



CERTIFIED

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IBLA 2007-21 : CACA-43098-FD/PT
: :
SHASTA COALITION FOR THE : Land Exchange
PRESERVATION OF PUBLIC LAND : :
: Intervention Granted;
: Motion to Dismiss Denied;
: Request for Stay Denied

ORDER

The Shasta Coalition for the Preservation of Public Land (Coalition) has appealed from and requested a stay of the effect of an October 6, 2006, decision of the State Director, California, Bureau of Land Management (BLM), dismissing its June 19, 2006, protest of the April 26, 2006, Finding of No Significant Impact/Decision Record (FONSI/DR), issued by the Field Manager, Redding Field Office, BLM, approving the "Salmon Creek Resources Land Exchange" (Exchange).^{1/} The Field Manager based the FONSI/DR on an April 2006 Environmental Assessment (EA) (CA-360-RE-2004-15), prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), to analyze the environmental impacts of the Exchange, including the reasonably foreseeable development scenario of rural residential development for the Federal land involved. BLM tiered its EA to the 1992 environmental impact statement (EIS) prepared in support of the July 1993 Redding Resource Management Plan (RMP).

Salmon Creek Resources, Inc. (SCR) is the exchange proponent, having offered in 2004 to exchange approximately 566 acres of non-Federal land in Trinity County, California, for approximately 216 acres of Federal land in Shasta County, California, pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1716 (2000).^{2/}

^{1/} Sacramento River Preservation Trust (Trust) has filed an appeal from a separate Oct. 6, 2006, decision of the State Director denying the Trust's protest of the FONSI/DR. No petition for stay was filed by the Trust.

^{2/} SCR has filed an opposition to the Coalition's request for stay. We consider that

(continued...)

The selected Federal land encompasses various contiguous lots in secs. 5 and 6, T. 31 N., R. 5 W., and sec. 32, T. 32 N., R. 5 W., Mount Diablo Meridian, Shasta County, California.^{3/} It is one of several isolated parcels of Federal land in a developing area several miles west of Redding, California. As public land, the County General Plan land use designation for the parcel in question is "Natural Resource Protection-Open Space," while zoning is "Unclassified." (SCR Opposition, Ex. A; see EA at 25.) The County stated in a January 11, 2005, response to a pre-application request for review of a development plan for the Federal parcel, involving division of the parcel into 59 residential lots, that a development request to change the County General Plan land use designation and zoning for the parcel to match the rural residential designation and zoning of surrounding land would require General Plan and zoning amendments. (SCR Opposition, Ex. A.) While maximum rural residential housing density is one dwelling unit per two acres for land with less than a 30 percent slope and one dwelling unit per ten acres for land exceeding a 30 percent slope, the County identified numerous issues to be addressed regarding potential development of the parcel, which, it stated, could result in much lower density and much larger lot sizes than the maximum allowable under a rural residential designation. Those issues included (1) impacts of development on biological resources, including threatened and endangered species (T&E) of fish, as well as potential impacts on riparian habitat and oak woodlands districts, and (2) impacts on existing trails and recreation use. Id.; see EA at 25-26. The County noted that "[s]ome conservation easements, setbacks, and other mitigations" might be required,

^{2/} (...continued)

pleading to be a request to intervene in this proceeding and grant it. SCR moved to dismiss the appeal on two grounds: failure to notify an adverse party (SCR) of the filing of the appeal and failure to show standing to appeal. The motion is denied. Service on an adverse party is only required for those parties expressly named as such in BLM's decision. See 43 CFR 4.413(a). BLM did not name SCR as an adverse party in its decision. Even if SCR had been named, it has not shown any prejudice from a failure to serve. It promptly filed an opposition to the request for stay. In response to the motion, the Coalition has filed numerous declarations of its members detailing their use and enjoyment of the Federal parcel. Those declarations support the Coalition's standing to appeal. See The Coalition of Concerned National Park [Service] Retirees, 165 IBLA 79, 86 (2005).

^{3/} The Federal parcel is crossed by Salt Creek, a tributary of the Sacramento River, and several of its unnamed tributaries. At the recommendation of the California Department of Fish & Game, patent of the Federal parcel will be issued subject to a restrictive covenant, denoted "a creek setback requirement," to limit surface disturbance activities near Salt Creek and its tributaries for the purpose of protecting fish and fish habitat. (SCR Response to Request for Stay (Response) at 7.)

and that it might “be necessary to incorporate some trails into the development plans for the site.” (SCR Opposition, Ex. A.)

The offered non-Federal land is situated in sec. 22, T. 32 N., R. 8 W., Mount Diablo Meridian, Trinity County, California, approximately 25 miles west of Redding, and is one of the last remaining parcels of non-Federal land in the Grass Valley Creek Watershed Area (Watershed Area).

In the EA, BLM explained that the Exchange would implement one of the major goals of the RMP, which is improving management of public lands by disposing of scattered Federal parcels while also acquiring lands where Federal management for recreation and resource enhancement is appropriate. (EA at 4.) It further stated that “[a]cquisition of the non-Federal land for restoration of critically eroding land in the Grass Valley Creek Watershed Area complies with the Trinity River Basin Fish and Wildlife Restoration Act of 1984 and the Grass Valley Creek Watershed Management Plan dated March 1995.”^{4/} Id.

On behalf of BLM, the Appraisal Service Directorate (ASD), National Business Center, U.S. Department of the Interior, appraised the fair market value of the Federal and non-Federal lands as of January 5, 2006.^{5/} Finding that the value of the Federal lands exceeded the value of the non-Federal lands by close to 15 percent, BLM required a cash equalization payment to the United States as part of the Exchange. (FONSI/DR at 13-14.)

The State Director’s October 6, 2006, decision consisted of a 9-page “**Decision**,” which addressed the Coalition’s “General Statement of Protest” and “Specific Grounds for Protest[.]” (Decision at 1, 4, 5.) BLM attached “Exhibit A-1,” to the decision, which is paginated as part of the decision (pages 10 through 81) and consists of the State Director’s separate responses to each of the comments made by the Coalition in Exhibits A and B, as supported by Exhibits C and D, of its protest. The State Director explained that, since Exhibit A consisted of “comments on the FONSI, Decision Record, and Environmental Assessment,” the responses were

^{4/} A resource condition objective of the RMP is to reduce the sediment load entering the Trinity River via the Watershed Area in order to improve anadromous fisheries. (FONSI/DR at 7.)

^{5/} By Secretarial Order No. 3251, dated Nov. 12, 2003, as amended Oct. 22, 2004, BLM’s real estate appraisal functions were transferred to ASD. Spanish Springs Pilots Association, Inc., 167 IBLA 284, 291 n.9 (2005). A private contract appraiser, Ted D. Foster, performed the challenged appraisals. An ASD review appraiser, James H. Shaw, approved the appraisals on behalf of BLM.

prepared by BLM, but that appraisal comments contained in Exhibit B were addressed by ASD. (Decision at 4 n.1.)

In accordance with 43 CFR 2201.7-1(c), an appeal from a BLM decision addressing a protest of a proposed land exchange “may be pursued in accordance with the applicable appeal procedures of 43 CFR [P]art 4.” Under 43 CFR 4.21(b)(1), a petition for a stay must show sufficient justification based on the relative harm to the parties if the stay is granted or denied; the likelihood of the appellant’s success on the merits; the likelihood of immediate and irreparable harm if the stay is not granted; and whether the public interest favors the granting of the stay. The party requesting the stay has the burden of showing that a stay is warranted by satisfying each of the criteria specified in the rule. 43 CFR 4.21(b)(2); Wyoming Outdoor Council, 156 IBLA 377, 383 (2002).

According to the Coalition’s protest, it “is a Shasta County community group that supports and encourages the maintenance and enhancement of public land for open space, fish and wildlife habitat, recreational trails and similar public uses.” (Protest at 1.) The Coalition is interested in preserving the Federal parcel in its present condition, including preserving fisheries habitat and the existing trail system created over a period of years by local residents. In the request for stay, the Coalition argues that BLM violated the environmental review requirements of section 102(2)(C) of NEPA and the appraisal requirements of section 206 of FLPMA, and its implementing regulations, 43 CFR Subpart 2201. (Request for Stay at 2-3, 7.)

The Coalition asserts that the relative harm to the parties weighs in its favor because failure to grant a stay will allow SCR “to proceed to do preliminary grading,” which “could result in the loss of highly-regarded trails, damage to a significant fishery, and a viewshed.” (Request for Stay at 1.) It also cites such grading in support of its claim that there is a likelihood of immediate and irreparable harm if a stay is not granted. Such claims are unsupported. While the Coalition contends at page 8 of the request that “[g]rading for a new 18[-]lot subdivision has just occurred right across the road” from the Federal parcel, there is no evidence that grading will occur anytime soon on the Federal parcel, if the Coalition’s request for stay is denied. The Coalition’s claim that there would be an incentive to “bulldoz[e] the existing trails out of existence, thus eliminating any possibility that the trail network [will] be preserved when the County considers any development proposal to enhance the prospects of development” is completely unsupported. Id.

There is no immediacy to the Coalition’s alleged harm. The Federal parcel has not been transferred out of Federal ownership. Even if BLM were to proceed with the Exchange absent a stay, it is extremely unlikely that the County would look favorably on a developer bulldozing the trails out of existence. While the Coalition claims that

grading could proceed without a permit, SCR disputes that assertion. Moreover, the County has already expressed its preliminary position that some trails may need to be incorporated into development plans for the site. As SCR states, “[t]here is nothing to be gained by * * * rushing out and obliterating the casual walking trails created by nearby residents.” (Opposition at 5.) In fact, the action suggested by the Coalition could jeopardize approval of amendments of the County’s General Plan land use designation and zoning for the site. SCR is correct in its assertion that there would be “no economic incentive * * * to engage in such conduct.” *Id.* Clearly, the Coalition has failed to show a likelihood of immediate and irreparable harm from denial of a stay.

We now turn to consideration of the Coalition’s contention that it is likely to succeed on the merits of its assertions that in approving the Exchange BLM violated NEPA. While the Coalition alleges various errors, including that the EA was biased in favor of the Exchange and conclusory in nature, that BLM failed to provide adequate public participation, and that an EIS, rather than an EA, should have been prepared, it essentially complains that BLM failed to take a “hard look” at potential environmental impacts of the proposed Exchange.^{6/} (Request for Stay at 2.)

A BLM decision to proceed with a proposed action based on an EA and FONSI and without preparation of an EIS will be upheld under section 102(2)(C) of NEPA, when the record demonstrates that BLM has taken a “hard look” at potential environmental impacts, considering all relevant matters of environmental concern, and has made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Rainer Huck, 168 IBLA 365, 401-02 (2006); Bark, 167 IBLA 48, 76 (2005); Armando Fernandez, 165 IBLA 41, 49 (2005). A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Rainer Huck, 168 IBLA at 402, and cases cited. Mere differences of opinion provide no basis for reversal. Rainer Huck, 168 IBLA at 402; Rocky Mountain Trials Association, 156 IBLA 64, 71 (2001).

The Coalition’s specific contentions regarding deficiencies in the FONSI and EA consist mostly of brief point-by-point queries and assertions regarding particular

^{6/} Nothing in the record supports the Coalition’s claim of inadequate public participation. In the FONSI/DR (at 14-15) and the October 6, 2006, decision (at 6-7), as well as BLM’s Response (at 4-5), BLM details the opportunities offered for public participation, including issuance of a scoping notice, several public meetings, and acceptance of written comments.

statements made in the EA and FONSI. See Request for Stay at 3-7. The Coalition raised all these points in its protest and BLM addressed them in Exhibit A-1 of the decision. While the Coalition complains that many of BLM's responses were conclusory, it does not offer any evidence to support its allegations of error. Instead, what it offers is a difference of opinion. A difference of opinion does not establish a likelihood of success on the merits of those arguments.

Based on a preliminary review of the record, nothing offered by the Coalition in its request for stay supports a finding that it has a likelihood of success on the merits of its contention that BLM failed to take a hard look at the environmental consequences of proceeding with the Exchange. Regarding fisheries, BLM concluded that Salt Creek does not offer high quality habitat for anadromous species due to its seasonal intermittent nature, alluvial load, and relatively small size, and, therefore, impacts from the Exchange, including reasonably foreseeable development of the Federal parcel, would not be significant, in light of the required inclusion of a restrictive covenant in a patent of the Federal parcel (see note 3, supra) and further opportunities for governmental review of and restrictions on development.

In addition, the record shows that in a May 31, 2005, letter to National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, U.S. Department of Commerce, BLM requested concurrence, pursuant to section 7 of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. § 1536 (2000), with its determination that the Exchange "may affect, but is not likely to adversely affect" various anadromous fish species, including the California Central Valley Steelhead trout (*Oncorhynchus mykiss*), a Federally-listed T&E species, or their designated or proposed critical habitat.^{2/} See EA at 29, 33-34; FONSI/DR at 3;

^{2/} NMFS designated an Evolutionarily Significant Unit (ESU) of anadromous Steelhead trout in the Central Valley of California as a T&E species, effective May 18, 1998. 63 FR 13347 (Mar. 19, 1998). It later designated "all river reaches accessible to listed steelhead in the Sacramento and San Joaquin Rivers and their tributaries in California," as critical habitat for the Steelhead trout ESU. 50 CFR 226.212(n). In making that designation, NMFS indicated that the degree to which a particular creek or stream is occupied by or provides suitable habitat for the trout would be taken into account when considering a proposed action. 65 FR 7764, 7767 (Feb. 16, 2000). In a final rule published Sept. 2, 2005, effective January 2, 2006, NMFS further identified, inter alia, critical habitat for the Steelhead trout ESU in designated stream reaches, including the "Spring Creek Hydrologic Sub-area 552440" of the "Shasta Bally Hydrologic Unit 5524," listing the outlet as the Sacramento River upstream to endpoints in various creeks, naming "Middle Creek," "Rock Creek," and "Salt Creek," as well as an "Unnamed Tributary." 50 CFR 226.211(l)(14)(iii); see 70 FR 52488, (continued...)

Decision at 14. In a September 29, 2005, letter, NMFS concurred in BLM's determination, stating that the Exchange did "not specifically provide any permits or funding for the development or other disturbance of the lands being exchanged." (Letter to BLM from NMFS, dated Sept. 29, 2005, at 1.) NMFS also noted, in support of its concurrence, that it "anticipated that any future development of the [Federal] parcel which might disturb Salt Creek or otherwise cause adverse effects to listed species will require Federal permitting (through the U.S. Army Corps of Engineers), and therefore will be subject to section 7 consultation under that permitting process." Id. at 2.

In its reasonably foreseeable development scenario, BLM assumed for purposes of assessment that the Federal parcel could be developed into "as many as 59 rural residential lots," with only approximately 50% of the parcel suitable for development due to "the surrounding development, topography of the parcel, mandatory setbacks, access, and other issues." (EA at 26-27.) Therein, BLM recognized the speculative nature of the extent of development and that any development would be subject to review under the California Environmental Quality Act, as amended, Cal. Pub. Res. Code §§ 21000, et seq. (West 2006), and Federal, State, and local permitting approval. See EA at 25-27; Decision at 55.

For purposes of determining whether the Coalition has shown a likelihood of success on its NEPA arguments, we may legitimately assume that governmental agencies will properly oversee any development of the Federal parcel and impose any restrictions required by law, including those for the protection of California Central Valley Steelhead trout and its designated critical habitat.

In Howard B. Keck, Jr., 124 IBLA 44 (1992), aff'd, Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993), a case in which the Board affirmed a BLM decision dismissing a protest of a proposed land exchange, we held that BLM's consideration of the expected impacts of development of the Federal parcel need only be commensurate with the known or anticipated level of detail concerning such development, and that we would not require more from BLM "where there is no evidence that the environmental impacts of actual development cannot adequately be analyzed by the appropriate county authorities at the time a proposal for such development is advanced * * *." 124 IBLA at 50. Quoting Conservation Law Foundation of New England, Inc. v. General Services Administration, 707 F.2d 626, 636 (1st Cir. 1983), we stated: "Any [] use of the * * * lands * * * will be fully

^{2/} (...continued).

52605, 52620 (Sept. 2, 2005). An accompanying map for Hydrologic Unit 5524 shows only a single strand of Salt Creek designated as critical habitat in Sub-area 552440. 70 FR at 52620.

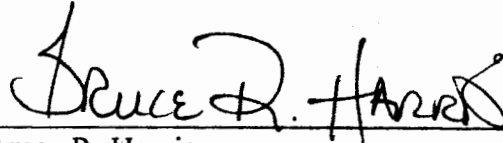
subject to the substantive constraints of local zoning laws and local and federal environmental standards.” Id.; Western Land Exchange Project v. United States BLM, 315 F. Supp.2d 1068, 1090 (D. Nev. 2004).

In this case, there is no way to predict accurately the extent of future development of the Federal parcel. However, any proposed development will be scrutinized closely by Federal, state, and local governmental agencies to ensure compliance with appropriate statutes and regulations. Under the circumstances, the Coalition has failed to show a likelihood of success on the merits of its arguments that BLM failed to take a “hard look” at the potential environmental consequences of the proposed Exchange, including impacts on fisheries from development of the Federal parcel.

We now turn to the Coalition’s arguments that BLM violated sec. 206 of FLPMA, its implementing regulations, and BLM’s policy pronouncements in appraising the fair market value of the Federal and non-Federal parcels. In order to establish error in an appraisal, an appellant must carry its burden to demonstrate, by a preponderance of the evidence, that the appraisal methodology was fatally flawed, that the appraiser failed to consider a relevant factor bearing on value, used inappropriate data, or erred in his or her calculations, or that the value arrived at does not, in fact, represent the parcel’s fair market value. See Spanish Springs Pilots Association, Inc., 167 IBLA at 290 (public airport lease). In order to establish that an appraisal does not represent fair market value, one challenging the appraisal must ordinarily offer another appraisal in rebuttal. Charles W. Nolen, 166 IBLA 197, 208 (2005).

The Coalition refers to alleged violations in conducting the appraisals, but makes no effort to demonstrate that the appraisals in question fail to represent fair market value. It presents little or no argument or supporting evidence, presumably relying entirely on the discussion in Exhibit B of its protest. Exhibit B raised questions regarding the adequacy of BLM’s appraisal analysis and conclusions, but the Coalition did not offer the results of a private appraisal of the Federal and non-Federal parcels. Following review of Exhibit B by ASD, BLM responded to the Coalition’s allegations in the State Director’s October 2006 decision and in its response to the Coalition’s Request. See Decision at 5; BLM Response at 9-10. Having reviewed these pleadings, we find that the Coalition has failed to show a likelihood of success on its arguments that the appraisals are erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, SCR’s request to intervene in the pending appeal is granted, and its motion to dismiss is denied. The Coalition’s request for a stay is denied.



Bruce R. Harris
Deputy Chief Administrative Judge

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