

ANITA ROBINSON

IBLA 82-659

Decided March 29, 1983

Appeal from decision of the Coeur d'Alene, Idaho, District Office, Bureau of Land Management, rejecting application for road right-of-way. I-18080.

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

Under the Federal Land Policy and Management Act of 1976, a Bureau of Land Management rejection of a road right-of-way is discretionary and will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

2. Administrative Procedure: Hearings -- Constitutional Law: Due Process -- Rules of Practice: Hearings

Due process does not require notice of a right to a prior hearing in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: William J. Dee, Esq., W. C. MacGregor, Jr., Esq., Grangeville, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Anita Robinson has appealed from a decision dated February 25, 1982, by the Coeur d'Alene, Idaho, District Office, Bureau of Land Management (BLM),

rejecting her road right-of-way application (I-18080) across lots 2, 3, and 7, sec. 26, T. 27 N., R. 1 E., Boise meridian, Idaho. The application was filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976). The decision gives the following rationale for rejection:

Land use plans have been developed in the Cottonwood Resource Area in accordance with Section 202, Federal Land Policy and Management Act of 1976 (FLPMA) (43 USC 1712). Pursuant to Section 302, FLPMA, public lands shall be managed in accordance with these land use plans. Pursuant to 43 CFR 1601.8(b)(3) and Instruction Memo Number ID-81-253, dated July 1, 1981, the proposed action is determined to be in nonconformance with the existing management framework plan (MFP).

Through the planning process, visual resource management (VRM) Class II restrictions have been applied to the subject public lands. Because of the terrain, the road cannot be designed to meet these management constraints. Therefore, granting the right-of-way would be inconsistent with the approved MFP for the Cottonwood Resource Area.

BLM's Land Report states that the lands involved are adjacent to a part of the Salmon River under study for inclusion in the National Wild and Scenic Rivers System (P.L. 90-542), 1/ and are subject to the Cottonwood Resource Area Management Framework Plan III, and to class II visual resource management restrictions (VRM II). With respect to roads, these restrictions provide:

Roads must not be seen from major travel routes or recreation sites and must be designed to minimize cut and fill areas.

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Roads that are required shall be concealed by vegetation, if possible, follow natural landforms, and be rehabilitated when the road is no longer needed. Cut and fill areas will be minimal and shall not exceed five feet.

With reference to critical portions of the route desired by appellant, the Land Report states:

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1/ Based on a study conducted by the Forest Service, the President recommended in 1977 that the entire 237-mile portion of the Salmon River designated as a potential addition to the wild and scenic rivers system by the Wild and Scenic Rivers Act be included in the system, but Congress limited its designation to 125 miles, from the town of North Fork to Long Tom Bar. 16 U.S.C. § 1274(a)(24) (Supp. V 1981). The conference report on the central Idaho Wilderness Act of 1980, P.L. 96-132, 94 Stat. (July 23, 1980), stated, however, that the conferees believed that the President's recommendations as to the remaining segment of the river had considerable merit but that "it was deemed desirable to defer action \* \* \* until further public hearings [could] be held." H.R. Rep. No. 1126, 96th Cong., 2d Sess., as printed in 126 Cong. Rec. H5580, H5587 (daily ed. June 24, 1980).

Station 30+00 to Station 31+00

In this portion, the road must drop at an 8% grade from the level plateau to an area along the river. This location would necessitate no tree removal. Construction would involve blasting a cut through a rock outcrop and extensive fill for a short distance. The road in this area would be visually apparent to the casual visitor.

Station 40+00 to Station 45+00

Here, the roadway would be against a steep bluff with little vegetation. Fill material would extend into the river in places; it appears that the road, as designed, would not meet IDWR [Idaho Department of Water Resources] minimum standards in slope and riprap size for a stream alteration permit. Blasting could be required in cut construction.

This section is within the flood prone area as identified by U.S.G.S.. During any major flood, this road section would be submerged, and the rock fill would be subject to possible loss because of the high-velocity flow coming in against this bank. Because little soil is present, the erosion and bank cutting amounts would be small in relation to the Salmon Rivers total flow and sediment load.

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On the portions of the proposed road where it cannot be screened from view of the casual visitor and where cuts and fill exceed 5 feet, the visual specifications designated for the area in the BLM Management Framework Plan cannot be met. Refer to the visual contrast rating worksheet, Attachment 6.

If the no action alternative were adopted, construction of a road on private land at a higher elevation, outside the public land boundary, would also result in visual degradation.

Appellant concedes that other possible routes of access exist. She suggests, however, that she may have been deprived of due process in that the decision rejecting her application is devoid of findings and conclusion. Appellant alleges that she and the engineer who prepared the original specifications for the road were encouraged by BLM personnel to proceed and were not apprised of the management constraints mentioned in the decision. Appellant also contends that the rejection is arbitrary, capricious, and contrary to the applicable provisions of FLPMA, supra. She requests that the decision be either reversed, modified, or held in abeyance pending issuance of findings by the district manager. Appellant also requests a hearing.

[1] Under section 501 of FLPMA, supra, approval of a right-of-way by the Secretary is a "wholly discretionary matter." William A. Sigman, 66 IBLA 53 (1982); Nelbro Packing Co., 63 IBLA 176 (1982). A BLM decision rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision to be based on a reasoned analysis of the

factors involved, made with due regard for the public interest. Id. at 185. The record discloses that appellant sought the right-of-way to obtain improved access to some 900 acres of her grazing land, for the purpose of building a home, and for the development of an irrigation project. Appellant's existing access is described as a "very steep" road which is "not an all weather road." 2/

A confirmation/report of a telephone call prepared by an official at BLM indicates that on February 27, 1981, appellant's husband spoke with the BLM official about the road. During this conversation, the official advised appellant's husband that the Salmon River corridor was subject to intensive management for recreation and scenic values, and that only a road with minimal 5-foot cuts and fills could be considered.

On March 5, 1981, the BLM area manager inspected the proposed road accompanied by other BLM officials and by appellant's husband. On March 24, the Robinsons visited the BLM office and the proposed road was discussed. By letter of March 25, BLM advised appellant that although many questions had been answered, appellant would have to provide an engineer's road design (showing subgrade width, slope, percent grade, and cross section data on cuts and fills) before a recommendation could be made.

A confirmation/report prepared by an official at BLM on March 31, 1981, describes a conversation between appellant's engineer and the BLM official. The construction requirements imposed by VRM II were discussed.

On August 21, 1981, appellant submitted an application for a right-of-way together with an engineer's road design prepared for her by an independent engineering firm. This report evaluated those portions of the route where substantial cuts and fill would be required. The report states that between stations 38+00 and 40+00, cuts and fills of up to 10 feet would be needed.

Other BLM documents -- most of which are incorporated in the Land Report -- indicate that the requirement for cut and fill greater than 5 feet between station 40+00 and 45+00 was a major factor upon which rejection of appellant's application was based. Other considerations were the passage of the planned route through a flood-prone area and its proximity to a steep bluff devoid of vegetation. We find no support in the record for appellant's position that she was unaware of the management constraints which precluded approval of her application. Appellant and members of her family spoke with BLM officials, inspected the proposed route with BLM personnel, and met at the BLM office to discuss the project. A memorandum memorializing a telephone conversation with appellant's husband on February 27, 1981, notes that he was advised that the area was subject to the scenic and recreational planning restrictions which were the basis for rejection of the right-of-way. The report of appellant's engineer which was compiled in August 1981, just prior to filing the application for right-of-way, clearly shows that the appellant's engineer was aware of the constraints. This report specifically recognized and addresses these constraints, and states: "The report concerns those areas where the

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2/ Area Biologist's memorandum, dated Mar. 6, 1981.

cuts and fills need specific consideration to meet your requirements. These requirements are based on esthetics and this report will show that where the requirements can not be met exactly that esthetics will not be jeopardized." In light of appellant's dialogue with BLM, the claim that appellant was unaware of the management constraints, or was inconsistent with prior BLM actions, is unfounded.

[2] Due process does not require notice and a right to a prior hearing in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. George H. Fennimore, 50 IBLA 280 (1980); Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978). Moreover, a hearing is not required in the absence of assertions of facts which, if proved true, would entitle appellant to the relief sought.

While it is true that the decision might have reiterated more specifically some of the findings tabulated in the land report, its brevity does not support appellant's claim of lack of due process. The decision does state the conclusion that because of the terrain, the road proposed by appellant cannot be designed to meet applicable visual management restrictions. At page 3 of her statement of reasons, appellant states that her engineer worked closely with BLM personnel to bring the proposed road as closely in compliance as possible, but that terrain features prevented this. On the same page of her statement, appellant asserts that neither she nor her engineer had the "faintest" idea of the basis for rejection. It is difficult to reconcile these assertions. We conclude that the record shows the decision to be based on a reasoned analysis of the factors involved and was neither arbitrary nor capricious. The decision was made with due regard for appellant's interest and the public interest. Appellant has failed to show that BLM has departed from, or failed to heed any applicable provision of FLPMA.

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 affirmed.

R. W. Mullen  
Administrative Judge

We concur:

Will A. Irwin  
Administrative Judge

Douglas B. Henriques  
Administrative Judge

