

Appeal from a decision of the Boise District Office, Bureau of Land Management, rejecting right-of-way application I-20529.

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 Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

APPEARANCES: Edward J. Connolly, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Edward J. Connolly, Jr. (Connolly), has appealed from a decision of the Boise District Office, Bureau of Land Management (BLM), dated April 16, 1985, rejecting his right-of-way application I-20529 for the second time. In this decision BLM found the application to be incomplete, despite specific BLM requests for additional information.

Appellant filed right-of-way application I-20529 with BLM on December 14, 1983, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701, 1761 (1982). In his application Connolly requested permission

to use the existing road across the SW 1/4 of the SW 1/4 of sec. 27, T. 5 N., R. 1 E., Boise Meridian, Idaho, so that I might have access to the SE 1/4 of the SE 1/4 of sec. 27, T. 5 N., R. 1 E., Boise Meridian, Idaho which I own. My brother Wallace R. Connolly and his wife Eda Rae Connolly own the land between these two parcels and he has granted me an easement across it.

Connolly's application states he has no other access to his land (Application at Item 7). He also states he and his brother have used the existing road for almost 20 years, he would maintain the road, and he had no reasonable alternative route (Application at Items 12, 13c).

BLM examined the area on April 9 and 17, 1984, <sup>1/</sup> but found no visible signs of a road across SW 1/4 SW 1/4, sec. 27, as described in the application. On April 24, 1984, BLM requested additional information and gave appellant 60 days to comply. This deadline was extended an additional 60 days and on October 10, 1984, BLM issued its first decision rejecting Connolly's application for failure to submit the required supporting information. Connolly appealed the first rejection to this Board. At the request of BLM, the Board vacated the first BLM decision by order dated January 7, 1985, and remanded the case to BLM for further action in response to a pending determination by the Ada County, Idaho, Engineer.

On April 16, 1985, BLM again rejected appellant's application in the decision now on appeal. The reason for rejection given is as follows:

On April 24, 1984, this office issued a decision which states that based on field examinations, data obtained from the Ada County Assessor, and the applicant, there does not appear to be legal access from the Old Pearl Highway to the public land. It was also stated that the right-of-way application did not contain information to allow the Bureau of Land Management to properly analyze the social and environmental impacts of the proposed right-of-way, particularly with regard to legal access across adjacent private lands, and the measures proposed for incorporation into the road location and design to mitigate the severe limitations imposed by slope and the erosion hazard. The applicant was asked to submit the following within 60 days of receipt of the decision:

1. Engineering drawings approved by the Ada County Engineer showing proposed road location and design, and
2. Agreements from Jessie Naylor and/or Manuel Sabala <sup>n2</sup> providing the applicant with legal access from the Old Pearl Highway to the public lands.

On June 27, 1984, the applicant was granted an extension of time until August 31, 1984, to submit the required information. The information was not submitted to this office. Therefore on

<sup>1/</sup> BLM examined the area in view of a proposed sale of the SW 1/4 SW 1/4 sec. 27 and possible conflicts with two right-of-way applications, including appellant's application.

<sup>2/</sup> These are owners of land, adjacent to the BLM parcel, through which the Old Pearl Road passes.

October 10, 1984, a decision issued by this office rejecting the application for failure to submit the required information.

After a review of the information contained in the case file, including a letter from the Ada County Engineer received on January 7, 1985, (after the case file was remanded to the BLM by the Interior Board of Land Appeals) the application is rejected for the following reasons:

1. Neither the applicant nor the Ada County Engineer has submitted evidence that the existing road (Old Pearl Highway) provides legal access to the public land. In 1868, the U.S. Government Cadastral Surveyor found the road to exist some 67 feet southwest of the southwest corner of Section 27. By measurement taken during a field exam on March 15, 1985, the road was found to be basically in the same location as recorded by the survey in 1868. During the March 15, 1985 field exam, a BLM archaeologist concluded that there was no physical evidence to support the location of the road within the SW 1/4 of Section 27.

2. Before the BLM can evaluate a proposal to locate a road on the public land, the applicant must submit engineering drawings of a proposed location so the social and environmental effects on BLM-administered lands can be determined. Engineering drawings approved by the Ada County Engineer have not been submitted in accordance with our April 24, 1984, request nor during the granted period of extension until August 31, 1984.

3. Since the BLM has concluded that the Pearl Highway does not cross public land at the SW 1/4 SW 1/4 of Section 27, the applicant was to submit evidence that legal access had been obtained from Jessie Naylor and/or Manuel Sabala. This documentation was requested in our April 24, 1984 letter and through the extension period to August 31, 1984, but has not been received.

4. Mr. Connolly states in Sections 7 and 13 C of his application, "I have no other access to my parcel of land which I described above" and "It is the only access to the parcel of land that I own." Yet, Mr. Connolly routinely gains access to his property via a private easement owned by Wallace Connolly. Evidence of the access is reflected by the development work occurring on his property.

In his statement of reasons for appeal of the second decision, appellant asserts:

[T]hat the Old Pearl Highway was declared a Public Road by the proper constituted authorities on January 18, 1889 and at that time it passed through the corner of the above Sec. 27 which is its true and exact legal location today even though in the past

hundred years it has drifted somewhat back and forth because of the sandy nature of the soil. The U.S.G.S. Survey of 1890 confirms the above.

All development on my parcel of land ceased approximately one year ago because of a lack of access. My brother Wallace Connolly had Idaho Supreme Court Order access for a one family dwelling and this does not include me and he currently has his entire ranch for sale.

With current public access to Sec. 27 above, agreements for adjacent neighbors are not required. Engineering drawings cannot be submitted until the Bureau of Land Management accepts the above stated facts of record because we have no starting point.

(Statement of Reasons at 2).

Appellant has submitted six documents in support of his position, including four documents which had been attached to his appeal of the initial rejection. The first is a copy of a map of the Old Pearl Highway, on file at the Ada County Recorder's Office, which does not appear to show the corner in question. The second is a letter to appellant dated April 9, 1984, from the Ada County Highway District which stated that the Ada County Commissioners had declared the "Old Pearl Highway" to be a public road on January 17, 1889, and that it is a public right-of-way. The third document is a letter from the Ada County, Engineer dated May 31, 1984, which states:

This office has reviewed the material submitted by you regarding the status of the Old Pearl Highway between Brookside Lane in Section 34, T5N, R1E, and running N by NW through Section 28, and transversing the extreme SW corner of section 27, the SW 1/4, of SW 1/4 Sec. 27 being the subject BLM property contiguous to your land. The material submitted includes a copy of the County Commissioners' minutes of 1889 designating the Old Pearl Highway as a public road and the U.S.G.S. quadrangle map showing this road in 1890. The road is shown as going through the extreme SW corner, Section 27 and it is presumed and accepted by this office that the intentions were that the property adjoining the road at the time of public dedication by the County Commissioners in 1889 be serviced by this road. The contiguous properties include the BLM properties in the SW1/4 SW1/4 of Section 27.

Discussions with Mr. Chuck Smith, of the Ada County Highway District and Mr. Steve Bradbury, of the Prosecuting Attorney's office, of all the facts pertinent to this particular case and a field inspection by the ACHD right-of-way personnel has led to concurrence with this office's opinion that this is still a publicly dedicated road pursuant to the County Commissioners' actions in 1889.

The existing location may or may not establish a prescriptive use right in the underlying fee lands, however, notwithstanding the fact that usage over the last approximately 100 years has led to a re-routing of the road to the WS [sic SW] direction such that a current field inspection reveals that the road does not go through Section 27, the Commissioners' action in 1889 established a public access via the Old Pearl Highway to Section 27, T5N, R1E, B.M. This access can only be changed by a statutorily prescribed vacation procedure; its physical location remains unchanged since 1889.

The fourth document submitted by appellant is an 1897 Geological Survey map, based on an 1890 topographic survey. This map shows the road in question crossing the east-west section boundary slightly northeast of the section corner. The map was drawn to a scale of 1/25,000 and the section lines were depicted with dotted lines which indicate the section lines had been projected at the time the map was made. The fifth document is a letter from a planner in the Ada County zoning division, stating that there is no access to appellant's land in the SW 1/4 NE 1/4 of sec. 27. The sixth exhibit submitted by appellant is described in his statement of reasons as:

[C]opies from Idaho Code Sec. 40-103 that states that roads located by order of the Board of Commissioners are highways, and Sec. 40-104 which states that roads furnishing public access to public lands may not be restricted to public use until abandoned by the County Commissioners or Board of Commissioners of the Highway District.

The case record indicates the SW 1/4 SW 1/4 had been cleared for sale in September 1984. At that time there were two right-of-way applications, including appellant's application for a road across the parcel to provide access to the site of a proposed shrimp farm on appellant's land. <sup>3/</sup>

The record contains photographs of the present location of the road in question near the intersecting corner of secs. 27, 28, 33, and 34. The current road passes southwest of the corner. These photographs do not show traces of another road near the current location.

The record also contains copies of a cadastral survey plat dated April 18, 1868, showing the "Boise City & Pagette Road" or "Old Pearl Road" in its present position, i.e., skirting just southwest of the corner, outside

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<sup>3/</sup> The Board of County Commissioners and the Zoning Commission had halted construction of the shrimp farm pending resolution of the access problem and because of a violation of the Ada County Subdivision Ordinance. Appellant had gained access using an easement across private land granted to Wallace and Eda Connolly. See *Gibbens v. Weisshaupt*, 98 Idaho 633, 570 P.2d 870 (1977). This Board makes no determination as to the legitimacy of appellant's use of this easement.

the SW 1/4 SW 1/4 sec. 27. Field notes dated March 29, 1868, indicate that the surveyor crossed the "Boise City & Payette Wagon Road" 1.5 chains south of the corner as he headed north toward the corner between secs. 33 and 34. He crossed this road 1.44 chains west of the corner as he traveled west between secs. 28 and 33.

BLM does not dispute that the Old Pearl Highway is a public road. Although all parties agree the Old Pearl Highway passes close to the corner of secs. 27, 28, 33 and 34, BLM does not find sufficient evidence to conclude that the road intersected the corner at one time.

The case record on appeal is augmented (apparently in response to the remand order of this Board) by a letter from the Ada County Engineer to the Bureau of Reclamation, dated January 15, 1985, as follows:

Regarding the question of access to Section 27, T4N, R1E via the Old Pearl Stage Route, I have in my files the materials submitted by Mr. Connolly regarding this matter and the material brought to my office by you. Following a careful review of all the information submitted, several facts are clear regarding the historic and current locations of the Old Pearl Stage Route.

1. The copies of the Government Land Office (GLO) survey notes of the original survey of this section in the 1860's clearly indicate that the road was located to the south and west of the SW corner of the section, in Section 33.
2. At approximately the same time as the Board of County Commissioners officially declared the Pearl Stage Road to be a public road, (circa 1890) the evidence indicates that the position of the road had changed and had moved to a northeasterly direction cutting through the SW corner of Section 27, northeasterly of the SW corner of said section.
3. Field review of the location of the road as it exists today indicates clearly the road is southwesterly of the SW corner of Section 27, transsecting the northeast corner of Section 33.

Looking at the road's physical location today in a southeasterly direction from the bottom of the draw (the draw being just northeasterly of the section corner), and looking at the terrain back down hill from the section corner in a southeasterly direction, it would appear to have been quite easy for the road to have drifted to different locations over the better than 100 years of its existence. Notwithstanding the present location of the road, the evidence clearly indicates that at the time of dedication as a public road, this Pearl Stage Road did indeed provide for access to Section 27. It continues to provide access to Section 27 until such time as the location as adopted by the

Commissioners is vacated according to legal procedure (public right-of-way is not lost by non use).

In discussing this matter with Mr. Chuck Smith of the Ada County Highway District, he informed me that historically there may well be grounds for existence of 50 to 60 foot rights-of-way on all section lines in Ada County which would alleviate any question on whether there was access to Section 27 from the Old Pearl Stage Road. Even if the Stage Road is located in Section 33, and has always been located in Section 33 southwest of the southwest corner of Section 27, legal access would be available north on the section line, common to 33 and 34, to the SW section corner of Section 27. The question is really a legal one, but as conveyed to me by Mr. Smith, the potential of the existence of 50 to 60 foot rights-of-way on section lines traces back in the history of Idaho to when it was a portion of Dakota Territory and the fact that the old territorial statutes contained a provision for 50 to 60 foot rights-of-way on the section lines. As the Dakota Territory was subsequently re-divided and Idaho was moved to other territorial jurisdiction and then statehood, apparently the legislators, rather than re-adopt a whole series of statutes for the new condition under which Idaho was formed, simply ratified the territorial statutes which had come forward from when it was a part of the Dakota Territory and therefore ratified the provision that there was 50 to 60 feet rights-of-way on the section lines. Mr. Smith also informed me that the land owners in Ada County that he is familiar with have operated for years on the premise that these rights-of-way did exist along the section lines. I feel certain that this provision was included in the territorial laws and was intended to be brought forward into Idaho Law to preclude the formation of land locked parcels and to provide for the full utilization of the land.

Appellant posits a significant road realignment in an erosion-prone area. However, BLM examiners found no trace of an old road crossing northeasterly of the southwest corner of sec. 27, and the photographs in the record support their findings. The survey plat and the field notes also indicate the road was in its present position years before it was designated a public road.

[1] FLPMA authorizes the Secretary of the Interior to grant rights-of-way on public lands. 43 U.S.C. § 1761 (1982). However, in order to grant a right-of-way, the Secretary must be apprised of its exact location:

(b) (1) The Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary to a determination, in accordance with the

provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

43 U.S.C. § 1761(b)(1) (1982). See also 43 CFR 2802.3(a)(3).

The statute does not authorize the grant of a right-of-way across private lands. Before BLM can make any decision to grant a right-of-way, it must be satisfied that appellant has a right to exercise the privilege for which it has applied. There is no question that, in its present location, the Old Pearl Road does not cross Federal land. Instead it traverses private lands near the corner of the Federal tract. Satisfactory proof of rights of ingress and egress across private land to the right-of-way is clearly "related to the use" of a right-of-way under the statute. BLM cannot act as a general clearinghouse for assurance that all required state and local approvals have been obtained. BLM Manual 2801.32B(g). Therefore, logic dictates that an applicant must furnish proof that he has access to public land before BLM can grant a right-of-way.

BLM correctly called for additional information on April 24, 1984. See 43 CFR 2802.4(c). The response period was extended through August 31, 1984. When appellant appealed the initial rejection of his application to this Board, the Board vacated the decision and remanded the case to BLM pending consideration of the location of the road by the Ada County Engineer. However, in order to permit BLM to process and issue the right-of-way, BLM must have a final decision as to the existence of a right-of-way across private lands, rather than opinions and suggestions as to the possible existence of a right of access. The supplementary information presented with this appeal expresses an opinion but cannot be held to be a conclusive determination that appellant has the right to cross the private land without the owner's permission. <sup>4/</sup>

BLM correctly concluded that in order to consider this application, it needed proof of access across private land to reach Federal land and a clear description of the location of this access right. Such proof could have been in the form of either: (1) proof of an express agreement with the adjoining landowner or landowners to allow access across their private property, or (2) proof that a right-of-way exists from some point on the present Old Pearl Road to the BLM parcel. Appellant has asserted the existence of a public right-of-way across private land and offered documentation to support this assertion. BLM asked for proof of express permission to cross and adjacent owner's land. (Decision Apr. 24, 1984). Appellant is apparently unable to obtain the requisite right-of-way or easement in agreement.

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<sup>4/</sup> The letter from the Ada County engineer also speculates as to the possibility of an automatic right-of-way on section lines. We have not found sufficient evidence of the existence of this right in Idaho, similar to that in Colorado. See Leach v. Manhart, 77 P.2d 652, 653 (1938).&

BLM may have caused appellant to believe that BLM could make the initial determination regarding existence of access across private land. However, BLM cannot adjudicate appellant's right as against a private landowner. <sup>5/</sup> This is the role of state courts. Thus, the appellant must seek relief from the state court prior to the grant of a right-of-way by BLM. Lacking an agreement between parties, BLM must be given evidence of a binding determination by a state tribunal or court that applicant holds the right to cross the private property. The information appellant submitted may well be helpful, but it was submitted to the wrong forum. BLM can only adjudicate the application as it affects Federal land.

Further, although appellant's application requests permission to use a road easement that appellant asserts crosses the southwest corner of sec. 27, the application does not indicate where appellant wishes the right-of-way to go once he gains access to the SW 1/4 SW 1/4 sec. 27. Even if appellant could establish the Old Pearl Road entered sec. 27, appellant has not indicated where he would cross the BLM parcel or at what point his desired right-of-way would enter or leave BLM land. Appellant has correctly stated that he cannot present engineering drawings without a starting point, presumably somewhere on the Old Pearl Road. However, the statute calls for the applicant to submit the plan, with supporting information. 43 U.S.C. § 1761(b)(1) (1982). It is thus the applicant's responsibility to identify the desired route of the right-of-way, including starting and ending points. Appellant has not submitted the planned route, nor has he presented the supporting information BLM has long requested.

Therefore, we affirm the BLM decision. BLM has called for proof of access to Federal land, as well as the specific information describing the specific desired route across Federal land. Both are necessary elements for the grant of a right-of-way. BLM may impose a reasonable time limit for completion of a right-of-way application. When BLM issues a decision to deny an application for a right-of-way on the basis of information then available, the applicant has been afforded an opportunity to furnish the additional information, and the rejection is based upon the lack of necessary information called for, the decision will be affirmed by this Board. <sup>6/</sup>

The standard of review as outlined in FLPMA and Dwane Thompson, 88 IBLA 31, 35 (1985), is as follows:

Approval of a right-of-way by the Secretary under section 501 of FLPMA, 43 U.S.C. § 1761 (1982), 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. Nelbro Packing Co., supra at 185.

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<sup>5/</sup> There has been no appearance by the private landowner, who is an interested party critical to the resolution of appellant's claim of right.

<sup>6/</sup> Appellant is not precluded from resolving the issue of a right-of-way across the private lands and resubmitting an application for a right-of-way.

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 Boise District Office is affirmed.

R. W. Mullen  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Kathryn A. Lynn  
Administrative Judge  
Alternate Member

