

JOE B. KEARL

IBLA 90-33

Decided April 22, 1991

Appeal from a decision of the Grand Junction District Office, Bureau of Land Management, determining cost recovery category for right-of-way application COC-50460.

Affirmed.

1. Administrative Procedure: Administrative Review--Rules of Practice: Appeals: Burden of Proof--Rights-of-Way: Generally

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by a preponderance of the evidence that the BLM determination is incorrect.

APPEARANCES: Joe B. Kearl, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Joe B. Kearl has appealed from a decision of the Grand Junction, Colorado, District Office, Bureau of Land Management (BLM), dated September 28, 1989, determining that the minimum cost recovery category, Category I, applied to appellant's right-of-way application, COC-50460.

On February 2, 1955, lots 5-8, sec. 4, T. 2 S., R. 1 E., Ute Meridian, were among lands classified for residence and business site purposes, pursuant to the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. § 682(a) (1976). 1/ The classification order provided, inter alia, "Lease and sale of the lots will be made subject to rights of way

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1/ Repealed effective Oct. 21, 1976, by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2787, 2789 on Oct. 21, 1976.

of record and to rights of way for roads and public utilities as follows: 30 feet in width along the north boundary of lots 5, 6, 7, 8" (Small Tract Classification Order No. 13, 20 FR 811, 812 (Feb. 8, 1955)). This portion of the order was left substantially unchanged <sup>2/</sup> by an amendment published in the Federal Register at 25 FR 223 (Jan. 12, 1960).

On August 17, 1989, appellant notified BLM that he wished to construct a domestic water pipeline across (along the north boundary of) public lands lots 5, 6, 7, and 8 in sec. 4, T. 2 S., R. 1 E., Ute Principal Meridian, in Mesa County, Colorado. The waterline would supply appellant's adjacent patented lot 9. BLM instructed appellant to file the right-of-way application, which he did on August 17, 1989.

On September 28, 1989, BLM issued its decision to assess the minimum cost recovery category for right-of-way fees. Appellant paid the fees under protest and filed this appeal. <sup>3/</sup>

In his statement of reasons for appeal, appellant challenged the necessity for any right-of-way application fee; he did not challenge the amount of the fee itself. Appellant maintained that he already had a right-of-way across these lots. He has relied upon the amended Federal Register notice, dated January 12, 1960, which retained the provision for a right-of-way along the northern boundary of lots 5, 6, 7, and 8 upon lease and sale (25 FR 223 (Jan. 12, 1960)). He also stated that he has unsuccessfully attempted to purchase the lots the right-of-way would traverse.

[1] FLPMA, 43 U.S.C. § 1761(a)(1)(1988), provides for right-of-way grants for waterlines across public lands. FLPMA also requires a right-of-way applicant to reimburse the United States for reasonable administrative and other costs incurred in processing the application and in monitoring construction and operation pursuant to the right-of-way. 43 U.S.C. § 1764(g) (1988); 43 CFR Part 2808.

The case record indicates that no patent ever issued for the lots across which appellant wishes to construct the waterline. Lots 5, 6, 7, and 8 are still Federally owned public land, so that the instruction in the Federal Register notices to reserve rights-of-way upon sale or lease was not yet applicable. Thus, BLM correctly assessed the cost recovery fee for construction of a pipeline across public lands.

Appellant asserted that he already had the right to the right-of-way. However, he has not submitted any evidence on appeal to support his

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<sup>2/</sup> The amendment substituted the term "tracts" for "lots," added lot 19 to the lots which would be subject to a right-of-way reservation along the northern boundary upon lease or sale, and deleted a different right-of-way reservation not at issue here.

<sup>3/</sup> The BLM decision presumed that the pipeline would cross "public lands in T. 2 S., R. 1 E., Sections 3 and 4, Ute Principal Meridian," although the application, which may be amended, specified only sec. 4.

assertion. An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Add-Ventures Ltd., 95 IBLA 44, 50 (1986). A party challenging a BLM determination has the burden of establishing by a preponderance of the evidence that the determination is erroneous. Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984). Absent a showing of error, we must affirm BLM's decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Grand Junction District Office is affirmed.

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John H. Kelly  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge