

ALBERT EUGENE RUMFELT

IBLA 95-461

Decided October 2, 1995

Appeal from and request to stay a decision of the Cody, Wyoming, Area Manager, Bureau of Land Management, denying road right-of-way application WYW 134058.

Stay denied; decision affirmed.

1. Rules of Practice: Appeals: Stay--Rights-of-Way: Generally--Rights-of-Way: Applications

A showing that the existence of reasonable alternative access was problematic provided insufficient reason for overturning a BLM decision to reject a road right-of-way application based on findings that alternative access was available and the proposed road would conflict with BLM planning for protection of deer migration routes.

APPEARANCES: Karen Budd-Fallen, Esq. and Vance E. Haug, Esq., Cheyenne, Wyoming, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; George L. Simonton, Esq., Cody, Wyoming, for Steve and Karen Devenyns.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Albert Eugene Rumfelt has appealed from an April 11, 1995, decision of the Cody, Wyoming, Area Manager, Bureau of Land Management (BLM), denying right-of-way application WYW 134058 for an access road in T. 51 N., R. 103 W., sixth principal meridian, Park County, Wyoming. The right-of-way sought by Rumfelt would, if built, occupy approximately 0.04 acres in a strip approximately 20 feet wide and 80 feet long across a small tract of BLM land lying between Rumfelt's property and a county road. Issuance of the right-of-way was protested by neighboring landowners. Following rejection of his application, Rumfelt filed a timely appeal; with his statement of reasons (SOR) he also filed a request to stay the BLM decision pending appeal.

The BLM decision had encouraged this approach by stating that a stay could be sought under provision of 43 CFR 4.21(a), the general stay regulation; this advice was not, however, entirely correct. A specific

regulation governing appeals from rights-of-way decisions is provided by 43 CFR 2804.1. That regulation provides the exclusive procedure for rights-of-way cases, and makes all rights-of-way decisions effective pending appeal unless otherwise ordered. 43 CFR 2804.1(b); and see Texaco Trading & Transportation Inc., 128 IBLA 239, 240 (1994), and cases cited therein. The decision in this case has therefore been in effect since it was issued by BLM. Id. Nonetheless, the pending request for stay presents the question whether a stay should now be ordered pursuant to 43 CFR 2804.1(b).

The burden of proof to show that a stay should issue rests with one who seeks it. Texaco Trading & Transportation Inc., 128 IBLA at 240. In support of his stay request, Rumpfelt has filed supporting documents with his SOR that challenge a premise upon which the decision to reject his application rests, by questioning whether alternative access to his property exists. Because standards customarily applied when determining whether to grant a stay include making an analysis of the probable ultimate success of the appeal, we necessarily decide this case on the merits when we conclude that Rumpfelt has not shown reversible error in the BLM decision in particulars described below. See Texaco Trading & Transportation Inc., 128 IBLA at 241. Accordingly, we deny the application for stay and affirm BLM's decision of April 11, 1995.

The decision notice/environmental assessment (EA) prepared by BLM as the foundation for the decision here under review found that Rumpfelt had other access to his land, observing that reasonable alternative access

already exists for the applicant on the southwestern portion of the property from the So. Fork road. The road is a recorded easement and has been incorporated and made part of the original deed of said property. It is currently being used by other homeowners in the area and would require less construction and involve fewer environmental impacts as compared to the proposed new road across public land.

(EA at ¶ II).

Rumpfelt contends on appeal that this finding was made in error. Stating that he has no other access to his property, he avers that the "recorded easement" referred to by the BLM decision no longer exists; in support of this contention he offers a letter dated April 27, 1995, from Robert J. Garrett that refers to a "McCue easement" recorded May 4, 1977, and states:

I [Garrett] agreed that you might have a temporary license to drive construction equipment across a portion of our property (the "License Area") which is not subject to the captioned McCue Easement - thereby serving as an interim (pending resolution of BLM issues): ingress

and egress to and from a portion of the property which is subject to the McCue Easement and the McCue property which you then had recently purchased.

Please make arrangements to have your use of the License Area terminated within the next thirty days.

Further, we have reviewed the terms of the McCue Easement and conclude that the easement therein described may well have long since been terminated - this for the reasons that (i) the scope of the grant was that of a "right-of-way and easement to construct, maintain and operate a roadway", and that (ii) the term of the grant was stated and intended to remain in effect only for "so long as said premises is used and maintained as a roadway for ingress and egress" to the land owned by McCue, and now by you.

We have met with former owners of the property subject to the McCue easement and are advised that no roadway to the McCue Property was ever constructed and/or used and/or maintained by the grantee under that easement or by any others.

Accordingly it would be inappropriate for you to now plan on any further extension of use over and upon that portion of our property which may have been described in the McCue Easement.

(SOR, Exh. 4).

Two other grounds were cited by BLM as providing support for rejection of the Rumpfelt application. The first of these found that the proposed right-of-way was "situated within a migration corridor for deer" (EA at ¶ II.2.). The April BLM decision also cited "concerns" of county residents and local landowners and "adverse visual impacts associated with another road" as a final reason to reject Rumpfelt's application. The EA upon which the decision was based explains, however, that this third conclusion is redundant of the second reason given for rejection, and was stated separately to acknowledge the role played by protests from neighboring landowners. The EA explains that:

Surrounding land owners have expressed a great deal of concern for the future development of the area in question. Increased development and construction of new homes have had a negative impact on both the values of surrounding private land, as well as the intention of solitude for existing land owners. The public land corridor in the area has supported wildlife migration and animals which tend to add to the scenic value sought by the current residents. [Citations and topic heading omitted.]

(EA at ¶ III.D.). Commenting upon planned future uses of the BLM land where the proposed right-of-way would be located, the EA states:

This small tract of public land, located on the west side of County Rd. 6WX, is part of a larger 40 acre tract of public domain situated along the Shoshone river. This land is currently being used by the public for access to the river for fishing, boating and other recreational activities. Future management of this area includes the development of a pull off to facilitate public use and sign management to identify and delineate opportunities for recreation.

(EA at ¶ III.C).

Rumfelt argues that this finding by the EA is inconsistent with rejection of his application for private access; if, he argues, the land is suitable for public parking to provide recreational access to casual users, a private driveway should also be consistent with BLM planning for the same area. It is contended by Rumfelt that the EA does not support the conclusion by the BLM decision that deer migration routes would be adversely affected by his proposed road.

[1] Rights-of-way applications for roads under 43 U.S.C. § 1761(a)(6) (1988) may be granted by BLM, subject to compliance with standards established by Departmental regulations. See 43 CFR 2802.1; 2802.4(a). A road right-of-way application may be rejected, however, if feasible alternatives exist. See Ben J. Trexel, 113 IBLA 250, 253 (1990). On the record now before us, the existence of the easement assumed by BLM to provide alternative access to the Rumfelt property may be problematic. Nonetheless, Rumfelt has not shown that the recorded easement is, as he now concludes, no longer in existence; what he has shown, as counsel for BLM points out, is the possibility that it may be disputed. He has not, therefore, shown that BLM erred in finding there was available alternative access; this finding is therefore affirmed.

Concerning the effect of objections that were voiced against the Rumfelt application, local opposition to a proposed road right-of-way is not, alone, enough to warrant denial of an application, which must be based upon a reasoned analysis of all relevant factors. Robert M. Perry, 114 IBLA 252, 254, 262 (1990). When planning considerations (such as encroachment of a road on a riparian zone) are relevant to a right-of-way decision, the record must establish how the planning conflicts with the proposed right-of-way. Charing Cross Associates, 83 IBLA 167, 168-69 (1984).

It does not now appear that construction of the proposed 80-foot driveway would be consistent with current BLM planning for site at issue, inasmuch as known wildlife distribution data provided in the EA supports BLM's finding that existing deer migration routes conflict to some degree with the construction proposed by Rumfelt. Because of this potential conflict, the Wyoming Game and Fishing Department also supported rejection of the application. This finding by BLM must also, therefore, be affirmed. Nor has Rumfelt shown that construction of the proposed 80-foot driveway

would be consistent with other BLM planning considerations for the site, inasmuch as there is no indication in the record that the parking place planned by BLM would coincide with the location proposed for the Rumpfelt driveway.

Because Rumpfelt has not shown there was error in the BLM decision to reject his application, his stay request must be denied since he has failed to show he has a likelihood of success on the merits (see 43 CFR 4.21(b)(1)(ii)), and it follows that the BLM decision must be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the stay request is denied and the BLM decision appealed from is affirmed.

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Franklin D. Amess  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

