

INTERIOR BOARD OF LAND APPEALS

J. E. Lepetich, et al.

129 IBLA 255 (May 5, 1994)

Title page added by:  
ibiadecisions.com

Appeal from a decision of the Bakersfield, California, District Office, Bureau of Land Management, rejecting application for a road right-of-way grant CA-25434.

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

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

APPEARANCES: J. E. Lepetich, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

J. E. Lepetich, et al., 1/ have appealed the February 20, 1991, decision of the Bakersfield, California, District Office, Bureau of Land Management (BLM), denying their application for a road right-of-way CA-25434. The application was filed June 30, 1989, under the provisions of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA), 90 Stat. 2743, 43 U.S.C. § 1701 (1988), for a right-of-way across public land situated in sec. 20, lot 1, NE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub>, NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, T. 4 S., R. 18 E., Mount Diablo Meridian, Mariposa County, California. BLM rejected the application citing 43 CFR 2802.4(a)(1) which provides that rights-of-way may be granted unless doing so would be inconsistent with the way public lands are being managed, and 43 CFR 8364.1 which governs closure of public lands to protect persons, public lands, and resources. The decision specifically stated:

1/ Other appellants include Frank Savada, Ron Cole, Dave Martin, Vincent Janssens, and Wilis Hatler.

On June 5, 1989, the Bureau of Land Management published a road closure order in the Federal Register (54 FR 24047). This order permanently closed the road that was subsequently applied for in application CA 25434. The reason for the closure was due to the poor design of the road causing degradation of resources and its unsafe condition. The result of a field investigation found that the use of the proposed right-of-way would result in additional environmental degradation or would require additional resource destruction in any attempt to improve its condition.

Due to the existing road closure and potential for environmental degradation the allowance of the application for the proposed right-of-way would be inconsistent with proper public land resource management. In view of the foregoing, application CA 25434 should be and is hereby rejected. This rejection of the proposed route is without prejudice and the applicant may propose alternative routes which will be examined on their own merits.

Appellants' application requested a 30-foot wide, 3,900 feet long right-of-way in order to provide access to a subdivided 160 acres of private land on Whiskey Flat northwest of Colorado Road in Mariposa County. Appellants are all landowners within the subdivided 160 acres which is surrounded by public land and are seeking to use and maintain an existing road which connects their property to a county road to the east, Sherlock Road.

The record of the environmental assessment/land report (EA/LR), dated September 12, 1989 (EA No. CA-018-89-38), reveals the following sequence of events leading to the closure of this access road by BLM by order published in the Federal Register, effective May 19, 1989. The access road was originally constructed by agents of Joseph Lepetich in 1972. Prior to that time, road access to Whiskey Flat was over a route from the west via two county roads, Whitlock and Mosher Roads.

In order to construct on the new approach from the east, Mr. Lepetich first acquired a non-exclusive easement on the private property to be crossed. He then applied for a Special Land Use Permit in October 1972 to construct the road across public land. This permit was issued to Mr. Lepetich on April 17, 1973, for a 5-year period (January 1, 1973, to December 31, 1977). Attached to the permit were six road construction/design stipulations.

BLM monitoring of the Lepetich road construction revealed noncompliance with all six construction/design stipulations and resulted in a determination that the road was actively eroding. Although BLM requested corrective action to be taken, there is no record that the problems were corrected prior to closure. The road permit expired at the end of 1977 without a request for renewal by Mr. Lepetich.

Because of disagreements between Whiskey Flat landowners (who use the road for access) and owners of land adjoining the affected public lands (who

consider the road's use a nuisance), the BLM Folsom Resource Area investigated the status and condition of the road. BLM determined that the road had no current authorization and was in poor condition. Neighboring landowners complained of reckless, abusive, and inconsiderate use of the road, as well as harassment by road users. A BLM engineer documented the deteriorated condition of the road and pointed out flaws, both inherent in the design and arising from faulty construction, that led to the deterioration and to subsequent damage of watershed values on public land. The engineer's report recommended closing the road in order to protect the public's safety. Because BLM considered the prior access routes from the west as a usable alternate access route to Whiskey Flat, the road closure order was issued in 1989 prior to appellants' right-of-way application (EA/LR at 1-3).

In response to the application BLM undertook an assessment of the environmental impact of granting the right-of-way and prepared the EA/LR in which it analyzed the proposed action along with three alternatives: (1) the grant of the proposed action including approval of the requested right-of-way, BLM's closure order would be rescinded and the access road would be opened; (2) the no action alternative; (3) the grant of a right-of-way 1,800 feet long by 30 feet wide for alternate existing road #1, located about 1 mile west of the proposed action from Whitlock Road via Mosher Road; (4) the grant of a right-of-way for alternate existing road #2, 2,800 feet long by 30 feet wide located about 1-1/2 miles west of proposed action beginning at the end of Mosher Road.

The EA/LR analyzed the critical impact factors of granting appellants' request determining that the proposed action was the least desirable alternative, stating:

#### C. Road condition

Proposed action: The subject road is a one-lane, dirt surface road running in a sidehill cut across west-facing slopes. Overall length of the road, from county maintenance to applicants' property boundary, is about 1.25 miles. Up until the date of closure, the road received regular use. Drainage of the road is provided via insloping with cross-drain culverts. Grade is extremely steep, varying from 18% to 25%. Culverts are grossly inadequate in number and are improperly installed, having led to accelerated erosion. Because of this, the road running surface is deeply gullied and is dangerously narrowed due to sloughing. Extreme grade, deteriorated condition of the road surface, and unstable soil type all add up to a condition of marginal traction. Both utility of the road and safety of the users suffer from a lack of turnouts.

(EA/LR at 9).

### III. Environmental Consequences and Mitigating Measures

Soils: The proposed action would result in continuing use of an unsurfaced road with extremely steep grade across 0.8 miles

of soil with a high to very high erosion risk. This represents the highest erosion hazard of any alternative. Erosion, with resulting gulying and sloughing of the road surface, will continue. The watershed value on public land will continue to be degraded.

(EA/LR at 11-12).

The Environmental Coordinator and the Folsom Area Manager reviewed the recommendations of the EA/LR and opted to deny appellants' application, preferring to offer a grant for alternative #1, stating in pertinent part:

Without major reconstruction, the road that is the subject of the application (proposed action) will remain unsafe and will continue to cause erosion on the public land. The costs of the improvements needed, to ensure safety and surface stability, are very high. Given the disproportionately high cost of this alternative, it does not appear feasible to pursue this option. Of all the alternatives considered, the proposed action is the most poorly designed road and poses the highest erosion risk; these inherent limitations can be mitigated only through elaborate and expensive measures.

\* \* \* \* \*

The alternate existing roads are both basically of sound design, and they follow routes which would allow their use without excessive environmental degradation. Even though they are both in need of improvements the estimated cost of these would be on the order of one-tenth the cost of those required by the proposed action. Alternative #1 has the advantage of being a shorter route over more stable soils, and of being the recognized historic access route. Of the two alternatives, #1 offers the greatest utility while minimizing maintenance demands and also minimizing environmental effects. Additionally, it is a route over which the r/w applicants would have established a prescriptive right of use. For these reasons, Alternative #1 is the option selected.

(Decision Record at 1-2).

On appeal, appellants disagree with BLM's decision, asserting, inter alia, that the road that existed since 1972 within the right-of-way application area has been in continuous use until it was illegally destroyed by BLM on May 11, 1989. They stress the need for the continuation of this road pointing out that residents and other owners have based their investments in the land and improvements on this access (Statement of Reasons (SOR) at 1).

They contend that they did not get sufficient opportunity to object to the removal of the road, indicating they did not receive notice until

June 7, 1989, 3 weeks after the road was destroyed. Appellants also indicate that the destruction of the road "was instigated by a disgruntled property owner and his counsel that had influence with BLM through whose property we have a recorded easement to reach the access road on BLM land" (SOR at 1).

Appellants deny that they have access to their property via the west side of the property through the "Schmittle's" property as District Manager Swickard has claimed, stating:

He [Swickard] later acknowledged that we did not have an access in a letter to me dated September 8, 1989, but then stated that we may have a right to obtain one. The property owner has advised us in writing that no easement exists and that he will not grant one. Swickard had a copy of the letter when he made the above statement. [Emphasis in original.]

(SOR at 2).

They contend further that requests by residents to improve the road had been denied for 2 consecutive years prior to destruction of the road, yet the reasons cited for the road closure was "the poor condition of the existing road."

Appellants allege that the investigation of the road was not conducted by a civil engineer, but by a "tractor operator" whose statements are easily refutable. They also challenge the extent of the environmental damage caused by the road which they contend could have been corrected if repairs to the road had been allowed (SOR at 2).

[1] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1988), grants the Secretary of the Interior the discretionary authority to issue rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. See also 43 U.S.C. § 1761(a)(7) (1988). Accordingly, the Board has repeatedly noted that approval of rights-of-way is a matter of discretion. King's Meadow Ranches, 126 IBLA 339, 341 (1993); Edward R. Woodside, 125 IBLA 317, 325 (1993); George Bernadot, 121 IBLA 138, 139 (1991); Glenwood Mobile Radio Co., 106 IBLA 39, 41 (1988); Kenneth W. Bosley, 101 IBLA 52, 54 (1988); Edward J. Connolly, Jr., 94 IBLA 138, 146 (1986); Dwane Thompson, 88 IBLA 31, 35 (1985); High Summit Oil & Gas, Inc., 84 IBLA 359, 364-65, 92 I.D. 58, 61 (1985).

Departmental regulations provide that a right-of-way application to use public lands may be denied if BLM determines either that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest 43 CFR 2802.4(a). When unusual circumstances dictating another result are not shown, this Board will affirm a BLM decision rejecting a right-of-way application if the record demonstrates that the rejection decision is based on a reasoned analysis of the facts and was made with due

regard for the public interest. See, e.g., George Bernadot, *supra* at 139-40; Glenwood Mobile Radio Co., *supra* at 41-42; High Summit Oil & Gas, Inc., *supra* at 365-66, 92 I.D. at 61-62.

As indicated, BLM prepared a detailed EA/LR in which it analyzed the pertinent factors relevant to appellants' application and concluded that approval of that application was not the best alternative for access to their private property. The Bureau's evaluation clearly found all factors including safety, surface stability, the need to prevent further erosion, excessive costs in reconstruction to bring the condition of the access road to a satisfactory level, and possible continued conflict and tension with the adjoining landowners, would have a significant negative impact on the public lands. BLM determined the proposed action to be unacceptable in line with proper management for the area. BLM's decision and accompanying case record amply support its conclusions that: (1) alternative route #1 is a preferable, viable alternative to the proposed action and, thus, the issuance of the requested right-of-way would be inconsistent with the purposes for which these lands are being managed; and (2) that issuance of the requested right-of-way would not be in the public interest.

Appellants challenge the Bureau's conclusions, asserting that the proposed right-of-way is superior to the recommended alternative and that they do not have access from the west as BLM indicates. In such circumstances, the burden is on appellant, as the party challenging BLM's decision, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. King's Meadow Ranches, *supra* at 342; Glanville Farms v. BLM, 122 IBLA 77, 85 (1992). Appellants have not met their burden of showing error in the BLM findings.

Appellants allege they will not have access over the Schmittle property to the west of Whiskey Flat because no easement exists. They do not deny, however, that this route has been used to reach their property since the other access road to the east was closed in 1989. Nor do they deny that this same route had been the historical access to Whiskey Flat prior to the Lepetich construction of the eastern road in 1972. Even though appellants contend the eastern route is superior and they may not be able to obtain the western access, they are not entitled to what they have determined to be the easier or highest degree of access. Whether or not the eastern route is superior is merely a matter of appellants offering their contrary opinion and appears totally inconsistent with the many negative aspects of the proposed action as shown by the record.

As we observed in Dwane Thompson, *supra* at 35, the burden is on the applicant to make an affirmative showing that there is no possibility of access other than that for which he contends. Appellants have not made a showing that alternative #1 is not feasible. Moreover, where BLM has indicated that it will approve a right-of-way for alternative route #1, if appellants choose to pursue that recommendation, in such circumstances they must explore all possibilities to obtain the necessary access over private land.

IBLA 91-223

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

---

James L. Byrnes  
Chief Administrative Judge

129 IBLA 261

ADMINISTRATIVE JUDGE MULLEN CONCURRING WITH THE RESULTS:

I accept the result reached by Chief Administrative Judge Byrnes because: (1) appellants have never expressed interest in gaining a right-of-way along Alternative #1 proposed by the Bureau of Land Management (BLM); (2) appellants tendered no evidence that they do not have access to the public lands along the alternative routes; and (3) appellants have strongly urged the issuance of a decision. I concur because I have been afforded little reason to believe that another result would eventually ensue.

I must concur with the results rather than the decision because of my serious reservations about whether BLM adequately defined the proposed action to be considered in its environmental assessment (EA). 1/ As a direct result of BLM's apparent failure, the case file raises more questions than it answers.

When contemplating issuance of a right-of-way, BLM must conduct an environmental analysis, and if necessary, an environmental impact statement. 43 CFR 2802.4(d)(1). The EA is conducted pursuant to the Departmental instructions for complying with the National Environmental Policy Act (NEPA), set out in the BLM Handbook. 2/

BLM prepared an EA and land report (EA/LR) setting out its analysis of the proposed action (BLM's road closure order would be rescinded and the requested right-of-way for the Lepetich road would be approved) and three alternatives to the action proposed by Lepetich: (1) a no action alternative; (2) the grant of a right-of-way for an alternate existing road, located about 1 mile west of the proposed Lepetich road right-of-way from Whitlock Road via Mosher Road; and (3) the grant of a right-of-way for alternate existing road located about 1-1/2 miles west of proposed Lepetich road right-of-way, beginning at the end of Mosher Road. The apparent scope of the proposed assessment was either to address the impact of issuing the right-of-way proposed by Lepetich or to address the impact of granting a right-of-way to appellants' land. I cannot tell from the EA/LR which was considered.

The study team concluded that the no action alternative was not available because "BLM is required to provide access to non-federally owned land, surrounded by public land, as is necessary to secure the owner reasonable use and enjoyment thereof" (EA/LR at 3). This would be an appropriate determination if the scope of the assessment was to consider the impact of issuing a right-of-way to appellants' land. A finding that the no action alternative was not available if the scope of the

1/ See BLM National Environmental Policy Act Handbook, BLM Handbook H-19790-1 (BLM Handbook at IV-1).

2/ The EA serves as a vehicle for an interdisciplinary review of proposed action and thus promotes consideration of all affected resources, and a mechanism for identifying and developing appropriate mitigation measures (BLM Handbook at IV-1A).

assessment was limited to the impact of issuing the right-of-way proposed by Lepetich. 3/

Having rejected the no action alternative, the BLM study team analyzed granting the right-of-way proposed by Lepetich and the two alternate routes. 4/ In a decision record, dated September 21, 1989, the Area Manager found that the recommended option would be to "deny the subject application and offer a grant identified as Alternative #1." 5/ He also found that granting a right-of-way along the Alternative #1 route would not have significant impact upon the environment.

In the February 20, 1991, opinion on appeal, BLM denied the application because issuance of the right-of-way proposed by Lepetich would result in environmental degradation or require additional resource destruction. The decision then notes that appellants "may propose alternative routes which will be examined on their own merits."

The dichotomy created by the course of action chosen by BLM can be illustrated in a number of ways. If the Alternative #1 is a viable alternative, BLM should have been willing to tender a right-of-way grant along that route, rather than rejecting the application. If the application was rejected because appellants had not shown proof of access to the public lands, how can BLM consider that route a viable alternative to the action proposed by Lepetich? 6/ Prior to rejection of the Lepetich route because Alternative #1 was the preferred route, BLM sought this proof with respect to the Lepetich route. 7/

3/ The two other routes apparently available to appellants were identified by BLM as Alternative #1 and Alternative #2. A denial of the application for the right-of-way described in the Lepetich application (Lepetich road) in favor of the no action alternative would not deny access as long as alternative access exists.

4/ It is within the scope of BLM's authority to grant a right-of-way other than the one proposed by the right-of-way applicant. See 43 CFR 2802.4(f). Not being limited by the applicants' choice, BLM is free to examine other viable alternatives.

5/ There is no evidence that BLM ever offered "a grant identified as Alternative #1."

6/ Under section 102(2)(E) of NEPA, a Federal agency must describe "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Oregon Natural Resources Council, 115 IBLA 179, 186 (1990);

In re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988); Handbook at IV-B(2)(a). As a result, the agency is required to consider alternatives that are feasible and reasonably related to the purpose of the proposed action; in other words, alternatives that can be accomplished and also fulfill the purpose sought to be achieved by the action. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974).

7/ In an Oct. 30, 1989, letter BLM advised each of the applicants that before the application for the Lepetich right-of-way could be processed

If it is shown that neither Alternative #1 nor Alternative #2 is available to appellants because they have no access to the public land across the private land, are appellants to once again file an application for a right-of-way along the Lepetich route? BLM stated in the EA/LR that the no action alternative was not available because "BLM is required to provide access to non-federally owned land, surrounded by public land, as is necessary to secure the owner reasonable use and enjoyment thereof" (EA/LR at 3).

By rejecting the application because the proposed Lepetich route was not the route preferred by BLM, Alternative #1 and Alternative #2 have been reduced to another form of no action alternative, which BLM says is unavailable to it. If the application was summarily rejected because there was no proof of access to the public land across the private land, Alternative #1 is not a viable alternative.

There is no evidence that the applicants were advised of or asked to accept the routing of the road as described in Alternative #1 or Alternative #2 if either of those routes were deemed to be preferable. 8/ There is no document in the file showing their having agreed to accepting a right-of-way along either of those routes. 9/

Because BLM has rejected the application, the only way appellants can "propose alternative routes which will be examined on their own merits" is to file a new application and pay the prescribed filing fees and costs. There is nothing that would prevent BLM from once again conducting an EA/LR, coming to another conclusion, and rejecting the application if appellants filed an application for a right-of-way along the route described as Alternative #1.

I would be disposed to reconsider my findings if evidence answering one or more of the questions I have outlined is tendered in a timely manner.

\_\_\_\_\_  
R. W. Mullen  
Administrative Judge

fn. 7 (continued)

appellants must furnish proof that they have access to the public land across the private land in the form of either: (1) proof of an express agreement with all the private landowners being crossed to allow access across their private property; or (2) proof that a public right-of-way exists on the proposed route. See also BLM Manual at 2801.35B.1.d.(4).

8/ See BLM Manual at 2801.35B.1.d.(4). If additional data is required for the proposal, it should be required for each of the alternative routes being evaluated. Proof of access was sought for the primary route but not for the alternative routes.

9/ See BLM Handbook at IV-1.a. For externally initiated proposed actions, the applicant must agree to any changes in writing, i.e., as a modification to the application.