



UNION TELEPHONE COMPANY, INC.

173 IBLA 313

Decided February 14, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

UNION TELEPHONE COMPANY, INC.

IBLA 2007-45

Decided February 14, 2008

Appeal from a decision of the Lander, Wyoming, Field Office, Bureau of Land Management, denying a communications site right-of-way application. WYW-154862.

Affirmed.

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

An application for a communications site right-of-way is properly rejected as not in the public interest where BLM determines that granting the application would result in the unnecessary proliferation of communications sites and would adversely impact visual resources, that viable alternative sites exist, and that use of the site for general communication uses would be contrary to the purposes for which the public lands are managed.

APPEARANCES: Shirley S. Fujimoto, Esq., Christine M. Gill, Esq., and David D. Rines, Esq., Washington, D.C., and V. Anthony Vehar, Esq., Evanston, Wyoming, for appellant; Suzanne H. Lewis, Esq., Laramie, Wyoming, for Biodiversity Conservation Alliance and Wyoming Outdoor Council, Intervenor; Doug Thompson, Lander, Wyoming, for Board of County Commissioners of Fremont County, Wyoming, Intervenor; and John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Union Telephone Company, Inc. (Union), has appealed from a November 2, 2006, decision of the Lander, Wyoming, Field Office, Bureau of Land Management (BLM), denying Union's application WYW-154862 for a cellular telephone

communications site right-of-way (ROW) on public lands in the Beaver Rim<sup>1</sup> area of Fremont County, Wyoming. Union sought an ROW for the following: (1) a 50-foot by 50-foot communications site containing an 80-foot-tall cell telephone tower, equipment building, generator building, and a 350-gallon propane tank; (2) a 6,720-foot by 16-foot area for a buried power line; and (3) a 1.97-mile long, 16-foot wide access road. In sum, the proposed ROW would disturb 6.246 acres of public lands. Statement of Reasons (SOR), Ex. 11. For the reasons that follow, we affirm BLM's decision.<sup>2</sup>

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<sup>1</sup> The site is located in sec. 2, T. 30 N., R. 96 W., Sixth Principal Meridian, Fremont County, Wyoming. It is located immediately north of U.S. Highway 287 between the towns of Lander and Jeffrey City. See Lander Resource Management Plan and Environmental Impact Statement (RMP/EIS) at 152 (Map 3-27), 408 (Map 5-14). Beaver Rim, which is also known as "Beaver Divide," comprises of approximately 7,000 acres of Federal public lands.

<sup>2</sup> Biodiversity Conservation Alliance and Wyoming Outdoor Council (BCA/WOC) filed a Motion to Intervene in Union's appeal, which Union opposed. By order dated June 4, 2007, the Board denied BCA/WOC's Motion to Intervene, and granted them Amicus Curiae status. BCA/WOC filed a Petition to Reconsider the Board's order pursuant to 43 C.F.R. § 4.403, contending that "[i]f BLM grants Union's application, an 80 foot cell phone tower and its ancillary facilities (*i.e.*, roads and power-lines) will substantially adversely affect the recreational and aesthetic value of the Beaver Rim to Petitioners and their members." Petition to Reconsider at 7. We hereby grant their Petition. "In accordance with the practice of the Board to grant intervention to a person having an interest that would be adversely affected if the Board overturned BLM's action, [BCA/WOC's] motion to intervene is granted." *Las Vegas Valley Action Committee*, 156 IBLA 110, 112 (2001). BCA/WOC also filed a request for extension to file a response to Union's SOR, stating that the Board's ruling on the Petition to Reconsider will alter the substance of their brief. They have submitted an Amicus Curiae Brief, which we have considered in reviewing this matter and in affirming BLM's decision to reject Union's ROW application, and accordingly we hereby deny their request for extension as moot.

The Board of County Commissioners of Fremont County (County Commissioners) filed a Motion to Intervene as a party in this proceeding, asserting that "[t]he injury that would be suffered by the County Commissioners and the citizens of Fremont County if the Board were to uphold BLM's Decision are clearly 'real and immediate' and 'more than hypothetical.'" County Commissioners' Motion to Intervene at 7, quoting *El Paso Electric Co.*, 146 IBLA 145, 148 (1998). We grant the County Commissioners' Motion to Intervene and have considered their arguments in reaching our decision herein.

## I. BACKGROUND

The Beaver Rim area where Union proposes to construct its communications tower and related facilities is within the Lander Resource Area and is subject to BLM's 1987 Lander RMP. On July 23, 1986, the Wyoming State Office, BLM, issued the RMP/EIS for the Lander Resource Area. The RMP/EIS identified 13 management subunits within the Resource Area, one of which is the Beaver Creek Management Unit. See RMP/EIS at 152 (Map 3-27), 408 (Map 5-14). The "Rim" runs about eight miles from north to south and is visible from U.S. Highway 287. The RMP/EIS documents the outstanding plant, wildlife, geologic, cultural, and scenic values present in the Beaver Rim area. See RMP/EIS at 31, 124 (Map 3-21), 131 (Table 3-13), 136, 139, 157, 159, 161, 172, 184, 186, 400, 407, 408, 409, and 412-13.<sup>3</sup>

On June 9, 1987, BLM issued a Record of Decision (ROD) for the RMP/EIS, selecting a preferred alternative under which "approximately 117,000 acres of the Lander Resource Area . . . will be designated as ACECs [Areas of Critical Environmental Concern] and will require intensive management of all surface-disturbing activities." ROD at 23 (emphasis added).<sup>4</sup> One of the areas designated as an ACEC is the 7,000 acre area of Beaver Rim. *Id.*; see also *id.* at 38. The RMP provides that Beaver Rim was designated as an ACEC in order "to protect significant sites and segments along the Oregon/Mormon Pioneer Trail (e.g., ruts, swales, graves, campsites, pristine settings, etc.)." *Id.* at 38. In addition to ACEC designation, the ROD would protect Beaver Rim's values by, *inter alia*, placing no-surface-occupancy (NSO) restrictions on oil and gas and phosphates exploration and development leases; developing a management plan to identify and protect rare plants; and encouraging Beaver Rim's designation as an NNL. See RMP/EIS at 398-400, 407-13. The RMP permits the construction of "major utility systems throughout the Beaver Creek Management Unit," but it provides that such systems "will be concentrated in existing corridors *whenever possible.*" ROD at 36 (emphasis added).

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<sup>3</sup> The National Park Service proposed that Beaver Rim be designated as a National Natural Landmark (NNL) for its scenic beauty, geology, and other natural values. See RMP/EIS at 184, 186.

<sup>4</sup> ACECs are defined by section 103 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1702(a) (2000), as "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards." Proposals for designating ACECs are made through BLM's land use planning process. See 43 C.F.R. § 1610.7-2.

On July 18, 2002, Union filed an initial application for a communications site ROW on and over Federal public lands within the Beaver Rim area, stating a need to provide enhanced cell telephone coverage for its customers. July 18, 2002, Application. To mitigate concerns over adverse impacts of the proposed communications facilities both on raptor nesting areas along Beaver Rim and also on Tribal cultural values, Union submitted a revised application dated October 31, 2003, which proposed an alternate site for the communication ROW at Beaver Rim, sometimes referred to as Beaver Rim #2, and stated a need to provide service from the “Lander/Riverton to Jeffrey City areas.” SOR, Ex. 9; BLM Answer at 7.

On January 23, 2004, a consultant, Western Archeological Services, Inc. (Western), issued a report concluding that Union’s proposed project would have no impact on Tribal cultural resources. *See* SOR, Ex. 9; SOR at 7-8; BLM Answer at 7. During 2003 and 2004, BLM conducted several other studies concerning the potential impact of Union’s proposed communications facilities at Beaver Rim on threatened or endangered species and determined that the project would have “no effect” on such species. *See* SOR, Exs. 9, 12 through 15; BLM Answer at 7.<sup>5</sup>

Union submitted revised applications dated February 2, 2004, and April 29, 2004, which proposed alternate sites for the communications facilities at Beaver Rim. *See* SOR, Ex. 11; BLM Answer at 7. This appeal concerns the April 29, 2004, revised application, which stated a need to provide cellular service along U.S. Highway 287 from Lander to Jefferey City.

Union indicates that it “investigated several options other than Beaver Rim” for a communications tower that would meet its needs, but concluded that these alternate sites are inferior. One such alternate site identified in Union’s April 2004

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<sup>5</sup> On Nov. 6, 2003, and Feb. 11, 2004, BLM biologists conducted evaluations of the proposed site, including a “T&E Section 7 Consultation” under the Endangered Species Act, 16 U.S.C. § 1537 (2000), with a breakdown of specific animal and plant species. Both evaluations concluded that there would be a “no effect” situation as a result of approving the project. *See* SOR, Exs. 12, 13, and 14.

On Jan. 23, 2004, Western completed a Class III Cultural Resource Inventory for the site and related access routes. According to the report, the project would not impact previously-identified cultural sites and no new cultural sites were discovered. The report, therefore, recommended cultural resource clearance for the final site, access road, and power line routes. SOR, Ex. 9 at 5.

A July 9, 2004, cultural and archaeological inventory report prepared by Western concluded that the potential for buried cultural remains in the project area is low, and recommended cultural clearance for the project. SOR, Ex. 15.

application is Cedar Rim.<sup>6</sup> Cedar Rim, located approximately 10 to 12 miles to the northeast of Beaver Rim in Fremont County, Wyoming, is an existing ROW utilities corridor on public lands. In its 2004 application, Union stated that the Cedar Rim site did not meet its needs as well as the Beaver Rim site, and would provide insufficient coverage for a 12-mile stretch of U.S. Highway 287. Union now states that “a tower at Cedar Rim would be incapable of providing the cellular telephone coverage necessary in this area, and it would therefore not be possible to place the proposed tower at this location.” SOR at 2. Union acknowledges, however, that the Beaver Rim site is also not capable of full coverage and that approval of that site would require yet another tower at an unspecified location. SOR at 3.

Subsequent to Union’s April 2004 application, additional cultural and environmental studies of the proposed Beaver Rim site were conducted. Notably, on July 28, 2006, Jared Oakleaf, BLM’s Outdoor Recreation Planner, completed a Visual Contrast Rating Worksheet (Worksheet), finding that the proposed Beaver Rim ROW would not meet Class II Visual Resource Management (VRM) objectives. The Worksheet stated that “[r]elocating this site to an existing disturbed site [Cedar Rim] is the only option available to meet class [II] designation.”<sup>7</sup> According to the

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<sup>6</sup> Box 13a of the application directs the applicant to “describe other reasonable alternative routes considered,” to which Union replied that “[o]ther alternatives looked at were the West and East Beaver Divide areas and the Cedar Rim Communication site area.” Union also identified Cedar Rim as an alternate site in the previous Feb. 2, 2004, ROW application.

<sup>7</sup> The *BLM Manual*, 8410-1, “Visual Resource Inventory Handbook,” provides BLM managers with a means for determining visual values. The inventory process consists of a scenic quality evaluation, sensitivity level analysis, and delineation of distance zones. Based on these three factors, BLM-administered lands are placed into one of four visual classes. These inventory classes represent the relative value of the visual resources.

The *BLM Manual* provides the following standards for the management of an area designated as Class II:

The objective of this class is to retain the existing character of the landscape. The level of change to the characteristic landscape should be low. Management activities may be seen, but should not attract the attention of the casual observer. Any changes must repeat the basic elements of form, line, color, and texture found in the predominant natural features of the characteristic landscape.

*BLM Manual*, H-8410-1, at 6.

(continued...)

Worksheet, “[t]he Beaver Rim feature creates a strong lateral line across the viewshed; as a result any horizontal disturbances to this line will create a strong contrast with the existing visual environment.” *Id.*

On August 14, 2006, BLM issued a Scoping Notice requesting public input on Union’s ROW application.<sup>8</sup> *See* SOR, Ex. 20. The vast majority of the comments received in response to this notice strongly opposed the project due to its potential adverse impact on scenic and environmental values. The Wyoming Game and Fish Department (WGFD) opposed the Beaver Rim site because of its likely adverse impact on raptors and crucial big game winter range habitat. *See* Letter from WGFD to BLM dated Sept. 18, 2006. Both the Eastern Shoshone Tribe and the Northern Arapaho Tribe opposed the site because of its likely adverse impact on cultural and environmental values. *See* Letter from the Eastern Shoshone Tribe to BLM dated Oct. 19, 2006; Undated Letter from the Northern Arapaho Tribe received by BLM on Oct. 23, 2006. On October 13 and 16, 2006, BLM met with the elders of the Tribes for consultation and to visit the Beaver Rim Site as proposed by Union. The elders preferred that Union’s communications site be located at Cedar Rim because of concerns over adverse impacts on cultural values. *Id.*; *see also* SOR at 10. The County Commissioners, on the other hand, supported the site because improved cell phone coverage provided by the site would benefit public safety. *See* Letter from County Commissioners to BLM dated Nov. 1, 2006.

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<sup>7</sup> (...continued)

When the level of impact which may result from management activities can no longer said to be “low,” where it “attracts the attention of the casual observer,” as in this case, such activities are properly prohibited, in BLM’s discretion.

<sup>8</sup> The notice reads:

The [proposed] action may improve cellular service to a 40-mile portion of highway 789/287 between Jeffrey City and Lander. The action would occur within an Area of Critical Environmental Concern (ACEC). This particular area was designated as an ACEC to protect significant sites and segments along the Oregon/Mormon Pioneer Trail. The intent of the designation was also to identify, protect, and maintain the habitat and population of rare plants and the Beaver Rim cushion plant and related successional plant communities within the Beaver Creek Management Unit. A previously developed telecommunications site is located near the proposed site and could also serve the objectives of this project as well.

SOR, Ex. 20 at 1.

By decision dated November 2, 2006, BLM denied Union's application for the proposed project at Beaver Rim as not in the public interest. This appeal followed.

## II. BLM's DECISION

BLM denied Union's ROW application because it determined that the proposed location is inconsistent with the "significant plant, animal, cultural, and paleontological resources" of the Beaver Rim ACEC, and that construction of the 80-foot tower would compromise the "highly scenic resources along Beaver Rim." Decision at 2. BLM stated that management of the Beaver Rim ACEC favors the alternative site at Cedar Rim, "an area already disturbed by several communication sites overlooking the Big Sand Draw Oil Field." *Id.* BLM stated that maps provided by Union "show that differences in the anticipated Beaver Rim and Cedar Rim service areas would be small." *Id.*

BLM emphasized that the Beaver Rim area was designated an ACEC in order "to identify, protect and maintain the habitat and population of rare plants," as well as "to protect raptor habitat and nesting sites." *Id.* BLM points out that "[b]ecause of these overlapping important resource values, the Beaver Rim area is identified in the Lander RMP as a 'no surface occupancy' area for oil and gas development," see Lander RMP, Map 17, and that "Wyoming BLM policy considers 'no surface occupancy' to apply equally to other, non-energy construction activities, if those activities would have similar adverse effects on resource values." Decision at 2.

In discussing the visual impact of Union's communications tower on the Beaver Rim area, BLM explained that the "project fails to meet highly scenic, visual resource management 'Class II' objectives for the Beaver Rim area," which "are aimed at retaining the existing landscape while allowing low levels of landscape change that don't attract attention." Decision at 3. BLM stated that "[t]he estimated annual average daily traffic level on U.S. Highway 287 is 2,173 vehicles," and that "[t]he proposed cell phone tower would be visible to those vehicles traveling along the highway for approximately 30 minutes, and would be highly visible during some of the most scenic portions of the drive." *Id.*

BLM argued that "the proposed action has the potential to adversely affect birds of prey which nest in the walls of Beaver Rim," and that locating the communications tower at Beaver Rim could significantly impact "[s]everal Wyoming BLM-listed sensitive plant species." *Id.* In support, BLM cites numerous comments from members of the public opposing the Beaver Rim site. More specifically, BLM noted that WGFD recommended that the tower be built at Cedar Rim, an alternative that comports with the Wyoming Bird Conservation Plan, stating: "Co-location of multiple telecommunications facilities on the same tower or clustering of towers in one



location restricts threats to birds to a single location, and reduces the cumulative footprint and habitat loss that would be otherwise incurred.” *Id.* at 4-5.

In addition, BLM stated that on October 13 and 16, 2006, it met with Arapaho and Shoshone Tribal representatives at the proposed tower site at Beaver Rim, the alternative site Beaver Rim #2, and the Cedar Rim site. BLM indicated that “[t]he proposed site was not viewed favorably by either tribe because of concerns over known spiritual or sacred sites.” *Id.* at 5. The Arapaho elders deemed the site at Beaver Rim #2 acceptable, but the Shoshone elders objected “because of its proximity to the important part of the Rim, and the potential for disturbing known and unknown cultural resources.” *Id.* Both Tribes “thought that the site they were shown on Cedar Rim was the most appropriate, since it has been disturbed already with many towers in place.” *Id.*

BLM evaluated Union’s application against the “importance of the scenic resources associated with the Beaver Rim area, as well as the importance of plant, wildlife, and cultural and traditional values in that specific area,” and concluded that “[g]uidance contained in the Lander [RMP] is weighted heavily in favor of avoiding disruption of these values whenever alternative development plans and proposals are available.” *Id.* at 6. BLM determined that designation of the Beaver Rim ACEC as an NSO area for oil and gas development is, as a matter of BLM policy, a factor favoring denial of Union’s application. BLM concluded that Union’s proposed project is not in the public interest.

### III. ARGUMENTS ON APPEAL

#### A. Union’s SOR

Union argues on four bases that BLM failed to consider all relevant facts and factors in denying its application for a communications ROW at Beaver Rim, as follows: (1) BLM “erred in determining that Cedar Rim is a suitable alternative (an error that effectively tainted other determinations in the Decision)”; (2) BLM “disregarded the extensive factual record developed in this case”; (3) BLM “failed to conduct proper consultations with affected Native American tribes”; and (4) BLM improperly applied the Lander RMP’s NSO restriction to the proposed project. SOR at 13. We will briefly review these arguments in turn.

##### 1. The Cedar Rim Alternative

Union’s principal argument is that “BLM committed a fundamental error that affected every aspect of its November 2, 2006, Decision by concluding that Cedar Rim is a suitable alternative to a site at Beaver Rim,” and that “BLM consistently ignored the very purpose of the entire project—to provide and improve communications

coverage along the US Highway 287 corridor.” SOR at 14. Union argues that the coverage in the Highway 287 corridor potentially achieved by placing the communications tower at Cedar Rim “would be . . . degraded by the topography and terrain features between this site and Highway 287.” *Id.* at 17. Union asserts that “the majority of the coverage that would be provided from Cedar Rim would be of areas that are already largely covered by existing Union cell sites in the Riverton area,” that “construction of a tower at Cedar Rim would . . . fail to provide coverage in the area where it is needed.” *Id.*

Union states that BLM’s alleged failure to understand the facts before it was “likely based on a mistaken, non-expert reading of the initial coverage maps requested from Union in September 2002 which . . . were so confusing to BLM staff that they requested simplified coverage maps focusing just on Beaver Rim and Cedar Rim less than two months later.” *Id.* at 20.<sup>9</sup> Union claims that its “site-specific maps . . . plainly show that any coverage of US Highway 287 provided by either a fifty-foot or eighty-foot tower at Cedar Rim would be highly scattered and thus inadequate for the provision of any reliable communications . . . .” *Id.* at 21; *see* Exs. 2 and 3. Union asserts that “it is not possible to achieve the objectives of Union’s proposal . . . by locating the tower in the existing Cedar Rim corridor.” SOR at 22. Union concludes that BLM’s decision “is not based on a reasoned analysis of all relevant factors, entirely fails to consider important aspects of the problem,” and accordingly is arbitrary and capricious under *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co. (Motor Vehicles)*, 463 U.S. 29, 43 (1983). *Id.*

Union further avers that BLM’s error regarding Cedar Rim tainted and undercut the validity of the public scoping process, as demonstrated by the August 14, 2006, Scoping Notice, which reads in pertinent part: “A previously developed telecommunications site is located near the proposed site and could also serve the objectives of this project as well.” SOR at 23, *quoting* Ex. 20 at 1. SOR at 23; *see* Ex. 1 at 3-4. Union likewise argues that 2006 Tribal consultations were tainted due to the same error, as Cedar Rim was presented to Tribal leaders as a suitable alternative site. SOR at 24-25.

## 2. BLM Disregarded the Extensive Factual Record

Union argues that BLM’s decision disregarded the factual record, including numerous discussions, site visits and studies, which Union catalogs, as well as Union’s attempts to mitigate the potential impact on environmental and cultural resources of

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<sup>9</sup> Union argues that BLM should not have relied on the 2002 maps because they do not adequately depict the amended Beaver Rim location in the 2004 application. Notably, however, Union itself relies upon those propagation maps in its 2004 application.

the proposed project.<sup>10</sup> Union claims that “[c]omments opposing Union’s application due to the perceived impact of the project on plants and wildlife, which were based on inaccurate and incomplete information from BLM, were then used by BLM to support the determinations it made in its Decision.” *Id.* at 34.

Union argues that it was not given the opportunity to review, respond to, or mitigate BLM’s concerns regarding the project’s failure to “meet highly scenic, visual resource management ‘Class II’ objectives for the Beaver Rim area.” *Id.* at 36, *quoting* Decision at 3. Union states that “[e]ven if it were appropriately within BLM’s discretion to determine that the public interest in scenic or other values outweighs the public interest in reliable communications for the safety of travelers in a remote area, no such determination has been made in this case, nor was this factor ever analyzed or even taken into consideration.” SOR at 39, *citing* section 503 of FLPMA, 43 U.S.C. § 1763 (2000).

### 3. Consultation with Native American Tribes

Union asserts that BLM arbitrarily excluded it from the opportunity to participate in the October 2006 on-site visit by, or in any discussions with, Tribal representatives in violation of the *BLM Manual*, H-8120-1.<sup>11</sup> Union asserts that “the tribal representatives were provided with incomplete and inaccurate information concerning many relevant aspects of Union’s proposal, including the fact that Union had proposed a total of four different sites on Beaver Rim by the time the final site location was selected.” *Id.* Union argues that it has no information regarding the visit or conversations with tribal representatives, but infers that the site they were shown was, in fact, a site initially proposed and abandoned several years previously. *Id.* at 42-43. Union states that, because of its exclusion from the Tribal consultation

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<sup>10</sup> Union notes that in order to avoid or mitigate specific concerns of the consultants and BLM’s specialists, Union moved the cell tower approximately 300 feet northeast of the location initially proposed. SOR at 28-33. Moreover, Union points out that, after discussing the initial site with Tribal leaders, it again moved its proposed tower site 2300 feet to the northeast of the original site to avoid completely the identified Native American cultural sites and to provide a quarter-mile buffer requested by the Tribal representatives. To the best of our understanding, Union did not, subsequent to 2002, provide BLM with propagation maps of this location.

<sup>11</sup> According to this provision, “[a]ll such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.” *BLM Manual*, H-8120-1, “Guidelines for Conducting Tribal Consultation” at V-7, *quoting* Executive Memorandum, “Government-to-Government Relations with Native American Tribal Governments,” Apr. 29, 1994.

process, BLM has prevented Union from explaining mitigation efforts that could resolve the Tribes' concerns.

Moreover, Union argues that BLM failed to document any of its consultation efforts, as required by the *BLM Manual*, H-8120-1, at I-1.<sup>12</sup> “Without such documentation,” contends Union, “BLM’s decision cannot be upheld because there is insufficient evidence in the record to support its conclusion.” SOR at 45, *citing SMR Network, Inc.*, 131 IBLA 384, 386 (1995); *Glenwood Mobile Radio Co.*, 106 IBLA 39, 41-42 (1988); *Coy Brown*, 115 IBLA 347, 356 (1990). Union concludes that “BLM has either failed to document its consultation efforts as required . . . or BLM has failed to disclose any such documentation to Union, meaning that . . . as a simple matter of due process, this documentation (if it exists) cannot serve as the basis for its initial decision or for a decision on appeal.” *Id.* at 47, *citing BLM Manual*, H-8120-1, at IV-3; 43 C.F.R. § 4.24(a)(4).

#### 4. *The “No Surface Occupancy” Restriction*

Finally, Union objects to BLM’s application of the oil and gas NSO to the proposed ROW. In fact, argues Union, BLM’s statement that the oil and gas NSO designation applies to all construction activities, including its planned communication site, appears for the first time in the November 2, 2006, decision. SOR at 48. Union argues that this action “has unfairly denied Union, through its consultants, any opportunity to conduct any type of independent analysis of how various mitigation measures, such as seasonal restrictions on access, could address BLM’s previously unannounced concerns relating to surface occupancy.” *Id.*

More specifically, Union argues that the Lander RMP does not, in fact, include an NSO policy for utility rights-of-way, including communications sites. Union points to the language of the RMP, which states that except for three areas not at issue in this case, “construction of major utility systems throughout the Beaver Creek Management Unit will be allowed.” *Id.* at 49, *quoting* Lander RMP at 36. The only limitation on utility system construction is that such systems be concentrated in existing corridors “whenever possible.” *Id.* Union argues that BLM effectively broadened the scope of the NSO designation beyond what is set forth in the RMP, in

<sup>12</sup> The *BLM Manual*, H-8120-1, at V2, states that, “[w]hatever method is chosen, all consultation activities should be carefully documented in the official record.” *BLM Manual*, H-8120-1, at V2. The *BLM Manual* provides: “Field Office managers and staffs shall consult with affected tribes to identify and consider their concerns in BLM land use planning and decision-making, and shall document all consultation efforts.” *BLM Manual*, § 8120.06(E), “Tribal Consultation Under Cultural Resource Authorities.”

violation of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2000). Union argues that this “policy decision” operates as a rule adopted without public notice and comment proceedings in violation of the APA. Further, Union argues that BLM has unfairly denied it the opportunity to conduct independent analysis of how various mitigation measures could address BLM’s concerns relating to surface occupancy.

*B. The County Commissioners’ Motion to Intervene*

The County Commissioners support Union’s application to construct the communications tower and related facilities at the Beaver Rim site. They state that “[t]he southeast portion of Fremont County, which includes a major section of US Highway 287, currently has large gaps in coverage for communications services,” and that they “have long been concerned about the limitations these coverage gaps impose on their ability to quickly respond to fires, accidents, and other life-threatening emergencies in the area.” County Commissioners’ Motion to Intervene at 2. They catalog the numerous public safety and emergency situations that demonstrate the need for effective cell phone service in the area. *Id.* at 2-4. By letter to BLM dated November 1, 2006, they submitted comments to BLM expressing the view position that “public safety takes higher priority than occasional visual enjoyment, especially in this situation.” Nov. 1, 2006, Letter at 2.

*C. BLM’s Answer and BCA/WOC’s Amicus Curiae Brief Supporting BLM’s Decision*

In its Answer, BLM states that its denial of Union’s ROW application was based upon a reasoned analysis of the factors involved and that its decision was made with due regard for the public interest. BLM states that it weighed the relevant factors and “rejected Union’s preferred ROW communications site at Beaver Rim because the site was incompatible with the values of the Lander Resource Area RMP and alternative sites were available for providing feasible coverage, including but not limited to the existing ROW corridor at Cedar Rim.” Answer at 14. Further, BLM states that its decision is “rationally based on the RMP which establishes that the significant surface values of Beaver Rim should be protected from surface disturbance and utility systems should be concentrated in existing ROW corridors wherever possible.” *Id.* at 14, *citing D.J. Laughlin*, 154 IBLA 159, 163-66 (2001).

With regard to Union’s contention that construction of the communications facilities at Beaver Rim would be less difficult and less expensive than at Cedar Rim, BLM responds that “[t]he Board has held that this is not sufficient reason to disturb a BLM ROW decision.” Answer at 15, *citing D.J. Laughlin*, 154 IBLA at 165. BLM asserts that Union has failed to establish error in BLM’s determination that Cedar Rim is a suitable alternative. BLM states that “the record contains only Union’s propagation maps and Union’s conclusion, based on the maps, that Cedar Rim is

not suitable,” and that “Union did not submit, and the record does not contain, the studies upon which the maps are based.” Answer at 15. BLM states that it “interprets the maps differently from Union and has concluded that the difference in coverage provided by the Beaver Rim and Cedar Rim sites is ‘small.’” *Id.*

BLM contends that “Union’s argument that BLM failed to consider Union’s efforts to mitigate potential adverse impacts of the proposed communications project on the cultural, plant, wildlife, and scenic values of the Beaver Rim area (SOR at 26-35) misconstrues the record and the gravamen of BLM’s reason for rejecting Union’s ROW application.” Answer at 16-17. BLM makes clear the basis for its decision:

Whether or not Union could have mitigated the potential adverse impacts to some degree was not central to BLM’s reasoning. Rather, the gravamen of BLM’s reasoning was that it was in the public interest to avoid *any* scenic and environmental damage to the Beaver Rim ACEC where Union’s use of alternate sites, one of which is an existing ROW corridor, were feasible. Clearly, if nothing else, it is in the public interest to avoid placement of an 80-foot tower on the unbroken horizon of the scenic Beaver Rim ACEC which serves as ‘emphasis’ to the pioneer values of the nearby Oregon/Mormon Pioneer Trail. This reasoning is in accord with Board decisions. *See, e.g., SMR Network*, 131 IBLA 384, 386 (1995) (“Avoiding the unnecessary proliferation of rights-of-way and associated structures on public land, especially where to do so minimizes environmental damage, is undoubtedly in the public interest.”).

*Id.* at 17.

In response to Union’s arguments regarding the site visit to Beaver Rim, BLM states that “[t]here is no provision in the referenced BLM Manual which requires BLM to invite the ROW applicant, Union, to participate in the site visits,” that Union was free to communicate with the Tribal elders about its proposed project, and that the *BLM Manual* is designed to protect the Tribes’ participation in public land decisions that could affect Tribal interests, rather than to support a party’s opposition to a Tribe’s views.

In responding to Union’s contention that BLM improperly applied oil and gas NSO restrictions to Union’s proposed project at Beaver Rim, BLM states that “[t]he NSO protections afforded by the RMP would be wholly negated if BLM readily

allowed development activities other than oil and gas to disturb the surface values to be protected by the NSO.” *Id.* at 19.<sup>13</sup>

In their *Amicus Curiae* Brief (Amicus Brief), BCA/WOC contend that BLM rendered a “well-reasoned decision of all the relevant factors with due regard for the public interest in Union’s project.” Amicus Brief at 5, *citing* 43 C.F.R. § 2804.26(a); *SMR Networks, Inc.*, 131 IBLA at 386. They maintain that “[t]he construction and placement of an 80 foot cell phone tower, and the tower’s ancillary facilities, [are] not compatible with the management of an ACEC.” Amicus Brief at 7.

Citing Oakleaf’s report, BCA/WOC agree with BLM’s finding that construction of the tower will conflict with Class II resource management objectives for Beaver Rim. Amicus Brief at 10, *quoting* ROD at 3. They argue that “[t]he cell tower *could not be reasonably blended into the landscape* to mitigate the injury to the aesthetics of the landscape.” Amicus Brief at 11 (emphasis in original). Specifically, they cite the report by Oakleaf, BLM’s Outdoor Recreation Planner, who stated that “re-locating the site to an existing site is the only option available to meet Class 2 designation.” Amicus Brief at 11, *quoting* SOR, Ex. 25.

In particular, BCA/WOC argue BLM’s rejection of Union’s ROW application is “on all fours” with the Board’s reasoning in *SMR Networks, Inc.*, 131 IBLA at 387, *i.e.*, that “avoiding the unnecessary proliferation of rights-of-way and associated structures on public land, especially where to do so minimizes environmental damage, is undoubtedly in the public interest.” Amicus Brief at 14. They assert that minimizing environmental damage in the Beaver Rim area, which has received ACEC and NSO designation, “is ‘undoubtedly in the public interest’ more than the company’s economic situation.” *Id.*; *see SMR Networks, Inc.*, 131 IBLA at 387.

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<sup>13</sup> Union filed a Reply to BLM’s Answer in which it states that BLM has indicated, for the first time, “that the data and materials provided by Union—at BLM’s request—may not have been sufficient.” *Id.* at 4. Union states that it “reasonably believed that BLM had all the necessary information regarding coverage, particularly since the coverage maps were prepared and provided in response to specific requests from BLM staff.” *Id.* at 5. Union calls this “newly-stated position . . . misleading at best, and in any event cannot serve as an excuse for BLM’s implausible interpretation of the coverage maps provided.” *Id.* Contemporaneously with its Reply to Answer, Union filed a Request for Hearing to address issues related to the suitability of Cedar Rim. In light of our disposition of this appeal, we hereby deny Union’s Request.

## IV. ANALYSIS

[1] At the outset, we note that BLM enjoys considerable discretion in approving or rejecting an application for an ROW. *See, e.g., Teton Communications*, 142 IBLA 117, 119 (1998); *SMR Network, Inc.*, 131 IBLA at 386. A BLM decision approving or rejecting an application for an ROW will ordinarily be affirmed by the Board when the record shows that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. *See, e.g., George Bernadot*, 121 IBLA 138, 139-40 (1991); *Glenwood Mobile Radio Co.*, 106 IBLA at 41-42; *High Summit Oil & Gas, Inc.*, 84 IBLA 359, 364-65, 92 I.D. 58, 61-62 (1985).<sup>14</sup>

In this case, BLM concluded that the public interest did not favor Union's proposed ROW in and through the Beaver Rim ACEC, because of the project's failure to meet VRM Class II objectives for the area because of the potential disruption of environmental and cultural values, and because of the availability of alternative options. It is well-settled that avoiding the unnecessary proliferation of ROWs and associated structures on public land, especially where to do so minimizes environmental damage, is undoubtedly in the public interest. *See* 43 C.F.R. § 2802.4(a)(2); *see also Glenwood Mobile Radio Co.*, 106 IBLA at 41-42; *SMR Network*, 131 IBLA at 386. Section 503 of FLPMA expressly provides: "In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical." 43 U.S.C. § 1763 (2000); *see also* 43 C.F.R. § 2800.0-2; *Ben J. Trexel*, 113 IBLA 250, 253 (1990); *Arnold E. Hedell*, 37 IBLA 22, 24 (1978); *Jicarilla Apache Indian Tribe*, 29 IBLA 57, 60, 64-65 (1977).

Our review of the record confirms that, contrary to Union's argument, BLM considered the relevant factors in rejecting Union's ROW application, as required by *Motor Vehicles*, 463 U.S. at 43. We agree with BCA/WOC that the Board's decision in *Teton Communications, Inc.*, provides clear authority for BLM's decision. In *Teton Communications, Inc.*, the area selected for a telecommunications tower was managed by BLM to protect "the highest and outstanding visual qualities," with the

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<sup>14</sup> The Departmental regulation at 43 C.F.R. § 2802.4 lists reasons for denying an application for a ROW to use public lands. The application may be denied if (1) the proposed ROW would be inconsistent with the purpose for which the public lands are managed; (2) the proposed ROW would not be in the public interest; (3) the applicant is not qualified to hold the ROW; (4) the ROW would otherwise be inconsistent with applicable laws; or (5) the applicant cannot demonstrate the technical or financial capacity to hold the ROW.



“management objective . . . being to retain the existing characterization of the landscape.” *Id.* at 118. Teton argued that BLM’s decision was arbitrary and capricious because BLM did not fully consider whether other sites would accommodate the type of service the company planned on providing. The Board stated that the factor of widespread public opposition, plus “the possible impact on visual and aesthetic values associated with allowance of the application, could be sufficient to justify rejection of the application, regardless of whether or not the type of coverage which Teton sought to supply was readily obtainable from other services.” *Id.* at 119. We conclude that those same factors “provided more than adequate justification for [BLM’s] rejection of the instant application.” *Id.* at 120; *see also SMR Network, Inc.*, 131 IBLA at 387; Amicus Brief at 21.

We see no basis for Union’s argument that BLM disregarded the factual record in reaching its decision, or failed to give sufficient weight to certain evidence. It is well-settled that the decision of the fact-finder need not mention every fact placed in evidence. Omissions of reference to particular testimony or exhibits do not constitute *per se* failures to consider the evidence. *E.g., United States v. Chartrand*, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973); *United States v. Zerwekh*, 9 IBLA 172, 175 (1973). The decision as written provides a detailed factual basis for the conclusions reached. Based upon the record before us, we conclude that BLM appropriately determined that the proposed ROW with an 80-foot tower in the scenic Beaver Rim ACEC was not in the public interest.<sup>15</sup> Even assuming, as Union argues, that the project would not have an effect on threatened or endangered species or on cultural resources, the clear impact on visual and aesthetic values within the subject VRM Class II area constitutes a sufficient factual basis for BLM’s decision to deny Union’s ROW application. *See Visual Contrast Rating Worksheet*, July 28, 2006.

