GARY AND SHARRON JOHNSON
v.
ACTING MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-159-A Decided April 22, 1998

Appeal from a "Notice of Intent to Proceed" with the River Road Phase III construction project on the Red Lake Indian Reservation.

Affirmed.

1. Indians: Lands: Environmental Assessments--National Environmental Policy Act of 1969: Environmental Assessments

Under a judicially developed "rule of reason" governing an agency's choice of alternatives to discuss in an environmental assessment and the extent to which it discusses those alternatives, the agency's discussion of alternatives is upheld as long as the agency makes its choices reasonably in light of the goals, needs, and purposes it has set for the project.

APPEARANCES: Jeanne M. Cochran, Esq., and Hans I.E. Bjornson, Esq., St. Paul, Minnesota, for Appellants; Thomas C. Jacobs, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Fort Snelling, Minnesota, for the Area Director; Bruce G. Odlaug, Esq., and Kristina L.C. Stierholz, Esq., St. Paul, Minnesota, for Randall Mostrom, Ernest Mostrom, and Lorraine Mostrom.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Gary and Sharron Johnson seek review of a June 23, 1997, notice issued by the Acting Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), announcing BIA's intent to proceed with the River Road Phase III construction project (project) on the Red Lake Indian Reservation. For the reasons discussed below, the Board affirms the Area Director's decision to proceed.

Background

The project involves the realignment of a portion of River Road, a reservation road also known as BIA Route 19. In conjunction with the BIA project, an existing county road in Pennington County, Minnesota, would be extended, reconstructed, and upgraded. Two portions of River Road have already been upgraded by BIA. The project at issue here would realign or improve the remainder of the road.

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Plans for Phase III were evidently initiated in 1993. At least three public meetings and/or hearings were held during 1994 and 1995, sponsored either by the County or jointly by the County, the Red Lake Band of Chippewa Indians (Tribe), and BIA. The summaries of those meetings indicate that the members of the public in attendance, with the exception of Appellants, appeared to be in favor of the project.

The Tribe prepared an environmental assessment (EA), the first draft of which was issued on January 5, 1996. Another draft was issued on April 16, 1996. Both drafts discussed six alternatives: a no-action alternative, two alternatives which would place the realigned road primarily off-reservation, i.e., within Pennington County, and three alternatives which would place the realigned road primarily on-reservation. Alternative 5, an on-reservation alternative, was identified as the "Preferred Alternative."

On May 14, 1996, the Area Director issued a notice of availability of the April 16, 1996, draft EA and a draft Finding of No Significant Impact (FONSI). The notice stated in part:

> The [BIA] and the [Tribe], in cooperation with Pennington County, propose to realign and extend the western end of River Road (BIA 19). River Road serves as a main link between the communities of the Red Lake Nation and areas of commerce lying to the west, including the tribally owned Thief River Casino. In order to improve traffic flow and safety in the travel corridor, the project would construct 3.0 miles of new two-lane paved roadway, and would reconstruct 1.1 miles of existing roadway, on lands adjacent to the western boundary of the reservation.

Appellants submitted extensive comments, contending that "this project as currently proposed * * * would needlessly impact approximately 30-acres of important wetlands and have other harmful effects on the environment." Appellants' June 17, 1996, Comments at 1. 1/ They proposed another alternative, which they termed "Modified Alternative 2" and which they contended "present[ed] a reasonable, prudent, and feasible alternative which the BIA has inexplicably ignored." Id.

The final EA was prepared by the Tribe in January 1997. The Area Director issued a final FONSI on January 17, 1997. On May 12, 1997, the Army Corps of Engineers issued a permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1994), 2/ to "[d]ischarge fill material into approximately 20 acres of wetland on the Red Lake Indian Reservation to construct the part of the 'River Road Phase III' highway upgrade project that is on the Red Lake Indian Reservation." On June 4, 1997, the Corps

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1/ Appellants also submitted comments on the Jan. 5, 1996, draft EA.

2/ All further references to the United States Code are to the 1994 edition.

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issued a similar permit to the Pennington County Highway Department, authorizing the discharge of fill material into approximately 5 acres of wetland in Pennington County.

On June 9, 1997, the Area Director issued a "Notice of Action," stating that BIA had received all necessary clearances and intended to proceed with the project upon procurement of a right-of-way. On June 23, 1997, he issued the "Notice of Intent to Proceed" at issue here. The notice stated that it was appealable to this Board.

Appellants filed a notice of appeal, which was received by the Board on July 25, 1997. The appeal was docketed on August 21, 1997. On November 3, 1997, the Board received a motion to intervene from Randall Mostrom, Ernest Mostrom, and Lorraine Mostrom, who stated that they are property owners and live in the immediate area of the road construction and are directly affected by this matter. Appellants opposed intervention, contending that the interests of the Mostroms were adequately represented by the Area Director. The Board allowed the Mostroms to submit a brief but postponed its ruling on intervention.

On December 29, 1997, the Board received a Motion for Immediate Effect or to Require an Appeal Bond from the Area Director. The Mostroms supported the Area Director's motion, and Appellants opposed it. Appellants also filed a cross-motion for expedited consideration.

On February 5, 1998, the Board denied the Area Director's motion and took Appellant's cross-motion under consideration.

Pending Motions

The motion of Randall Mostrom, Ernest Mostrom, and Lorraine Mostrom to intervene in this appeal is granted, and their brief is accepted. They clearly have an interest in the matter at issue here and are therefore entitled to participate in this appeal under 43 C.F.R. § 4.313. 3/

Appellants' cross-motion for expedited consideration is granted.

Discussion and Conclusions

Appellants state that they farm in the immediate project area and live near the project area. They state that they oppose the project as approved by BIA because "it would result in the needless loss of approximately 30 acres of wetlands" and "because it would needlessly dissect their farm in two, causing great disruption to their farming operations." Opening Brief at 3.

3/ Although it accepts the Mostroms' brief, the Board agrees with Appellants that the brief does not address the issues raised by Appellants. The brief does, however, demonstrate that the owners of small farms close to the project favor the BIA decision and strongly oppose the alternative advanced by Appellants.

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Appellants contend that BIA violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4335,

> by deciding on a course of action before completing the EA, thereby defeating the informational purposes of NEPA[;] by failing to consider a reasonable alternative proposed by [Appellants;] by failing to verify information in the EA prepared by the [Tribe], a party with a clear bias in favor of the selected alternative[; and] by failing to take a hard look at the potential environmental effects of the project.

Id. at 4.

In support of their first argument, Appellants cite Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989), for the proposition that an agency violates NEPA when it commits to a course of action prior to preparing an EA. They contend that BIA is guilty of such a prior commitment here because it had already determined to construct the road in accordance with the Preferred Alternative prior to completion of the EA. As evidence of this prior commitment, Appellants point to: (1) a 1995 hearing held by BIA and the County, at which preliminary construction plans were presented; 4/ (2) detailed hydrology/hydraulics design computations prepared in 1994-95 and a subsurface exploration report completed in November 1994; (3) a June 18, 1996, Cooperative Agreement among BIA, the Tribe, and Pennington County "[t]o establish a mechanism for the County, [BIA] and the Tribe to modify, reconstruct and construct a roadway referred to as River Road Phase III"; and (4) BIA's approval of road design plans in August 1996. As further evidence that BIA pre-decided the issue, Appellants submit a copy of an E-mail message between two BIA employees. 5/

In order to remedy this alleged violation, Appellants contend that BIA must "perform a new EA looking at all reasonable alternatives, including Modified Alternative 2." Opening Brief at 8-9.

4/ Appellants state that the hearing was held in June 1995. However, they appear to be referring to a hearing held on July 26, 1995.

5/ The E-mail message stated in part:
"[The BIA Minneapolis Area Environmental Services Engineer] stated that we have a weakness due to the fact that the design has already been completed. In theory, NEPA and all required permits should have been performed and acquired prior to the completion of the final design. It is a technicality that implies that we were acting with bias. I stated that the issues do not address Tribal rights or the urgency to the Tribe to build this road during the funding term of ISTEA [Intermodal Surface Transportation Efficiency Act of 1991, 105 Stat. 1914]. The risk can be accessed [sic] as the cost to design versus the potential loss from the cost to construct the road. He thought that might work as an argument in favor of the BIA - but not very strong."

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The Area Director contends that none of the examples cited by Appellants show that BIA had committed to construct the Preferred Alternative prior to preparing the EA. He argues that the road construction proposal, as it was described for the July 1995 hearing, was not specific to the preferred alternative but, rather, fit several of the five alternatives. He argues that the Cooperative Agreement, which was not signed until after review and public comment on the draft EA, was a "tentative time-saving formality with no effect until all requirements and final decisions were completed." Area Director's Answer Brief at 6. Further, he contends, "[i]t would have been irresponsible at best for the BIA to risk loss of ISTEA dollars for the road by failing to enter into cooperative agreements with all governmental units involved." Id.

The Area Director concedes that BIA did planning and design work prior to completing the EA. He explains:

> The BIA made a cost-benefit analysis that the best use of its term-available funds was to allow shortened time to the eventual construction. * * * The BIA was caught where it always is: trying to serve the tribes within the constraints of ever-declining term-available dollars. * * * It reasoned that it made more sense to spend money on planning, figuring that the savings would be greater than the risk that the road would not be built and/or the preferred alternative not implemented.

Id. at 7. Further, the Area Director contends:

> Appellants' argument that the planning indicates a prejudgment ignores another practical reality: much of the planning for one alternative would accrue to the benefit of the project were another route chosen))a change of route would not mean a change in the kind or amount of the materials, for example, nor a significant change in the amount of labor, etc.

Id. at 7-8.

Finally, the Area Director contends that Sierra Club v. Lujan is not on point here.

Sierra Club is the only case cited by Appellants in which an agency was found to have committed to a project before completing an EA. As evidence of this pre-EA commitment, the court described a contract, entered into four years before completion of an EA, for "the construction of a new hotel * * * together with improved employee housing, new maintenance facilities and other improvements." 716 F. Supp. at 1291. The court discussed other problems with the actions of the agency and issued a preliminary injunction upon concluding that "[t]he Agency's decision * * * may well have been arbitrary and capricious, ranging from its commitment to the project to the determination not to prepare an EIS." Id. at 1293. While the court's decision to issue a preliminary injunction was evidently based upon a combination of factors, the agency's pre-EA commitment was clearly an important factor.

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None of BIA's pre-EA actions in this case, however, are comparable to the construction contract involved in Sierra Club. Although Appellants attempt to equate the Cooperative Agreement with a construction contract, their effort is strained. The Cooperative Agreement recognizes that the project is still a proposed project (Scope of the Agreement paragraph) and provides that, in the event of a change, or in the event of unresolvable problems, BIA is to notify the County (Art. II, sec. A). Thus, it clearly seems to be what the Area Director contends it is))a "tentative time-saving formality" which memorializes the inter-governmental cooperation that would be required if the project were to proceed, regardless of which alternative were chosen.

BIA's approval of the road construction plans in August 1996 did not commit BIA or anyone else to construct the road as approved. Further, BIA's expenditure of funds for planning and design has a rational explanation, which has been provided by the Area Director.

Appellants appear to be contending that BIA should have done nothing t all in the way of planning until after completion of an EA. Sierra Club does not stand for such a proposition. Indeed, Appellants produce no support whatsoever for such a proposition.

With respect to the E-mail message submitted by Appellants, Appellants contend that it is an admission by BIA that it violated NEPA. The Area Director argues that the author of the message was "a low-ranking employee unqualified and unauthorized to give a legal opinion for the Department nor to evaluate that of [the] BIA Minneapolis Environmental Services engineer * * * especially as to the strength or weakness of legal positions." Area Director's Brief at 6. Appellants take issue with the Area Director's response, contending that it was the engineer's opinion))not that of the author of the message))that was being reported. The Board finds that, with respect to Appellants' argument here, it does not matter which BIA employee was the source of the opinion. Appellants fail to show that either employee was authorized to offer a legal opinion or to confess legal error on behalf of BIA.

The Board finds that Appellants have failed to show that BIA committed to proceed with the Preferred Alternative prior to completion of the EA.

Appellants next argue that BIA violated NEPA by failing to consider Modified Alternative 2. They contend that BIA was required to consider this alternative because it is reasonable, meets the purpose of the project, is feasible, and is less harmful to the environment than the selected alternative.

In response, the Area Director argues that there is no legal requirement that BIA consider Modified Alternative 2 and that, even if there were, Modified Alternative 2 was adequately addressed in the Response to Appellants' comments which was incorporated into the final EA.

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[1] In a recent decision, the United States District Court for the District of Columbia stated:

> NEPA does not describe how many alternatives))or which alternatives))an agency must discuss in the [final Environmental Impact Statement (EIS)], and [Council on Environmental Quality] regulations state only that an agency must discuss those alternatives that are reasonable and feasible. 40 C.F.R. § 1502.14. Courts have interpreted this to impart a "rule of reason" that governs both the agency's choice of alternatives to discuss and the extent to which it discusses them. City of Grapevine[, Texas v. Department of Transportation], 17 F.3d [1502,] 1505 [(D.C. Cir. 1994), Citizens Against] Burlington[, Inc. v. Busey, 938 F.2d [190,] 195-96 [(D.C. Cir. 1991]. Under this rule of reason, as long as the agency makes these choices reasonably in light of the goals, needs, and purposes that it has set for the project, its discussion of alternatives is upheld. Burlington, 938 F.2d at 196. Corridor H Alternatives, Inc. v. Slater, 982 F. Supp. 24, 29 (D.D.C. 1997). 6/ The court went on to hold that the Federal Highway Administration had adequately considered an alternative advocated by the plaintiffs even though that alternative was not discussed extensively in the final EIS. Id. at 29, 30.

In this case, the final EA incorporates a 17-page Response to Appellants' comments, addressing Appellants' proposed alternative in detail. The Response makes it clear that Modified Alternative 2 was not deemed to be a reasonable alternative. The reasons for this conclusion were summarized at page 16 of the Response:

> a) It would not result in the stated safety objectives of the project.
>
> b) It would create a significantly greater amount of farm segmentation and other adverse socioeconomic impacts to the residents of Pennington County.
>
> c) It would require greater acquisition of private properties to establish a right-of-way.
>
> d) It would be more costly and difficult to build.

6/ The Area Director furnished a copy of this decision to the Board after briefing was completed, making no arguments based upon it. Appellants object to the submission but also contend that the decision is not relevant here.

The Board appreciates being advised of recent decisions relevant to a pending appeal. The Area Director's submission, in which he offered no comment on the substance of the decision, was entirely proper.

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Appellants contend that the discussion of Modified Alternative 2 in the Response was insufficient because it did not adequately address environmental impacts and was not comparable to the discussion of alternatives in the main body of the EA. Appellants continue to contend that Modified Alternative 2 must be addressed in more detail because it is a reasonable alternative.

Only the first of the four reasons listed in the Response))failure to meet safety objectives))need be considered in order to conclude that BIA's discussion of Modified Alternative 2 was adequate. Public safety was one of the "goals, needs, and purposes" that were set for the project. Indeed, it appears to have been one of the two principal goals. 7/

In answer to a contention made by Appellants that Modified Alternative 2 satisfied safety and transportation needs, the Response stated:

> Modified Alternative 2 would result in a minimum of 5 intersections of the highway with local township and BIA roads. Use of the preferred alternative, in contrast, would result in a highway separated from these local access roads, whereby the local roads would collect into one road that would have only two intersections with the highway. It is our opinion that important safety considerations would not be addressed by the use of Modified Alternative 2, but would be addressed by Alternative 5.

Response at 3. Appellants, while continuing to contend that Modified Alternative 2 meets the safety and traffic objectives of the project, do not dispute the statements in the Response concerning intersections and the mix of highway and local traffic.

Applying the "rule of reason" described in Corridor H Alternatives, the Board finds that BIA considered and rejected Modified Alternative 2 reasonably in light of the goals, needs, and purposes set for the project.

Appellants next contend that BIA failed to verify information in the EA "relating to the cost of the project and other factors affecting costs, such as soil conditions." Opening Brief at 16. Appellants state that, in their comments on the April 16, 1996, draft EA, they had "specifically argued that Modified Alternative 2 would be less costly than Alternative 5." Id. The Tribe responded to that argument in the final EA. Appellants object to the Tribe's response, contending that the Tribe's analysis of the amount of work necessary for road reconstruction under Modified Alternative 2 was in conflict with a soils report furnished directly to BIA. Thus, Appellants reason, the Tribe's cost analysis was rendered suspect and BIA was required to independently verify that analysis.

7/ See, e.g., the final EA at 1: "In order to improve public safety and traffic flow, BIA - Roads in cooperation with Pennington County, proposes to realign the westernmost section of the River Road." See also May 14, 1996, BIA notice quoted above.

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Appellants argue:

> "[P]roof of actual agency review" must be contained in the administrative record. Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 641 (5th Cir. 1983) (emphasis added [by Appellants]). Moreover, if the agency receives "particularized objections to material upon which it importantly relied in its review," it must "undertake some independent effort to verify or discredit the challenged material." Van Abbema v. Fornell, 807 F.2d 633, 640 (7th Cir. 1986). An agency's NEPA obligations are not fulfilled by "blind reliance on material prepared by the applicant in the face of specific challenges raised by opponents. Id. at 642.

Opening Brief at 15.

The Area Director argues that the record contains proof of actual agency review of the draft EA. He cites as examples the review comments of the BIA Area Roads Archaeologist and the BIA Area Environmental Services Engineer.

The court in Save Our Wetlands, addressing an argument that the Army Corps of Engineers had unlawfully delegated authority to an outside entity, stated: "As long as there is proof of actual agency review, it is not a delegation of authority to an interested party to make an environmental assessment for the Corps." 711 F.2d at 641. In this case, it is apparent from the documents prepared by the BIA Archaeologist and Engineer that they reviewed the draft EA and that the Archaeologist, at least, also reviewed Appellants' comments. Accordingly, there is proof of actual agency review of the EA.

There is, however, no evidence that BIA specifically reviewed the Tribe's cost analysis following Appellants' assertion that Modified Alternative 2 would cost less than Alternative 5.

The cost argument Appellants presented to BIA was a general one. Appellants there contended:

> [T]he Preferred Alternative is much more costly to the federal taxpayers than Modified Alternative 2, because the Preferred Alternative includes construction of three miles of new road whereas Modified Alternative 2 only requires construction of 6,000 feet. * * * Similarly, the Preferred Alternative contemplates removal and stockpiling of 30 acres of wetlands, which is likely to be very expensive.

Appellants' June 17, 1996, Comments on April 16, 1996, Draft EA at 9.

Appellants appear to be contending that, based upon that general allegation, BIA was required to conduct a detailed review of the Tribe's cost analysis. Van Abbema, supra, upon which Appellants rely, was a case

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in which the "record [was] teeming with specific factual challenges to reports tendered to the [Army] Corps [of Engineers]." 807 F.2d at 643. "In these circumstances," the court stated, "it is the Corps' responsibility to verify in a reasonable way the data on which it relies." Id. The court remanded the matter to the Corps for further analysis, explaining:

> This does not mean than every [EA] containing factual inaccuracies will have to be redone. In this case the Corps apparently faced a close decision, evidenced by the disagreement between the district and division engineers and by the vigorous public and scientific debate. The alleged benefits were economic and related to relative transportation costs, yet our review of the record reveals no consistent analysis of what these benefits might actually amount to.

Id. None of the circumstances described in Van Abbema are present here. Appellants made only a general allegation concerning cost, not a specific factual challenge. There was no internal disagreement within BIA nor any vigorous public or scientific debate, because all parties except Appellants supported the Preferred Alternative. Cost was only one of several considerations. The principal benefits of the project were not economic in nature; rather, as discussed above, BIA sought to improve public safety and traffic flow. Finally, there was no inconsistency in BIA's or the Tribe's analysis of the benefits of the project. Given the far different circumstances present in Van Abbema, the decision in that case does not support a remand here.

Further, as discussed above, BIA rejected Modified Alternative 2 based upon a conclusion that it did not meet the goals, needs, and purposes set for the project. Appellants seek to compel BIA to engage in a detailed review of a cost comparison between the Preferred Alternative and an alternative which BIA reasonably rejected, simply because Appellants made a general argument in their comments about such a cost comparison. To require a detailed review in these circumstances would not comport with the "rule of reason" described above.

The Board finds that Appellants have not shown that BIA was required to engage in a detailed review of the Tribe's cost analysis in response to Appellant's comments on the draft EA.

Finally, Appellants argue that BIA failed to take a hard look at the potential environmental effects of the project. In this argument, Appellants allege that "[t]he EA fails to include sufficient factual evidence upon which to analyze the potential for significant environmental effects associated with the filling of almost 30 acres of wetlands." Opening Brief at 21. Appellants evidently do not take this argument seriously as they devote less than a page to it, making only the most general allegations.

The EA acknowledges and discusses in detail the impact of the project upon wetlands. Further discussion on this point is included in the Response. Among other things, the EA shows that the project had been reviewed and cer-

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tified by the United States Environmental Protection Agency under section 401 of the Clean Water Act, 33 U.S.C. § 1341; and that a mitigation plan, under which an equal acreage of new wetlands would be created to replace the filled wetlands, had been prepared and included in the Tribe's application to the Army Corps of Engineers for a permit under section 404 of the Clean Water Act. 8/

The record supports a conclusion that BIA did in fact take a hard look at the environmental effects of the project. The Board finds that Appellants have failed to show otherwise.

The Board concludes that Appellants have failed to show error in the Area Director's decision to proceed with the River Road Phase III construction project.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's decision is affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

8/ The record indicates that Appellants opposed issuance of the section 404 permit. However, as stated in the Background section, supra, the Corps issued the permit on May 12, 1997.

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