

MARK PATRICK HEATH

IBLA 2002-52

Decided November 10, 2004

Appeal from decision issued by the Field Manager, Royal Gorge (Colorado) Field Office, Bureau of Land Management, offering right-of-way grant COC-60553.

Set aside and referred for an evidentiary hearing.

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

Under section 501(a)(6) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761(a)(6) (2000), a decision to issue a right-of-way is discretionary. When BLM uses its discretionary authority to reject an application for a land use authorization or impose a condition upon a land use authorization, it must provide a rational basis for its decision.

2. Administrative Procedure: Hearings--Hearings--Rules of Practice: Appeals: Hearings

When the record before the Board on appeal discloses the existence of material issues of fact unresolved by the record, the decision is properly set aside and the case referred to an administrative law judge for an evidentiary hearing.

APPEARANCES: David S. Williamson, Esq., Boulder, Colorado, and Mark Patrick Heath, Lafayette, Colorado, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mark Patrick Heath has appealed an October 4, 2001, decision issued by the Field Manager, Royal Gorge (Colorado) Field Office, Bureau of Land Management (BLM), offering right-of-way (ROW) grant COC-60553. The right-of-way grant consisted of three segments; two road segments (segments 1 and 2), and a pedestrian trail (segment 3). The basis for BLM's decision to offer this right-of-way is set forth in an Environmental Assessment Record (EA) and a Finding of No Significant Impact (FONSI).

Heath had applied for a ROW in 1997 to provide road access from Sunshine Canyon Drive to the patented Big Horn lode mining claim that is near the top of Big Horn Mountain, northwest of the city of Boulder, Colorado.<sup>1/</sup> Heath had intended to use the road to access a single family detached residence he intends to build on his claim. Heath contends that BLM erred when it limited his access in segment 3 to a pedestrian trail instead of a road that would provide vehicular access.

Heath's efforts to obtain vehicular access to his property in order to build a home have been long and arduous. The route Heath selected crosses patented land as well as public land, and portions of the route across the public land are subject to unpatented mining claims. When Heath met with BLM on August 7, 1997, he was advised that it was BLM's policy to not issue a ROW until legal access had been obtained across the intervening private lands.<sup>2/</sup> (Jan Feckrell, Realty Specialist, Notes to File.) Establishing his right of access across the private land involved litigation, and Heath states that during the course of this litigation, the possibility that BLM would restrict the use of any part of the ROW to a pedestrian trail, and not grant a right of vehicular access had never been mentioned. He asserts that, from the outset, BLM understood

that any action I took then, or in the future, would only be to ensure the completion of my home, not some picnic area. I would not have allowed over seven years of my life and hundreds of thousands of dollars to be wasted if I had known that there was even a remote risk of being granted a "trail" permit as opposed to a "vehicular" permit. Why would I need a "trail" permit when I could walk back to my property unhindered at any time?

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<sup>1/</sup> The Big Horn lode mining claim is in the Gold Hill Mining District, Boulder County, Colorado. It was located under the Mining Law of 1866, is 1500 feet long, 100 feet wide, and contains 4.82 acres. (Plat, Mineral Survey 487, Oct. 1, 1881.)

<sup>2/</sup> This policy is not new. See Edward J. Connolly, Jr., 94 IBLA 137, 144 (1986).

(Statement of Reasons (SOR) at 4.) With respect to BLM's concerns regarding the feasibility of a road, Heath asserts conflicting issues of fact, and requests a hearing to resolve those issues.

An understanding of the geographic setting of the claim and the ROW is necessary for a proper appreciation of the issues in this appeal. The Big Horn lode claim is located near the top of Big Horn Mountain. Its northeast end lies at an elevation of about 8200 feet, and the claim extends about 1500 feet down the side of the mountain to an elevation of about 7600 feet at its southwest end. The maps in the record show that the claim is one of numerous patented and unpatented mining claims, and irregular parcels of public land in that area. Documents in the record dating from 1915 and 1935 indicate that a mine was producing on the claim at those times, that there was a mill at the southwestern end of the claim, and that there was access to the claim by way of a road that is no longer open.<sup>3/</sup>

Heath indicated that he wanted to use two existing roads running southerly from Sunshine Canyon Drive to reach the northeast endline of his patented claim. The first is an old wagon road corresponding to segment 1, which Heath believed to be a public road, sometimes referred to as the Gold Hill Road, and the second was a spur road, sometimes referred to as the Bighorn Road, that corresponds to segments 2 and 3. BLM's EA describes the segments as an existing road:

[The first] segment is an old wagon road that originally comprised a portion of the road from the city of Boulder to the town of Gold Hill, running east and west over the northern slope of Bighorn Mountain. In 1887, another road (Sunshine Canyon Drive) running further to the north was constructed to provide better access. Now, this old wagon road can be entered only from the west end from Sunshine Canyon Drive; overgrowth and a steep embankment prevent it from being entered from the east.

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The second segment is a portion of a spur road running southerly off the public road identified as Segment 1, and has been used historically as access to the Bighorn Lode. This road had been utilized, but does

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<sup>3/</sup> In its EA, BLM identified access from this road as an alternative that was analyzed but rejected: "This road crosses the properties of numerous individuals who are unwilling to grant access across their parcels before it enters the lower portion of the Big Horn lode. Mr. Heath has reported that these individuals claim that a chain that blocks the foot of this road has been up since the sixties, strengthening their assertion that the road is not a public road." (EA at unnumbered page 4.)

not appear to have been maintained, during recent years. It is basically a wandering trail through openings, with a few trees removed for convenience. Segment 2 extends from the point where it leaves segment 1 to the crest of the hill, as shown on the survey plat.

The third segment roughly parallels the route of the spur road from the end of segment 2 to the Bighorn Lode. The first portion of segment 3 would require construction of switchbacks down a natural drainage, while the original mining route goes directly down the drainage.

(EA at unnumbered page 2.)

Boulder County has played a major role in the events leading to this appeal. Because of the size of the claim, to build a home on his property, Heath must obtain approval of a subdivision exemption application, which the County was willing to process only if Heath could provide proof of legal access to the claim. (May 20, 1997, letter from Ruth Cornfeld Becker, Deputy County Attorney, to David S. Williamson, Esq.) The reason for Boulder County's interest in the area is indicated in BLM's EA:

Bighorn mountain was designated as a Natural Landmark in 1978 by Boulder County in their Boulder County Comprehensive Plan. Boulder County considered it a prominent part of the heritage of Boulder County and, as such, warranted the designation for possible future acquisition and/or special land use considerations. Boulder County has had a long-standing application for the area under the Recreation and Public Purposes Act. The application has been complicated by the fractured land pattern and questions of access. Interest in the preservation of the area remains high, and Boulder County continues to seek resolution of these issues.

(EA at unnumbered page 3.)

In a March 23, 2001, letter to Senator Wayne Allard, BLM's Colorado State Director responded to concerns raised by Heath and provided some background regarding BLM's land management policy in Boulder County:

There are approximately 3100 acres of public land remaining in Boulder County. These lands are located within historic mining districts in the mountainous areas west of the city of Boulder and consist of highly fragmented parcels ranging in size from 0.01 to approximately 150 acres. BLM's Northeast Resource Management Plan identified these lands for "specific review" and eventual disposal

because BLM cannot effectively and efficiently manage them. BLM categorized these lands into two disposal projects--the Ward unit, containing 950 acres, and the Gold Hill unit, containing between 2100 and 2300 acres. The specific review process, which involves further study analysis, and public input before final disposal decisions are made, is nearly complete for the Ward unit and in progress for the Gold Hill unit.

The letter referred to a proposed exchange as being the “first of several anticipated land disposal activities that will occur over the next three to five years and result in the transfer of much of the remaining 3100 acres of public land to the county and other governmental entities.” The letter also referred to the need to protect access to private property through issuance of ROWs. The letter explained that Heath’s ROW application affects land that is not subject to the current exchange proposal but may be included in future exchange actions with Boulder County.

Attempting to satisfy BLM’s requirement that he have access across private lands, Heath first tried to negotiate easements with other landowners in the area. He was successful with the exception of one holdout landowner near the beginning of segment 1, who refused to grant access. Heath filed a lawsuit to have the old Gold Hill road a declared public road. Boulder County intervened in the proceedings and opposed Heath, stating concerns about the road itself and the effect a public road would have on the county’s plans to acquire the private land on Big Horn Mountain as open space. Assistant County Attorney Leslie Lacy explained: “If the road is declared not public, it will dramatically affect the market value, and then we could purchase it.” (The Mountain-Ear, Aug. 5, 1999, p. 4.) The trial court ruled against Heath, but the Colorado Court of Appeals reversed, finding that the road was a public road. Heath v. Parker, N. 99CA2436 (Colo. Ct. App. Nov. 24, 2000).

