

KING'S MEADOW RANCHES

IBLA 90-410

Decided June 17, 1993

Appeal from decision of the Richfield, Utah, District Office, Bureau of Land Management, rejecting application to amend right-of-way grant U-47312.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Act of Oct. 21, 1976 (FLPMA)--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Act of Oct. 21, 1976 (FLPMA)--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rules of Practice: Appeals: Burden of Proof

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively

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BLM can reject ROW when spring development will result in destruction of riparian habitat.

researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

APPEARANCES: Kenneth A. Dastrup, Manager, King's Meadow Ranches, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

King's Meadow Ranches (appellant) has appealed the May 18, 1990, decision of the Richfield, Utah, District Office, Bureau of Land Management (BLM), denying its request to amend right-of-way U-47312 to permit the development of Shoo-Fly Spring and construction of a water conveyance pipeline from that spring.

After considerable study, fully documented in the record, BLM concluded that the proposed action would damage and permanently destroy a substantial amount of riparian vegetation presently existing at Shoo-Fly Spring (Environmental Assessment No. UT-050-090-107 (EA) at 13-14, 15, and 16). BLM concluded that the loss of riparian vegetation could not be mitigated because it could not be re-established without contaminating the water source, and because the source of water to support that vegetation would be eliminated (EA at 15). BLM noted that riparian vegetation has been completely removed from an area previously developed by appellant for a similar project (EA at 1-2).

BLM also found that the destruction of the riparian vegetation would reduce habitat available to the Bald Eagle, an endangered species known to inhabit the surrounding area (Threatened and Endangered Plant Clearance form at 2).

Finally, noting that the previous development had resulted in erosion (EA at 1), BLM found that granting the amendment could potentially result in significant soil erosion problems because existing drainage channels and stream hydrology would be changed (EA at 12 and 16). BLM did note that those effects could be "somewhat reduced or controlled by reseeding, water bars, etc.," but that those measures would significantly increase the surface disturbance, and their cost would "likely be prohibitive" (EA at 15).

BLM disapproved the amendment in part because granting it was not consistent with BLM's Riparian Area Management Policy, set out in BLM Instruction Memorandum (IM) No. 87-274, which states that "the objective of riparian area management is to maintain, restore, or improve riparian areas to achieve a healthy and productive ecological condition for maximum long-term benefits" (BLM Record of Decision (ROD) at 1). Concluding that the amendment would degrade one of the few remaining natural riparian areas left in the area (ROD at 1), BLM issued its May 18, 1990, decision denying

the application. On appeal, appellant has filed only a brief statement of reasons, setting out six points of disagreement with BLM's decision. No supporting documentation has been submitted.

[1] As BLM observed in its decision, under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines either that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. 1/

We note initially that, although the application in question was for an amendment of an existing right-of-way, the regulation cited by BLM generally addresses the filing of new right-of-way applications. However, appellant effectively sought authorization for use of a substantial new parcel of public lands, although in the same general area in which other use was originally authorized. BLM properly treated the application for amendment under 43 CFR 2802.4(a).

Approval of rights-of-way is a matter of discretion. George Bernadat, 121 IBLA 138, 139 (1991); Glenwood Mobile Radio Co., 106 IBLA 39, 41 (1988); Kenneth W. Bosley, 101 IBLA 52, 54 (1988); Edward J. Connolly, Jr., 94 IBLA 138, 146 (1986); High Summit Oil & Gas, Inc., 84 IBLA 359, 364-65, 92 I.D. 58, 61 (1985). When unusual circumstances dictating another result are not shown, this Board will affirm a BLM decision rejecting a right-of-way application if the record demonstrates that the rejection decision is based on a reasoned analysis of the facts and was made with due regard for the public interest. See, e.g., George Bernadat, supra at 139-40; Glenwood Mobile Radio Co., supra at 41-42; High Summit Oil & Gas, Inc., supra at 365-66, 92 I.D. at 61-62.

BLM has made a persuasive showing that riparian vegetation would be lost if the application were granted. Even apart from the undesirability of losing riparian vegetation, risks of other undesirable secondary effects were also identified, namely, loss of bald eagle habitat and the possibility of erosion. BLM's decision and accompanying case record amply support its conclusions (1) that the amendment would permanently alter the riparian qualities of these lands and, thus, would be inconsistent with the purposes for which these lands are being managed (as riparian habitat), and (2) that issuance of a right-of-way would not be in the public interest. 2/ Thus,

1/ The regulation also sets out other circumstances where such an application may be denied that are not relevant here.

2/ BLM's management policy, as set out in IM 87-274, is not established by regulation and, thus, lacks the force and effect of law. Accordingly, we are not obliged to enforce it. United States v. Kaycee Bentonite, 64 IBLA 183, 214 (1982); see Schweiker v. Hansen, 450 U.S. 785, 789 (1981). Nevertheless, we regard that policy statement as providing valid standards to judge whether granting a right-of-way for riparian lands would be either "consistent with the purposes for which the public lands are managed," or

unless its factual basis is rebutted by appellant, BLM's decision is in accordance with its authority under the regulations.

[2] In such circumstances, the burden is on appellant, as the party challenging BLM's decision, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Glanville Farms v. BLM, 122 IBLA 77, 85 (1992). The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Thus, where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that the party objecting to the determination offers a contrary opinion. Appellant must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. See id. and cases cited.

Appellant asserts that it has a great need for water and that the water which it owns should not have to benefit the general public. However, as BLM has held, it is not private interests but the public interest that must be served by the issuance of a right-of-way. Of course, benefits to appellant would be cognizable in determining whether the public interest is served. However, BLM made a clear determination, well supported by evidence, that the detriment of the project to the public interest would outweigh those private benefits.

Appellant submits that the proposed development will not degrade or disturb the riparian area and that it would plant new trees if necessary. BLM found, to the contrary, that permanent destruction would occur, and that new trees could not be established in the area if the water was diverted. Appellant has not met its burden of showing error in those findings. Appellant condemns BLM's determination that practical alternatives exist. However, it is clear that BLM has the authority under 43 CFR 2802.4(a) to deny a right-of-way that is neither in the public interest nor in concert with the purpose for which lands are being managed, even where there are no practical alternatives. 3/

fn. 2 (continued)

"in the public interest," as provided under 43 CFR 2802.4(a). Where BLM establishes a policy by instruction memorandum that is consistent with its legal authority, the Board will not hesitate to affirm its application. Beard Oil Co., 105 IBLA 285, 288 (1988).

3/ In any event, appellant acknowledges that a storage tank could be built for its existing system, although the cost would be "exorbitant and prohibitive." However, BLM has in effect determined that the adverse consequences of allowing the alternative proposed by appellant would, in effect, impose an unacceptably high cost on the public interest. That public cost is the controlling factor.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge