

Editor's note: Erratum issued Oct. 6, 1999. Pages 251 and 252 were transposed in original. Correction made in this document.

WILLOUGHBY/LEAVITT ASSOCIATION

IBLA 96-117

Decided June 22, 1999

Appeal from a decision by Dixie Resource Area Manager, Bureau of Land Management, issuing road access right-of-way grant. UTU-73831.

Affirmed.

1. Federal Land Policy and Management Act: Surface Management–Mining Claims: Surface Uses–Surface Resources Act: Management Authority

The Surface Resources Act, 30 U.S.C. § 612 (1994), provides as follows with respect to rights under an unpatented mining claim located after July 23, 1955: Rights under any mining claim located after July 23, 1955, are subject, prior to issuance of patent, to the right of the United States to manage and dispose of the vegetative surface resources and other surface resources thereof. Any such mining claim shall also be subject, prior to issuance of patent, to the right of the United States, its permittees and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land, provided that any use of the surface does not endanger or materially interfere with prospecting, mining or processing operations, or uses reasonably incident thereto. If appellant can show that grant and use of a right-of-way over its mining claim endangers or materially interferes with mining activity, the right-of-way use must yield to the mining claimant's dominant and primary right to use the surface and its resources for mining purposes.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Federal Land Policy and Management Act of 1976–Rules of Practice: Appeals: Burden of Proof

A BLM decision approving a right-of-way application filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1994), 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, and no reason to disturb the decision is shown on appeal.

APPEARANCES: Brent Willoughby, Jay R. Leavitt, and Rodney E. Leavitt, Gunlock, Utah, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE PRICE

On behalf of Willoughby/Leavitt Association, Brent Willoughby, 1/ Jay R. Leavitt, and Rodney E. Leavitt have appealed from a November 29, 1995, Decision by the Area Manager, Dixie Resource Area, Utah, Bureau of Land Management (BLM), granting a right-of-way to Stephen DeLong and Todd Meeks for a road across public land. 2/ The right-of-way crosses Willoughby/Leavitt Association's unpatented placer mining claim (UMC 356847), and it is contended that the right-of-way will adversely affect its mining operation.

The roadway alignment embraced by the right-of-way grant has been the subject of applications for an access road to a millsite and an access road to a gravel permit area associated with a mineral sales contract. DeLong and Meeks have been the proponents in each instance, and in each instance there was strong opposition to the millsite and to access. Matters have been complicated by the sometimes rancorous feuding between DeLong and Meeks, and Appellant's principals, other neighbors, and community and state regulatory groups opposed to the millsite and/or the access road for a variety of reasons. The dispute is made no easier by the presence of Appellant's rival mining operation at the southern end of the right-of-way, while at the northern end, Ed Bowler, another neighbor who opposes the millsite, has used and improved an area to graze his livestock. DeLong and Meeks have complained that BLM has not acted on Bowler's trespass, and it appears that BLM intends to lease the surface of the millsite to Bowler for grazing. (Environmental Assessment (EA) No. UT-045-95-28 dated September 20, 1995, UTU-73368.) The record shows that the individuals involved have not hesitated to avail themselves of any opportunity to advance their interests, and it is evident that BLM has struggled to find a way to accommodate everyone. Despite this context, however, the only issue on appeal is whether BLM properly granted the right-of-way.

The history of the right-of-way application begins with DeLong's and Meeks' purchase of land in SE¹/₄SE¹/₄NE¹/₄ of sec. 29, T. 40 S., R. 17 W., Salt Lake Base and Meridian (SLB&M), that is entirely surrounded by private holdings and by land administered by BLM. After purchasing their land, DeLong and Meeks staked a millsite (UTU-73368) adjacent thereto, and on January 18, 1995, submitted a document to BLM styled a "plan of operations" to build an access road pursuant to 43 C.F.R. § 3809.3-3, and to disturb

1/ The names Richard B. Willoughby and R. Brent Willoughby appear in the case record. It is not certain whether Richard B. and R. Brent are the same person, but we assume so.

2/ The case record consists of files for right-of-way UTU-73831; Mineral Material Sale UTU-73825; DeLong and Meeks millsite UTU-73368; and Willoughby/Leavitt mining notice UTU-74004. Citations to documents will include the BLM case file number.

1 acre on the millsite to construct a building in which to refine and test gold ore. Because less than 5 acres were to be disturbed, BLM deemed this submission a Notice pursuant to 43 C.F.R. § 3809.1-3 and requested further information, which was submitted by DeLong on January 25, 1995.

The location of the millsite immediately engendered intense opposition, not only from DeLong's and Meeks' neighbors, but from members of the larger community of Gunlock, Utah, who contended that the millsite would compromise important environmental values and habitat; it would negatively affect an important annual rodeo event, Gunlock's major revenue-producing activity; it would depress housing values; and that it was located within the flood plain of the nearby Santa Clara River, posing a threat to riparian values and water quality. Recognizing that DeLong and Meeks lawfully could locate the millsite on public land, however, and that they were entitled to reasonable access to their millsite operations pursuant to 43 C.F.R. § 3809.3-3, BLM was reluctantly drawn into the controversy.

On February 14, 1995, DeLong and Meeks submitted an application to purchase 500 yards of gravel in Minor's Canyon, sec. 29, R. 17 W, T. 40 S., SLB&M. The gravel was to be used to surface the access road to DeLong and Meeks' millsite. (June 6, 1995, Memorandum from Area BLM Manager to BLM Deputy State Director, UTU-74004.) A mineral materials sale contract was signed on April 18, 1995. Under the gravel permit, DeLong and Meeks were authorized to construct an access road from the Manganese Wash Road, through the gravel permit area and to their adjacent private property in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 29. The gravel access road was to coincide with the alignment for the access road to the millsite, so that one road subject to the two authorizations would be constructed. (June 6, 1995, Memorandum from Area BLM Manager to BLM Deputy State Director, UTU-74004.) The proposed sale and construction of the access road had been determined to be in compliance with the 1981 Virgin River Management Framework Plan (MFP). (April 12, 1995, Categorical Exclusion/National Environmental Policy Act Compliance Record, UTU-73825.) On or about May 13, 1995, DeLong and Meeks started construction of the road. (May 13, 1995, Note to File by BLM geologist Larry Gore, recounting telephone conversations with Jay Leavitt and Laree Orton, an adjoining property owner, UTU-73831.)

Previously, however, on March 27, 1995, Willoughby/Leavitt had located its placer mining claim, UMC-357893. ^{3/} In processing the gravel sale, BLM had run a computer mining claim recordation check on April 10, 1995, but this did not disclose the existence of Appellant's claim. On Saturday, May 13, 1995, Jay Leavitt telephoned Gore to express his concerns regarding the potential right-of-way across Appellant's mining claim. Gore telephoned DeLong, who stated that work on the road had ceased for the weekend and no further work would be done without first notifying BLM. (Undated Note to File by Gore, probably May 13, 1995, UTU-73821.) On May 15, 1995,

^{3/} The claim was located on Mar. 27, the location notice was recorded at the Washington County Courthouse on Mar. 29, 1995, and a copy was received by BLM on Mar. 31, 1995, and assigned serial number UMC-356847. (Undated Note to File by Gore, probably May 15, 1995, UTU-73825.)

BLM confirmed that Appellant had a properly recorded mining claim which had not been entered in BLM's database in a timely manner. ^{4/} Ultimately, BLM notified DeLong by telephone that the gravel sale was canceled. The telephone call was followed by a written decision on May 17, 1995, canceling the sale.

The May 17, 1995, decision stated that reclamation of the road was not to be required at that time, because it had been constructed in good faith, and because the road was on the alignment authorized under DeLong and Meeks' Notice to construct a road to their millsite. (June 6, 1995, Memorandum from Dixie Resources Area Manager to Deputy State Director, UTU-74004.) The decision further stated that they could use the road because it was located in an area classified as open to off-highway vehicles, but cautioned that it could not be further improved or upgraded.

