



RONALD W. MALONE

173 IBLA 347

Decided February 20, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

RONALD W. MALONE

IBLA 2007-125

Decided February 20, 2008

Appeal from a decision of the Arcata, California, Field Office, Bureau of Land Management, denying an application for a right-of-way over Federal lands in the King Range National Conservation Area, Humboldt County, California. CACA 48352.

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

Denying an application for a right-of-way under 43 C.F.R. § 2804.26 where (1) doing so furthers applicable land management objectives, and (2) there is adequate alternative access to the applicant's private lands, represents a reasoned consideration of the factors involved with due regard for the public interest and is a proper exercise of discretion by the Bureau of Land Management.

APPEARANCES: Ronald W. Malone, San Pablo, California, *pro se*; Lynda J. Roush, Field Manager, Arcata, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Ronald W. Malone has appealed a February 13, 2007, Finding of No Significant Impact and Decision Record (Decision) denying his application for a right-of-way (ROW) (CACA 48352). Malone applied for a ROW approximately 2,840 feet in length and 10 feet in width to use and maintain a road over certain public lands in Lots 7 and 8, sec. 18, T. 5 S., R. 2 E., Humboldt Meridian, Humboldt County, California. The parcel of public land over which Malone seeks the ROW is in the Frontcountry Zone of the King Range National Conservation Area (KRNCA) administered by the Arcata Field Office, Bureau of Land Management (BLM), near the eastern edge of the southernmost portion of the KRNCA approximately 1 mile

north of the Humboldt County/Mendocino County line.¹ Environmental Assessment EA CA-330-07-01 (EA), issued on February 1, 2007, at unpaginated 2-4. The land is within the Mattole Watershed in the proximity of South Fork Bear Creek. *Id.* at 4.²

Malone sought the ROW for the purpose of accessing private land that he owns that adjoins the KRNCA on the east. For the reasons explained below, we affirm BLM's Decision denying the application.

FACTUAL AND LEGAL BACKGROUND

A. Malone's Property and Access Over the Southern Route

In 1971, Malone and his father purchased 160 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 7, and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 18, T. 5 S., R. 2 E., Humboldt Meridian.³ The Malones had access to the southeastern portion of their property over a road that connected it with Chemise Mountain Road in section 18 to the southwest of their parcel. (This access road is referred to hereinafter as the "southern route.") They constructed a cabin or vacation house on a high elevation point in the southeastern portion of their property. June 26, 2006, Letter from Malone to Charlotte Hawks, BLM Realty Specialist, accompanying Malone's ROW application dated June 29, 2006; Letter from Ronald W. Malone to Interior Board of Land Appeals in support of his appeal, dated March 26, 2007, at 1.⁴ According to Malone, he and his family have used the southern route access twice per year for approximately three weeks at a time since 1972.

In 1975, according to Malone, BLM approached his father with a request to exchange the southwestern 40 acres of the Malone parcel for 40 acres of BLM land located near Whitethorn (a town situated a few miles to the east). Malone and his father met with BLM officials in the BLM office then located in Ukiah, California, to complete the exchange. According to Malone, his father specifically inquired regarding continued use of the existing road to reach the property they still owned.

¹ The "Frontcountry Zone . . . forms an interface between the Backcountry Zone and the surrounding private lands." May 2005 King Range National Conservation Area Resource Management Plan (KRNCA RMP) at 4-2. The map on page 4-3 shows that the BLM land over which Malone seeks the ROW is in the Frontcountry Zone.

² South Fork Bear Creek is eligible for inclusion in the National Wild and Scenic River System (with preliminary classification as recreational). KRNCA RMP at 4-19.

³ See Master Title Plat for T. 5 S., R. 2 E., Humboldt Meridian, California.

⁴ This letter is in substance his statement of reasons under 43 C.F.R. § 4.412(a) and will be cited as "SOR" for convenience.

Malone states that the BLM representative “advised us that as long and [sic] we did not change the road, other than maintain it for ingress and egress, and did not cut down any trees on BLM property, there would be no problem using the road.”

June 26, 2006 Letter; *see also* SOR at 1. BLM asserts, and Malone does not dispute, that the exchange documents did not include any reservation of an easement or ROW by the Malones or any grant of an easement or ROW by BLM.⁵ The land conveyed to BLM in the exchange was included within the boundaries of the KRNCA. *See* BLM Response at 3-4 and maps submitted as Enclosures 1 and 8 thereto. As noted above, Malone continued to use the road for more than 30 years thereafter. SOR at 1-2.

In approximately 1985, Randy Davis and Bonnie Glantz purchased property adjoining Chemise Mountain Road through which the first portion of the southern route runs. SOR at 2. In early 2004, Glantz informed Malone that he could no longer have access on the road across the Davis/Glantz parcel. *Id.* Litigation ensued between Malone and his wife (now deceased) against Davis and Glantz in the Superior Court of the State of California in Humboldt County (*Ronald W. Malone and Marilyn S. Malone v. Randy E. Davis, et al.*, Case No. DR 030623). The litigation resulted in a judgment in Malone’s favor filed on November 2, 2005, quieting title to an easement for the portion of the southern route that ran through the Davis/Glantz property.

BLM was not a party to the *Malone v. Davis* litigation, and the judgment in that case did not address the BLM land situated between the Davis/Glantz parcel and the Malone property through which the southern route runs. It appears that during the pendency of the litigation, Glantz had been communicating with BLM regarding Malone’s use of the southern route that included BLM land. SOR at 2. On December 7, 2005, one month after the entry of judgment in Malone’s favor in the state court litigation, Malone received a “Notice to Cease and Desist” from BLM notifying him that his use of the southern route over BLM land was unauthorized and requiring him to cease using the road. Dec. 7, 2005, Notice to Cease and Desist; SOR at 2. BLM subsequently installed a locked gate to block access to the road.

B. *The ROW Application for the Southern Route and the Question of the Northern Route*

Section 501(a)(6) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(6) (2000), grants the Secretary authority “to grant, issue, or renew rights-of-way over, upon, under, or through such [public] lands for — . . . (6) roads, trails . . . or other means of transportation” Implementing regulations are found at 43 C.F.R. Part 2800. The regulations regarding lands

⁵ *See* “Response to Statement of Reasons from Appellant Ronald Malone,” dated Apr. 23, 2007 (hereinafter “BLM Response”), at unpaginated 2, 7.

available for ROW grants under FLPMA, at 43 C.F.R. § 2802.10(a), provide: “In its discretion, BLM may grant rights-of-way on any lands under its jurisdiction”⁶

On June 29, 2006, Malone filed the ROW application at issue in this appeal. In block 13a of the application, which asks an applicant to “[d]escribe other alternative routes,” Malone stated “[t]here are at present no alternative routes to the upper-40 acres to my property where my house is located.” Application at 2. In block 13c, which asks an applicant to “[g]ive explanation as to why it is necessary to cross Federal Lands,” Malone stated: “The existing road is the only current available access.” *Id.*

Malone’s June 26, 2006, letter to BLM Realty Specialist Hawks that accompanied his application referred to an earlier letter (not in the record) dated October 13, 2005, in which Hawks

inquired about the Northern access that falls just short of my property. Although I could probably acquire access that way without much trouble; that road leads to the Northern 80 acres which is in a deep valley and is not accessible to the Southern 40 acres - which is where my house is located, and, also, where the road in question [the southern route] accesses.

June 28, 2006, Letter. The “Northern access” to which this statement refers is a road known as Bridge Creek Road or Baker Creek Road, which runs through private property in a winding but generally southerly direction from Shelter Cove Road (a county public road) a few miles north of Malone’s property. *See, e.g.*, maps submitted as Enclosures 1 and 8 to BLM Response.

On October 5, 2006, Hawks sent an internal memorandum to the Resource Specialists in the BLM Arcata Field Office requesting an evaluation of environmental impacts of the requested ROW for the EA to be prepared under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4332(2)(C). In that memorandum, Hawks noted Malone’s stated reasons for the ROW application, which included the following:

(c) his [Malone’s] deeded access from the north does not actually carry him to the property line and he would have to enter into litigation to

⁶ Three exceptions are then listed, namely, when “(1) [a] statute, regulation, or public land order specifically excludes rights-of-way; (2) [t]he lands are specifically segregated or withdrawn from right-of-way uses; or (3) BLM identifies areas in its land use plans or in the analysis of an application as inappropriate for right-of-way uses.”

match up the end of the road, which is on private property, with his own property; and

(d) even if that were accomplished, his deeded access does not carry him into topography that would allow him the reasonable use of his property.

Oct. 5, 2006, Memorandum at unpaginated 2. On December 4, 2006, Hawks sent a memorandum to Lynda Roush, Field Manager of the Arcata Field Office, captioned "Briefing Regarding Various Alternatives Considered Preliminary to Writing Environmental Assessment." Among other things, Hawks stated:

During the pre-application telephone conferences between Applicant and BLM Realty Specialist Charlotte Hawks prior to September 2006, Applicant stated [that] both the legal description in the deeded easement (see map)^[7] and [the] physical road did not go all the way to his property. Applicant maintains he would have to:

(1) file a quiet title action with the Court to remedy the problem of the unconnected easement;

(2) build a new road to reach the cabin. Applicant said the road does not go to his cabin and he would have to construct new road over steep terrain and two stream channels;

(3) Applicant also stated that six or seven of the nine intervening landowners have locked gates across their properties and, notwithstanding his legal right to do so, will not allow him to cross. Given the nature of the illegal agricultural industry in that area, he felt it was unsafe to attempt to pursue this alternative, particularly when the Court had awarded him [an] easement from the south.

BLM was unable to obtain permission from the various landowners to check this road, so relied upon Applicant's representation. In order to sort out the road system, BLM personnel obtained aerial photo WAC-84C 24-163, taken 5/6/1984. That photo showed that, at least in 1984, the road system did follow the deeded easement route directly to Applicant's cabin. The road serves numerous landowners in the area, and appears on the 1984 aerial photo to be drivable to the property line and even further, to the cabin.

⁷ The map referred to is not identified in the record.

Dec. 4, 2006, Memorandum at unpaginated 1.

By an earlier letter from Roush dated October 24, 2006, Davis and Glantz were offered an opportunity to submit comments for BLM's consideration in preparing the EA in connection with the ROW application. They responded on January 13, 2007, submitting a package that included their comments together with a number of documents they had obtained from Kerry Perkett, a land title consultant. Among these were a copy of a deed dated October 10, 1968 (recorded March 10, 1969), conveying to Herbert C. Brueckner, Malone's predecessor in interest, property that included (1) the 160 acres later conveyed to the Malones, and (2) an easement for ingress and egress over a strip of land 60 feet in width whose centerline was described in metes and bounds in two segments that together extended from Shelter Cove Road to the northern boundary of the property later conveyed to the Malones. (Bridge Creek Road — the "Northern access" referred to in Malone's June 26, 2006, letter to Hawks — follows the route of this easement.) The documents also included five other conveyances of the same easement to owners of other properties neighboring Malone's property. On the basis of these conveyances (and asserted title insurance for four of them), the Davis/Glantz submission maintained that there is no gap in the easement route between Shelter Cove Road and Malone's property. (This easement will be referred to hereinafter as the "northern route.")⁸

Davis and Glantz also submitted a copy of a deed dated October 12, 1999 (recorded on April 21, 2000, as Document 2000-8336-2), by which Malone and his wife conveyed to Carolyn Campbell Massey and Melvin Campbell an easement as follows:

A non-exclusive easement for ingress, egress, and utilities in and across a strip of land 40 feet wide the centerline of which is the centerline of the existing road which begins at the Southerly terminus of the easement described as "Parcel 3" in deed recorded August 14, 1973 in Book 1203, Page 375, Humboldt County Official Records. Said point being on the North line of the Southwest Quarter of the Southeast Quarter of Section 7, Township 5 South, Range 2 East, Humboldt Meridian; and running thence Southerly and Easterly across said Southwest Quarter of Southeast Quarter of Section 7 and across the Northwest Quarter of Northeast Quarter of Section 18 in said township and range to the West line of the Northeast Quarter of Northeast Quarter of said Section 18.

⁸ For reasons that are not explained, the conveyance of the easement from Brueckner to Malone (or Malone and his father) was not among the documents Perkett furnished to Davis and Glantz, and is not in the record. However, Malone does not dispute that the easement in fact was conveyed to him.

Said easement is to be appurtenant to said Northeast Quarter of Northeast Quarter of Section 18.

This easement begins at the northern boundary of Malone's property, apparently at the southern end of the northern route, and runs generally south and then east to the western boundary of the property which adjoins Malone's property on the east. According to the description in the conveyance, it follows an existing road.

C. *The BLM Decision*

In its February 13, 2007, Decision, BLM denied Malone's application because BLM determined that "the right-of-way is not in the public interest and does not deny access to private property." Decision at unpaginated 2. In explaining its rationale, BLM stated:

By issuing a right-of-way, the [southern] route would, in effect, become a road, and would require culverts and maintenance. All of this would occur in the King Range National Conservation Area, the Mattole Watershed, and late seral reserve as defined by the Northwest Forest Plan. All three of the stated designations have management goals that call for decreasing or elimination of roads.

Decision at 2. In the accompanying EA, under the heading "Water Quality: Surface/Ground," BLM further explained: "There would be a negative impact on water quality with the continued use of the existing road if maintenance were not performed. Two areas where the stream crossings are beginning to fail would require culverts in the future." EA at unpaginated 6.

The Decision and the EA rejected Malone's argument that he did not have alternative access to the property. In the Decision, BLM stated:

During pre-application discussions, Applicant said he was unable to use the northerly route afforded by his deeded easement because (1) the deeded easement was defective and did not reach all the way to his property; (2) and even if it did, he could not build a road to get over the steep terrain to his cabin from the north; and (3) he could not gain the cooperation of the intervening landowners to open their gates.

. . . .

As a result of the field examination performed in October 2006, and after reviewing the research package [compiled by Perkett], it was

apparent that Applicant actually has sufficient legal and physical access to his properties through his existing northern easement

Decision at 1. With regard to alternative access to the property, the EA further explained:

Although the Applicant stated that there were no alternative routes to his property (Item 13a. in the application), the BLM recently received information to the contrary. Recorded documents indicate there is a deeded easement crossing private land to northern [sic] portion of the Applicant's property. The writing of the legal description fell short of the northern boundary line of applicant's parcel, which is a minor deficiency in the easement deed. However, the easement has been in use continually for 38 years and the title company is insuring the easement as the law recognizes that minor mistakes such as the one in the deed do not override the intent of the easement itself.

This route is a well-used road shared in common by numerous landowners. Applicant does not use this northerly easement himself; however, he deeded an easement over APN 108-131-04 via Document 2000-8336-2, recorded April 21, 2000, Humboldt County Official Records. This allows his neighbor (Lawrence) access via the north route across Applicant's property.

. . . During a field examination by BLM employees on October 25, 2006, the road was evident on his property. There are no barriers to use of this route as is evident by the fact that his neighbors to the south and east can and do access the northern route through his property, making this a valid alternative.

EA at 3. In the Decision, BLM concluded that "[w]hile the proposed route may be more convenient to the Applicant than the easement road, it is not necessary to access his property." Decision at 2.

D. *The Instant Appeal*

In his SOR, Malone asserts that when he and his father purchased the property in 1971, "[w]e were told by the sellers that there were two accesses to the property: one from the North which is at the lowest part of the property, and one from the South which goes to the highest point of the property." SOR at 1. He further states: "We were informed that the access from the North into the valley had a break in the deeded access where it went across 'Doc' Stevenson's property. We contacted Mr. Stevenson and inquired about access across his property and he refused to give it."

Id. Malone explains the exchange of the southwestern 40 acres with BLM and the conversation regarding the southern access, as related above. In the last two paragraphs of his argument, he further asserts:

17) Please be aware that although I have an easement to the Northeast twenty acres in the valley (APN 108-141-24), and [sic] there is **NO** road beyond that point. To build a road to the upper forty would require a climb of 1,000 feet in less than ¼ mile to my house (APN 108-132-29).

18) Even if it were possible to build a road climbing approximately 1,000 feet in less than ¼ mile there could be damage to the ecology and water sources (see attached map with blue denoting waterways and black square denoting house).

SOR at 2-3.

In its Response, the BLM Arcata Field Office asserts that granting the ROW would be inconsistent with the KRNCA RMP and with the requirements of the 1994 Northwest Forest Plan (NWFP). The land allocations of the NWFP were carried forward in the KRNCA RMP. After quoting various objectives and standards from these documents, BLM summarizes as follows:

The proposed route has not been designated as a preexisting acceptable road in the KRNCA; therefore, opening the road is not consistent with the planning directives prescribed for the King Range and Late-Successional Reserves. The planning areas call for rights-of-way to comply with the overall management zone regulations and objectives. The Northwest Forest Plan provides planning regulations calling for the reduction of road systems in Late-Successional Reserves. . . . It is also clear from these plans that if routes outside of late-successional reserves are available, they should be considered instead of disrupting protected areas. In appellant's case, he has a deeded easement to his property, which eliminates the need for an additional route through BLM's protected KRNCA. BLM's rejection of the right-of-way as being in conflict with management plans is clearly supported by the language of the plans calling for reduction of roads, and is an appropriate reason for rejection.

BLM Response at 4.

BLM also argues that Malone has adequate alternate access to his property via the northern route. BLM asserts that any discrepancy in the total number of feet in

the description of the northern access easement is nothing more than a minor drafting error that under California law would have no legal significance. BLM further argues that the easement reaches all the way to Malone's property line, and that Malone now admits that he has access over that route. Responding to Malone's assertion of lack of access to the southern portion of his property, BLM argues that Malone has failed to explain the easement granted to Massey and Campbell that runs over an existing road. BLM also asserts that Malone has not submitted actual evidence to support his argument that the elevation change from the northern part of his property to the southern part is impossible to overcome, and that the easement Malone granted to Massey and Campbell contradicts this argument. See BLM Response at 5. BLM argues that "the benefit to the singular Appellant of a more convenient access to his land does not outweigh the cost to the public interest in abating the goals of road reduction and preserving the environmental conditions in the KRNCA." *Id.* at 6.

E. *Standard of Administrative Review in ROW Cases*

BLM regulations governing applications for ROW grants under FLPMA, at 43 C.F.R. § 2804.26, provide in relevant part: "(a) BLM may deny your application if:

(1) The proposed use is inconsistent with the purpose for which BLM manages the public lands described in your application; [or] (2) The proposed use would not be in the public interest"⁹ As this Board has explained in numerous cases:

The Secretary of the Interior is authorized under section 501(a)(6) of 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 ROW, 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). 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). Thus, a BLM decision approving or rejecting an application for a ROW 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. *Cypress*

⁹ The quoted provisions were promulgated on Apr. 22, 2005 (70 Fed. Reg. 21058), and are substantively identical to the previous 43 C.F.R. § 2802.4(a)(1) and (2) (2004), in force since 1980.

Community Church, supra at 164, citing *Coy Brown*, 115 IBLA 347, 356 (1990); *Glenwood Mobile Radio Co.*, 106 IBLA 39, 41-42 (1988).

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 International Sand and Gravel Corp.*, 153 IBLA 295, 299 (2000), quoting *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999); *see also Mountain Home Highway District*, 147 IBLA 222, 226-27 (1999); *Glenn B. Sheldon*, 128 IBLA 188, 191 (1994); *Larry Griffin*, 126 IBLA 304, 306-07 (1993).

D.J. Laughlin, 154 IBLA 159, 163-64 (2001). *See also Kirk Brown*, 151 IBLA 221, 225 (1999); *Pete Zanetti*, 113 IBLA 239, 241 (1990), and cases cited. Therefore, the questions before us are whether BLM's denial of Malone's application as contrary to the public interest constitutes a reasoned analysis of the factors involved, and whether Malone has shown error by a preponderance of the evidence.

ANALYSIS

I. *Denial of the ROW Application Serves Land Management Objectives Specified in the KRNCA RMP and the NWFPP*

Section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2000), requires the Secretary of the Interior to manage the public lands "in accordance with the land use plans developed by him under section 1712 of this title" The KRNCA RMP is such a land use plan, *see* 43 C.F.R. § 1601.0-5(n), to which BLM's resource management actions must conform. 43 C.F.R. § 1610.5-3.

Objective LR [Lands and Realty] 3.1 from the KRNCA RMP states:

Issue rights-of-way and permits on, over, or across public lands under the authority of FLPMA. Applications for rights-of-way and permits will be considered on a case-by-case basis pursuant to [43] C.F.R. 2800/2900, and must meet the overall objectives and resource conditions of the specific management zone in which they are located.

KRNCA RMP (Enclosure 7 to BLM Response) at 4-13. To implement that objective, the RMP includes Management Action LR 3.1.2, on which BLM also relies: "Land use authorizations, including rights-of-way, permits, and leases, will be considered in the Frontcountry and Residential Zones on a case-by-case basis, consistent with the local planning, California Coastal Commission Regulations, and overall management goals of the zones." *Id.* at 4-14. We note that Objective LR 3.4 states: "Consider new

access proposals to private lands through public lands and on a case-by-case basis to evaluate and mitigate adverse impacts to planning area resources.” *Id.*

In addition, the KRNCA is a “Late Successional Reserve” land use allocation under the 1994 NWFP. KRNCA RMP at 3-35.¹⁰ In the KRNCA, BLM “carr[ie]d forward the land allocations identified in the [NWFP]” including late successional reserves. KRNCA RMP at 1-11 (¶ 1.6.1.2). The RMP then stated that “[t]he standards and guidelines outlined in the NWFP will serve as forest land health standards for this plan.” *Id.*

The BLM Response (at unpaginated 4) quotes three of the “Standards and Guidelines” from the NWFP, namely, C-7, C-16, and C-19. The first (C-7), pertaining to “Outside Roadless Area” states: “Reduce existing system and nonsystem road mileage. If funding is insufficient to implement reduction, there will be no net increase in the amount of roads in Key Watersheds.” The third standard (C-19), regarding “Rights-of-Way, Contracted Rights, Easements, and Special Use Permits,” states: “Access to nonfederal lands through Late-Successional Reserves will be considered,” with existing ROWs and easements recognized as valid uses. It further states: “New access proposals may require mitigation measures to reduce effects on Late-Successional Reserves. In these cases, alternative routes that avoid late-successional habitat should be considered.”¹¹ BLM maintains:

The planning areas call for rights-of-ways [*sic*] to comply with overall management zone regulations and objectives. The Northwest Forest Plan provides planning regulations calling for the reduction of road systems in Late-Successional Reserves. . . . It is also clear from these plans that if routes outside of late-successional reserves are available, they should be considered instead of disrupting protected areas.

BLM Response at 4.¹²

¹⁰ The purpose of late successional reserves is to “represent a network of old growth forests retained in their natural condition with natural processes allowed to function (including fire) to the extent possible.” *Id.*

¹¹ The second standard quoted by BLM (C-16), pertaining to “Road Construction and Maintenance,” states: “Road construction in Late-Successional Reserves for silvicultural, salvage, and other activities generally is not recommended unless potential benefits exceed the cost of habitat impairment. . . . Alternative methods, such as aerial logging, should be considered.” This standard is directed to logging activities and does not appear to be relevant to the instant situation.

¹² BLM also states that the KRNCA RMP “designated all acceptable roads in the
(continued...)

We agree that BLM's denial of the ROW application furthers the land management objectives of the KRNCA RMP and NWFP. First, as quoted above, these plans do not favor the proliferation of new roads. Denying the requested ROW furthers the policy of minimizing or reducing road mileage within the KRNCA.

Second, the Decision mitigates adverse impacts on water quality. Even though the impacts in this case were not found to be "significant" to the degree that an environmental impact statement would have been required under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), denying the requested ROW prevents aggravation of the failure of stream crossings on the southern route and the necessity of constructing culverts in the future.

Third, the Decision furthers the policy of choosing alternatives that avoid use of late successional habitat within the KRNCA for roads where possible. The northern route is such an alternative.

The Decision furthers the land management objectives of the KRNCA RMP in all of these respects. Nothing in Malone's arguments demonstrates otherwise.¹³

II. *Malone Has Not Shown Error in BLM's Conclusion that He Has Adequate Alternative Access by a Preponderance of the Evidence.*

The record currently before us supports BLM's finding that Malone has alternative physical access both to the boundary of his property via the northern route and to the house located on the higher elevations in the southern portion of the property. First, Malone now concedes that he has access to the northern boundary of his property over the northern route (Bridge Creek Road). SOR at 2, ¶ 17.¹⁴ Malone

¹² (...continued)

management area (4.17.2 *Transportation and Accessibility*, page 4-64)" and that the southern route had not been so designated. On that ground, BLM argues that "opening the road is not consistent with the planning directives prescribed for the King Range and Late-Successional Reserves." BLM Response at unpaginated 3, 4. The cited RMP provisions, however, are part of a section of the RMP that addresses public access to KRNCA lands, not limited private access, and they do not appear to apply to the type of ROW Malone seeks here.

¹³ By this decision we are not suggesting that no ROW could have been granted across public lands under the KRNCA RMP under any circumstances. We merely find on this record that BLM's exercise of discretion was rational.

¹⁴ In fact, if Malone did not have such access, his 1999 grant to Massey and Campbell of the easement over an "existing road" on his property that begins at the
(continued...)

has introduced no evidence refuting BLM's findings from its October 25, 2006, on-site examination, stated in the EA, that "his neighbors to the south and east can and do access the northern route through his property" and that the northern route easement over Bridge Creek Road "has been in use continually for 38 years."¹⁵

Further, Malone's claims regarding alleged lack of access to his house from the northern boundary of his property (at the southern end of the northern route easement) are contrary to evidence in the record. In addition to the results of BLM's on-site examination, the record contains aerial photographs from 1992 (WAC-92CA 5-37) that show the road reaching the house. The photographs show that from the point that the road crosses Malone's property line, it proceeds generally southerly along an ascending ridge top up to the high point where the house is located. The route leading east to the neighboring properties also clearly appears. This contradicts Malone's statement in his SOR that "there is no road" south of the northern boundary of his property. SOR at 2, ¶ 17 (emphasis omitted).

Moreover, Malone's statement that "[t]o build a road to the upper forty [acres] would require a climb of 1,000 feet in less than ¼ mile to my house," *id.*, also appears contrary to the evidence in the record. The U.S. Geological Survey (USGS) topographic map submitted as Enclosure 8 to the BLM Response,¹⁶ with the boundary lines of Malone's property added, together with the depiction on the 1992 aerial photograph, indicate that the northern route access crosses the northern boundary of Malone's property (from whence the road continues toward the south) between the 1,200-foot and 1,400-foot elevation contour lines (and closer to the 1,400-foot contour line). Malone's house, according to his own depiction on a copy of part of that same topographic map submitted as Exhibit A to his SOR, is located just above the 2,000-foot contour line — an elevation gain of probably less than 700 feet, not 1,000 feet. That elevation gain occurs over a distance of almost ½ mile "as the crow flies," and a significantly greater distance over the course of the actual road, not ¼ mile as Malone asserts.

Additionally, contrary to Malone's assertion that "[e]ven if it were possible to build a road climbing approximately 1,000 feet in less than ¼ mile[,] there could be damage to the ecology and water sources," SOR at 3, ¶ 18, it appears from the maps

¹⁴ (...continued)

northern boundary of his property was both misleading and meaningless.

¹⁵ Consequently, there appears to be no reason for this Board to address whether there is any "gap" in the northern route easement description or to address the effect of any description error under California law.

¹⁶ Briceland, California Quadrangle, USGS 7.5 Minute Series (Topographic), 1969 (scale 1:24,000).

and photographs referred to above that the road along the northern route crosses the stream bed before it crosses Malone's property line. Malone has not shown that there would be additional "damage to the ecology and water sources" from a route that already exists and that others already use.

On the evidence in the present record, Malone has not demonstrated either that he does not have access over the northern route or that he does not have access to his house from the northern boundary of his property.

[1] Denying an application for a ROW where (1) doing so furthers applicable land management objectives, and (2) the requested ROW is not necessary to accomplish the purpose for which it is sought because there is adequate alternative access to the applicant's private lands represents a reasoned consideration of the factors involved with due regard for the public interest. See *D.J. Laughlin*, 154 IBLA at 164.

In *Dwane Thompson*, 88 IBLA 31 (1985), the ROW applicant had access through another route, part of which was a public easement through a private parcel. The owner of the private parcel had petitioned the county to vacate the public easement, giving rise to the possibility that access would end. In its decision, BLM stated that "approval of the right-of-way would not conform to its planning decision to keep rights-of-way along existing routes whenever possible to avoid the proliferation of separate rights-of-way." 88 IBLA at 32. BLM also cited opposition to the ROW from the state wildlife agency and from adjoining landowners because the land to be crossed was within the boundary of a winter deer range. *Id.* In light of these management objectives, and although the future of the access was uncertain, we held that "[i]n the absence of an affirmative showing that there is no possibility of access other than that sought in the application, appellant has failed to establish error in the BLM decision rejecting his application for right-of-way" 88 IBLA at 35.¹⁷

Several other cases involve situations in which the Board has upheld denial of a ROW application where the applicant has adequate alternative access and denial of a ROW would serve land management goals articulated in applicable land management plans. For example, in *Kirk Brown*, 151 IBLA at 226, we explained:

¹⁷ In *Tom Cox*, 142 IBLA 256 (1998), we set aside a ROW grant in an appeal by an affected third party, a grazer whose allotment the ROW traversed. The appellant showed that the ROW grantee had applied to the State of Arizona for access to his property through another route, and the State had offered the ROW grantee a route that he had found acceptable. We remanded for BLM to reconsider the ROW grant. See 142 IBLA at 259-260.

This Board has upheld BLM's rejection of right-of-way applications when feasible alternatives are present. *Dwane Thompson*, [88 IBLA] 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 the instant case, as explained above, BLM considered the land management objectives of the KRNCA RMP, including minimizing or eliminating road mileage, avoiding impacts on water quality (including the necessity of road maintenance along the southern route), and selecting alternatives that avoid use of late-successional habitat for roads. At the same time, adequate alternative access is available to the private landowner. Denial of the requested ROW as not in the public interest under 43 C.F.R. § 2804.26 therefore reflects a reasoned analysis of the factors involved. Malone has not met his burden to show error by a preponderance of the evidence.

CONCLUSION

On the present record, for the reasons set forth above, we conclude that BLM's February 13, 2007, Decision denying Malone's ROW application as contrary to the public interest is well within the agency's discretion.

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.

_____/s/_____
 Geoffrey Heath
 Administrative Judge

I concur:

_____/s/_____
 Christina S. Kalavritinos
 Administrative Judge