

INTERIOR BOARD OF LAND APPEALS

Kirk Brown

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KIRK BROWN

IBLA 97-342

Decided December 13, 1999

Appeal from a decision issued jointly by the Bureau of Land Management and the Forest Service, U.S. Department of Agriculture, rejecting right-of-way application CACA 37838.

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 right-of-way application for a road and utilities corridor project is properly rejected by a joint BLM and U.S. Forest Service decision pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1994), 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--Rules of Practice: Appeals: Burden of Proof

The burden is on a right-of-way applicant, who appeals a BLM decision denying his application, to demonstrate by a preponderance of the evidence that BLM erred in rejecting the right-of-way. That burden is not met where the right-of-way is rejected because it would be incompatible with a national scenic trail closed to motorized traffic and where the possibility of other access exists. An applicant does not gain entitlement to a particular right-of-way because alternate access may be difficult or expensive.

APPEARANCES: Kirk Brown, pro se; Area Manager, Eagle Lake Resource Area, Susanville, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Kirk Brown has appealed from an April 1, 1997, decision jointly issued by the Eagle Lake Resource Area Manager, Bureau of Land Management (BLM), and the Eagle Lake Ranger District, U.S. Forest Service (FS), denying Brown's application for a road and utilities right-of-way filed with BLM and FS on February 11, 1997.

On November 8, 1996, Brown purchased 20 acres of undeveloped land described as the W¹/₂NW¹/₄NW¹/₄, sec. 8, T. 29 N., R. 11 E., Mount Diablo Meridian in Lassen County, California. Brown's parcel is within Patent No. 2407. (May 7, 1997, BLM Response, Exs. A and D.) Brown's land is south of the Bizz Johnson Trail (BJT), a national recreational trail established by BLM and FS and officially designated by Congress on March 28, 1983 (Pub. L. No. 98-11, sections 301-304). BLM and FS prepared a joint Recreation Activity Management Plan (RAMP) for the BJT in August 1983.

In his application, Brown stated that he was seeking permanent road and underground utility access for the purpose of building a home on the site and that there was no legal access to his land. Brown's proposed road would enter FS land via the BJT Devil's Corral Trailhead access road off State Highway 36. It would then run south on FS land and across the BJT, then southeasterly across FS land onto and across BLM land to Brown's private land. The FS and BLM lands to be crossed by Brown's proposed road are within the BJT corridor. (May 7, 1997, BLM Response, at 1-2; Ex. A.)

The April 1, 1997, decision appealed from states in pertinent part:

Our [BLM and FS] concerns center around stated management goals in the Susanville-Westwood Trail Recreation Area Management Plan (Bizz Johnson) completed in 1983. It is our intent to manage the abandoned Southern Pacific railroad grade from Susanville to the Mason Station as a multiple use nonmotorized recreation trail within a natural appearing environment. Other objectives for managing the trail include: (2c) to develop trail improvements only to the extent they do not detract from the natural setting of the area; (2d) manage for nonmotorized use where feasible; and (2e) ensure adequate protection of private land from trespass, littering, wildfire and vandalism. Vehicle access to the trail is allowed for emergencies, maintenance, recreation management, and fire protection only. The drawing included with [Brown's] application applies to an area restricted from motorized use. Your application is in conflict with our management plan.

During the check of our county records we found the County of Lassen was given access across private lands in the area of your property which could be available to you.

An archaeological inventory of the portion of the ROW applied for under the Lassen National Forests' administration has indications of extensive turn of the century logging activity, considered significant as a historic resource. Also, there is potential for Native American early history sites (prehistoric) in the area. Because of the sensitive nature of these resources, disturbance of this area is not desirable.

Unauthorized vehicular use of the trail and the ability to ensure there will be no damage through your access, as well as any future needs for utilities, are additional reasons why your proposed access is in conflict with our management plan for the Bizz Johnson Trail.

In a subsequent filing, 1/ BLM amplified its concern that granting the right-of-way would not be in the public interest:

A grant of the proposed right-of-way would * * * have a high potential of resulting in daily vehicle use to as many as nine residences, with consequent construction, traffic, utility lines, daily trips by residents, and frequent use by delivery trucks, all using the Devil's Corral Trailhead access road and crossing this part of the BJT. Such use would be a clear conflict with our management prescription for this part of the BJT and the adjacent public and [national forest] land within the trail corridor.

In his appeal, Brown asserts that BLM is improperly denying him access to his property. Brown cites 16 U.S.C. § 478 (1994) which preserves the "egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes * * *." Brown also cites the National Trails Systems Act, 16 U.S.C. § 1241 (1994). Brown points to 16 U.S.C. § 1246(a)(2) which instructs the "appropriate Secretary [t]hat in selecting the rights-of-way [for national scenic and national historic trails] full consideration shall be given to minimizing the adverse effects upon the adjacent landowner or user and his operation." He notes further that under 43 U.S.C. § 1246(c), the appropriate Secretary is authorized to promulgate regulations authorizing the use of motorized vehicles when "necessary to meet emergencies or to enable adjoining landowners or land users to have reasonable access to their lands or timber rights."

Brown has submitted an April 22, 1997, letter from the Superintendent of Roads, Lassen County Department of Public Works. Brown interprets the

1/ June 20, 1997, BLM Response, at 4.

letter as indicating that Lassen County cannot provide him access to his property. The text of the letter is as follows:

This letter is in answer to your questions regarding Devil's Corral Road, County Road Number 230. Devil's Corral Road is maintained by Lassen County Road Department for only 0.48 mile from its intersection of State Route 36. I have enclosed a map with said road highlighted.

All other roads in the area are not county maintained.

Brown has also included an evaluation of his property by a title company. That evaluation mentions an easement, recorded June 21, 1920, for road purposes, in favor of Lassen County. It also includes the following paragraph:

The fact that the land herein described does not appear to abut upon an open public street or road and access thereto by means over other land cannot be ascertained from public record information. Any policy to be issued in connection with this application for title insurance will delete, by means of an endorsement to the policy, any coverage relating to any right of access to or from the land.

Brown argues that he has no legal access, is entitled to reasonable access, and that BLM must grant him such access.

BLM's May 7, 1997, response affirms the reasons given in the April 1, 1997, decision for denying Brown's application. It also points out that Brown's property is not within, but adjacent to, a national forest, and hence 16 U.S.C § 478 (1994), dealing with ingress and egress of actual settlers inside the forest boundary, is not relevant.

BLM next points out that under 16 U.S.C. § 1246(a)(2) (1994), the appropriate Secretary, in "selecting rights-of-way for trail purposes, * * * shall obtain the advice and assistance of * * * landowners and land users concerned." BLM states that when the BJT Management Plan was established in 1983, adjacent landowners were provided with the opportunity to express concerns, and that no concerns were expressed by the then owner of the land purchased by Brown in 1996. BLM asserts that Brown was on notice when he bought his land that the BJT was north of that land and knew from his title company that access to the land was in doubt.

BLM suggests that Brown has the possibility of reasonable access other than the right-of-way he sought in his application. Referring to Ex. A, BLM notes that Brown's parcel encompasses both sides of the Susan River, with the greater portion to the south of the river. BLM states that there is an existing access route through the Devil's Corral area to Brown's land on the south side of the river. BLM admits that this route would be more expensive because it would require crossing two creeks.

(May 7, 1997, Response at 4; Ex. A.) BLM notes that Brown's title report mentions an easement for road purposes in favor of Lassen County. Referring to the letter Brown received from the Lassen County Superintendent of Roads, BLM points out that "the fact that the County does not maintain the road into the south end of Mr. Brown's parcel does not mean that he cannot use this road." BLM's response continues:

Mr. Brown does appear to have reasonable access into his property on the south side of the Susan River, even though this access would cost him more than a road across the USFS and public land to the north. Mr. Brown should have investigated the costs and opportunities of obtaining access into his parcel prior to his purchase.

Id. at 5.

BLM contends that Brown does have reasonable access "across the private lands to his west, both from the county road reservation on his parcel, and from the legal principle of an easement by implication and necessity * * * ." While this access would cost more than the route sought in Brown's application, the public interest in protecting the BJT from unauthorized motorized use, and damage to cultural resources "outweighs the private benefit to Mr. Brown" of the less expensive access. Id. at 7.

Brown has submitted a number of additional statements and exhibits in support of his appeal and BLM has submitted additional responses. Insofar as pertinent to our disposition, we will refer to these documents in our discussion below.

[1, 2] The Secretary of the Interior is authorized under section 501(a)(6) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(6) (1994), to grant rights-of-way over public lands for "roads, trails, highways, * * * or other means of transportation." Approval of an application for a right-of-way, however, is a matter wholly committed to the Department's discretion. Cypress Community Church, 148 IBLA 161, 164 (1999); Dwane Thompson, 88 IBLA 31, 35 (1985). Thus, a BLM decision approving or rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. See, e.g., Coy Brown, 115 IBLA 347, 356 (1990); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988). Departmental regulations provide that an application may be denied if the authorized officer determines that the proposed right-of-way would not be in the public interest. 43 C.F.R. § 2802.4(a)(2). We have noted many times that a party challenging a decision rendered by BLM in the exercise of its delegated authority has the affirmative burden of establishing error by a preponderance of the evidence. See Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984); James Spur, Inc. v. Office of Surface Mining Reclamation and Enforcement (OSM), 133 IBLA 123, 178 (1995); Powderhorn Coal Co. v. OSM (On Reconsideration), 132 IBLA 36, 40 n.2 (1995).

This Board has upheld BLM's rejection of right-of-way applications when feasible alternatives are present. Dwane Thompson, *supra* at 35; High Summit Oil & Gas, Inc., 84 IBLA 359, 92 I.D. 58 (1985), and cases cited therein; Lower Valley Power & Light, Inc., 82 IBLA 216 (1984). Moreover, where the proposed access would conflict with other land management objectives, a showing that alternative access may be more difficult or expensive provides insufficient reason for overturning a BLM decision to reject a road right-of-way application. Intermac, Inc., 141 IBLA 61, 63 (1997); Albert Eugene Rumpfelt, 134 IBLA 19, 22 (1995).

In Thompson, *supra*, the applicant for a right-of-way was the owner of a 40-acre parcel which had no legal access at the time he purchased it. BLM rejected Thompson's application for the reason that the right-of-way would not conform to its planning policy. Further, BLM cited opposition to the right-of-way from the Oregon State Department of Fish and Wildlife and from adjoining landowners because the land to be crossed was within the boundary of deer winter range. Finally, BLM stated that alternative routes were available which would avoid the winter deer range, would not cross public land, and would be acceptable to adjoining landowners. In Thompson, the applicant sought and was granted a way of necessity under Oregon law, but the route proved to be unacceptable due to the nature of the slopes to be crossed. He also sought and received a BLM right-of-way which, coupled with a public easement across private land, would have provided access. However, the private property owner petitioned the county to vacate the public easement.

We held in Thomson that in the absence of an affirmative showing that there is no possibility of access other than that sought in the application, the applicant had failed to establish error in the decision rejecting his application. *Id.* at 35.

Here, as in Thompson, the burden is on Brown, as the party challenging BLM's decision, to support his allegations with evidence showing error. The gist of Brown's argument is that BLM must provide him the access he applied for. Brown has failed to support his position with compelling authorities or argument.

The statutory provision cited by Brown, 16 U.S.C. § 478 (1994), is not applicable because Brown is not a settler on national forest lands and the section does not grant access rights to private inholders other than actual settlers. The other provision cited by Brown, 16 U.S.C. § 1246(a)(2) (1994), instructs the appropriate Secretary to minimize adverse effects on adjacent landowners. That provision was complied with by the agencies contemporaneously with their planning and establishment of the BJT. As indicated earlier, the agencies did consult with adjacent property owners during the planning stages. According to BLM, the previous owner of Brown's parcel, Grace Jackson, "did not comment on, or protest against the BJT management prescriptions in the RAMP, and never requested legal access across the public or USFS lands in question

before or after the establishment of the BJT." 2/ Brown bought his property long after the BJT was an established fact. The agencies were under no duty to minimize possible disadvantages of his real estate transaction.

The evidence Brown has provided to support his position that no access is possible, other than the right-of-way sought in his application, is unconvincing. As BLM points out, the existing public access enters the northwest corner of Patent No. 2407, and Brown would have to make an effort to obtain legal access across the western half of this patent to reach his property. BLM points out that Brown has submitted no documentation "of his efforts to acquire legal access across the other private lands such as filings in State Courts to acquire an easement by necessity, or through the dominant tenement he may have as the owner of a portion of Patent No. 2407." 3/ BLM also notes that Lassen County Assessor's maps show at least nine lots of 5 acres each on both sides of the Susan River, in the same vicinity as Brown's land. BLM suggests that Brown could get together with other landowners in the area in a cooperative effort to improve access. 4/

Brown did submit a letter from another private landowner refusing Brown access across his land. The letter states in part: "At the time I sold the property you [Brown] now own, we used to drive in from the north side of the Susan River, crossing what is now the Bizz Johnson Trail." Based on this letter, Brown asserts a right to access via the route he sought in his right-of-way application. 5/ In an "Amended Appeal" filed January 22, 1999, Brown asserts that the agencies improperly blocked "historical access" to his and other properties. In a January 26, 1999, filing, BLM denies the existence of "historical access" and refers to the route as "a faint 2-wheel track through the area, which does not show on any USGS map or on any Lassen County maps as a road." Responding to Brown's claim that this access, the subject of his application, was actually an R.S. 2477 highway, 6/ BLM stated:

Since a portion of Mr. Brown's applied for "road" lies within the reservation for the Lassen National Forest, his claim for an RS 2477 right-of-way is in error. In addition, the

2/ June 20, 1997, BLM Response at 2, 3. See also undated letter from brokerage house who sold property to Jackson on July 8, 1982.

3/ June 20, 1997, BLM Response at 2.

4/ June 20, 1997, BLM Response at 3, 4.

5/ Brown's Jan. 12, 1998, filing and Ex. A thereto.

6/ The existence of a right-of-way for a road across public lands under section 8 of the Act of July 26, 1866 (R.S. 2477), repealed by section 706(a) of FLPMA, depends on evidence showing historical use and dedication to a public purpose. Normally, the existence of an R.S. 2477 road is a question of state law for adjudication by state courts.

two-wheel track in question could in no way be considered a "highway," since it goes nowhere except to the rim of the canyon, and does not provide any through public access to any other public lands. [7/]

In further filings, Brown amplifies the R.S. 2477 argument. BLM is correct in its response that no issue is before the Board respecting the existence of an R.S. 2477 highway. 8/

We conclude that BLM's rejection of Brown's right-of-way application is soundly based on a consideration of relevant management objectives with which the grant would conflict. We also conclude that Brown's showing of difficulty of alternate access is insufficient to overturn BLM's decision. To the extent not discussed in this decision, Brown's other arguments have been considered and rejected.

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.

James P. Terry
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

7/ Jan. 26, 1999, BLM filing, at 2.

8/ Feb. 11, 1999, Brown filing; Mar. 18, 1999, BLM filing.