The record shows that there was some question whether DeLong and Meeks actually intended to utilize the road as access to their private property. (E.g., Note to File by Gore dated January 13, 1993, at 2, UTU-73368; Note to File by Gore dated February 7, 1995, at 1, UTU-73368; Letter with telecopier date of May 26, 1995, from Orton to BLM Associate State Director, UTU-73825.) Accordingly, when BLM acknowledged receipt of the January 25, 1995, Notice on February 8, 1995, it advised DeLong and Meeks that "[o]nly operations and uses reasonably incident to mining shall be conducted on the millsite and access road. Unless authorized by an additional right-of-way or other authorization, the road shall not be used to access your private property in the area. You did not request any residential occupancy at the millsite, and none is authorized." (Letter from Acting Area Manager to DeLong and Meeks dated February 8, 1995, at 2.) ^{5/}

Thus, DeLong and Meeks next filed right-of-way application UTU-73831 on April 4, 1995, seeking access to their private property. The proposed right-of-way followed the same alignment as the road constructed pursuant to the gravel purchase permit and the millsite access under 43 C.F.R. § 3809.3-3, except DeLong and Meeks proposed to improve and upgrade it. The right-of-way is 50 feet in width and 1,000 feet in length, will be a year-round road open to the public, and is perpetual in term unless terminated, abandoned or relinquished. (EA No. UT-045-95-031 at 2.) The public land involved is at the northern end of the road, in SW^{1/4}SE^{1/4} and NW^{1/4}NE^{1/4}, sec. 29, T. 40 S., R. 17 W., SLB&M, and terminates on DeLong's and Meeks' private property. (EA at 2.) The southern end of the right-of-way is the Manganese Wash Road, a county-maintained road across Federal land. (EA at 2.)

The EA, prepared in November 1995 in accordance with 43 C.F.R. § 2802.4(d)(1), noted that there was no authorized easement, right-of-way

^{4/} There were other events in the tale of the millsite access road which we will not recite, since that decision was not appealed.

^{5/} The file contains a copy of a computer printout, dated Apr. 10, 1995, that shows that there are no open mining claims. Appellant's claim was not entered into the Mining Claims Recordation database until Apr. 20, 1995. (Undated Note to File by Gore, probably May 15, 1995, UTU-73825.)

or improved public road to DeLong's and Meeks' property, and that they had been unable to obtain easements or rights-of-way to traverse the private property of others. Thus, without the right-of-way, they would have no assured access. (EA at 3.) The EA determined that the right-of-way was subject to the MFP and concluded that it conformed to the MFP recommendation to grant rights-of-way on public land to meet public and Government needs. (EA at 1.)

On November 8, 1995, the Area Manager issued a Decision Record/Finding of No Significant Impact concluding that the proposed right-of-way conformed to the approved land use plan. Also on November 8, 1995, BLM offered right-of-way grant UTU-73831 to DeLong and Meeks. It became effective when it was signed by the authorized officer on November 27, 1995. The Area Manager issued his Decision granting the right-of-way on November 29, 1995. A copy of that Decision was provided to Willoughby and the Leavitts, among others. This appeal followed. In addition, a stay was requested, which was denied by Order dated March 5, 1996. Appellant has submitted no further reasons for appeal beyond those stated in its Notice of Appeal (NA) and Request for Stay.

Appellant asserts that it was not notified of the right-of-way application, and that it was entitled to notice because of the adverse effect on its mining claim. There is no express obligation in the regulations to notify mining claimants of the filing of a right-of-way application, but BLM is required to "[c]oordinate, to the fullest extent possible, all actions taken pursuant to [43 C.F.R. Part 2800, Rights-of-Way] with State and local governments, interested individuals and appropriate quasi-public entities." 43 C.F.R. § 2800.0-2(d). This may include a public hearing if BLM deems it appropriate do so. 43 C.F.R. § 2802.4(e). The EA process also specifies public involvement, and the record of the EA shows that Jay Leavitt was one of the individuals consulted in the course of its preparation. (EA, VI, Consultation and Coordination, at 9.)

