WASHINGTON COUNTY, UTAH

185 IBLA 39 Decided August 18, 2014

United States Department of the Interior
Office of Hearings and Appeals
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WASHINGTON COUNTY, UTAH

IBLA 2013-173 Decided August 18, 2014

Appeal from a decision of the Field Office Manager, St. George (Utah) Field Office, Bureau of Land Management, denying an application for a right-of-way to construct, operate, and maintain a public highway on public lands. UTU-89592.

Set aside and case remanded.

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

   Where BLM issues a decision denying an application for a right-of-way (ROW) pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (2006), on the basis that the public lands involved are included in an ROW avoidance area, but the applicable land use plan allows new ROWs in such avoidance areas when feasible alternative routes or designated corridors are not available, and BLM fails to address the question of whether there in fact exists a feasible alternative route or designated corridor, the Board will set aside BLM's decision and remand the case for further consideration.

APPEARANCES: Constance E. Brooks, Esq., Denver, Colorado, and Brock R. Belnap, Esq., and Jodi Borgeson, Esq., Washington County, Utah, for appellant; James E. Karkut, 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

Washington County, Utah (County), has appealed from a May 3, 2013, decision by the Field Office Manager, St. George (Utah) Field Office (SGFO), Color Country District, Bureau of Land Management (BLM), denying its application for a right-of-way (ROW), UTU-89592, to construct, operate, and maintain a public highway, to be known as the "Washington Parkway," across public lands situated in

Washington County, Utah, north of the City of St. George, Utah (City), which BLM acknowledges is "a very fast-growing area in southwestern Utah[.]" Answer at 3.

For the reasons set forth below, we set aside BLM's decision and remand the case for further action.

Background

On April 9, 2013, the County filed a completed application for an ROW that would authorize the construction, operation, and maintenance of the public land portion of a major arterial four-lane, paved public highway, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), and its implementing regulations, 43 C.F.R. Part 2800.[1/] The highway is expected "to relieve traffic congestion and provide access to and between the expanding communities in the Dixie Metropolitan Planning Organization [DMPO] of Washington County, Utah," and is designed to promote the public health and welfare of County residents and other members of the public.[2/] Notice of Appeal at 2.

The proposed highway is estimated to cost a total of $56 million. It would run a total of 6.4 miles from the Buena Vista Boulevard, west of its intersection with Interstate 15, westward to the Red Hills Parkway, east of its intersection with State Route 18, and would cross private, State, County, City, and public lands.[3/] The entire proposed route is situated in undeveloped areas north of the City, and is intended to alleviate the increasing traffic congestion associated with the continued growth and development of the City and surrounding areas. It is expected to afford the shortest and most direct route from Interstate 15 to State Route 18, and would constitute the most technically and economically feasible transportation route capable of achieving the County's aims.[4/]

[1/] The County, which has "primary responsibility" under State law for "develop[ing] and manag[ing] the county transportation system," originally filed its ROW application on or about Jan. 28, 2013, but the application was not deemed complete until Apr. 9, 2013, when it was duly executed. Notice of Appeal at 2.

[2/] The County's ROW application was supported by the DMPO and the City.

[3/] The County has yet to present any evidence that it has secured ROWs from the private landowners, State, or City for their respective portions of the ROW route.

[4/] The County also states, on appeal, that the proposed highway is needed to accommodate a growing population; provide for the safe and efficient movement of local residents, law enforcement officers, firefighters, and search and rescue personnel; and facilitate livestock grazing, watershed management, flood control, water developments, communications, recreation, wildlife habitat improvements, and (continued...)

The FLPMA portion of the ROW would be 1.56 miles long and 300 feet wide, situated in secs. 8, 17, and 18, T. 42 S., R. 15 W., Salt Lake Meridian, Washington County, Utah. The 100-foot wide highway would be constructed within the 300-foot wide ROW, and the County states on the ROW application that any adverse effects associated with surface disturbance and related activity would be avoided or minimized with appropriate mitigation measures.[5/]

The public lands at issue are under the jurisdiction of the SGFO, which manages approximately 629,005 acres of public land in Washington, Iron, and Kane Counties, and are subject to the SGFO Resource Management Plan (RMP), which was promulgated on March 15, 1999. *See* Record of Decision (ROD) and RMP, dated Mar. 15, 1999, at 1.1 to 1.3.

Washington County is inhabited by the Mojave population of the desert tortoise (*Gopherus agassizii*), which was designated a threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544 (2006), by the Fish and Wildlife Service (FWS), U.S. Department of the Interior, on April 2, 1990. *See* 54 Fed. Reg. 32,326 (Aug. 4, 1989); 55 Fed. Reg. 12,178 (Apr. 2, 1990). FWS later designated a total of 129,100 acres of Federal, State, Tribal, and private lands in Utah, in two Critical Habitat Units (CHUs) (Beaver Dam Slope and Upper Virgin River), as critical habitat for the desert tortoise, effective March 10, 1994. *See* 59 Fed. Reg. 5820 (Feb. 8, 1994); 59 Fed. Reg. 9032 (Feb. 24, 1994). The public lands at issue were designated as part of the Upper Virgin River CHU, which encompasses a total of 54,600 acres of Federal, State, Tribal, and private lands.[6/]

[4/] (...continued)
other activities in the area. *See* Statement of Reasons for Appeal (SOR) at 1, 3-4, 12-13.

[5/] *See* ROW Application (Exhibit (Ex.) B of the Administrative Record (AR)) and Plan of Development (Ex. A of the ROW Application), and Maps (AR, Ex. C).

[6/] The Upper Virgin River CHU is, in relevant part, synonymous with the Upper Virgin River Recovery Unit (RU), which was later designated by FWS in its June 28, 1994, Desert Tortoise (Mojave Population) Recovery Plan. *See* Recovery Plan, dated June 28, 1994 (http://ecos.fws.gov/docs/recovery_plans/1994/940628.pdf (last visited Aug. 12, 2014)), at 20, 40 (Figure 8 (Proposed Upper Virgin River Desert Wildlife Management Area (DWMA) in the Upper Virgin River Recovery Unit)). FWS reports that in 1996 the average density of desert tortoises in the Upper Virgin River RU was "an estimated 80 animals per square mile," or a total of approximately 7,883 animals. Biological Opinion (BiOp) (FWS/R6 6-RO-96-F-01 COKANUT), dated Feb. 22, 1996, at 12; *see id.* at 15. FWS also proposed, in the Recovery Plan,

(continued...)

See 59 Fed. Reg. at 5844, 5863, 5864 (Map L); 59 Fed. Reg. at 9036, 9036 (Map L); Map of Desert Tortoise Habitat–Red Cliffs National Conservation Area (NCA) (AR, Ex. J).

On February 23, 1996, FWS issued a 20-year Incidental Take Permit (ITP) to the County pursuant to section 10(a) of the ESA, 16 U.S.C. § 1539(a) (2006).[7/] *See* 61 Fed. Reg. 26,529 (May 28, 1996). The ITP authorized the County to incidentally "take" up to 1,169 desert tortoises in the Upper Virgin River CHU in connection with the development of up to 43,546 acres of private land, currently or potentially occupied by desert tortoises. The ITP included a finding that the County's activities, undertaken in accordance with the February 23, 1996, Washington County Habitat Conservation Plan (HCP), were not likely to jeopardize the continued existence of the desert tortoise or destroy or adversely modify its designated critical habitat.[8/] *See* BiOp, dated Feb. 22, 1996, at 3-4, 17, 21-22. The authorized development encompassed road building, land clearing, building construction, and other lawful activity.

[6/] (...continued)
the designation of the Upper Virgin River DWMA within the Upper Virgin River RU. *See* Recovery Plan at 46-47. References herein to the CHU refer to the CHU and RU, as appropriate.

[7/] FWS issued the ITP in conjunction with a Feb. 22, 1996, BiOp (FWS/R6 6-RO-96-F-01 COKANUT), which contained an Incidental Take Statement (ITS), and pursuant to a ROD based on a Final Environmental Impact Statement (EIS). *See* 61 Fed. Reg. 1048 (Jan. 12, 1996); 61 Fed. Reg. 26529 (May 28, 1996).

Section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1) (2006), states that, except as otherwise provided, it is unlawful for any person to "take" any threatened and endangered (T&E) wildlife species within the United States. *See* 16 U.S.C. § 1532 (2006) ("'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"). However, section 10(a) of the ESA provides, in pertinent part, that the Secretary of the Interior "may permit, under such terms and conditions as he shall prescribe[,] . . . any taking otherwise prohibited by [16 U.S.C. §] 1538(a)(1)[] . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a) (2006). Issuance of a permit is contingent on submission of a "conservation plan" by the applicant, and appropriate findings by the Secretary. *Id.*

[8/] FWS' no jeopardy determination pertained to the desert tortoise and other T&E species in the county, specifically, peregrine falcon (*Falco peregrinus*), woundfin minnow (*Plagopterus argentissimus*), Virgin River chub (*Gila robusta seminuda*), dwarf bear-claw poppy (*Arctomecon humilis*), and Siler pincushion cactus (*Pediocactus sileri*).

In its February 1996 BiOp, FWS stated that, in order to be exempt from the prohibition on takings in section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1) (2006), the County was required, *inter alia*, to comply with certain "mandatory terms and conditions," including the following: "*The HCP must be implemented*. Findings of the [FWS] with regard to nonjeopardy or effect of the proposed action on listed species are based on implementation of all proposed actions, including recommended actions, contained within the HCP." BiOp, dated Feb. 22, 1996, at 22 (emphasis added). The HCP, which was incorporated in the ITP, provided that the incidental take of desert tortoises would be mitigated primarily by having the United States acquire and manage 60,969 acres of other private, State, and City land in the Upper Virgin River CHU as a reserve for the conservation of desert tortoises and other T&E plant and animal species. *See id.* at 4, 8-10, 15. The HCP Reserve would be managed by BLM initially as a reserve and later, after Congressional designation, as an NCA for the benefit of the Mojave desert tortoise, in perpetuity.

Thereafter, 61,022 acres of Federal, State, Tribal, and private land within the Upper Virgin River CHU were designated as the "Red Cliffs Desert Reserve" (Desert Reserve) in connection with promulgation of the HCP on February 23, 1996. *See* HCP at 9, 22, 25 (Figure 3.1 (Proposed Reserve Boundaries)); Letter to Utah Department of Transportation (DOT) from Utah Field Supervisor, Utah Field Office, FWS, dated Feb. 16, 2012, at 1. The public lands at issue were designated as part of the Desert Reserve. *See* Map of Red Cliffs NCA and Red Cliffs Desert Reserve Boundary Differences (AR, Ex. L). Management of the Desert Reserve is governed by a June 12, 2000, Red Cliffs Desert Reserve Public Use Plan (PUP).

When BLM promulgated the SGFO RMP on March 15, 1999, it included the public lands at issue in "ROW avoidance areas." *See* ROD and RMP at 2.6 ("Rights-of-way avoidance areas, totaling 308,889 acres, are depicted in Table 2-3 and on Map 2.3. New rights-of-way will be granted in these areas only when feasible alternative routes or designated corridors are not available. Measures to reduce impacts to affected resources will be applied based on site-specific analysis." (RMP Decision LD-19)), 2.6 (Table 2-3 (Rights-of-Way Avoidance and Exclusion Areas (Subject to Designated Corridors)), listing, *inter alia*, "Washington County HCP Reserve" and "T&E and Candidate Species Habitat"), 2.25 ("Critical habitat for [F]ederally-listed species . . . will be designated right-of-way avoidance areas" (RMP Decision FW-10)), 2.27 ("To meet HCP objectives, lands within the Reserve will also be designated a [ROW] avoidance area"), 2.76 (Map 2.3 (Rights-of-Way Avoidance

and Exclusion Areas)); Map of Rights-of-Way Avoidance/Exclusion Areas and County Proposed Corridor Alignment–Red Cliffs NCA (AR, Ex. M).[9/]

On March 30, 2009, Congress designated the "Red Cliffs National Conservation Area," subject to valid existing rights, pursuant to section 1974(c) of the Omnibus Public Land Management Act of 2009 (OPLMA), Pub. L. No. 111-11, 123 Stat. 991, 1082. The NCA encompasses approximately 44,725 acres of public land in Washington County, Utah, north of the City.[10/] Designation and management of the NCA is designed, *inter alia*,

> (1) to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the [NCA]; and
>
> (2) to protect each species that is–
>
> (A) located in the [NCA]; and
>
> (B) listed as a threatened or endangered species [under the ESA.]

123 Stat. at 1081. BLM is required, by section 1974(d) of the OPLMA, Pub. L. No. 111-11, 123 Stat. 991, 1082, to develop, within 3 years after enactment of the OPLMA, a comprehensive long-term management plan (MP) for the NCA, which may incorporate provisions of the RMP, HCP, and PUP. Within that same time frame, BLM is also required by section 1977(b) of the OPLMA, Pub. L. No. 111-11, 123 Stat. 991, 1089, to develop a comprehensive travel management plan (TMP) for public lands in the county, which will, *inter alia*, provide a "clearly marked network of roads and trails," and "designate a system of areas, roads, and trails for mechanical and motorized use."

For our present purposes, the 1.56-mile segment of the proposed ROW, situated in secs. 8, 17, and 18, T. 42 S., R. 15 W., would cross public lands designated as part of the NCA and Desert Reserve. *See* Maps of Washington Parkway (attached to ROW Application) (AR, Ex. C); Map of Red Cliffs NCA and Red Cliffs

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[9/] In contrast to ROW avoidance areas, the RMP designated "ROW exclusion areas," totaling 2,690 acres, wherein "[n]ew rights-of-way will be granted . . . only when required by law or [F]ederal cou
rt action." ROD and RMP at 2.6 (RMP Decision LD-19); *see id.* at 2.6 (Table 2-3), 2.76 (Map 2.3).

[10/] The NCA virtually coincides with the previously-established Desert Reserve. *See* Map of Red Cliffs NCA and Red Cliffs Desert Reserve Boundary Differences; Decision at 2 ("The public lands of the Red Cliffs NCA comprise 70% of the Washington County HCP Reserve"); Answer at 6.

Desert Reserve Boundary Differences. Further, these public lands were designated by FWS as critical habitat for the desert tortoise. *See* Maps of Washington Parkway; Map of T&E Desert Tortoise Habitat–Red Cliffs NCA.

BLM is required b
y section 1974(e) of the OPLMA, Pub. L. No. 111-11, 123 Stat. 991, 1082, to manage the public lands in the NCA in accordance with section 1974 of the OPLMA, FLPMA, and other applicable law, and "in a manner that conserves, protects, and enhances the resources of the [NCA.]"[11/] Only "uses" that BLM, as the delegate of the Secretary, determines "would further a purpose described in [section 1974(a) of the OPLMA]" may be allowed in the NCA. 123 Stat. at 1082. Except for administrative purposes or in emergencies, the statute permits "the use of motorized vehicles in the [NCA] . . . only on roads designated by the [MP] for the use of motorized vehicles." *Id.* Finally, section 1974(h) of the OPLMA, Pub. L. No. 111-11, 123 Stat. 991, 1083, states that nothing in section 1974 "prohibits the authorization of the development of utilities within the [NCA]," if development is carried out in accordance with the applicable utility development protocol in the HCP and any other applicable law.

As required by section 1974(d) of the OPLMA, BLM is "in the process of developing" a comprehensive long-term MP for the NCA, and, as required by section 1977(b) of the OPLMA, a comprehensive TMP. Answer at 6, 7; *see* 75 Fed. Reg. 25,876 (May 10, 2010); SOR at 7.

In a January 28, 2013, cover letter accompanying its original submission of the ROW application, the County acknowledged the fact that BLM had yet to promulgate its NCA MP. However, given the upcoming availability of highway funding, the County stated its desire to move forward with the specific highway project, recognizing that BLM would expend considerable time and effort in conducting the environmental review required under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and in the decisionmaking process.[12/] In particular, the County noted that its

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[11/] The public lands in the NCA were also withdrawn from all forms of entry, appropriation, and disposal under the public land laws, location, entry, and patenting under the mining laws, and the operation of the mineral leasing, mineral materials, and geothermal leasing laws. *See* 123 Stat. at 1083.

[12/] The County indicated that, even though BLM's adjudication of the ROW application would necessarily take place apart from the ongoing land use planning process that was designed to culminate in promulgation of the NCA MP, BLM's approval of the application "can amend your current Land Use Plan," which could "eventually be incorporated into your ongoing Resource Management Planning

(continued...)

proposed highway raised the issue of "*where* the proposed [ROW] will go through the recently designated Red Cliffs [NCA,] which has [Federally-]listed Mojave Desert Tortoise habitat." Letter to BLM, dated Jan. 28, 2013, at unp. 1 (emphasis added). The County expressed its willingness to fund an environmental impact statement (EIS), in coordination with the Utah DOT, and requested BLM to initiate the review and decisionmaking process "as soon as possible." *Id.* The County deemed the highway project to be a "high priority," given the need to protect the safety of local residents and to promote the anticipated future growth of the county. *Id.* Further, in its ROW application, the County stated that it would protect wildlife:

> No probable effects on wildlife are planned. We are planning to help enhance the overall conditions in the NCA as mitigated for this project. Some wildlife may be displaced by construction, but could be removed and held until completion–then released back.

In his May 2013 decision, the Field Office Manager denied the County's ROW application, citing BLM's discretionary authority under Title V of FLPMA and 43 C.F.R. § 2804.26(a), which states BLM may deny an ROW application when "[t]he proposed use is inconsistent with the purpose for which BLM manages the public lands described in [the] application." He referred to the fact that the SGFO RMP provides for managing the public lands covered by the County's ROW application with the ultimate goal of promoting the recovery and delisting of T&E species under the ESA. *See* Decision at 2 (citing ROD and RMP at 2.25). In order to achieve these overall purposes, the Field Office Manager stated that the RMP, in RMP Decision FW-10, specifically denotes designated critical habitat as ROW avoidance areas, and, in RMP Decision LD-19, in addition to designating the Desert Reserve as an ROW avoidance area, provides that new ROWs may be granted in ROW avoidance areas only when feasible alternative routes or designated corridors are not available. *Id.* (citing ROD and RMP at 2.25 and 2.6).

Considering these factors, the Field Office Manager concluded that "[t]he granting of a new ROW . . . would not be in conformance with the objectives and management decisions contained in the St. George Field Office RMP." Decision at 2. He further stated:

12/ (...continued)
effort." Letter to BLM, dated Jan. 28, 2013, at unpaginated (unp.) 1. It thus acknowledged the likelihood that BLM would need to amend the SGFO RMP in order to approve the ROW application, since approval does not conform to the current RMP. *See* SOR at 5 ("The [ROW] application may require an amendment to the current [SGFO] RMP.").

> The proposed use of the ROW would not be consistent with the purposes for which BLM manages the[] [public] lands [at issue], as *construction of the proposed highway would negatively impact designated critical habitat and populations of the threatened Mojave desert tortoise*, as well as other resource values.

Id. (emphasis added).

The County's Arguments on Appeal

In its SOR, the County argues that BLM improperly determined that the ROW would be inconsistent with the public land management purposes identified in the SGFO RMP. The County further contends that BLM's decision contravenes section 1977(b) of the OPLMA, Pub. L. No. 111-11, 123 Stat. 991, 1089, which requires BLM, in developing a comprehensive TMP, to consider a "northern transportation route" in the county. *Id.* The County states that this directive was the basis for its proposed ROW, and that the denial of the ROW application was premature since BLM failed to consider authorization of a northern transportation route. The County argues that BLM did not properly apply the regulatory criteria for denial of an ROW application, having failed to consider the public health and safety factors that weighed in favor of the proposed ROW. It also notes that BLM failed to consider alternative routes and appropriate measures for mitigating the adverse effects of the proposed ROW on the NCA.

Discussion

It is well established that BLM, as the Secretary's delegate, holds broad discretionary authority under section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (2006), to grant or deny ROW applications. *See, e.g.*, *Graham Pass, LLC*, 182 IBLA 79, 87 (2012). When BLM grants or denies an ROW application, its decision must have a rational basis, and not be arbitrary and capricious. *See id.* In challenging such an exercise of discretionary authority, we have long held that

> [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, including less stringent alternatives to the decision, and acted on the basis of a rational connection between the facts found and the choice made.

Id. The burden is not satisfied simply by expressions of disagreement with BLM's analysis or conclusion. *Id.*

More specifically, BLM "may," pursuant to 43 C.F.R. § 2804.26(a), deny an ROW application when it determines that any of the following listed conditions apply: (1) the proposed use of the ROW is inconsistent with the purpose for which BLM manages the public lands; (2) the proposed use is not in the public interest; (3) the applicant is not qualified to hold an ROW grant; (4) issuance of the ROW grant would be inconsistent with FLPMA, other laws, or regulations; (5) the applicant does not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the ROW; or (6) the applicant has not adequately complied with a BLM deficiency notice or request for information needed to process the ROW application.

In the present case, BLM stated in its May 2013 decision that the granting of the proposed ROW would not "conform[] with the *objectives and management decisions*" of the RMP, and that the proposed use "would not be consistent with the purposes for which BLM manages the[] [public] lands" at issue, as set forth in the RMP. Decision at 2 (emphasis added).

The decision to deny the County's ROW application because the proposed use is "inconsistent with the purpose for which BLM manages the public lands" under 43 C.F.R. § 2804.26(a) involves the exercise of BLM's discretionary authority under Title V of FLPMA and its implementing regulations. *See*, *e.g.*, *Wiley F. Beaux*, 171 IBLA 58, 66 (2007). Such an exercise must consider the purpose for which BLM manages the public lands at issue, as identified in the applicable RMP, because 43 C.F.R. § 1610.5-3(a) requires BLM to determine whether the proposed ROW use conforms with the RMP. BLM must consider whether the RMP either "specifically provide[s]" for that use or the use is "clearly consistent" with the terms, conditions, and decisions of the RMP. *See* 43 C.F.R. § 1601.0-5 ("*Conformity or conformance*"). When the proposed ROW use is neither specifically provided for nor clearly consistent with the RMP, its approval may be deemed to be inconsistent with the purpose for which BLM manages the public lands. Such an ROW application may be properly denied pursuant to 43 C.F.R. § 2804.26(a). *See*, *e.g.*, *Wiley F. Beaux*, 171 IBLA at 59-61, 66-67.

In the present case, BLM decided under 43 C.F.R. § 2804.26(a) to deny the ROW application because it deemed the proposed use to be "inconsistent with the purpose" for which the public lands at issue are managed. BLM effectively concluded that approval of the ROW does not "conform" with the RMP, within the meaning of 43 C.F.R. § 1610.5-3(a), because the proposed ROW use is neither specifically provided for nor clearly consistent with the RMP. *See* Answer at 9 ("BLM did not abuse its discretion in concluding that approving Appellant's [ROW] application . . . would not be in conformance with the RMP."), 12 ("[U]nder . . . 43 C.F.R. § 2804.26(a), BLM may deny a[n] [ROW] application if the proposed use is

inconsistent with the purpose for which BLM manages the public lands, which is precisely why BLM denied Appellant's application.").

[1] BLM concluded that the proposed ROW is inconsistent with the purpose for which the public lands are managed on the basis that the public lands involved are included in an ROW avoidance area. However, the applicable land use plan allows new ROWs in such avoidance areas when feasible alternative routes or designated corridors are not available. BLM has failed to address this question. For this reason, we deem it appropriate to set aside BLM's decision and remand the case to BLM for further review.

BLM did not identify any management decision in the RMP that specifically precludes the granting of the County's proposed ROW. Nor did BLM identify any purpose set forth in the RMP with which granting of the ROW is demonstrably inconsistent. Rather, it is clear that the RMP expressly allows the granting of an ROW in an ROW avoidance area when there are no feasible alternative routes or designated corridors. In such a case, the granting of an ROW can "conform" with the RMP within the terms of 43 C.F.R. § 1610.5-3(a), even though the area of public lands in the avoidance area contains desert tortoises and critical habitat for the desert tortoise. *See* ROD and RMP at 2.27 ("New rights-of-way may be authorized in the Reserve in accordance with protocols established in the HCP"); BiOp (ES/6-UT-98-F-005), dated Aug. 12, 1998, at 19 ("Through the establishment of extensive rights-of-way avoidance areas, all desert tortoise critical habitat would be protected from surface disturbing activities associated with rights-of-way development. . . . Where other alternative routes are not feasible, future rights-of-way that are allowed within the critical habitat would have continued protection of the ESA through mitigation stipulated by a section 7 consultation with the Service."), 24 ("Although the HCP Reserve is a[n] [ROW] avoidance area, new rights-of-way could still be permitted in accordance with protocols established in the HCP").

We do not doubt that the route of the proposed public highway crosses an ROW avoidance area that contains designated critical habitat for the Federally-listed desert tortoise and is situated in the HCP Reserve. However, the RMP does not provide a bright-line test for deciding whether an ROW may be granted in an avoidance area, but instead requires BLM to assess the existence of feasible alternative routes or designated corridors. If it finds that a feasible alternative route or corridor exists, BLM may deny the ROW application. However, if BLM decides that no feasible alternative route or corridor exists, BLM may justifiably conclude that the proposed ROW for public lands in the ROW avoidance area is not precluded by the cited provisions of the RMP, and may proceed to further adjudicate the application on that basis.

Based on BLM's decision and the supporting record provided by BLM, we conclude that BLM has not addressed the question of whether there exists a feasible alternative route or designated corridor for the proposed ROW that does not include public lands in the ROW avoidance area. *See* SOR at 15 ("[T]here are possible alternatives to the currently proposed route, but all routes are within [ROW] avoidance areas or would potentially affect other special designation areas managed by BLM or the Forest Service"). In fact, there may be no feasible alternative routes or designated corridors for the proposed ROW, meaning that BLM is not necessarily precluded by the cited provisions of the RMP from granting the ROW. However, the converse is equally true.

BLM may deny an ROW application based on its determination that doing so is necessary to protect wildlife and/or its habitat, especially when the wildlife species at issue is a listed T&E species and its habitat is designated as critical under the ESA, even though the proposed use is not likely to jeopardize the species or destroy or adversely modify its critical habitat. *See*, *e.g.*, *Mountain Home Highway Dist.*, 147 IBLA 222, 227-29 (1999); *Jenott Mining Corp.*, 134 IBLA 191, 192-93, 194-95 (1995) (mineral materials sale); *Stewart Hayduk*, 133 IBLA 346, 355-57 (1995); *Kenneth Knight*, 129 IBLA 182 (1994); *King's Meadow Ranches*, 126 IBLA 339 (1993); *Edward R. Woodside*, 125 IBLA 317, 318-20, 325 (1993); *Lower Valley Power & Light, Inc.*, 82 IBLA 216, 223-25 (1984); *James M. Chudnow*, 76 IBLA 167 (1983) (oil and gas lease). It may not, however, do so without a rational basis.

It is well established that a decision made in the exercise of BLM's discretionary authority must, at its most basic, provide a reasoned and factual explanation for the action taken, supported by a proper administrative record, as follows:

> [The] [a]ppellant must be given some basis for understanding and accepting the [decision] or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board [in the exercise of its objective, independent review authority] can determine its correctness if disputed on appeal.

Graham Pass, LLC, 182 IBLA at 92 (quoting *S. Union Exploration Co.*, 51 IBLA 89, 92 (1980)). Absent the necessary explanation and supporting record for an agency decision, we have long held that it is appropriate to set aside the decision, and remand the case to BLM for compilation of a more complete record and readjudication of the matter. *See*, *e.g.*, *Graham Pass, LLC*, 182 IBLA at 92, and cases cited.

We hold that BLM failed to provide a reasoned and factual explanation for its denial of the County's ROW application, because it did not address the question of whether there are feasible alternative routes or designated corridors for the ROW or whether the ROW may be granted in such a way as to avoid any negative impact to desert tortoises or their critical habitat. *See Graham Pass, LLC*, 182 IBLA at 84, 89, 92-93; *Mack Energy Corp.*, 180 IBLA 291, 298-303 (2011).

However, on appeal, BLM provides an entirely different reason, not set forth in the May 2013 decision, for denying the County's ROW application. BLM now asserts that, in the ITS of an August 12, 1998, BiOp (ES/6-UT-98-F-005), which was prepared in conjunction with promulgation of the SGFO RMP and is set out as Appendix 4 of the RMP, FWS provided that no new paved roads shall be authorized in a DWMA, and, since the route of the paved public highway at issue would pass through a DWMA, BLM was precluded from approving the County's ROW application for construction, operation, and maintenance of the public highway. *See* Answer at 8-9 (citing ROD and RMP, Appendix 4 (U.S. FWS Terms and Conditions for Authorized Activities within Desert Tortoise Habitat), at A4.7).

We note that BLM provided, in RMP Decision FW-15: "All activities within desert tortoise critical habitat will be conducted in accordance with the terms and conditions described in the U.S. Fish and Wildlife Service Biological Opinion for the Mojave desert tortoise (August 12, 1998). The terms and conditions are outlined in Appendix 4." ROD and RMP at 2.26. Appendix 4 contains the ITS of the August 1998 BiOp. *See* BiOp, dated Aug. 12, 1998, at 45-58. Under the heading "*Terms and Conditions*," FWS states: "In order to be exempt from the prohibitions of section 9 of the ESA, *the Bureau must comply with the following terms and conditions*, which implement the reasonable and prudent measures . . . . These terms and conditions are nondiscretionary." (Emphasis added.) ROD and RMP, Appendix 4, at A4.2. Thereafter, FWS specifically provided, in pertinent part, that "[n]o new paved roads shall be authorized *in the DWMA*[.]" (Emphasis added.) *Id.* at A4.7. The "DWMA" appears to refer to the Upper Virgin River DWMA that FWS had proposed for designation by BLM. *See* ROD and RMP, Appendix 4, at A4.7; Recovery Plan at 40 (Figure 8), F7 to F9; BiOp, dated Aug. 12, 1998, at 28 ("The recovery plan for the Mojave population of the desert tortoise (Service 1994) proposed establishment of 14 DWMAs in six Recovery Units. . . . The boundaries of proposed DWMAs are not precisely defined in the recovery plan, but would be established by the Bureau . . . in coordination with the Service, State wildlife agencies, and others."). BLM states that the Upper Virgin River DWMA is synonymous with the Upper Virgin River CHU. *See* Answer at 8 n.6; BiOp, dated Aug. 12, 1998, at 1 ("The proposed . . . RMP establishes a Desert Wildlife Management Area (DWMA) in the Upper Virgin River Recovery Unit as this unit is designated in the Desert Tortoise (Mojave Population) Recovery Plan (Service 1994). This DWMA coincides roughly with the Red Cliffs Desert Reserve established in 1996[.]").

The ITS clearly precludes BLM from authorizing any new paved roads in the Upper Virgin River DWMA, which seems to encompass the public lands now at issue. However, we find nothing in the RMP, as finally promulgated, either designating the DWMA or deeming it to be synonymous or co-extensive with the CHU. Nor are we yet persuaded that, by incorporating the terms and conditions of the August 1998 BiOp, including the ITS, into the RMP, BLM specifically meant to preclude paved roads in a DWMA that may never have been established. On remand, BLM may choose to rely on such terms and conditions, but the decision must adequately explain the underlying facts and BLM's reasoning for doing so.

We recognize that BLM may be required by the dictates of the ITS to deny the County's ROW application, because, if approved, it would authorize a new paved road in the Upper Virgin River CHU. However, we conclude that the appropriate course of action is to set aside BLM's decision and remand the case for BLM to formally readjudicate the matter. Once the case is returned to BLM, it should address all of the applicable requirements for granting an ROW. We do not prejudge that adjudication or express any opinion about its outcome. Should the County, at the conclusion of that process, again be adversely affected, it may appeal to the Board pursuant to 43 C.F.R. Part 4.[13/]

We, therefore, conclude that the Field Office Manager, in his May 2013 decision, improperly denied the County's FLPMA ROW application, UTU-89592, for the stated reasons, and that the decision is properly set aside and the case remanded to BLM for further action.

[13/] We note that the County expresses frustration with what it sees as the slow pace of the land use planning required by the OPLMA. The Board lacks any authority to affect the timing or results of the land use planning process. *See Yates Petroleum Corp.*, 175 IBLA 44, 48 (2008); *Biodiversity Conservation Alliance*, 171 IBLA 313, 319 (2007); *Redding Gun Club*, 171 IBLA 28, 31-32 (2006); *S. Utah Wilderness Alliance*, 159 IBLA 220, 244 (2003); *Harold E. Carrasco*, 90 IBLA 39, 41 (1985). In any event, we note that BLM is in the process of developing a comprehensive long-term MP and TMP for the NCA, which involves consultation with appropriate Federal, State, Tribal, and local governmental entities, as well as members of the public. Once that process concludes, BLM presumably will have addressed the question of a northern transportation route.

Accordingly, 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 the case is remanded to BLM for further action consistent herewith.

// original signed
James F. Roberts
Administrative Judge

I concur:

// original signed
Eileen Jones
Chief Administrative Judge