

INTERIOR BOARD OF LAND APPEALS

Stuart Krebs

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STUART KREBS

IBLA 98-199

Decided January 8, 1999

Appeal from a decision of the Uncompahgre Resource Area Manager, Bureau of Land Management, granting right-of-way application COC-53623. CO-034-97-58.

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

A BLM decision granting a right-of-way application for a bridge and road building project, filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1994), will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Federal Land Policy and Management Act of 1976–Rules of Practice: Appeals: Burden of Proof

The burden is on a right-of-way challenger who appeals a BLM decision granting its application, to demonstrate by a preponderance of the evidence that BLM erred in the collection or evaluation of data supporting the grant of the right-of-way. The challenger's claim of improper reliance on a BLM environmental assessment, which concluded that a bridge and road project was feasible, does not establish error in the grant, when the decision was based not only on the EA, but on a safety analysis prepared by BLM experts showing that denying the application and favorably considering Appellant's proposed alternative would adversely affect public safety on the access road for which the grant was issued.

APPEARANCES: Stuart Krebs, pro se.

## OPINION BY ADMINISTRATIVE JUDGE TERRY

Stuart Krebs (Krebs or Appellant) has appealed from a February 9, 1998, Decision Record (DR) and Environmental Assessment (EA) issued by the Uncompahgre Resource Area Manager, Bureau of Land Management (BLM), granting right-of-way application COC-53623 for the Ray Coffey Access Road Project, T. 48 N., R. 9 W., sec. 19, lots 5, 6, and 7, NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, New Mexico Principal Meridian, Montrose County, Colorado. The Area Manager based his DR on EA No. CO-034-97-58.

On January 27, 1992, E. Ray Coffey, a developer and the owner of real estate interests near Happy Canyon in Montrose County, Colorado, filed with BLM a right-of-way application seeking approval to develop the following improvements across BLM land:

New access road including creek crossing via bridge or culvert, underground utilities. Road to be constructed to County specifications for rural gravel road. Will be maintained privately. \* \* \* Average right-of-way to be 60 foot with some widening in areas of steeper side slopes to allow for placement of cut material and proper slopes. \* \* \*

On October 27, 1992, BLM advised Coffey by letter, in pertinent part:

At the present time, it is our determination that before the BLM will process your right-of-way (R/W) application for an access road any further, you need to pursue the appropriate county requirements and show due diligence to develop your proposed subdivision. The existing county road R/W provides adequate access to your property for the present level of use. Upgrading the existing road to county standards is not warranted. When you demonstrate you are actively pursuing approval of your subdivision with the Montrose County Planning Commission, BLM will coordinate with you and the county to perfect your R/W application, collect the processing fees, and process a R/W.

On February 9, 1994, Coffey resubmitted the right-of-way application to BLM with greater specificity. The application provided:

Road and utility easement approximately 1 mile in length. County Specifications - 60 ft. Easement width. Road 24 ft. Driving width, 9 inches base gravel, 4 inches 3/4 finish gravel. This requires a 30.5 ft. Dirt road foundation. Power, telephone and water lines will be installed within the 60 ft. Easement.

Easement and road will originate where the Sims Mesa [C]ounty road leaves private lands at the Northeast corner of Section 19, R(W, T48N, N.M.P.M.; thence along the old wagon or jeep road as shown on the U.S.G.S. 7.5 minute Topographic Map (1962-revised 1983) bearing Westerly and Southerly to a point 200 ft. West of the Southwest Corner of the Southeast Quarter of said Section 19.

On August 29, 1994, BLM advised Coffey of the various requirements associated with design, engineering and upgrading of the proposed road to his Sims Mesa subdivision. On June 27, 1996, BLM advised the Montrose County Commissioners of a change in Coffey's application to simply upgrade the existing unimproved Happy Canyon Roadbed and construct a bridge over Happy Canyon.

The more northerly route for the initial part of the proposed project (from east to west) along the existing Happy Canyon Roadbed, parallel to the creek (riparian route), is that proposed by Coffey. Appellant has continued to pursue a more southerly alternative (from east to west) over higher terrain for the initial part of the improved roadway to the same proposed bridge as in Coffey's Preferred Alternative. Although Kreb's alternative (Alternative B) would have the bridge in the same location over Happy Canyon, it would be in a higher position to accommodate the higher elevation of the proposed southerly route for the initial segment of the roadway. From the bridge, both proposals would follow the Happy Canyon Road westerly to the road's termination at the Coffey property.

One alternative, Coffey's originally proposed road alignment, was eliminated from consideration early in the process as it would have resulted in new road construction for the entire way. According to the EA, this alternative would have resulted in new surface disturbance in a relatively pristine riparian area and would have fragmented the wildlife habitat in the area further. (EA at 6.)

The DR and EA prepared by BLM examined the proposed action forwarded by Coffey (Proposed Action), a no-action alternative, and Kreb's Alternative B. In the DR signed by the Resource Area Manager on February 9, 1998, BLM determined:

From an engineering standpoint, the county road alignment is by far a better travelway. It is straighter and has a flatter road grade on the east side approach to the proposed bridge, hence it will be a safer travelway compared to the Alternative B alignment not only for the short term, but more importantly over the long term as the private land is developed and traffic on the road increases.

It has been demonstrated based on the preliminary engineering calculations that to utilize the existing county road alignment will cause less surface disturbance overall compared to the Alternative B alignment. It is also recognized that it will result in more impacts to vegetation, and in turn, likely more impacts to wildlife habitat. However, it is my decision that public safety cannot be compromised.

To follow the county road will also have no change in legal access status, as compared to the Alternative B alignment which

the county would have to adopt in order to provide for the same level of legal access to the land owners who use it.

(DR at 2.) The DR found that the Proposed Action is in conformance with the Uncompahgre Basin Resource Management Plan, approved in July 1989, and Plan Amendment, approved in September 1993. Id. The DR further determined that the EA, in analyzing the environmental effects of the Proposed Action, outlined mitigation measures which supported a finding of no significant impact (FONSI) on the human environment. Id.

On appeal, Appellant questions whether the Area Manager's decision is based on an adequate environmental analysis, since "environmental considerations as a basis for reaching a decision are dismissed in a single sentence in the Decision Record." (Statement of Reasons (SOR) at 2.) Krebs further disputes the merits of the Area Manager's stated concerns regarding safety, claiming that if the standards for the class of road approved in this case are adequate, then there is no reason to reject Alternative B for reasons of safety. Id. Moreover, Appellant claims, the present roadbed following the route proposed for Alternative B was probably constructed in the 1950's during the uranium boom and has a very sharp curve after descending to the creek bottom where it turns to cross the creek. Appellant claims that these features would be significantly modified by proposed Alternative B, although the present road with these features has been used for decades. (SOR at 2.) Appellant claims that, "[t]o my knowledge, there has never been an accident here even though the road configuration and alignment are far less favorable than they would be with the Alternative B." (SOR at 3.)

Krebs claims there are at least three reasons why the riparian route is not safer than Alternative B, and is likely more dangerous. Appellant claims:

\* \* \* First, this entire area and the riparian route in particular has a high mule deer population, especially during the winter. Higher vehicle speeds along the densely vegetated riparian route are a recipe for the kind of slaughter which regularly occurs along highways in the region—the nearby U.S. Highway 550 between Montrose and Ridgway being a conspicuous example.

Second, the riparian route at its western part goes through dense vegetation along a north-facing hill. This section of road does now, and will in the future, remain snowy, icy and muddy for months longer each year than open routes such as Alternative B. My own access road which goes through an area similar to this portion of the riparian route only about 200 feet away, has been snowy and icy since November and is still in that state at the time of this writing. Adjacent exposed road sections have been dry most of the winter.

Prolonged periods of slick road surface in this section of the riparian route are particularly hazardous because if that portion were to be constructed as described in the EA—well above the creek in order to minimize disturbance of the creek bed itself—then a vehicle losing control and accidentally leaving the roadway would fall off of the shelf and 15 feet into the creek below.

The third consideration affecting the relative safety of the alternative routes is the presence of two side access routes, mine and my neighbor's, entering the riparian route at densely vegetated blind corners. Alternative B has no such complications, but even if it did, it passes through completely open country with good visibility.

The Alternative B route has a substantial history of safe, periodically heavy use. If upgraded to BLM standards as proposed, it would be safer still. It is located in an open area with good visibility and is unencumbered by regular side road traffic. Considering only safety, it is a perfectly satisfactory route.

(SOR at 3-4.)

Krebs contends, however, that his "concern is primarily environmental." (SOR at 4.) He incorporates by reference the comments submitted in response to the draft EA (Comments). In those comments, Krebs claims that

although the area of disturbance and the volume of soil moved are important factors which have to be considered, these quantities do not begin to capture the substantial qualitative differences in the nature of the area disturbed. In the case of the riparian route virtually all of the disturbance is in the section immediately adjacent to the creek—the area of greatest biomass and biodiversity. In the case of ALTERNATIVE B the disturbed area is covered with only sparse vegetation already heavily impacted by recreational activities except in the lower parts of the bridge approach where the impacts are essentially the same as for the riparian route.

(Comments at 2.)

Finally, while accepting that Alternative B will be more expensive, Krebs argues that

[p]ossibly the greatest shortcoming of the EA examination of environmental impact is the failure to consider the effects of building any of the proposed alternatives to county road standards. I realize that this is probably not legally required

or usually done. But the possibility, and even probability, of this happening is acknowledged in the section mentioned immediately above and elsewhere as well. And in fact it is likely to happen.

(SOR at 4.)

In this case, BLM has recognized that upgrading the existing Happy Canyon County Road alignment and approving the construction of a bridge over Happy Canyon involved the balancing of a number of factors, including safety, environment, future development needs, and cost. The question is whether BLM properly granted the Ray Coffey right-of-way application over the existing Happy Canyon Road in preference to the more southerly proposal of Krebs for the first quarter mile of the project. We conclude that it did.

[1] As the authorized representative of the Secretary of the Interior, BLM has the discretion to accept or reject a right-of-way application for a bridge and road-building project filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988). Kenneth Knight, 129 IBLA 182, 183 (1994); C.B. Slabaugh, 116 IBLA 63, 65 (1990); Eugene V. Vogel, 52 IBLA 280, 283, 88 ID. 258, 259 (1981). A BLM decision granting such an application will be affirmed where the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Kenneth Knight, *supra*.

[2] The burden is on Appellant, as the party challenging BLM's decision, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The Department is entitled to rely on the reasoned analysis of its experts in the field in matters within their realm of expertise. King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. Thus, where BLM has evaluated the feasibility of the bridge and road building proposed by the applicant, and has researched and balanced the anticipated environmental consequences with other safety considerations, it is not enough that Appellant offers a contrary opinion. In order to prevail, Appellant must demonstrate by a preponderance of the evidence that BLM erred in evaluating its data or reaching its conclusions. King's Meadows Ranches, *supra* at 342.

To determine whether a BLM decision granting a right-of-way application was based on a reasoned analysis of the facts and was made with due regard for the public interest, the Board looks to the impacts anticipated from the proposal as those impacts are evaluated in the EA. The EA states that the proposed action and alternatives were analyzed to determine the effect on the following critical elements: (1) Air Quality; (2) Cultural Resources; (3) Floodplains/Wetlands/Riparian Zones/Alluvial Valleys; (4) Native American Religious Concerns; (5) Prime and Unique

Farmlands; (6) Threatened and Endangered Species; (7) Hazardous or Solid Wastes; (8) Water Quality, Surface or Ground; and (9) Wilderness, Areas of Critical Environmental Concern, Wild and Scenic Rivers. (EA at 7-10.) The following noncritical elements were also examined: (1) Access and Transportation; (2) Climate; (3) Geology and Minerals; (4) Hydrology and Water Rights; (5) Land Status/Realty Authorizations; (6) Noise; (7) Range Management; (8) Recreation; (9) Soils; (10) Visual Resources; (11) Wildlife, Aquatic; and (12) Wildlife, Terrestrial. (EA at 10-17.) We examine each of these values below, except where no known impacts were found to be present.

The area affected by the alternatives considered by BLM is located approximately 5 miles south of Montrose, Colorado. Topography is primarily mesas with fairly deep draws. Happy Canyon Creek runs through the project area. Vegetation consists of pinon, juniper and cottonwood trees, oakbrush and sagebrush, and various grasses. Happy Canyon Road provides legal access to several landowners along it. Approximately 2,000 acres of private property in the area could be accessed by this road. Some of the private properties are being divided into 35+ acre parcels and are being sold. (EA at 7.)

The EA indicates that BLM has reviewed the proposed action and the alternatives in the context of the Uncompahgre Basin Resource Management Plan and Plan Amendment as required by 43 C.F.R. § 1610.5 and BLM 1617.3. (EA at 2.) The Area Manager further determined that the proposed action is subject to FLPMA, as the proposed road improvement and bridge will cause new surface disturbance beyond what currently exists associated with the county road. Id. In its review of environmental concerns, BLM determined that there would be no known impacts for either the Proposed Action or Alternative B with respect to the critical elements listed above as (5), (6), (7), and (9). (EA at 6-10.)

With respect to air quality, the EA determined that while the air quality in the area is good, there may be some increase in dust during road construction and maintenance activities in the case of both the Proposed Action and Alternative B, with no change if the no-action alternative were selected. (EA at 7.) The only known cultural phenomenon to be impacted under any of the three alternatives is a possible hearth which is located in the road on the west bank of Happy Canyon Creek just past the creek crossing. The EA determined that the potential exists for cultural resources to be buried in the immediate area, and that in the case of both the Proposed Action and Appellant's Alternative B, the construction of the bridge and the road improvement will have to be closely monitored to ensure any cultural resource present is protected. With respect to the no-action alternative, possible impacts from continued road use on buried cultural objects would remain. (EA at 7.) In addressing Native American religious concerns, the same factual predicate and the same considerations addressed above would apply. (EA at 8.)

The EA determined the Happy Canyon Creek area to be a riparian zone, while the bridge structure will be in the creek's floodplain. In reviewing

the Proposed Action, the EA determined that approximately 900 feet of the existing road parallels the creek riparian area with the road improvement in this area to be on the uphill side of the road (cut bank) with impacts expected from sidecasting road scrapings, burying some riparian vegetation, and inadvertently widening the road out into the riparian zone. (EA at 8.) The EA found that both the Proposed Action and Alternative B will utilize previously disturbed areas of the existing county roadway, and that in each case, additional surface disturbance will occur at the creek crossing where the bridge will be constructed. Id. The bridge structure under the Proposed Action will require less fill in the creek floodplain than the bridge structure under Alternative B. Id. Under Alternative B, the bridge will need to be higher in order to align properly with the road grade and thus the need for more fill. Id.

There are no prime and unique farmlands within the affected area, and therefore this critical element would not be impacted under any of the alternatives. (EA at 9.) Likewise, there are no occurrences of threatened and/or endangered plant species on the proposed right-of-way. Id. The only listed animal species that may occur in the area are wintering bald eagles and Peregrine falcons, which may forage there. However, there is no known essential habitat for these species in the Happy Canyon area, and since the roadway already exists, the potential for detectible effect is extremely low. Id.

While there are no known impacts from hazardous or solid wastes associated with any of the alternatives, surface or ground water quality could be impacted by both the Proposed Action and Alternative B. (EA at 10.) Under the Proposed Action, sediment could increase in the creek during bridge construction from the associated adjacent disturbed areas. Id. The EA determined that road maintenance scrapings and runoff from the road surface are more likely to enter the creek in greater quantities under this alternative leading to a higher degree of sedimentation over the long term. Id. Under Alternative B, based on the preliminary engineering, there will be more cut and fill under this alternative, therefore more sedimentation may occur in the creek during construction than in the Proposed Action. (EA at 10.) The runoff from the improved portion of the roadway for all except the first quarter mile (where the alternatives differ) would be the same for the Proposed Action and Alternative B.

In addressing noncritical but other important elements related to the environment, the EA determined that future traffic will increase along the road from landowners, whose number is likely to increase as land is being divided and sold, and from the public as a result of the improved access resulting from the project's completion. (EA at 11.) The EA determined that over the long term, it would be in the best interest of public safety for access to be along the road alignment represented by the Proposed Action than along the Alternative B alignment. Id. The EA found that the steeper road grade and curve before entering the bridge on the east side of the creek in the Alternative B alignment would not be as safe a travelway as that described in the Proposed Action. (EA at 11.)

In addressing climatic considerations, the EA found that the first quarter mile of the county road segment (Proposed Action) has more vegetation along it and more northern exposures, making it likely that snow will not melt as fast as the more southerly exposures on the Alternative B routing. However, the EA determined that the alignment within the Proposed Action may get less snow accumulation due to more extensive vegetative cover. (EA at 12.)

The EA determined the geology of the area to be important to implementing either the Proposed Action or Alternative B. To the east of the proposed bridge, under the Alternative B alignment, a more extensive excavation of the hill top to remove shelf rock before reaching the creek would be required. Under both the Proposed Action and Alternative B, the same general track is followed for the improved roadway on the west side of the creek, and some of the material removed as a result of widening the road will be used as fill on other portions of the road. (EA at 12-13.)

Since Happy Canyon Creek is a perennial stream, hydrology became an important consideration in the EA as well. The first quarter mile of the Proposed Action alignment (where the only significant difference between the two alternatives exists), road construction will need to be compatible with potential flooding as this route is lower and parallels the creek bed. Conversely, the bridge in Alternative B would be required to be a higher structure in order to meet the road grades on the bridge approaches. Under this alternative, more fill will be needed for the bridge abutments and the bridge height would likely exceed the minimum bridge design standard. (EA at 13.)

The legal status of the land involved was also addressed. This is important in the EA because Alternative B would require authorization from landowners to construct a new roadbed over the first quarter mile of the project, while the Proposed Action would utilize an existing authorization. Appellant downplays this in his SOR by claiming that only he and one neighbor's authorization are required, and that he already has a right-of-way from that neighbor. Nevertheless, no statement of the neighbor is contained in Appellant's filing and no evidence of the right-of-way has been provided. (EA 13-14.)

Noise concerns were reviewed. Although the project area is rural, the noise level would increase in the area during road and bridge construction in both the Proposed Action and Alternative B. The noise associated with the road improvement for the first quarter mile in the Proposed Action may be higher for those landowners in the immediate vicinity compared to the Alternative B alignment as this activity would be closer to their property. Conversely, construction of the road and bridge under Alternative B would be more difficult because of the more extensive road cut and bridge fill on the east side of the creek crossing. Thus, the EA concluded that Alternative B would likely take more time to complete, but not significantly more, and the noise levels could be longer in terms of time. (EA at 14.)

Recreational use of the area under each alternative was carefully reviewed and includes hunting, hiking, biking, motorcycling, 4-wheeling, all-terrain vehicle use, and sledding. Under the Proposed Action, the road would continue to provide access for the recreational uses occurring on the public land, and in fact, the uses may increase due to an improved access road. (EA at 15.) Alternative B would also provide increased access for the recreational uses occurring on the public land. One specific concern was addressed by BLM concerning Alternative B. Sledding occurs on the hillside to the south of this alternative alignment, and sled tracks have been seen over the area dissected by Alternative B, raising concerns about sledder safety and the traffic that would occur on this road segment. Id.

The project's effect on soils was examined, recognizing that the majority of the soils in the project area are decomposed shale, a poor road building material. The importation of gravel would thus be required. The Proposed Action would require approximately 260 cubic yards of cut and 3,130 cubic yards of fill for the road and bridge. Alternative B would require approximately 5,835 cubic yards of cut and 1,624 cubic yards of fill. (EA at 16.) Overall, there would be less surface disturbance under the Proposed Action than Alternative B, because of the more significant requirement under Alternative B to properly align the road approaches to the bridge. Id.

Visual resources in the project area will be impacted under both the Proposed Action and Alternative B. Excavation will occur under both proposals. The bridge structure under Alternative B will be higher and may impact visual resources in the surrounding area more than the Proposed Action. (EA at 16.)

The impact of project completion on terrestrial and aquatic wildlife was also reviewed. It was determined that during bridge construction activities under either the Proposed Action or Alternative B, surface disturbance and resulting increased sedimentation will occur in Happy Canyon Creek, although not to the extent under the Proposed Action as in Alternative B. Conversely, over time, the runoff from the initial quarter mile segment of road under the Proposed Action may be more than that in Alternative B because of its parallel track to that of the creek bed. (EA at 17.) This sedimentation under both alternatives could adversely impact aquatic wildlife. Terrestrial wildlife impacts would likely be greatest in the riparian zone represented by the first quarter mile of the Proposed Action. This could occur as a result of the road widening and straightening activities which may disturb nesting or hiding areas. Id.

We set forth the environmental analysis of the proposed alternatives for this project at some length above because we believe it demonstrates that "a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable" and that BLM correctly determined an environmental impact statement was not necessary. We believe BLM's analysis of the environmental impacts from the project was comprehensive and its selection of

the Proposed Action, as well as its conclusion that the impacts, as the Proposed Action is designed, are not significant, is correct.

We find BLM's determination that the Proposed Action is preferable to Alternative B is reasonable in light of both safety and environmental concerns. We are not persuaded that BLM overlooked significant impacts in properly concluding that the Proposed Action represented a more satisfactory choice than either Alternative B or the no-action alternative. The fact that the Proposed Action may be controversial to some does not automatically make its impacts significant, or its choice erroneous. Glacier Two-Medicine Alliance, 88 IBLA 133, 143-44 (1985).

As shown above, Appellant's assertion that BLM did not investigate the environmental impacts of the Proposed Action in comparison to Alternative B is without merit. Not only were the critical elements thoroughly reviewed, but each relevant noncritical element was carefully assessed.

In sum, we conclude Appellant has not met his burden of showing that BLM's FONSI is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the Proposed Action. The grant or denial of the right-of-way application was within the discretion of the Area Manager in this case. The Area Manager relied on the EA in making his determination, and the decision was supportable and reasonable.

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 P. Terry  
Administrative Judge

I concur.

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David L. Hughes  
Administrative Judge