

INTERIOR BOARD OF LAND APPEALS

John Dittli and Leslie Goethals

139 IBLA 68 (April 10, 1997)

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JOHN DITTLI
LESLIE GOETHALS

IBLA 95! 634

Decided April 10, 1997

Appeal from a decision of the Area Manager, Bishop Resource Area, California, Bureau of Land Management, rejecting application for road right! of! way. CACA! 21816.

Set aside and case remanded.

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

A BLM decision rejecting an application for a road right! of! way will be set aside and the case remanded for reconsideration where the record does not substantiate BLM's conclusions that granting the right! of! way, and constructing, maintaining, and using a short road to access a parcel of private land will adversely affect visual resources and deer habitat, contrary to directives in the applicable land use plan, or demonstrate that BLM gave adequate consideration to whether any adverse impacts might be mitigated.

APPEARANCES: John Dittli and Leslie Goethals, pro sese.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On June 3, 1992, John Dittli and Leslie Goethals, hereinafter Appellants, filed a timely notice of appeal from an April 24, 1992, Decision of the Area Manager, Bishop Resource Area, California, Bureau of Land Management (BLM), rejecting their application for a road right! of! way, CACA! 21816, that would provide access across public lands situated in secs. 25 and 36, T. 4 S., R. 29 E., Mount Diablo Meridian, Mono County, California, to their private property. The BLM rejected the right! of! way application since it was considered "inconsistent" with certain land use planning directives, and thus the purpose for which the land was managed. (Decision at 1, citing 43 C.F.R. § 2802.4(a)(1).) The BLM explained:

The Benton/Owens Valley Management Framework Plan and the Bishop Resource Management [P]lan [RMP] restrict uses that could harm wildlife habitat or degrade scenery.

Both plans designate this location as VRM [Visual Resource Management] II. The "VRM II" classification means that we should not authorize uses that would "attract the attention of the casual observer[.]" Based on visual simulations and contrast ratings we believe that road construction and maintenance associated with your proposal would violate the VRM II standards.

Your proposal is within a major deer migration corridor that is designated as a "full protection zone" by the Bishop [RMP]. This means that we cannot authorize actions that would harm the deer habitat. Road construction, maintenance, and increased vehicle use along your proposed right of way could contribute to the decline in deer habitat along this important migration corridor.

(Decision at 1; see also Decision Record/Finding of No Significant Impact, dated Apr. 23, 1992.)

Appellants did not include a statement of reasons (SOR) with their notice of appeal, thus, in accordance with 43 C.F.R. § 4.412(a), they were required to file one "with the Board * * * within 30 days after the notice of appeal was filed [with BLM]." Hence, their SOR was due to be filed with the Board on or before July 3, 1992. The Board, however, has no record of receiving Appellants' SOR prior to January 21, 1997, when it was forwarded to the Board by the Resource Area office in response to our inquiry.

The SOR is dated June 24, 1992, and signed by both Appellants. The record establishes that, after filing a timely notice of appeal with BLM, an SOR was served on the Office of the Regional Solicitor, Pacific Southwest Region, in Sacramento, California. By memorandum dated July 14, 1995, to the State Director, California, BLM, the Area Manager, Bishop Resource Area, attached Appellants' notice of appeal and the official file for right-of-way CACA-21816, and advised that "this case was never sent to your office for transmittal to IBLA until now." There is no record of when the SOR was received by the Resource Area office, though it was clearly after the case file was forwarded to the Board on July 31, 1995, since it is not contained therein. 1/

1/ The July 14, 1995, memorandum to the State Director also advised that the Bishop Resource Area office "does not have any record of the 'statement [of reasons]' being received," despite Appellants' assertion, in their notice of appeal, that one would be filed. However, the Area Manager noted: "The appellant[s] ha[ve] indicated that the 'statement' was sent as per the appeal guidelines and therefore should be in the [S]olicitor's office." Thus, following transmittal of the case, BLM apparently retrieved the SOR from that office. However, until our inquiry, it was mistakenly not forwarded to the Board.

The filing of Appellants' SOR with the Solicitor's office did not constitute compliance with the requirement of 43 C.F.R. § 4.412(a) to file "with the Board." Cf. San Juan Coal Co., 83 IBLA 379 (1984) (filing of notice of appeal). The applicable Departmental regulation, 43 C.F.R. § 4.402, provides that the underlying appeal is "subject to summary dismissal" absent the timely submission of an SOR. The Board, however, is not required to dismiss the appeal in such circumstances, and may decline to do so where there has been no showing that any prejudice has resulted to the Department or any party to the proceeding. Tagala v. Gorsuch, 411 F.2d 589, 590 (9th Cir. 1969); Red Thunder, Inc., 117 IBLA 167, 172-73, 97 Interior Dec. 263, 266 (1990). However, we have not hesitated to do so where, after the deadline for filing, no SOR has ever been filed, and no explanation has been offered for the failure to file. See Robert L. True, 101 IBLA 320, 324 (1988).

Here, an SOR was filed timely by Appellants, albeit with the wrong office. No prejudice to the Department, or to any party to this proceeding is apparent, thus we will proceed to decide the merits of the appeal.

Appellants initially proposed, on October 17, 1988, construction of a 1,161¹ foot long section of road across public lands for the sole purpose of affording them, in conjunction with another section of road (287 feet long) on private lands (which would in turn connect with the "Crowley Lake [Road]"), year¹ long access to their private property, described as a "[home] building site," in the NW¹/₄ NE¹/₄ of sec. 36, T. 4 S., R. 29 E., Mount Diablo Meridian, Mono County, California. (Right¹ of¹ Way Application, dated Oct. 17, 1988; see also Environmental Assessment (EA) (CA¹ 017¹ 92¹ 18) at 1.) They described the original route of the proposed road, characterized as an "unsurfaced driveway," across public lands:

At +0 f[ee]t the driveway would head [northeast] then curve [north¹ northwest] on private land until reaching BLM land at +287 f[ee]t. From there the drive needs to continue [northwest] across BLM land to gain a "weakness" through a cliff band and a "flat" ideal for the needed direction change, +916 f[ee]t. At this point the project becomes obscured from public view by M[ount] Mahogany as it curves north then east until it is traversing the slope in a [southeast] direction before reaching private land at +1448 f[ee]t. [2/]

Right¹ of¹ Way Application. Appellants stated that the visual impact of the road, which, when built, would have a 12¹ foot wide road bed, would be minimal:

²/ In its EA, on page 1, BLM incorrectly referred to the length of the proposed road right¹ of¹ way across public lands as 1,448 feet. Rather, subtracting out the initial 287¹ foot long section of road across private lands, the length is actually 1,161 feet. See SOR at 1.

Half of the proposed project would be obscured by existing vegetation[.] though the other half would be visible, with regrowth and proper revegetation it would not likely be notice[.]able.

* * * * *

* * * The project would be carried out in such a way as to minimize alteration to land surfaces and vegetation. * * * Local soils have very little horizon development, consisting mostly of medium grain sand, [and] the angle of repose should "naturalize" road cuts. Vegetation impact would include removal of 3! 1[-inch] dbh [diameter at breast height] Pinyons * * * and several of the following species[.] Mountain Mahogany * * *, Bitterbrush * * *, Sagebrush * * * and Rabbitbrush * * *. Mitigation could include transplanting from the building site.

Id. Appellants did not identify the means of road construction, but noted that it would take 2 to 7 days.

In response to subsequent statements by BLM that it was not likely to approve the granting of a right! of! way along the original route ("Proposed Action"), Appellants proposed an alternate route ("Alternative B"), which would follow an existing improved/unimproved road about 7,000 feet across public (5,000 feet) and private (2,000 feet) lands, and a newly! constructed road that would continue another 1,000 feet southeast across public lands to Appellants' private property. (EA at 1.) See Conversation Record, dated Jan. 28, 1992. The road bed would also be 12 feet wide, and construction would take 3 to 14 days.

The BLM then prepared its EA to analyze the environmental impacts of issuance of a right! of! way grant along either of the two proposed routes, and a no action alternative. In assessing those impacts, BLM concluded that the Proposed Action and Alternative B would both involve construction of a road by means of bulldozing. (EA at 1.)

In the case of the Proposed Action, BLM noted that new road construction would "permanently remove" about 0.4 acres of vegetation, with an additional 1.4 acres "remove[d] or damage[d]" by "[c]ut and fill disturbance above and below the road" where the initial 916 feet would cross a 60! percent slope. (EA at 2.) In addition, BLM stated that, as in the case of the nearby Crowley Lake Road (the old Highway 395) that is located on a "similar slope," the area of disturbance would likely not revegetate, even after several decades, and loose sandy soils above and below the road would likely "slip." Id. The BLM stated that all this would "probably" create a similar "roadcut scar," which would be "highly visible" from both the new

Highway 395 to the northwest and the town of Crowley Lake to the west. 3/ Id.

In the case of Alternative B, BLM noted that new road construction would permanently remove about 0.3 acres of vegetation, with an additional 1.2 acres along the existing road likely "disturb[ed]" by road maintenance. (EA at 2.)

The BLM further noted that the area where either proposed right of way would be located had been designated, most recently by the RMP in 1991, as VRM II. This meant the following:

The objective of [Class II] 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 from key observation points, 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.

(RMP, Appendix 3, at A3! 1.)

In order to assess the impact of the Proposed Action, in terms of the VRM classification of the project area, BLM prepared a "Visual Contrast Rating Worksheet" (Form 8400! 4 (September 1985)) on December 5, 1991. It considered the impact from the key observation point only on the outskirts of the town of Crowley Lake, and not along the Crowley Lake Road or at the scenic pull! out on the new Highway 395. The BLM concluded that there would be (over the long term), in terms mostly of the appearance of the land, a strong to moderate "Contrast" as a result of construction, maintenance, and use of the proposed road, and that, because of this, such activity would violate the VRM II standard. Specifically, BLM noted that the contrast would be strong/moderate in the case of "Form," with the advent of sloughing above and below the road contrasted with generally rounded/rocky outcrops. In the case of "Line," the contrast would be moderate, with a distinct horizontal line contrasted with generally angular/vertical lines. In the case of "Color," the contrast would be strong, with lighter tans

3/ Attached to the EA are artist's renderings of what would be seen from three observation points should one or the other of the proposed roads be built. These were made by drawing the roads on photographs taken from these points, which were located at the scenic pull! out along the new Highway 395 to the northwest, on the outskirts of the town of Crowley Lake to the west (considered the "Key Observation Point") and along Crowley Lake Road farther to the west. The only rendering of the Proposed Action is from the edges of town. There are renderings of Alternative B from all three locations. Also attached are the original photographs of existing conditions, as seen from all three locations, which represent no action.

contrasted with generally reddish tans/browns. Finally, in the case of "Texture," the contrast would be moderate, with a smooth texture contrasted with generally rough outcrops and smooth soils. The BLM did not recommend any measures for mitigating the anticipated violation of the VRM II standard.

In the case of Alternative B, BLM did not prepare any similar rating worksheet. Rather, it stated only that a "project simulation indicates that this alternative could violate VRM standards though visual impacts would be less than with [the Proposed Action]." (EA at 2.) We presume that the "simulation" to which BLM refers consists of the artist's renderings of what would be seen from the three observation points in the case of this alternative.

Next, BLM noted that the area where either proposed right-of-way would be located is within a migration corridor for mule deer, with "[u]p to 5000 deer mov[ing] through this portion of the * * * corridor in late fall and spring," and that the entire corridor had been designated by the RMP as a "full protection zone for deer, where actions would not be approved if they [would] adversely affect[] the deer habitat." (EA at 2.) The BLM noted that new road construction, in the case of the Proposed Action, "could disrupt migration and result in increased deer/automobile accidents along [H]ighway 395 and Crowley Lake [R]oad, if the construction was allowed to occur during the migration period." Id. It further stated that "[a]fter construction, the road cut might channel deer onto the Crowley Lake [R]oad along a curve at the top of the hill where they would be prone to be hit by cars." Id. In the case of Alternative B, BLM found no such likelihood, but stated that "more habitat would be disturbed * * * by construction, maintenance and use of the longer route," thus contributing to the downward trend in the amount of habitat along the migration corridor. Id.

In its April 1992 Decision, BLM rejected Appellants' application for a road right-of-way because of the impacts construction, maintenance, and/or use of the road would have on visual resources and deer habitat.

[1] Appellants dispute BLM's assessment of these impacts, asserting either that BLM is wrong in its evaluation of the scale or magnitude of the impacts or that they could be mitigated, and thus not violate the RMP directives. They contend first that, in judging whether their original proposed road would violate VRM II standards, BLM improperly compared it with the Crowley Lake Road. Rather, they argue that the two roads are quite different ("apples and oranges"), noting that the Crowley Lake Road, which is the old Highway 395, is 75 feet wide, with a 100-foot high cut bank, and was built by bulldozers, whereas Appellants' proposed road would be "built mostly by hand (with the possibility of help from a back hoe to remove/place large rocks)." (SOR at 2.)

The BLM clearly compared Appellants' proposed road with the Crowley Lake Road in judging whether it would violate VRM II standards. It

concluded that, due to similar problems with revegetation and slipping soils in the case of areas disturbed on either side of the road, construction of the proposed road would probably leave a similar "roadcut scar" that would cause it to violate VRM II standards. (EA at 2.) Based on this record, we are not persuaded that the lingering effects of constructing a 12! foot wide driveway will be similar to those of constructing a 75! foot wide highway, with 100! foot high cut banks. While it is true that Appellants may experience similar problems with revegetation and slipping soil in the case of adjacent areas, and they have offered no evidence to the contrary, ^{4/} there is nothing in the record supporting BLM's conclusion that the "scar" left by construction of the driveway will be "similar" to that left by construction of the highway. ^{5/}

Nor does the record demonstrate that the proposed road must be built entirely by bulldozing discounting Appellants' plan to use mostly hand methods, which may, as they indicate, minimize the effects of construction. Bulldozing appears to have been a unilateral choice made by BLM. While it may, in fact, be necessary or preferable, nowhere is this substantiated in the record.

Appellants also assert that, contrary to BLM's rating worksheet, the proposed road would not violate VRM II standards:

LINE: the roadline visible to the casual observer would tie in with the existing line created by the cliff/slope contact.

FORM: the existing form of the involved landscape is angular/linear. Where the road may be visible, its linear form would tie into the natural contour of the landscape.

TEXTURE: the texture of the area varies from smooth to a stipple of boulders and vegetation. If any noticeable change to the existing texture occurred (i.e. minor road cut and down slope debris) it would be easily mitigated by the placement of native materials (rock) from the project site and private property. This would also stabilize any up slope sl[ough]ing. In addition,

^{4/} They point to a section of the Crowley Lake Road "just east of th[e] scar" where the area disturbed by road construction has "stabilized and naturally revegetated." (SOR at 2.) However, they do not distinguish the two sections of that road, and, most importantly, offer no evidence that stabilization and revegetation is also likely to occur in the case of the proposed road.

^{5/} Also, nothing in the record disputes Appellants' assertion that, of the 1,161 feet of road crossing public lands, only 629 feet would be visible at all to any observer, with the remainder "completely screened by vegetation." (SOR at 2.)

manual and natural revegetation of these areas would also negate any contrast in texture. Large down slope debris would be kept to an absolute minimum by the use of a back hoe with a thumb, thereby "plucking" and setting aside rocks for later use.

COLOR/CONTRAST: any contrast in color would again occur in areas of down slope sl[ough]ing and would be mitigated as stated under texture.

(SOR at 2! 3.)^{6/}

Visual contrast ratings made by trained BLM employees will not be lightly set aside since they constitute professional opinion, even though they may represent subjective judgments based on established facts. See, e.g., G. Jon Roush, 112 IBLA 293, 302 (1990); American Gilsonite Co., 111 IBLA 1, 32! 33, 96 Interior Dec. 408, 424! 25 (1989). However, what clearly undergirds the opinions expressed in BLM's December 1991 rating is the conclusion that the normal visual impact of the proposed road will be exacerbated due to problems with natural revegetation and slipping soil in the adjacent areas disturbed by road construction. The record does not substantiate BLM's determination in these respects. It is not sufficient to simply point to a road cut on the Crowley Lake Road, without discussing the basis for its conclusion that the instant area will experience similar problems. At a minimum, BLM must identify the particular soils involved and the precise nature of the problem with revegetation, and demonstrate how the two areas are similar in these respects. Nor, in any event, did BLM consider at all whether this impact could be mitigated, as Appellants now generally offer to do, (SOR at 3), by special efforts to stabilize the soil and revegetate the disturbed areas.

Further, Appellants assert that they are still willing to accept Alternative B. We note that, according to BLM and Appellants, this would, unlike the Proposed Action, not traverse 916 feet of 60! percent slope, and thus not result in a scar similar to that caused by the Crowley Lake Road. (EA at 2; SOR at 3.) Moreover, BLM did not perform a visual contrast rating in order to determine whether there would be a VRM II violation. Rather, it relied only on a "project simulation," which "indicate[d] that this alternative could violate VRM [II] standards." (EA at 2; emphasis added.) The BLM did not state that it would, in fact, violate those standards. Also, even presuming that the "simulation" consisted of the artist's renderings, we still do not know the specific basis for BLM's determination in the absence of a visual contrast rating. A visual representation will not suffice. Finally, there is no evidence that

^{6/} Appellants also provided, as an attachment to their SOR, a revised version of BLM's rendering of what would be seen from the town of Crowley Lake in the case of the Proposed Action. There is little or no sloughing of soil above and below the initial section of new road, before it switches back across the slope of the mountain, as depicted by BLM.

BLM analyzed whether the adverse impacts of this alternative could be mitigated. We are, therefore, not persuaded that BLM adequately considered Alternative B in this respect.

Next, Appellants question whether the area that would be traversed by either proposed right of way actually constitutes deer habitat since, while it offers suitable forage, they and others have failed to observe any deer or any signs indicating their presence in the area. They are unsure of the reason for this, but suggest that it may be due to the fact that abundant water and leafy greens to the southeast and northwest, coupled with "development along Highway 395 and Crowley Lake Road from Tom's Place to Long Valley," might have "split" the migration route for the deer, causing them to avoid the project area. (SOR at 4.) In any case, they propose mitigating any adverse impact by precluding construction and restricting use of the road during the time of migration.

We are not convinced that the area of the proposed road is not within a "migration corridor," or that it at least does not constitute temporary habitat, for mule deer. The BLM states that "[u]p to 5000 deer" move through the area "in late fall and spring." (EA at 2.) The only evidence Appellants offer to the contrary is that they and others have not seen any deer or their sign in the area. However, Appellants' own observations are based only on "many days" spent walking in the area over the course of 4 years. (SOR at 3.) Further, we do not know whether Appellants were ever there during the migration season. In addition, they rely on reports by "long time residents of Crowley Lake who have very rarely or never seen deer in the area." Id. at 4. We do not know how often these individuals visited the area, or also whether they were ever there during the migration season. The lack of sightings and signs may, of course, be due to the fact that the deer do not linger long as they migrate through the area. In any case, we are not prepared to conclude, on the basis of this meager evidence, that BLM is incorrect in its assessment that the area is subject to migration at certain times of each year, and thus constitutes temporary habitat for the deer.

Thus, in accordance with the RMP, BLM may not approve the granting of either proposed road right of way should it be determined that it would adversely affect any deer habitat. At best, BLM concluded that, in the case of the original proposed route, the "road cut might channel deer onto the Crowley Lake Road along a curve at the top of the hill where they would be prone to be hit by cars." (EA at 2.)^{7/} Even assuming that this

^{7/} So far as road construction disrupting migration and diverting deer onto Highway 395 and Crowley Lake Road is concerned, BLM admits that this would occur only "if the construction was allowed to occur during the migration period." (EA at 2.) It did not consider whether these impacts could be mitigated by precluding any construction during that time, which Appellants have now offered to do. Precluding, or at least limiting, road maintenance during this time period should also be considered.

in fact will occur, there is no evidence that BLM considered any measures for mitigating this impact, such as minimizing the extent of the "cut," so that deer would not be diverted, but, rather, would continue along their natural migration route across the proposed road. ^{8/}

We have long held that a BLM decision rejecting an application for a right-of-way, filed pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1994), will be affirmed by the Board where the record demonstrates that BLM has reasonably analyzed all pertinent factors, with due regard for the public interest. Peregrine Broadcasting Co., 62 IBLA 133, 137 (1982); Patrick O. Brown, 55 IBLA 336, 338 (1981). However, the record must substantiate the conclusions made by BLM, which formed the basis for its rejection. Peregrine Broadcasting Co., 62 IBLA at 137-38; Patrick O. Brown, 55 IBLA at 338-39; Eugene V. Vogel, 52 IBLA 280, 284-85, 88 Interior Dec. 258, 260 (1981). In addition, BLM's review should encompass an adequate consideration of appropriate measures to mitigate any identified adverse impacts to public lands resources, as well as the option of taking less drastic action, including granting the right-of-way subject to appropriate stipulations. Peregrine Broadcasting Co., 62 IBLA at 137-38, 138-39; Eugene V. Vogel, 52 IBLA at 284-85, 88 Interior Dec. at 260. We are not convinced that BLM properly fulfilled its duties here.

Accordingly, we conclude that the best course of action is to set aside the Area Manager's April 1992 Decision, and remand the case for reconsideration of Appellants' proposed road right-of-way, including Alternative B. See, e.g., Peregrine Broadcasting Co., 62 IBLA at 137-38, 138-39; Patrick O. Brown, 55 IBLA at 338-39. In so doing, BLM should specifically address whether the adverse impacts to visual resources and deer habitat in the area of the proposed activity might be mitigated, such that a right-of-way could justifiably be granted, subject to appropriate stipulations.

^{8/} We also note that BLM found that no such diversion would occur in the case of Alternative B, presumably because the proposed road would not link up with the Crowley Lake Road. (EA at 2.) Instead, BLM rejected this alternative because "construction, maintenance[,] and use" of this longer route would "disturb[]" more deer habitat. Id. Again, BLM does not appear to have given any thought to restricting construction and maintenance activity during times of deer migration. So far as use of the road is concerned, it must be remembered that much of this use would occur on an existing road. The BLM has not identified the extent of the expected increase in the use of that road, much less why it would have a greater impact on deer or their habitat. Nor has BLM described how deer habitat would be adversely affected by any use, whether on the existing road or especially the short new road. We also note that there is no suggestion in the EA or elsewhere in the record that the use alone of the new road, or even the new road in the case of the Proposed Action, by Appellants and their associates would be of such a magnitude as to have any adverse impact on deer or their habitat.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside, and the case is remanded to BLM for further action consistent herewith.

Gail M. Frazier
Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge