

DALE LUDINGTON

IBLA 85-162

Decided October 28, 1986

Appeal from a decision of New Mexico State Office, Bureau of Land Management, rejecting right-of-way application for communication site facilities. NM-58258.

Affirmed.

1. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

APPEARANCES: Dale Ludington, pro se; Gayle E. Manges, Esq., Field Solicitor, Sante Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Dale Ludington has appealed the October 29, 1984 decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting a right-of-way application for the construction of communication facilities on public lands located on Goat Mountain, Dona Ana County, New Mexico, in the SE 1/4 SW 1/4 of sec. 8 and the NE 1/4 NW 1/4 of sec. 17, T. 22 S., R. 2 E., New Mexico Principal Meridian, New Mexico.

Ludington filed an application on June 21, 1984, to install an amateur radio repeater, housed in a structure, and a tower not to exceed 45 feet. On June 29, 1984, the BLM area manager informed him that existing adjacent users were being notified and would have 30 days to comment on the application. See 43 CFR 2802.4(d)(3). In a response filed July 18, 1984, the Dona Ana County Sheriff stated:

I would like to inform you that we do not approve. The Sheriff's Office Radio Communications Officer, Charles D. Lucero, has advised that it would not be in the best interest of the County to do this. The location where this site would be located may cause interference because of the nearness to the radio equipment that is already installed with our Agency.

A week later the County Manager filed a letter stating in part:

We recently visited the top of the specific site in question and find the area to be very small geographically and not suitable for multiple buildings insuring proper room to turn vehicles, construct additional buildings and so forth.

At the present time we are planning considerable improvements to our County-wide communications system. Such improvements would include the Sheriff's Department, Road Department, Emergency Medical Services, Fire Departments and Animal Control, as well as other elements of County government. This would be a multiple station for all aspects of public safety and performance. Included in this would be both low band, high band and microwave frequencies.

We are currently working with the State Communications Division on our long-term requirements. I believe it would be premature to allow a private organization to have access to the geographic location on the top of this peak at this time. When our plans are complete, we would be happy to cooperate with Mr. Ludington to see if we could not construct a building that would also allow his operation on a non-interference basis. At the present time, our plans have not progressed to the state that we could make this determination.

In response to a letter from Ludington dated August 4, 1984, the BLM area manager held a meeting with him and the county manager, after which he wrote the following letter to Ludington, dated August 21, 1984:

I am writing to you regarding your letter dated August 4, 1984 requesting the status of your right-of-way application with the Bureau of Land Management and to briefly summarize what was discussed in our meeting at the Las Cruces/Lordsburg Resource Area office on August 13, 1984.

The 30-day comment period on your notice to occupy the site at Goat Mountain, New Mexico, ended July 29, 1984. Although Dona Ana County did not respond to the FCC concerning possible frequency problems or electromagnetic incompatibility with their existing site on Goat Mountain, Mr. Robert L. Smith, Dona Ana County Manager, expressed his concerns to me regarding the space limitations at the site that may affect vehicle parking and turning and the construction of additional buildings.

The Bureau is responsible for the proper use and management of the public lands. Communication sites are particularly sensitive areas due to the high demand for these limited number of sites in the past few years.

Dona Ana County has indicated that they plan to modify their existing site area to accommodate additional users. I see this as a good opportunity for the Bureau to manage the Goat Mountain site to its optimum, by cooperating with the County on establishing its site plan.

I realize that you are anxious to proceed with the construction of your facilities on Goat Mountain. However, I feel that by allowing Dona Ana County time to formulate a site plan for the Bureau's review and establishing a time frame for construction at the site, all concerned parties in this matter will benefit in the long run.

Your right-of-way application for a site on Goat Mountain will not be processed further, at this time, allowing Dona Ana County 30 days (until September 14, 1984) to formulate the time frame for development of the site. I will review this plan from the Bureau's standpoint and then arrange to discuss the plan further with you and Dona Ana County.

On September 14, 1984, the BLM area manager met with the Dona Ana County Manager and Sheriff to discuss the county's concerns and plans. On September 28, 1984, the area manager wrote the following letter to the Dona Ana County Manager.

I am writing to you regarding the right-of-way application that the Las Cruces District Office has from Mr. Dale Ludington for communication facilities on Goat Mountain, New Mexico.

Based on numerous meetings with members of your staff, it was determined that Dona Ana County will not be constructing a new or larger building, therefore allowing sufficient room for Mr. Ludington's facilities at the Goat Mountain Site. It was previously determined that no electromagnetic incompatibility or frequency problems existed at the site.

This would allow for the issuance of a right-of-way grant to Mr. Ludington for the Goat Mountain Site with stipulations providing for protection of the existing rights of Dona Ana County and the public lands.

Dona Ana County is understandably concerned about any potential problems at the Goat Mountain Site due to the location of County law enforcement and emergency communication equipment at the site. In order to avoid any right-of-way users at this site, Dona Ana County could apply for exclusive use of the Goat Mountain Site. Upon receipt of an application for an exclusive

use right-of-way a fair market appraisal would be completed and an annual rental determined.

I request that this subject be discussed at the October 3, 1984 County Commission Meeting, so that all of the affected parties can express their concerns once again and a final decision be made by Dona Ana County.

The discussion at the October 3, 1984, meeting of the Board of County Commissioners is reflected in the draft minutes contained in the file:

3. Discussion of Lease with Bureau of Land Management for Twin Buttes (Goat Mountain) Communication Site.

Robert L. Smith, County Manager, discussed this item and stated that BLM is requesting a final decision at this time. At an earlier meeting Dale Ludington indicated that he would like to co-use the communication site at Goat Mountain. At that time his request was for an amateur radio repeater which would be temporary and would be out before the new county communication system was installed. Mr. Ludington's request has changed to a request for a permanent site which would be commercial in nature.

Bill Dwire of Santa Fe, who is designing the county's new communication system, has indicated that there would be no frequency interference concerning Mr. Ludington's request.

Manager Smith and Sheriff Diaz spoke against allowing a commercial enterprise to co-locate on the communication site. They were concerned that other enterprises might also wish to use the site or what the extent of Mr. Ludington's other requests might be.

Manager Smith reported that BLM has advised that in order to have sole use of the mountain, the county would need to obtain an exclusive use permit and pay a yearly fee of between \$500 and \$1,000 depending on the appraised value of the site.

It was recommended by Manager Smith and Sheriff Diaz in view of the fact that this site is an extremely integral part of the county's communication and safety system, it would be in the best interest of the county to request an exclusive use.

Dale Ludington, amateur radio operator, representing Twin Peaks Remote Group, which basically has filed the application, stated that the application is still amateur, that there is no commercial involved. He stated that there may be in the future. He felt that the problem that he and the county had been running into lately was due totally to misinformation from BLM. He felt there was plenty of room on this mountain for both the county and himself. He felt that it was in the best interest of the county to cooperate with the development of communication sites

as it has been done statewide. He stated that if the county had exclusives, they would be the only site in the state of New Mexico that doesn't share with someone.

Sheriff Diaz commented that he was thinking of the county in the future. He stated that possibly this co-use would be alright at this time, but in a few years there would be problems with interference.

Chairman Macias asked Bill Harkenrider, Area Manager for BLM, if the county could keep this peak exclusive. Mr. Harkenrider answered "yes". The present right-of-way that the county has is a non-exclusive easement. A new application would have to be submitted. He would obtain a fair market appraisal on what the price would be. Because of their being a government entity, there would be a discount on the price, there is no charge to the County for a non-exclusive site. There would be a charge for an exclusive. Mr. Harkenrider could not estimate that charge at this time.

Commissioner Gonzalez MOVED that the county begin proceedings to gain exclusive rights to Twin Buttes (Goat Mountain) Communication Site. The motion was SECONDED by Commissioner Stull. Commissioner Cooper stated, that in view of the opinion from Mr. Dwire, that there would not be an interference, either with Site or Radio, he felt that the commission should accommodate Mr. Ludington's request if there would be no problems. Commissioners Gonzalez, Luchini, Macias and Stull voted AYE. Commissioner Cooper voted NAY. The motion carried.

BLM's October 29, 1984, decision rejecting Ludington's right-of-way application followed. It stated in part:

The application is hereby rejected \* \* \* for the reason that the existing facilities of Dona Ana County at the Goat Mountain site are for the County's law enforcement and emergency communication equipment. It would be in the public's best interest as decided by resolution at the Dona Ana County Commission meeting on October 3, 1984, to avoid any potential problems at this site which might endanger the citizens of the Dona Ana County.

In his statement of reasons appellant quotes the Management Framework Plan (MFP) objective for communication sites ("To accommodate the continued and expanding use of established communication sites in the planning area.") and the MFP decision that "[n]o new sites should be allowed in the planning area without definite proof that existing sites can not substantially meet the need. Efforts should be increased to coordinate facilities among the users." He argues that BLM has "refused to coordinate users and \* \* \* rejected [his] application in order to avoid having to do any coordination." Multiple use of communication sites is the norm, he asserts, and there would be no frequency interference. Finally, he complains that "local BLM officials are cooperating with local government officials to an excessive degree."

[1] The Secretary of the Interior is authorized to grant rights-of-way over public lands for "systems \* \* \* of communication." 43 U.S.C. § 1761(a)(5) (1982). Approval of a right-of-way application is a matter of discretion. Lower Valley Power & Light, Inc., 82 IBLA 216 (1984). A BLM decision rejecting an application for a right-of-way 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 to disturb BLM's decision has been shown. High Summit Oil & Gas, Inc., 84 IBLA 359 (1985).

BLM may consider whether granting an application for a right-of-way for a communication site would cause undue interference. Peregrine Broadcasting Co., 62 IBLA 133 (1982). It may deny an application if it determines the proposed right-of-way would not be in the public interest. 43 CFR 2802.4 (a)(2); High Summit Oil & Gas, Inc., *supra* at 365-66. In this case BLM denied the application on the grounds that avoiding potential problems for the county's communications system from traffic, interference, or vandalism was in the public interest. We see no reason why BLM may not exercise its discretion in a precautionary manner to prevent possible harm to the public interest that could reasonably occur as a result of granting a right-of-way application. The Management Framework Plan statements only require that BLM make an effort to coordinate uses of communication sites; they do not require that BLM insist on coordination or multiple use at the expense of the public interest. Nor do we find BLM's cooperation with Dona Ana County excessive; rather, providing local public officials the opportunity to plan for their long-term needs is a sensible use of BLM's discretion in managing the public lands. In sum, we find that the record supports BLM's analysis of the factors involved in deciding on appellant's application and that appellant has not shown sufficient reason to upset that decision.

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.

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Will A. Irwin  
Administrative Judge

We concur:

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Kathryn A. Lynn  
Administrative Judge  
Alternate Member

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R. W. Mullen  
Administrative Judge