

INTERIOR BOARD OF LAND APPEALS

Tom Cox

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TOM COX

IBLA 94-803

Decided January 28, 1998

Appeal from a decision of the Tucson Resource Area Office, Bureau of Land Management, granting right-of-way AZA 28493.

Set aside and remanded.

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--Rules of Practice: Appeals: Burden of Proof

A BLM determination approving a right-of-way application filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1994), will be set aside where the record shows that the decision may have been based on a misapprehension of the true factual situation.

APPEARANCES: Gary B. Hansen, Esq., Tucson, Arizona, for Tom Cox; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Tom Cox has challenged the issuance of right-of-way AZA 28493 by the Tucson Resource Area Office, Bureau of Land Management (BLM or the Bureau), to John F. Dirksen, effective August 1, 1994, for a road across secs. 29 and 30, T. 21 S., R. 23 E., Gila & Salt River Meridian (G&SR), Cochise County, Arizona. For reasons set forth below, we set aside the grant of the right-of-way and remand the matter to BLM for further consideration.

The instant right-of-way, which is 50 feet wide and 6,800 feet long, traverses a grazing allotment held by Cox. It was granted for the expressed purpose of providing Dirksen with access to the NE¹/₄ sec. 25, T. 21 S., R. 22 E., G&SR. Dirksen had filed an application with BLM on February 23, 1994. The application envisioned the construction of a road to be created by "one pass over the surface with a grader and then repeated use." (Attachment to Application, 7.c, at 1.) Dirksen asserted that the

right-of-way was needed "to provide access for my wife and I to our home site." ^{1/} The application discussed four other possible routes of accessing the NE¹/₄ sec. 25 from the east but concluded that all of these were impractical for varying reasons.

The Bureau proceeded with an environmental assessment (EA) review of the proposed action, serialized as AZ-046-94-017. A finding of no significant impact was rendered by BLM on July 22, 1994, along with a determination to grant the right-of-way under two special stipulations: (1) entrances to the right-of-way, which was not to be used for public access, were required to be kept locked; and (2) any cultural or paleontological resources discovered during construction or use were to be reported to BLM.

The Bureau thereafter authorized the right-of-way. In explaining the basis for its action, BLM noted that it would not cause significant environmental impacts, that it conformed to the Safford District Resource Management Plan, and that it would "have the beneficial socio-economic effect of providing legal access to private land." (Decision Record at 1.) Upon notification of BLM's determination, Cox filed an appeal seeking review by this Board.

On appeal, Cox asserts that BLM failed both to provide sufficient safeguards in the right-of-way grant as well as to assure that there was a real need for the right-of-way in the first instance. With respect to this latter point, Cox claims that it is clear that BLM did not adequately consider alternatives to the right-of-way in question and did not properly consult with other agencies, such as the Arizona State Land Department, because, Cox point outs, Dirksen was simultaneously negotiating for and obtaining a right-of-way from the State Land Department for alternative access to his inholdings. Cox suggests that, since Dirksen clearly had alternate access available from other sources, there was no need to grant him the access he sought from BLM.

[1] Before examining Cox's assertions in detail, certain general observations are in order. As the authorized representative of the Secretary of the Interior, BLM has broad general discretion to accept or reject a right-of-way application pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1994). Kenneth Knight, 129 IBLA 182, 183 (1994); C.B. Slabaugh, 116 IBLA 63, 65 (1990); Eugene V. Vogel, 52 IBLA 280, 283 (1981). A decision by BLM regarding such an application will normally be affirmed where the record shows that the

^{1/} The application continued: "Without this right of way we cannot legally enter or leave our property. There is a minimal cost in constructing a driveway. There is a \$2,000 to \$4,000 cost for the highway access work. The amounts are covered by an existing \$10,000 cash reserve. Our alternative is to abandon the property." (Attachment to Application at 15.)

decision represents a reasoned analysis of the factors involved with due regard for the public interest. J.E. Lepetich, 129 IBLA 255, 259 (1994).

In preparing the EA for the proposed action, BLM analyzed the anticipated impacts of the proposed action and the alternatives suggested in the application on a broad spectrum of resources, including, inter alia, range, wildlife, and botany. Individual reports on several of these disciplines are present in the file.

The primary impact of the proposed action was described in the EA as the loss of plant and wildlife habitat resulting from surface disturbance. (EA at 2.) This impact was deemed "insignificant since the area is surrounded by similar alternative habitat" and "will not significantly change the existing character of the landscape." Id. at 2. The EA justified the proposal as providing Dirksen with legal access to his property, noting that "[w]ithout legal access, the landowner cannot develop his property." Id. at 1.

In order to prevail in a challenge to a BLM decision granting or denying applications to use Federal lands, the challenging party must demonstrate by a preponderance of the evidence that BLM erred in compiling its data or in reaching its conclusions. And, in this regard, conclusory allegations of error or mere differences of opinion, standing alone, do not suffice to discharge an appellant's burden. See, e.g., Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). Herein, to the extent that Cox has argued that BLM analysis of the environmental impacts of the proposed action was flawed, we find that the record establishes that BLM fairly examined the anticipated consequences of the proposal.

As noted above, Cox argues that his grazing rights will be adversely affected, a situation which, he avers, is contrary to the statutes and regulations BLM is obligated to follow. However, insofar as the anticipated effects on grazing are concerned, we note that Grant Drennen, a BLM range specialist, stated in a written report that surface disturbances to build the road would result in the loss of about 10 acres of range land, an acreage reduction which would not result in a decrease in Cox's authorized grazing use. Although he did indicate that increased human activity along the road would be an increased disturbance to Cox's livestock and might impair his ranching operations, Drennen also pointed out that the parcel was already difficult to manage because of the fractured ownership patterns in the area and that the parcel was targeted for disposal out of Federal ownership because its isolated location in an area given to residential development poses management problems for the Department.

The statutes and regulations adverted to by Cox in his brief focus on two Congressional and Departmental concerns: improvement of public rangelands in accordance with land-use objectives and minimization of undue environmental damage caused by rights-of-way over public land. But, contrary to Cox's assertions, we find nothing connected with BLM's determination granting the subject right-of-way which conflicts with those statutes. As discussed therein, BLM's experts fully analyzed the proposal's anticipated impacts and concluded that the proposed action would not cause

significant environmental harm or diminish grazing potential. Cox has simply failed to rebut these conclusions with a preponderance of credible evidence.

A more troubling question, however, is whether the decision below was premised on a mistaken view of the underlying factual situation. As noted above, Dirksen justified his application on the ground that his property in the NE $\frac{1}{4}$ sec. 25 was landlocked and that the right-of-way which he sought represented the only viable way of accessing his property. Based on the information contained in the case file at the time that BLM authorized the right-of-way grant, there was no reason to challenge this assertion. However, with his Request for Hearing, Cox has supplemented the record with documents Dirksen filed with the State Land Department. See Request for Hearing, Ex. C. These documents, when examined in conjunction with the submissions Dirksen made to BLM, raise substantial questions as to whether Dirksen had been completely forthcoming with BLM as to his needs regarding access to his property.

As we noted above, Dirksen's February 1994 application was premised not only on the fact that he had no present access to his property but that the access which he sought was the only reasonable access which he might obtain to the NE $\frac{1}{4}$ sec. 25. Notwithstanding this claim, however, it is now clear that less than 6 weeks after he submitted his application to BLM, Dirksen filed a separate right-of-way application with the Arizona State Land Department seeking access to the NW $\frac{1}{4}$ sec. 25.

The documents which Cox has submitted make it clear that not only had Dirksen sought a right-of-way from the west to obtain access to the NW $\frac{1}{4}$ sec. 25, but that the State had offered a route which Dirksen found acceptable. It seems elementary that, where one individual owns title to both the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of a section, which, in effect, means that the individual owns the entire N $\frac{1}{2}$ of the section, access to either quarter constitutes access to the entire property. When Dirksen asserted to BLM that there was no reasonable alternative access to his property, he was, in reality, asserting only that there was no other reasonable way to access his property from the east. There clearly was reasonable alternative access to his property from the west. 2/ An individual's property cannot be landlocked by other property which that individual owns.

2/ There is a certain disingenuousness to Dirksen's two applications. Thus, in seeking to justify the grant of a right-of-way from BLM for the NE $\frac{1}{4}$ sec. 25, Dirksen asserts that there is no practical alternative access, but discusses only alternatives providing access to the east (though we note that alternative 1, while commencing at Highway 80 east of the NW $\frac{1}{4}$ sec. 25, actually meanders around to such an extent that it approaches the NW $\frac{1}{4}$ sec. 25 from the west). On the other hand, in his application with the State of Arizona Land Department, seeking access to the NW $\frac{1}{4}$ sec. 25, he again asserts that there is no practical alternative access, but in this application he discusses only alternatives providing access to the west.

A principal predicate for the approval of the right-of-way was the desire to provide Dirksen with access to property which he claimed was "landlocked." Whether BLM would have done so had it been apprised of Dirksen's ongoing negotiations with the State with reference to obtaining access from the west is unclear. See, e.g., Albert Eugene Rumfelt, 134 IBLA 19, 22 (1995); Ben J. Trexel, 113 IBLA 250, 253 (1990). We believe it appropriate, however, to afford BLM an opportunity to review its approval of Dirksen's application in light of the possibility of access from the west, as disclosed on the documents submitted on appeal. Accordingly, we will set aside BLM's grant of right-of-way AZA 28493 and remand the case file to BLM for further consideration of the application.

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's determination to grant in the exercise of its discretion the subject right-of-way is set aside, and the case files are remanded for further consideration.

James L. Burski
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge