

Appeal from a decision issued by the Bureau of Land Management rejecting appellant's preferred access route and closely related alternate route in right-of-way application AZA 29297 and approving a longer alternate route.

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 preferred access road, or a closely related alternative, partially through an area of critical environmental concern is properly rejected and a longer alternative approved by BLM 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 first two preferences in his right-of-way application, to demonstrate by a preponderance of the evidence that BLM erred in rejecting the preferred access routes. That burden is not met where the preferred access routes are rejected because they would be incompatible with protection of values within an ACEC through which each of the preferred routes would traverse 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 more expensive.

APPEARANCES: Norman D. James, Esq. and Jay L. Shapiro, Esq., Phoenix, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

D. J. Laughlin (Laughlin or appellant) has appealed from a January 10, 1996, decision of the Area Manager of the Kingman Resource Area (Arizona), Bureau of Land Management (BLM or respondent), denying appellant's preferred access route and first alternative, and proposing to grant the much longer second alternative route proposed in appellant's right-of-way (ROW) application filed on September 8, 1995, and revised December 8, 1995, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994).

The ROW at issue sought to cross the Black Mountain Area of Critical Environmental Concern (ACEC) established by the Kingman Resource Management Plan (RMP). "Areas of critical environmental concern" are defined by section 103 of FLPMA, 43 U.S.C. § 1702(a) (1994), to mean "areas within the public lands where special management attention is required * * * to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural system or processes, or to protect life and safety from natural hazards." An ACEC is a distinct category for planning purposes, and establishment of an ACEC means that protection of certain resources are recognized to be of special importance, justifying special usage. In such areas, the land is managed to protect the identified critical environmental concern. See High Desert Multiple Use Coalition, Inc., 116 IBLA 47, 50 (1990).

The Kingman Area RMP established a list of ACECs for the Kingman Resource Area. Designation as an ACEC under the Kingman RMP distinguishes an area from areas that are managed for traditional multiple use by requiring that proposed uses "be evaluated for compatibility with area of critical environmental concern goals and objectives." See Kingman RMP, p. 95 at Exh. E to Answer. The Black Mountain Ecosystem ACEC was established to "maintain balanced resource development while providing for public demand and sensitive resource needs," to "protect and enhance special status species habitat, to protect cultural resources", and to "manage wilderness to maintain wilderness values and characteristics." See Kingman RMP, p. 99 at Exh. E to Answer, Exh. F, Errata. Within this planning framework, the Kingman RMP imposed 23 management prescriptions for the Black Mountain Ecosystem ACEC. See prescriptions in Kingman RMP, p. 100 attached at Exh. E to Answer, and Exh. F, Errata.

This is a series of management prescriptions that require the land manager to review each application for land use and take account of the specific land management objectives for the area concerned. (Answer at 18-19.) ACEC management prescription no. 2 requires the land manager to:

2. Limit off-highway vehicle use to existing roads, trails and washes. Limit off-highway vehicle use within Cerbat

beard-tongue habitat to existing roads and trails. Close desert bighorn sheep lambing grounds to the construction of new roads. Limit construction of new roads in other crucial habitat areas.

Id. at 19, quoting ACEC prescription no. 2; see pages of the Kingman RMP, 96 and 179, which establish habitat and lambing grounds for Bighorn Sheep within the ACEC boundary. In addition, the RMP provides guidance on the granting of rights-of-way through ACECs. That RMP guidance, respondent notes, provides that: "All other minor rights-of-way would be evaluated through the environmental review process and granted or rejected on a case-by-case basis. Existing rights-of-way would be used when possible to minimize surface disturbance." (Answer at 19-20, quoting from Kingman RMP, Errata Sheet, December 20, 1993 at 2.)

Appellant's property is located in sec. 27, T. 22 N., R. 20 W., Gila and Salt River Meridian, in Mohave County, Arizona. Appellant's land is situated approximately 3 miles north of State Highway 68, a major transportation route connecting Laughlin, Nevada, with Kingman, Arizona, the county seat of Mohave County. Appellant's property is surrounded on four sides by public lands administered by BLM, but other private lands lie in the immediate vicinity, arranged in a checkerboard fashion. See BLM Map at Tab 3 to Statement of Reasons (SOR).

Appellant sought an ROW because no public roads provide access to his property, despite its proximity to State Highway 68. (SOR at 4.) According to undisputed maps in the record, an unimproved and unmaintained jeep trail extends from Highway 68 northwesterly to appellant's property. Appellant's proposed ROW seeks access across this trail. The proposed first alternate would involve approximately 4,000 feet of new road construction for the express purpose of avoiding vehicular traffic in the immediate vicinity of a spring. Id. The second alternate is a much longer circuitous route over roadways which cross various private lands over which legal access has not been granted. The longer circuitous route reflects a far less-desired means of access from the appellant's perspective, but a route that does not impact the ACEC traversed by the first two alternatives.

In its January 10, 1996, decision (Decision) denying appellant's two preferred routes through the northwesterly corridor and approving the longer circuitous route, BLM stated:

Please be advised we cannot accept the shorter route involving new construction as an alternate based on preliminary comments after the field trip of December 11, 1995. It is within the Black Mountain Ecosystem Area of Critical Environmental Concern (ACEC) and the proposal is inconsistent with goals, objectives and management prescriptions for the ACEC. If a road were built, even a 4-wheel drive road, the increased use afforded

by easier access and impact to the area involved would be substantial. The area involved is within high value Bighorn sheep habitat evidenced by heavy use observed during the field trip. A new road would mar the truly beautiful scenic quality of the area and would result in unacceptable impacts to the riparian habitat surrounding the spring in the canyon near the proposed route. The access and resulting impacts [are] unnecessary since access is currently available, albeit [by] a longer route.

Roads on public lands may be used at any time. If you wish to pursue a right-of-way for legal access or maintenance purposes across public land for the existing longer route, please advise. Our records currently do not show any rights-of-way for the existing road across public land. A right-of-way for the existing road could be issued, subject to proof of access across third party lands, and would assist you in a civil pursuit, if necessary, for that access. You will also need to include access from the existing road to the SW portion of Sec. 27 currently being used without authorization in your application. Please submit the required \$300.00 and notice of your intentions or a revised application.

(Decision at 1-2.)

Appellant claims his application for the proposed and first alternative was "summarily denied" on the "basis of a single field trip and 'preliminary comments.'" (SOR at 13.) Second, Laughlin argues that the evidence simply does not support BLM's conclusion that the existing jeep road (Laughlin's proposed ROW) or first alternative would be inconsistent with the management prescriptions for the ACEC. (SOR at 17.) Appellant further states that there is no evidence that the proposed ROW or first alternative would impact bighorn sheep lambing grounds. Id.

Third, with respect to the proposed and first alternate ROW, appellant urges that the nature of this particular ACEC does not support the finding that a limited right-of-way for motor vehicle access to private property which is surrounded by public lands would have any significant affect on it. Id. In fact, appellant states, the area within the ACEC that will be impacted by the proposed ROW already includes "a major state highway, major utility corridors, numerous parcels of non-federal land, grazing allotments and material disposal sites." Id. Appellant urges that the relevant portion of the ACEC is designated for multiple use purposes. According to Laughlin, this should prove that BLM's claim that the ROW request would adversely impact the ACEC is not supported by reasoned analysis. (SOR at 17-18.) Moreover, appellant claims, "the proposed Alternate Route No. 1 was in fact designed to mitigate any negative impacts to riparian habitat surrounding the spring." (SOR at 19.)

Appellant's fourth argument is based on his contention that BLM erred in relying on Laughlin's ability to use alternative 2 because that alternate route no longer provides the opportunity for access to his private

property. (SOR at 18.) Appellant claims that alternate route 2, authorized to be granted by BLM, is simply not available because it crosses the private land of eight property owners, none of which are willing to grant appellant an ROW. Id. Appellant further explains that seven of the eight landowners are willing to sell their entire property to appellant but that the eighth will neither sell nor grant a ROW, making this alternate route not viable. Id. ^{1/}

Fifth, Laughlin argues that BLM had authority to mitigate, pursuant to section 505 of FLPMA, 43 U.S.C. § 1765 (1994), any negative impacts from the proposed ROW or first alternate by the imposition of reasonable terms and conditions in the ROW grant such that the Federal property is protected and damage to the environment is minimized. (SOR at 19.) Appellant notes that ROW use could be further limited to use by only Laughlin and his family. Id.

Finally, appellant argues, section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (1994), guarantees reasonable access to private property across public lands, even outside of Alaska. (SOR at 20, citing Mathilda B. Williams, 124 IBLA 7, 12 (1992); Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993).) For these reasons, Laughlin urges that the Board reverse the BLM decision and remand the matter to BLM with instructions to authorize an ROW along either the proposed route or alternate route no. 1, subject to reasonable terms and conditions to minimize impacts to public lands and resources. (SOR at 22.)

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

[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

^{1/} In his Supplemental Brief, Laughlin states that the number is "approximately eight" owners and does not argue that they are trying to sell him their property. (Supp. Br. at 19.)

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). This Board has upheld BLM's rejection of ROW 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, 225 (1984). Moreover, where the proposed access would conflict with other land management objectives, a showing that alternative access may be more difficult provides insufficient reason for overturning a BLM decision to reject a road ROW application. Internac, Inc., 141 IBLA 61, 63 (1997); Albert Eugene Rumfelt, 134 IBLA 19, 22-23 (1995).

With this legal background, we turn to each of appellant's points. First, we agree with BLM that appellant has not proven its claim that the application was summarily denied on the basis of a single field trip and preliminary comments. (Answer at 8; see SOR at 13.) As respondent states, "the site visit referred to [was] but one of the authorities underlying the decision." (Answer at 15.) Respondent argues that its concern for the habitat of the desert bighorn sheep was not based strictly on the "field-trip" as alleged by appellant, but rather that this habitat had been a "central rationale for establishment of the Black Mountain Ecosystem ACEC." *Id.* BLM states that its concern for the Bighorn followed from identification of the Black Mountains in the RMP as the habitat of one of Arizona's premier herds, and from various coordinated efforts between BLM and the Arizona Game and Fish Department which addressed not only the habitat but the fact that the ACEC was also prime lambing grounds for this species. (Answer at 15-16.) This conclusion is rationally based on the terms and management prescriptions of the RMP, which establish the habitat and lambing grounds for Bighorn sheep within the ACEC boundary.

For these same reasons, we conclude that BLM's rejection of Laughlin's two preferred routes within the ROW application is soundly based on a consideration of relevant management objectives for the ACEC with which the preferred routes would conflict. One of the major factors in consideration of appellant's application was the fact that a major portion of the proposed and first alternate route would have traversed the Black Mountain Ecosystem ACEC. As just noted, BLM's decision is soundly based on management prescriptions, including prescription 2, concerning protection of sheep habitat. Further, BLM notes that appellant's challenge to the BLM determination that the proposed ROW would result in "unacceptable impacts to the riparian habitat surrounding the spring in the canyon near the proposed route" fails to consider the BLM obligation to protect riparian habitat within the Black Mountain Ecosystem ACEC. (Answer at 16-17.) Appellant has not shown this conclusion to be arbitrary and capricious. Finally, BLM relies on the RMP at pages 98-99 establishing the goals and objectives of the Black Mountain ACEC. We agree with BLM, contrary to appellant's argument (SOR at 16-18), that BLM need not cite every page of the RMP in its decision in order to lose an arbitrary and capriciousness challenge. The burden to demonstrate by a preponderance of the evidence

that BLM erred in rejecting the two preferred access routes is not met where the preferred routes are rejected because they would be incompatible with protection of values within an ACEC and where the possibility of other access exists. See Kirk Brown, 151 IBLA 221, 227-228 (1999).

Third, BLM is not bound by the existence of State Highway 68 or other jeep trails to grant this ROW. The existence of the highway does not mean that a new ROW will not have a negative impact. See Answer at 16, citing RMP at 180. In that regard, respondent cites page 30 of the Kingman RMP which emphasizes the BLM commitment to create, improve, and maintain riparian-wetland conditions and avoid or mitigate the impact of surface-disturbing activities on riparian-wetland areas. (Answer at 17-18.)

Fourth, turning to the argument that BLM was compelled to reject appellant's proposed alternative 2, we find it difficult to fault BLM for accepting a proposal appellant propounded. In Dwane Thompson, *supra* at 32, BLM rejected Thompson's application for the reason that the ROW would not conform to its planning policy. In that case, 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. 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. The applicant had sought and received a BLM ROW 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.

Notwithstanding this petition, 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 Laughlin, as the party challenging BLM's decision, to support his allegations with evidence showing error. An applicant does not gain entitlement to a particular right-of-way because alternate access may be more difficult. *Id.*

The evidence Laughlin has provided to support his position that no access is possible, other than the two preferred routes sought in his application, is unconvincing. As BLM points out, it will grant appellant a ROW across the Federal land over which alternative 2 would cross, and Arizona law provides a right to a way of necessity over private parcels that must be crossed in this route, although Laughlin would have to make an effort to obtain legal access across the private parcels. We note that appellant has submitted no documentation to this Board of his efforts to acquire legal access across the other private lands such as filings in State Court to acquire an easement by necessity.

We thus conclude that Laughlin's showing of difficulty as a result of the alternate access approved by BLM is insufficient to overturn BLM's decision. Kirk Brown, *supra* at 228. In this case, Arizona law clearly provides, as set forth by respondent in its answer, the opportunity to secure a way of necessity over private land.

Finally, we reject appellant's argument that BLM should mitigate the impacts and grant the preferred ROW. Appellant's first obligation is to show that BLM has acted arbitrarily in agreeing to grant an ROW for alternative no. 2. It has not done so.

Laughlin has also argued that the terms of ANILCA, 16 U.S.C. § 3210(b) (1994), apply outside of Alaska to guarantee him "reasonable access" to his property across public lands. We need not address this legal matter because Laughlin's presumption behind this argument is that alternative 2 provides him no access. This is an unproven assertion. Moreover, Laughlin makes no effort to argue that ANILCA requires separate access over public lands when other access sought by an applicant is available from BLM. Accordingly, Laughlin fails to preponderate on such an argument, let alone raise it. We will not address it further. ^{2/}

To the extent not expressly or impliedly addressed in this decision, all other errors of fact or law alleged by appellant have been considered and are rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

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:

Lisa K. Hemmer
Administrative Judge

^{2/} In its Answer, BLM equates Laughlin's challenge to the ROW denial with a challenge to the RMP. See Answer at 8. Laughlin expressly denies doing so. (SOR at 8, Supp. Br. at 2.) Accordingly, because we agree with Laughlin that he seeks no relief in the form of altering the RMP, the designation of the Black Mountain ACEC, or its purposes or management prescriptions, we need not address this issue.