In the “Decision and Rationale” section of its EA and FONSI, BLM refers to the Boulder County’s proposed acquisition of Heath’s property:

He has indicated that Boulder County has made a cash offer to purchase his property as Open Space, but that it was unacceptably low. He feels that a vehicular ROW from the Bureau of Land Management (BLM) is critical to receiving fair market value for his property. Mr. Heath has inferred [sic] that if Boulder County made him an acceptable offer once he had established vehicular access to his property, he would prefer to sell to them and would not need to develop this ROW. Although this may be the case, he has also indicated his desire to build on the parcel should the County not purchase his land, and this environmental analysis addresses the reality that once the road is authorized, that it certainly may be developed as access to a

residence. It is BLM's policy to provide such access to non-Federally owned land surrounded by public lands as is adequate to secure to the owner of the in-holding the reasonable use and enjoyment thereof, in conformance with reasonable rules and regulations applicable to access across public lands. This does not include providing access for monetary speculation.

(FONSI at unnumbered page 1.)

Heath strongly denies that his reason for obtaining a vehicular ROW is for "monetary speculation." He notes that the fair market value of his property with vehicular access was "long ago dwarfed by" the costs of obtaining access across private lands and other actions he undertook to protect his property. (SOR at 5.) He then states that the action he has taken to date demonstrates that his motivation is not what "anyone would associate with 'monetary speculation'" but "are steps that one would take if they wished to build their home." (SOR at 6.) The record raises a strong concern that the actions taken for purposes of "monetary speculation" actually arise from the county's desire to acquire land and its attempts to suppress the value of the land by actively opposing a reasonable grant of access. The issue of whether Heath will elect to sell the land to Boulder County rather than build a home on it is a matter between Heath and Boulder County. BLM's concern about "monetary speculation" on Heath's part is not an appropriate reason for rejecting his application for vehicular access to his property. It is no more proper for BLM to be swayed by the county's desire to suppress the value of the Heaths' property than it would be for BLM to grant the right-of-way strictly because Heath wants it to enhance the value of the property. The proper focus of BLM's concern should be whether vehicular access is necessary for Heath's reasonable use and enjoyment of his property. As it said in its FONSI, "[i]t is BLM's policy to provide such access to non-Federally owned land surrounded by public lands as is adequate to secure to the owner of the in-holding the reasonable use and enjoyment thereof, in conformance with reasonable rules and regulations applicable to access across public lands."

The disposition of this appeal hinges on the feasibility of a road for segment 3. According to the EA, even the foot trail involves obstacles:

Construction of segment 3 as a trail will be difficult and not easily achieved, because of steepness, shallow soils underlain by bedrock, and rock outcrop with cliffs and boulders. A safe route will most likely require blasting, with dumping of excess rock materials down slope. Steepness of slopes also make[s] it difficult to maintain grades of less than 10%, even on the cut and fill portion proceeding south to private land. Impacts to soils could be minimized with appropriate water control (such as barring [at] approximately 50 feet intervals[]).

However, continued use on these decomposing granite soils will require regular maintenance to prevent water control structure failure.

(EA at unnumbered page 9.) According to BLM, a road would pose greater problems:

The impact of allowing a suitable road for vehicular access on segment 3 will greatly increase impacts to soils. Road construction switch backs down the existing drainage will most likely wash out during all precipitation events of 5 year magnitude or greater, greatly increasing erosional cuts and sedimentation. Large amounts of blasting or heavy bulldozing will be required to establish a suitable width for safe vehicle driving on the southern portion of segment 3, with fill materials being pushed over the steep slopes. These materials could be removed, but cost of such removal would increase cost of road construction by a factor of 4 to 5. The length of the southern part of the road from the switchbacks to applicant's destination, which is private for about half the distance, is not sufficient to allow suitable grades of less than 8 to 10% in a cut and fill construction, so some of the construction will be in excess of normal BLM limits. Control of the cut materials dozed off the road base area will be impossible, with larger rocks rolling nearly to the bottom of the drainage, unless they impact against trees. This could result in additional dislodging of other rocks and vegetation increasing the total disturbances of construction activities. The cuts along the steep slopes will not allow slope reduction, so vertical walls will be left, with no vegetation establishment possible. It is also possible that construction activities could result in complete destabilization of the soil/rock structure on the slope, and result in large areas of sliding occurring. Slides could occur during construction, or later, most likely after storm events reduce natural friction. No reclamation of such areas will be possible. If such instabilities are found to exist, then road construction total widths could be as much as 3 to 4 times those estimated for road width, because of need to cut further into the slope for a stabilized road bed area.

Id.

Heath asserts that there are no switchbacks, but only a "broad S shaped curve proposed in Segment 3 that would occur at the top of the 'natural drainage (gulch),' where water control measures, mitigation, and reclamation efforts would be less intrusive than were it to occur further into the gulch." (SOR at 6.) The maps in the record appear to support Heath's characterization. Heath challenges many of the factual bases of BLM's assessment of the impacts of construction. He asserts that many of BLM's findings are based on unfounded assumptions, including those

concerning soil conditions and climate. (SOR at 6-12.) For example, Heath rebuts BLM's statement that excess rock materials will be dumped, stating that they will go into the retaining walls for the road in segment 3. (SOR at 8.) Heath disputes BLM's finding that offsite removal of material would add to costs, noting that the driveway could be designed to balance cut and fill material. (SOR at 9.) In response to BLM's concerns that soil conditions make a road unfeasible, Heath refers to a report prepared by Western Soils, Inc., supporting the feasibility of a driveway project 1.5 miles to the east of Heath's ROW, which Heath believes is comparable to the site in this appeal. (SOR, Exh. F.)

[1] Under section 501(a)(6) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761(a)(6) (2000), a decision to issue a right-of-way is discretionary. See Douglas E. Noland, 156 IBLA 35, 39 (2001), and cases cited therein. When BLM uses its discretionary authority to reject an application for a land use authorization, it must provide a rational basis for its decision. Fallini v. BLM, 162 IBLA 10, 34 (2004); George W. Philp, 141 IBLA 195, 197 (1997); Burnett Oil Co., 122 IBLA 330, 332 (1992); The City of Chico, 119 IBLA 136, 138-40 (1991). It is likewise well established that if BLM wishes to impose a condition upon a land use authorization, it must provide a rational basis for its decision. James M. Chudnow, 70 IBLA 225, 226 (1983); James E. Sullivan, 54 IBLA 1, 2 (1981).

Under 43 CFR 2802.4(c), BLM may require an applicant to submit information deemed necessary to review an application. BLM's EA includes notes of a May 30, 2001, inspection report based on notes from June 7, 2000, that refers to the difficulties in constructing a road and recommends that Heath be required to furnish engineering drawings or plans before taking action on the application. (EA, Exh. A.) There is no evidence that BLM sought this information and the record contains no engineering drawings or plans that either demonstrate that the road is feasible or that it is not, even though the report concluded that a road would not be feasible for the portion of segment 3 beyond the switchbacks. In his SOR, Heath offers an alternative route for segment 3 if the difficulties observed by BLM cannot be overcome. Heath has raised numerous factual issues concerning the feasibility of a road in segment 3 to which BLM makes no meaningful response<sup>4/</sup> and we are unable to resolve these issues on the basis of the record before us.

[2] As noted above, Heath has requested a hearing. A hearing is properly granted when significant material issues of fact are raised by the appeal and the evidence in the record is insufficient to resolve them without a hearing allowing introduction of testimony and other evidence. Stickelman v. United States, 563 F.2d

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<sup>4/</sup> On Feb. 20, 2002, counsel for Heath filed a supplemental pleading requesting a hearing, pointing out that the general nature of the denial in BLM's Answer itself raises factual issues that must be resolved.

413, 417 (9th Cir. 1977); Samedan Oil Corporation, 163 IBLA 63, 79 (2004); State of Alaska, 132 IBLA 197, 205-206 (1995); Yates Petroleum Corporation, 131 IBLA 230, 235 (1994); Exxon Company, U.S.A., 98 IBLA 218, 232 (1987). In view of the lack of any meaningful evidence supporting the conclusion that a road is not feasible, and the allegations and evidence submitted on appeal, we find that material issues of fact remain. Accordingly, we hereby set aside the decision below and refer the case to the Hearings Division for an evidentiary hearing before an administrative law judge.

Therefore, 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 set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for a hearing before an administrative law judge. The administrative law judge's decision shall be final for the Department in the absence of an appeal to this Board.

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R.W. Mullen  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge