



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

MICHAEL & EDITH LEDERHAUSE

IBLA Colorado Decision:
BLM not obligated to
approve structures that
could be built on private
lands.

BLM can deny ROWs to
protect ACECs.

IBLA 2007-216

Decided April 9, 2008

Appeal from a decision of the Associate Field Manager, Glenwood Springs, Colorado, Field Office, Bureau of Land Management, rejecting a right-of-way application to install an irrigation pipeline and related structures on public land. COC-70997.

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--Rules of Practice: Appeals: Burden of Proof

The grant of a right-of-way across the public lands for pipelines or other facilities for the storage, transportation, or distribution of water pursuant to section 501(a)(1) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(1) (2000), is within the discretion of BLM. A BLM decision rejecting an application for a right-of-way because the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed will be affirmed when the record shows that the decision represents 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. The appellant has the burden of demonstrating by a preponderance of the evidence that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

APPEARANCES: Michael and Edith Lederhause, McCoy, Colorado, *pro sese*; Kristen C. Guerriero, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

Michael and Edith Lederhause have appealed the April 27, 2007, decision of the Associate Field Manager, Glenwood Springs, Colorado, Field Office, Bureau of Land Management (BLM), rejecting their right-of-way (ROW) application, COC-70997, for an irrigation pipeline and related structures on public land. Because BLM's decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and the Lederhauses have not shown error in the decision, we affirm BLM's decision.

BACKGROUND

The Lederhauses own water rights to 2 cubic feet per second (cfs) of water from Tepee Creek, which is a tributary of the Colorado River in Eagle County, Colorado. In accordance with a March 16, 1973, decree of the Colorado District Court, Water Division Five (Case No. W1137), they currently divert the water, which they use for irrigation and livestock watering, via an open ditch (the White Cotton Ditch) from a head gate located on their private property in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 9, T. 2 S., R. 84 W., 6th Principal Meridian (PM), Eagle County, Colorado. *See* Application for Change of Water Right, attached to ROW Application, at 1. The flow of the creek is intermittent, with the amount of flow varying depending on the time of year and location along the creek. According to the Lederhauses, the flow at the current point of diversion usually ceases before the end of the growing season.

On March 14, 2007, the Lederhauses filed an ROW application, pursuant to section 501(a)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(1) (2000), and its implementing regulations, 43 C.F.R. Part 2800, seeking approval of the construction of a buried irrigation pipeline and related structures from a new diversion point upstream on Tepee Creek across approximately 1,182 feet of public land within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 5, and the NE $\frac{1}{4}$ sec. 8, T. 2 S., R. 84 W., 6th PM.¹ The Lederhauses proposed to divert water from the creek bed through a simple diversion dam into a pipe that would carry the water out of the flood zone of the creek to a concrete head gate, after which their decreed

¹ The Lederhauses simultaneously filed an application for a change of water right with the Colorado District Court, Water Division Five, requesting to change the decreed diversion point for their 2 cfs water right to a point on public land in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 5, T. 2 S., R. 84 W., 6th PM, approximately 2,400 feet northwest of the current diversion point on their land. *See* Application for Change of Water Right, attached to ROW Application, at 1-2. BLM asked the Solicitor's Office to file a statement of opposition to the change in diversion point application. *See* May 3, 2007, Memorandum from Deputy State Director, Resources and Fire, to Office of the Solicitor at 1.

water would pass through a weir and be carried across public land in an underground pipeline, which would drop 210 feet along the route for an average grade of 11.6 percent, to their private land where it would be distributed through underground pipes to sprinkler heads for irrigation. See Supplement to ROW Application at 1; Application for Change of Water Right at 1-2.

The Lederhauses explained that construction of the pipeline and related structures would require trimming cedar and pinion trees to allow passage of equipment, creating a 10-foot wide path with a dozer, burying the pipe in the path, covering the pipe with either native soil or clean sand from their property, installing water bars to prevent erosion on the path, and reseeding the disturbed areas. Supplement to ROW Application at 1-2. They also sought permission to maintain enough of a path to allow access for future maintenance of the system, averring that the path would receive minimal use and would not be visible or accessible to the public. *Id.* at 3.

The Lederhauses asserted that no feasible alternatives existed because the only creek elevations high enough to allow the head pressure to operate the sprinkler system efficiently were located on public land, with the proposed route being the best and shortest route across public lands. ROW Application at 2, sec. 13a; Supplement to ROW Application at 3. They stated that the project would provide a public benefit by improving water quality and visual resources, asserting that the ROW would reduce erosion and silting in the Colorado River, diminish the amount of salt deposited into the river, and enhance the scenic impact of the land to travelers along the adjacent road, railroad, and Colorado River by creating views of green fields with grazing wildlife. They also suggested that the increased forage would aid the large herd of deer and elk that winter on the land; that there would be no adverse effects on the population in the area; and that any negative environmental effects of the ROW would be minimal or appropriately addressed. Supplement to ROW Application at 3-4. While acknowledging that the proposed pipeline was situated within the Blue Hill Area of Critical Environmental Concern (ACEC),² the Lederhauses doubted that the area to be disturbed was of archaeological interest and indicated that they had contacted an archaeological consultant to deal with any cultural resource concerns. Supplement to ROW Application at 4.

² The Blue Hill ACEC was created to protect cultural and historical values from accidental or intentional destruction and was also classified as a critical watershed because of the soil erosion hazard. See 1988 Revised Record of Decision and Resource Management Plan, Glenwood Springs Resource Area (Glenwood Springs RMP), attached as Exhibit 1 to Entry of Appearance, Motion to Supplement the Record, and BLM's Response to Appellants' Appeal of Decision (BLM Response), at 36. We grant BLM's Motion to Supplement the Administrative Record to include the Glenwood Springs RMP.

In its decision, BLM determined that the Lederhauses' need to use the public land was unwarranted because they could use the water rights they owned without unnecessarily encumbering public lands. BLM cited the policy of the United States, found in section 102(a)(8) of FLPMA, 43 U.S.C. § 1701(a)(8) (2000), that public lands be managed to protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archaeological values; to preserve and protect certain public lands in their natural condition where appropriate; to provide food and habitat for fish and wildlife and domestic animals; and to provide outdoor recreation and human occupancy and use. BLM pointed out that the project area encompassed land within the Blue Hills ACEC, which was managed to protect archaeological and cultural values from accidental or intentional destruction and was classified as a critical watershed due to the soil erosion hazard. Glenwood Springs RMP at 36. Because of the ACEC's classification as an erosion hazard area, motor vehicle use was limited to existing roads and trails. *Id.* at 11-12 and Table 1. BLM denied their ROW application in order to prevent unnecessary or undue degradation to the public lands, concluding that the project's impacts would be adverse without any notable public benefit and that the Lederhauses' needs could be met without utilizing public lands.

The Lederhauses filed a timely appeal.

ANALYSIS

[1] Section 501(a)(1) of FLPMA authorizes the Secretary to grant ROWs for "reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." 43 U.S.C. § 1761(a)(1) (2000); *see* 43 C.F.R. § 2801.9(a)(1); *Clifford Bryden*, 139 IBLA 387, 389 (1997); *Stewart Hayduk*, 133 IBLA 346, 354 (1995); *see also* *Southern Utah Wilderness Alliance*, 166 IBLA 140, 142 (2005). Approval of an application for an ROW is a matter committed to the Department's discretion. *Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008); *Wiley F. & L'Marie Beaux*, 171 IBLA 58, 66 (2007); *D.J. Laughlin*, 154 IBLA 159, 163 (2001); *Cypress Community Church*, 148 IBLA 161, 164 (1999). A BLM decision approving or rejecting an application for an ROW ordinarily will be affirmed when the record shows that the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. *Union Telephone Company, Inc.*, 173 IBLA at 327; *Kirk Brown*, 151 IBLA 221, 225 (1999), and cases cited; *Clifford Bryden*, 139 IBLA at 390. An ROW application may be denied if, *inter alia*, the authorized officer determines that the proposed use would be inconsistent with the purpose for which the public lands are managed, that the proposed use would not be in the public interest, or that issuing the grant would be inconsistent with applicable laws. 43 C.F.R. § 2804.26(a)(1),

(2), and (4); *Clifford Bryden*, 139 IBLA at 389-90; see *Douglas E. Noland*, 156 IBLA 35, 39 (2001).

To successfully challenge a discretionary decision, the appellant bears the burden to

demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

Wiley F. & L'Marie Beaux, 171 IBLA at 66, quoting *International Sand & Gravel Corp.*, 153 IBLA 295, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999). The Lederhauses must therefore show, by a preponderance of the evidence, that BLM erred in rejecting their application. *D.J. Laughlin*, 154 IBLA at 163-64, and cases cited; *Stuart Krebs*, 147 IBLA 167, 172 (1999). They have failed to meet that burden.

The Lederhauses raise three general issues on appeal. First, they dispute BLM's determination that the ROW is unnecessary because they can use their water allotment without encumbering the public lands. Second, they deny that the ROW violates the Glenwood Springs RMP's management prescriptions for the Blue Hill ACEC, including those for critical watersheds. Third, they dispute BLM's finding that the proposed ROW would cause unnecessary or undue degradation of the public lands. Each of these arguments is addressed below.

Use of Water Rights

The Lederhauses allege that BLM erred in determining that they could use their water rights without encumbering the public lands. They claim that the flow of water in the Tepee Creek is intermittent and varies depending on the location and time of the year. They contend that in the last 30 years for which they have kept track of water flow in the creek, the water has not flowed to their property line throughout the growing season. Statement of Reasons (SOR) at 1.

The Lederhauses have not shown that no alternatives to using public lands exist. BLM asserts that it is not the current diversion point downstream on Tepee Creek that is barring the Lederhauses' access to water throughout the growing season, but their reliance on a gravity flow system. BLM contends that by installing a pump at their current point of diversion and a storage pond, they could achieve the same results as those sought with the ROW. BLM Response at 4; see Memorandum documenting Apr. 6, 2007, office meeting, prepared by Carole Huey, Realty

Specialist; *see also* May 3, 2007, Memorandum from Deputy State Director, Resources and Fire, to Office of the Solicitor at 1. The Lederhauses have not explained why they believe BLM is incorrect on this point. While it is clear that the Lederhauses face water shortages in drought years with their current system at their current point of diversion, they have not demonstrated by a preponderance of the evidence that BLM erred when it determined that they could reasonably use their water rights without encumbering public lands.

RMP Management Prescriptions

It is undisputed that the proposed ROW lies within the Blue Hill ACEC, which is also a critical watershed management area. *See* Glenwood Springs RMP at 36. FLPMA defines ACECs as “areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historical, cultural, or scenic values.” 43 U.S.C. § 1702(a) (2000). An ACEC is a “distinct category for planning purposes, and establishment of an ACEC means that protection of certain resources [is] recognized to be of special importance, justifying special usage. In such areas, the land is managed to protect the identified critical environmental concern.” *D.J. Laughlin*, 154 IBLA at 160.

The Blue Hill ACEC was designated specifically to protect the “large number of archeological sites located within the area [that] have the potential to yield information important to the prehistory of north-central Colorado” from “accidental or intentional destruction.” Glenwood Springs RMP at 36. Contrary to the Lederhauses’ speculation that BLM made no effort to investigate the archaeological value of the ROW, BLM’s lead archeologist reviewed the Lederhauses’ application, confirmed that the Blue Hill ACEC “has a very high site density,” and expressed her concern that “the likelihood of significant resources being along the [proposed ROW] route is high.” Email from Cheryl Harrison dated Apr. 4, 2007. Rather than providing objective proof demonstrating that the area encompassed by the ROW does not contain archaeological resources, the Lederhauses counter BLM’s position only by stating that the pictures included with their application do not indicate anything of archaeological value in the proposed ROW and that they believe that “Indians and early settlers to this area were intelligent enough to camp and live in areas that were flat enough to [lie] down comfortably and did not camp on the proposed right-of-way.” SOR at 2. BLM is entitled to rely on the opinions of its experts within their areas of expertise, particularly when an appellant merely expresses a difference of opinion with the expert’s conclusion. *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 400 (2007); *Stuart Krebs*, 147 IBLA at 172. We find no error in BLM’s determination that the proposed ROW conflicts with the purposes for which BLM

manages the lands described in the ROW application.³ See 43 C.F.R. § 2804.26(a)(1); see also *Wiley F. & L'Marie Beaux*, 171 IBLA at 66.

Unnecessary or Undue Degradation

Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), directs the Secretary to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” BLM’s ROW regulations similarly specify that one of the objectives of the ROW program is to control the use of ROWs on public lands in a manner that “[p]revents unnecessary or undue degradation to public lands.” 43 C.F.R. § 2801.2(b). BLM based its determination that granting the proposed ROW would cause unnecessary or undue degradation on its conclusions that the project was unnecessary, given the existence of alternatives to the proposed water diversion system, and that the project would create adverse impacts to the public lands while providing little or no commensurate public benefits.

The Lederhauses dispute BLM’s conclusion that the ROW would cause unnecessary or undue degradation to the public lands, stating that, while public land would be disturbed, they “do not agree that [the public land] would be degraded or the impact to public lands would be adverse.” SOR at 2. The Lederhauses reiterate the public benefits they believe the project will create by improving water quality and the scenic quality of their property for passers-by. *Id.* at 2-3. They repeat their claim that the project would provide more winter forage for wildlife, reduce erosion and silting in the Colorado River, and reduce the deposition of salts in the Colorado River. *Id.* at 3.

Although these benefits may very well result from the project, the Lederhauses have not shown by a preponderance of the evidence that the adverse impacts to the ACEC cited by BLM will not result, or that BLM’s balancing of the beneficial and adverse impacts was in error. See also discussion of *Use of Water Rights*, *supra*.

The record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and that the Lederhauses have not shown error in that decision. BLM appropriately denied the ROW because it is inconsistent with the purposes for which the public lands in the Blue Hills ACEC are managed and because granting the ROW would conflict with

³ The ACEC is also classified as a critical watershed because of the soil erosion hazard. The Lederhauses aver, but have not demonstrated, that there would be no increased erosion risk under the proposed ROW because they would implement certain mitigation measures. Since BLM properly denied the ROW application because it conflicted with the archaeological values the ACEC was designed to protect, we need not address this issue.

FLPMA's directive to prevent unnecessary or undue degradation, 43 U.S.C. § 1732(b) (2000), and the ROW program's objective to prevent such degradation, 43 C.F.R. § 2801.2(b). *See* 43 C.F.R. § 2804.26(a)(1), (4). The Lederhauses simply disagree with BLM's balancing of the impacts of this project, but the fact that they disagree with BLM does not deprive BLM's decision of a rational basis. *See Intermac, Inc.*, 141 IBLA 61, 63 (1997).

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/
Sara B. Greenberg
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge