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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

2010 OCT 18 P 4: 52

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED

OCT 18 2010

DOCKETED BY

IN THE MATTER OF THE
APPLICATION OF ARIZONA PUBLIC
SERVICE COMPANY, IN
CONFORMANCE WITH THE
REQUIREMENTS OF ARIZONA
REVISED STATUTES §§ 40-360, *et seq.*,
FOR A CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY
AUTHORIZING THE TS-5 TO TS-9
500/230kV TRANSMISSION LINE
PROJECT, WHICH ORIGINATES AT
THE FUTURE TS-5 SUBSTATION,
LOCATED IN THE WEST HALF OF
SECTION 29, TOWNSHIP 4 NORTH,
RANGE 4 WEST AND TERMINATES AT
THE FUTURE TS-9 SUBSTATION,
LOCATED IN SECTION 33, TOWNSHIP
6 NORTH, RANGE 1 EAST, IN
MARICOPA COUNTY, ARIZONA

Docket No. L-00000D-08-0330-00138

Case No. 138

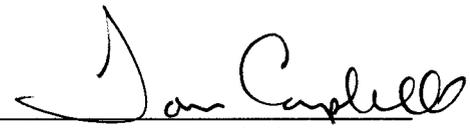
**ARIZONA PUBLIC SERVICE
COMPANY'S NOTICE OF
ERRATA**

On October 15, 2010, Arizona Public Service Co. ("APS") filed the attached
Decision of the Interior Board of Land Appeals (Decision No. 2010-151, dated October 6,
2010). Pages 6 and 7 were not included in that filing. APS is filing a complete copy of
the Decision.

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RESPECTFULLY submitted this 18th day of October, 2010.

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ORIGINAL and thirteen (13) copies
of the foregoing filed this 18th day
of October, 2010, with:

The Arizona Corporation Commission
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COPY of the foregoing hand-delivered
this 18th day of October, 2010, to:

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9 **COPY** of the foregoing
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October 6, 2010

IBLA 2010-151)	AZA-035079
)	
ARIZONA PUBLIC SERVICE COMPANY)	Right-of-Way
)	
)	Motion for Expedited Consideration
)	Granted; Decision Set Aside and
)	Remanded

ORDER

Arizona Public Service Company (APS)¹ appeals from an April 28, 2010, Decision of the Field Manager, Hassayampa Field Office, Phoenix District, Bureau of Land Management (BLM), rejecting its Application for Transportation and Utility Systems and Facilities on Federal Lands (AZA-035079) (Application) submitted for the purpose of securing a right-of-way (ROW) across public land for electrical power lines and appurtenant facilities for 75 years.² The Decision rejected the Application

¹ APS timely filed a Notice of Appeal on May 26, 2010, followed by a Statement of Reasons for Appeal (SOR) on June 24, 2010. APS filed a motion for expedited consideration on Aug. 19, 2010. That motion is granted. Council for the City of Peoria, Arizona, on behalf of the City and Diamond Ventures, Inc., and Vistancia LLC ("Peoria Entities") filed a pleading, styled "Answer to APS' Notice of Appeal and Statement of Reasons for Appeal" in support of the appeal filed by APS and suggesting alternative relief. The Administrative Record (AR) includes correspondence more fully identifying those entities and their respective interests in the appeal. AR 10, 12, and 14. We grant the Peoria Entities' Motion to Intervene and have considered their arguments in reaching our decision herein.

² The 300-foot wide ROW to construct and operate a 500/230kV Transmission Line project would cross approximately 7 miles of BLM-administered lands lying north of Arizona Route 74 between 163rd Ave. and El Mirage Road alignments and south of State Route 74 between El Mirage Road and 115th Ave. alignments. AR 38, 39. The ROW would cover approximately 170 acres within the Castle Hot Springs Management Unit, all of which is designated as the Castle Hot Springs Special Recreation Management Area (SRMA). For the lengthy legal description of the

(continued...)

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as "not in conformance with the objectives and decisions" of the April 22, 2010, Bradshaw-Harquahala (BH) Resource Management Plan (RMP). Decision at 2. For the reasons that follow, the Decision is set aside and remanded.

I. Background

In its Answer, BLM provides a detailed chronology of the relevant history of the matter on appeal, supported by documents comprising the AR. Appellant does not dispute this factual recitation, and we will not endeavor to reproduce it here, focusing selectively as follows.

BLM manages the public land at issue under the guidance of the BHRMP and the RMP Amendments/Record of Decision (ROD) for the Designation of Energy Corridors on BLM-Administered Lands in the 11 Western States (West-Wide RMP/ROD), approved in January 2009.³ BLM first notified the public of its intent to initiate development of the BHRMP to guide management of the 896,100 acres of public land in Maricopa, Yavapai, and La Paz Counties, Arizona, on April 23, 2002. BHRMP at 25. BLM analyzed the environmental impacts of the proposed RMP in a Draft EIS, inviting public comment on it and the Draft BHRMP on January 6, 2006. In June 2008, BLM issued a Proposed BHRMP and Final EIS for public review, comment, and a 30-day protest period.

APS began the process of obtaining State approval, and in August 2008, the Arizona Corporation Commission (ACC) Transmission Line Siting Committee conducted a public hearing to evaluate APS' preferred route and three alternative routes. AR 30. On December 29, 2008, the ACC approved APS' application for a

² (...continued)

proposed ROW, *see* Decision at 1; Answer, Attach. 5 (BLM Recordation (live) Serial Register Page, July 20, 2010).

³ BLM began development of the West-Wide RMP/ROD in response to enactment of sec. 368 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 727 (2005) codified at 42 U.S.C. § 15926 (West Supp. 2005-2010), which requires, *inter alia*, certain Federal agencies to designate corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal lands in 11 western states, including Arizona.

See http://corridoreis.anl.gov/documents/docs/Energy_Corridors_final-signed-ROD-1-14-2009.pdf. BLM, in cooperation with the U.S. Department of Energy, and other agencies, prepared a Programmatic Environmental Impact Statement (EIS), pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C) (2006). The West-Wide RMP/ROD designated 16 energy corridors in Arizona.

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Certificate of Environmental Compatibility (CEC) for Alternative 3 of the proposed transmission line project, conditioned upon APS obtaining all required approvals and permits necessary and filing for an ROW across BLM-administered public land.⁴ The ACC granted a CEC approving the project that would cross BLM-administered land on March 17, 2009.

On April 29, 2009, APS submitted its ROW Application to BLM. AR 39. BLM acknowledged receipt on May 12, 2009. In numerous correspondence over the next several months, BLM indicated that the Application had been pre-adjudicated and would determine whether it was in conformance with the August 2008 BHRMP, after approval of the ROD, anticipated to occur in September 2009. On April 22, 2010, BLM issued the BHRMP ROD. On April 28, 2010, BLM rejected the Application. The Decision states simply:

The BLM Hassayampa Field Office has reviewed the application filed by APS against the Lands and Realty Management decisions in the RMP/ROD. It is the BLM's position that the application filed by APS is not in conformance with the objectives and decisions of the approved [BHRMP]. **Thus the application is hereby rejected.**

II. Arguments of the Parties

Appellant states that "BLM cited no statutory or regulatory authority for its decision to take no action on the Application for 364 days and then reject it without considering its merits. None exists." SOR at 2. It notes that the Decision does not cite any of the six factors enumerated in 43 C.F.R. § 2804.26(a) for rejection of an application. *Id.* It then argues that the proposed use (1) is consistent with the purpose for which BLM manages the public lands (as demonstrated in the recent state siting process); (2) is in the public interest because, in transmitting remote renewable energy to the Phoenix metropolitan area, the project would meet the Federal government's interest in promoting renewable energy development (citing Secretarial Order No. 3285 (Mar. 11, 2009)); and (3) is consistent with Section 102(c)(9) of the Federal Land Policy Management Act of 1976 (FLPMA),

⁴ On Feb.13, 2009, BLM sent a letter to APS indicating that the portion of the plan that would cross public land is not within any of the designated energy corridors. AR 19. On Mar. 2, 2009, BLM sent a letter to the ACC stating that the proposed BHRMP does not identify a utility corridor along State Route 74 corresponding to the Line Siting Committee's recommended corridor, and that the BHRMP identified tortoise habitat and visual resource management concerns north of State Route 74, and allocated over 112,430 acres in the area as the Castle Hot Springs SRMA. AR 28.

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43 U.S.C. § 1712(c)(9) (2006). *Id.* at 5-7. APS also contends that BLM had “a nondiscretionary duty to consider the Application through an RMP amendment. *Id.* at 7-8. APS asks the Board to reverse the Decision “to reject the Application without consideration of the merits,” and remand the matter to BLM “with instructions to initiate an RMP amendment process, consider the Application’s merits,” and either approve or deny the Application by June 30, 2011.

Intervenor Peoria Entities support APS’ Answer but, rather than requesting that the Board remand the Decision with instructions to BLM to initiate an RMP amendment, they suggest two “more appropriate” options. First, they request that the Board direct BLM to approve the Application on the basis that it is in conformance with the objectives and decision of the RMP. Peoria Entities Answer at 3. They assert that in denying the Application, BLM “failed to acknowledge that the RMP did not explicitly exclude consideration of utilities in the ‘transportation corridor’ created along State Route 74.” *Id.* For support, intervenors quote the BHRMP at LR-3, which states that “[t]he designated transportation corridor may be suitable to accommodate more than one type of [ROW] use or facility or one or more [ROW] uses or facilities which are similar, identical, or compatible.” *Id.* They also direct our attention to the BHRMP at LR-15: “All major utilities will be routed through designated corridors. Encourage new [ROWs] within designated corridors to promote the maximum use of existing routes. Encourage joint use wherever possible.” *Id.* at 3-4. Intervenors note that BLM provided “no explanation as to why the State Route 74 ‘transportation corridor’ cannot accommodate the utility lines identified in the Application.” *Id.* at 4. Further, they claim, BLM has failed to address a point they previously raised during the Application review period, that in the BHRMP, BLM did not specifically prohibit the area encompassing the public land from use as an ROW corridor, as authorized under 43 C.F.R. § 2802.11(d). “Because BLM did not expressly exclude consideration of utilities in the ‘transportation corridor’ along State Route 74, APS’ Application is in conformance with the RMP as a suitable, compatible use and should have been granted by BLM.” *Id.*

Intervenors next request the Board to direct BLM “to correct errata in the RMP that mistakenly identifies BLM lands along State Route 74 as a ‘Transportation Corridor’ when the proper term should be ‘Designated Corridor.’” The Peoria Entities assert that the terms “transportation corridor” and “utility corridor” may be used in general discussions, but, since they are not defined in the RMP Glossary or any Federal statute or BLM regulation, it is proper, instead, to use the term “Designated Corridor,” “consistent with BLM’s repeated statements in its RMP and elsewhere that it favors the co-location of utility and transportation [ROWs],” as “BLM laws and regulations all support this broad flexibility held by BLM to characterize and implement a transportation and utility corridor as a single term and concept.” *Id.* at 5-6 (citing section 503 of FLPMA, 43 U.S.C. § 1763 (2006); 43 C.F.R.

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§ 2802.11(c); 43 C.F.R. § 2801.5).⁵ Intervenor asks the Board to grant the relief requested by appellant, in the event the Board determines not to provide the intervenors' requested relief. *Id.* at 7.

In its Answer to appellant's SOR, BLM provides a very detailed analysis of the Application, examining at length whether the Application is consistent with the BHRMP and whether granting it is in the public interest. BLM considers the Application in light of BLM's management goals for the Castle Hot Springs SRMA, its interest in protecting Category II and III desert tortoise habitat (and difficulty in mitigating impacts to such habitat), and its objective of managing the area around the proposed ROW (designated as Visual Resource Management Class II and III lands) "for retention or partial retention of the landscape character." Answer at 7-10. After each analysis, BLM states that it "rejected Appellant's [ROW] Application with due regard for the public interest" and that the Decision "is consistent with" the BLM management goal under discussion, *i.e.*, "managing this area as an SRMA," or "protect[ing] protected biological resources," or "BLM's [Visual Resource Management] program." *Id.* at 9. Next, BLM describes the environmental analysis it undertook in the BHRMP Final EIS, stating that "BLM fully analyzed the environmental impacts of authorizing a utility corridor within the Castle Hot Springs MU and decided not to designate any new utility corridor," and states that, "based on the environmental impact analysis, BLM also decided to limit placing major utility lines to designated utility corridors." *Id.* at 10. "Under the circumstances," BLM states, "Appellant's application was fully considered and found to be inconsistent with BLM's land use planning for the area. BLM rejected Appellant's application with due regard for the public interest and the rejection is consistent with the purposes for which BLM manages the relevant public lands." *Id.* at 10-11 (citing 43 C.F.R. § 2804.26(a)(1)).⁶

⁵ Intervenor then identify several perceived "errors" in the BHRMP.

⁶ In response to intervenors' claim that the ACC process determined that the Application is in the public interest, BLM rightly notes that the ACC administrative determination for the purposes of granting a State-issued CEC "does not supplant or substitute BLM's responsibility and discretionary authority to make its own determination regarding whether a[n] [ROW] application should be approved over BLM-administered lands." Answer at 7 (citing *Desert Survivors*, 96 IBLA 193, 196 (1987)). BLM also notes "that Appellant submitted a request to the Arizona State Director to amend the BHRMP. This request is under consideration." *Id.* at 11, n.4. We are without jurisdiction to consider any issue related to amendment of the RMP. See *Mona Sindelar*, 167 IBLA 185, 188, n.3 (2005).

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III. Discussion

Under section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (2006), BLM has the discretion to accept or reject an ROW application. *See, e.g., Bristlecone Alliance*, 179 IBLA 51, 54-55 (2010), *Santa Fe Northwest Information Council*, 174 IBLA 93, 104 (2008); *Wiley F. & L'Marie Beaux*, 171 IBLA 58, 66 (2007); *Mark Patrick Heath*, 163 IBLA 381, 388 (2004). When BLM uses its discretionary authority to reject an application for a land use authorization, or to impose a condition upon such use, it must provide a rational basis for its decision. *Wiley F. & L'Marie Beaux*, 171 IBLA at 66; *Mark Patrick Heath*, 163 IBLA at 388; *Fallini v. BLM*, 162 IBLA 10, 34 (2004). The Board will affirm a BLM decision approving or rejecting an ROW 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 is shown to disturb BLM's decision. *Santa Fe Northwest Information Council*, 174 IBLA at 104; *Mark Patrick Heath*, 163 IBLA at 388; *James Shaw*, 130 IBLA 105, 115 (1984).

BLM regulations governing the processing of ROW applications under FLPMA assure applicants that BLM will take "the action necessary to fully evaluate and decide whether to approve or deny your application." 43 C.F.R. § 2804.25(d)(6). At 43 C.F.R. § 2804.26, applicants are told, in relevant part, that "(a) BLM may deny your application if: (1) The proposed use is inconsistent with the purpose for which BLM manages the public lands described in your application;[⁷] [or] (2) The proposed use would not be in the public interest" *See Ronald W. Malone*, 173 IBLA 332, 341-42 (2008).

In challenging an ROW 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.

Bristlecone Alliance, 179 IBLA at 54-55 (quoting *International Sand & Gravel Corp.*, 153 IBLA 293, 299 (2000)); *see also Santa Fe Northwest Information Council*, 174 IBLA at 104; *D.J. Laughlin*, 154 IBLA 159, 164-65 (2001).

⁷ Section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2006), requires the Secretary of the Interior to manage the public lands "in accordance with the land use plans developed by him under section 1712 of this title" *See* 43 C.F.R. §§ 1601.0-5(n) and 1610.5-3.

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On appeal, BLM argues strenuously that appellant's ROW Application does not conform to the applicable land use plan and is contrary to public policy. It cites the BHRMP to show that the ROW grant would not conform to the RMP. BLM discusses special concerns pertaining to the subject lands (SRMA, tortoise habitat, and Visual Resource Management issues) and identifies other resources that, according to the BHRMP, would be impacted by an ROW grant such as this one, in support of its claim that the ROW application would be contrary to the public interest. Its pleading contrasts starkly with its Decision.

Upon receipt of the Decision summarily rejecting the Application, APS could not determine whether BLM had made a reasoned analysis of the facts. On appeal, APS cannot meet its burden to show error in the Decision so laconically communicated. "The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board." *Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6, 21 (2006), and cases cited.

Our role too is impacted by BLM's terseness. We cannot determine from the Decision, as supported by the record, whether BLM fully evaluated the application, and whether the decision is based on a reasoned analysis of the relevant factors involved, made with due regard for the public interest. See *Santa Fe Northwest Information Council*, 174 IBLA at 104.

APS was entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. See *Bookcliff Rattlers Motorcycle Club*, 171 IBLA at 21, and cases cited. Counsel's explanation for the Decision, however detailed, is not a proper substitute for a well-reasoned, fully supported decision.

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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 set aside and remanded.


Christina S. Kalavritinos
Administrative Judge

I concur:


James F. Roberts
Administrative Judge

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