We have considered Union’s argument that BLM conducted consultation with Tribal representatives in violation of *BLM Manual* guidelines. We are persuaded, however, that BLM was properly guided by the paramount objective stated in the Lander RMP, *i.e.*, that it manage the Beaver Rim ACEC so as to protect its scenic and other cultural values. BLM’s decision to deny the ROW application was reasonable in light of this purpose. Further, provisions of the *BLM Manual*, unlike regulations, do not have the force and effect of law. 1 C.F.R. § 305.92-2; *Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986). Even assuming, *arguendo*, that BLM erred as argued by Union, that error would not mandate reversal of BLM’s decision because sufficient basis exists for affirming BLM’s decision, as set forth above. The Board is not limited

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<sup>15</sup> The record also documents BLM’s concern about proliferation of ROWs; the record includes a letter from Union’s ROW Engineer to BLM suggesting that another company would seek to join Union by locating communications facilities at the Beaver Rim site if Union’s application were granted. Letter from R.W. Headd to Jack Kelly, BLM (Oct. 5, 2005), SOR, Ex. 17.

to reasons or theories asserted in the decision under review or in the parties' filings. See, e.g., *Wyoming Outdoor Council*, 160 IBLA 387, 397-98 (2004); *United States Fish and Wildlife Service*, 72 IBLA 218, 220 (1983).

We likewise reject Union's argument that BLM improperly applied an oil and gas NSO to the proposed communications tower. A review of BLM's decision shows that BLM invoked the NSO status of the Beaver Rim ACEC to emphasize the need to protect its "significant plant, animal, cultural, and paleontological resources," as well to protect the "highly scenic resources along Beaver Rim." Decision at 2. BLM stated that its "policy" is to evaluate non-energy proposals, such as utility construction, in view of the NSO designation of the area. Application of this policy does not dictate denial of Union's ROW application, but does suggest that any decision to approve the application would have been subject to an appropriate level of environmental review under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000). See, e.g., *Center for Native Ecosystems (CNE)*, 170 IBLA 331, 344-45 (2006), and cases cited. The Lander RMP's designation of the Beaver Rim ACEC as an NSO area was a factor that BLM rightly took into consideration in denying Union's application as not in the public interest.

BLM concluded that the public interest did not favor the construction of an 80-foot communications tower on the scenic Beaver Rim ACEC, particularly given Union's indication that alternate sites would provide the coverage Union sought.<sup>16</sup> Union argues that, contrary to BLM's decision, the Cedar Rim site is not a viable alternative to its proposed site at Beaver Rim. As noted, in its decision, BLM states, *inter alia*, that "the Cedar Rim site would provide a roughly equivalent increased coverage area to lands that are north and west of the Cedar Rim location, including coverage to the Big Sand Draw Oil Field." Decision at 2. In its SOR, Union states that BLM's determination that Cedar Rim would provide roughly equivalent coverage is based upon a misunderstanding of the propagation maps it provided with its application and in response to BLM's request for clarification. We see merit in BLM's assertion that its conclusion regarding the difference in coverage "is not inconsistent [with] Union's statement that, under prime conditions, its cell phone towers have a theoretical broadcast range of up to 20 miles, because the 12-mile stretch of U.S. Highway 287 sought to be covered by Union is within a 20-mile radius of the Cedar Rim site." *Id.* However, based upon our review of the maps and other documents submitted by Union and purportedly relied upon by BLM in reaching its decision, we are unable to fully confirm the validity of either Union's assertions or of BLM's reading of those documents.

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<sup>16</sup> We find no objective evidence that Union was misled or pressured by BLM into listing Cedar Rim as a viable alternate site on its applications.

We are left with Union's statements that "an advantage to the Beaver Rim location is that it would require the construction of only one additional site to cover the final gap between the Beaver Rim coverage area and Wyoming Highway 28"; that it "investigated several options other than Beaver Rim, but determined that, due to the topography of the region, it would require construction of two or even three separate new sites – at a minimum cost of \$200,000 per site – to obtain coverage that would be equivalent to the coverage that a single site at Beaver Rim would provide"; and that "depending on the location of these multiple sites, more than one new site may be necessary to cover the remaining segment of US Highway 287 to Wyoming Highway 28." SOR at 3-4. While Union indicates that other potential sites will involve greater expense, the Board has held that an applicant does not gain entitlement to a particular ROW because alternate access may be more difficult or expensive. *See D.J. Laughlin*, 154 IBLA at 165.<sup>17</sup>

Notwithstanding the ambiguity in the record regarding the extent of coverage from the Cedar Rim site as compared to the location at Beaver Rim, it appears that there are alternative options, as acknowledged by Union. On the other hand, the record is clear that the ROW sought by Union would impact the visual and resource values of the Beaver Rim ACEC, also a VRM Class II area. Concern about such impacts constitutes a sufficient factual basis for BLM's decision to deny Union's ROW application regardless of the viability of any other site. We conclude that BLM properly found Union's proposed ROW not to be in the public interest for this reason.

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 affirmed.

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James F. Roberts  
Administrative Judge

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<sup>17</sup> Notably, though Union asserts in its SOR that additional sites would cost \$200,000, its application maintained that such costs would be \$100,000 per site. Union concedes that even a Beaver Rim tower must be supplemented with another undisclosed tower, a fact not mentioned in its application. A party may not obtain a factual hearing by generating an appeal on an ambiguity in its own facts of record.

I concur:

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Lisa Hemmer  
Administrative Judge