



MARK PATRICK HEATH

172 IBLA 162

Decided August 23, 2007



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

MARK PATRICK HEATH

IBLA 2007-199

Decided August 23, 2007

Appeal from a letter issued by the Field Manager, Royal Gorge (Colorado) Field Office, Bureau of Land Management, offering a right-of-way grant for an access road and parking area. COC-60553.

Motion to dismiss denied.

1. Rights-of-Way: Generally--Rules of Practice: Appeals: Protests

When BLM offers a right-of-way (ROW) grant to a ROW applicant pursuant to certain terms and conditions, such an offer is an action proposed to be taken, *i.e.* issuance of a ROW grant. An applicant receiving such an offer who disagrees with the terms and conditions of the offer may protest those terms and conditions, in accordance with 43 C.F.R. § 4.450-2. However, if the applicant appeals the offering of the grant to this Board, we may adjudicate the case on its merits when no useful purpose would be served by remanding the case to BLM.

APPEARANCES: Jack M. Merritts, Esq., Denver, 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 CHIEF ADMINISTRATIVE JUDGE HOLT

Mark Patrick Heath has appealed a May 10, 2007, letter from the Royal Gorge Field Office, Colorado, Bureau of Land Management (BLM) titled "Right-of-Way Grant Offered, Rental Fees Estimated" (Grant Offer). Counsel for BLM has filed a Motion to Dismiss the appeal on the grounds that the Grant Offer does not constitute a final decision which may be appealed under 43 C.F.R. § 4.410. Counsel for appellant has responded, contending that precedent set by the Board allows an individual to appeal a right-of-way (ROW) grant offer. For the following reasons, BLM's Motion to Dismiss is denied.

Background

The Board previously considered an appeal by Heath from BLM's October 4, 2001, offer of an ROW grant under the same serial number, COC-60553. In *Mark Patrick Heath*, 163 IBLA 381 (2004), Heath challenged, *inter alia*, BLM's rationale for limiting one portion of his proposed access road to a pedestrian trail, whereas appellant desired the entire access to consist of a vehicular road. 163 IBLA at 382. The Board found that material issues of fact existed regarding BLM's conclusion to limit part of the ROW to a pedestrian trail. 163 IBLA at 388. Therefore, the Board referred the case to an Administrative Law Judge (ALJ) for an evidentiary hearing.

While the case was before the ALJ, BLM offered to revise the ROW grant to allow vehicular access along the entire access road, but appellant rejected the proposed revision because it included stipulations and conditions with which he did not agree. Reply to Appellant's Response to Second Motion for Remand dated Feb. 5, 2007, at 3-4. BLM moved to remand the case so that it could officially issue the revised ROW grant offer, but appellant opposed remand on the grounds that the Board explicitly intended that a hearing be held. Appellant's Response to Second Motion to Remand dated Feb. 2, 2007, at unpaginated 2, 7. The ALJ held a prehearing conference in an attempt to settle the case, but despite an apparent resolution, as indicated in the ALJ's February 6, 2007, letter to the parties, the parties were unable resolve their differences, principally the amount of the required performance bond.

The ALJ rescheduled the hearing, but prior thereto, BLM filed a "Motion for Rulings" requesting that the ALJ rule on its Motion for Remand. BLM contended that the issue for which the Board sent the case to the Hearings Division to resolve, *i.e.* the basis for limiting part of the access road to a pedestrian trail, was no longer relevant. Motion for Rulings dated Mar. 13, 2007, at 4. Rather, counsel for BLM asserted, the relevant issues were disputed stipulations and conditions in a proposed ROW that had not yet been offered, and he stated: "Upon remand, BLM would offer Heath a ROW grant as set forth in the motion and modified in BLM's March 2, 2007, letter. If Heath desired, he could *appeal the stipulations and conditions at that time.*" *Id.* (Emphasis added.) Although appellant again objected to remand, the ALJ granted the Motion to Remand, indicating that because BLM no longer supported the original decision referred to the ALJ by the Board, the appropriate course was to allow BLM to issue a "new decision," which appellant could subsequently appeal if he desired. Mar. 22, 2007, Order granting Motion for Remand at 3 ("Heath may then appeal the new decision if he so desires.").

On May 10, 2007, BLM issued the Grant Offer that has been appealed in this case. BLM has filed a Motion to Dismiss on the grounds that the Grant Offer is not a final decision and therefore is not appealable.

Discussion

In support of its Motion to Dismiss, BLM cites 43 C.F.R. § 2805.10, *How Will I Know Whether BLM Has Approved or Denied my Application?* In part, that regulation explains at subsection (b) that, if an applicant agrees with the *unsigned right-of-way grant offer*, it may indicate its agreement by signing and returning the document to BLM. The regulation also explains that BLM will sign the grant and return it with a final decision that may be appealed.¹ Subsection (c) of the regulation provides that an applicant may appeal a BLM decision denying a ROW application.

BLM argues that Heath's appeal is premature because BLM's letter does not constitute either a written decision granting Heath's application for a ROW, which is subject to appeal in accordance with 43 C.F.R. § 2805.10(b) or written decision denying the ROW application, which is subject to appeal under 43 C.F.R. § 2805.10(c).

Appellant asserts that, because the Board accepted jurisdiction of a ROW grant offer in *Mark Patrick Heath*, we should do so again.

[1] In this case, BLM's Grant Offer takes no action in and of itself. It merely offers Heath a ROW grant under certain terms and conditions. As such, it is a proposed action, not a final appealable decision. *Compare* 43 C.F.R. § 4.450-2 with 43 C.F.R. § 4.410. However, while 43 C.F.R. § 2805.10(b) provides a party with the opportunity to appeal a ROW grant, we do not find that signing a ROW grant offer is the only method for a ROW applicant to obtain review by this Board. In fact, 43 C.F.R. § 2805.10(b) indicates that an applicant for a ROW should only sign the offered grant and return it to BLM if it agrees with the terms and conditions of the unsigned ROW grant. The regulation makes no provision for the applicant who does

¹ The regulation at 43 C.F.R. § 2805.10(b) reads in full:

If you agree with the terms and conditions of the unsigned grant, you should sign and return it to BLM with any payment required under § 2805.16 of this subpart. BLM will sign the grant and return it to you with a final decision issuing the grant if the regulations in this part, including § 2804.26, remain satisfied. You may appeal this decision under § 2801.10 of this part. [Emphasis added.]

not want to accept the grant offered by BLM, but, in fact, desires some change or modification of the grant.

In this case, appellant does not agree with the offered terms and conditions of the unsigned grant offer. His recourse in such a situation is to file a protest of the ROW grant offer because a ROW grant offer constitutes a proposed action (issuance of a ROW grant under specific terms described therein) and may be protested under 43 C.F.R. § 4.450-2. BLM's action regarding such a protest would thus yield an appealable final decision without engaging 43 C.F.R. § 2805.10(b).²

In this case, Heath did not protest; he filed an appeal of the Grant Offer. In such a situation, BLM properly forwarded that appeal to this Board. BLM has now moved to dismiss the appeal as premature. Dismissal by the Board, however, is not mandatory when an appeal is premature. Rather, the Board will examine such cases to determine whether there is any practical benefit in dismissing the appeal as premature and remanding the matter to BLM for consideration of the objections as a protest. If no useful purpose would be served by remanding the case, the Board may adjudicate the case on its merits. *Beard Oil Co.*, 97 IBLA 66, 68 (1987).

As discussed above, while the parties were before the ALJ, appellant indicated that he did not agree with certain stipulations and conditions in the Grant Offer. Although the parties attempted to resolve their differences through negotiation, their efforts proved unsuccessful. Nevertheless, counsel for BLM advocated for a remand so BLM could issue the Grant Offer with the stipulations and conditions as proposed. Knowing appellant's unwillingness to accept such an offer, counsel clearly stated that issuing the Grant Offer would present appellant with an opportunity to file a new appeal "at that time." Motion for Rulings dated Mar. 13, 2007, at 4. In the interest of judicial economy, the Board will retain this case for final disposition on its merits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's Motion to Dismiss is denied.

/s/
H. Barry Holt
Chief Administrative Judge

² Arguably, Heath's objection to BLM's "decision" in *Mark Patrick Heath* "offering right-of-way (ROW) grant COC-60553," 163 IBLA at 382, should have been considered a protest of action proposed to be taken. That does not mean, however, that the Board should have dismissed the appeal or that consideration of the appeal by the Board was improper. See discussion, *infra*.

I concur:

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge