the operator's interest in proceeding under the terms of the settlement.

I concur:

_____/s/
James K. Jackson
Administrative Judge