Moreover, it is clear from the record that Appellant and its principals had actual knowledge of the application before it was filed and certainly before the grant was approved. Right-of-way file UTU-73831 includes a "Note to File" dated May 15, 1995, which memorializes a meeting between BLM, Jay Leavitt, and Orton. That meeting was convened to discuss the mineral sale permit and the road built by DeLong and Meeks pursuant to the permit, but the discussion also included the question of access to DeLong's and Meeks' private property, in the course of which Leavitt expressed his opposition. In addition to evidence of his involvement as one of Appellant's principals, the record includes letters from Leavitt as president of the Gunlock Rodeo Association and as president of the Gunlock Water Users Association. Indeed, from the outset Jay Leavitt was among the most vocal of those opposed to DeLong's and Meeks' activities. Similarly, the record contains ample evidence that Appellant's other principals were fully aware of, and communicated their opposition to, the millsite and the access road from the time it was constructed under the gravel purchase permit. Appellant's assertion therefore is without merit.

Appellant generally asserts that the Decision is "adverse to it." It is further contended that the right-of-way will materially interfere with

its mining claim (UMC 357893) and will inhibit exploration and development activities. The only factual allegation offered to support this conclusion is that the right-of-way was "granted on the Southeast corner of the claim with the bulk of the claim being to the northwest and crosses the alluvium filled valley." (NA at 1.) Hence Appellant claims that "[f]uture mining activities will necessitate traversing through the valley bottom directly across the DeLong, Meeks road to develop the property." (NA at 1.) These contentions are also unpersuasive.

[1] The Surface Resources Act, 30 U.S.C. § 612 (1994), provides as follows with respect to rights under an unpatented mining claim located after July 23, 1955:

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: * * *

(Emphasis supplied.) Thus, the right-of-way grant constitutes a license to enter the public land at issue, and Appellant has no right either to prevent the granting thereof or the use of the right-of-way unless it can be shown that the use endangers or materially interferes with its mining activities. See U.S. v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980). If Appellant can make the requisite showing, the right-of-way use must yield to the mining claimant's dominant and primary right to use the surface and its resources for mining purposes.

This, however, Appellant cannot do. Appellant's showing consists of two assertions: "The Decision you have granted * * * has and will be materially interfering with the Willoughby/Leavitt Association Claim * * *. It inhibits exploration and development activities." (NA at 1.) There is no evidence that the existence or use of the right-of-way in any way "causes danger or peril" to Appellant's mining activity, or that it "substantially hinder[s], impede[s], or clash[es] with" its operations. Robert E. Shoemaker, 110 IBLA 39, 54 (1989). The mere possibility that the right-of-way may substantially hinder or impede mining operations is insufficient reason to invalidate the grant. Cliff Gallagher, 140 IBLA 328, 339 (1997).

Neither the case record nor the history of the access road supports Appellant's assertion that the right-of-way will interfere with exploration or development of the mining claim. As a physical matter, the right-of-way

involves a tiny fraction of the acreage encompassed by Appellant's mining claim, most of which lies north and west of the DeLong/Meeks road, and thus the present case is not comparable to the decision in Robert E. Shoemaker, *supra*, the effect of which was to obstruct 20 percent of the streambed on appellant's placer mining claim. What is more important, however, is that Appellant has not been hindered or impeded in its mining activity at all. Thus, on May 23, 1995, DeLong telephoned BLM to allege that a trench had been cut across the road, and that as a result, his cat operator could not remove his equipment. DeLong sought permission to fill the trench to the point that a truck could be brought in, but BLM refused to authorize the action and instead suggested that the cat be "walked" out to the Manganese Wash Road and loaded there. On May 25, 1995, Brent Willoughby informed BLM by telephone that the cat operator was damaging his assessment trench. (Undated Note to File by Gore, probably the latter part of May 1995, UTU-74004.) At that time Gore informed Willoughby that his use of mechanized equipment required a Notice pursuant to 43 C.F.R. § 3809.1-3, and that the road was to remain open. In a May 27, 1995, letter to BLM, Willoughby claimed that a "trackscavator" was observed improving the road and that a small excavation trench on the claim had been filled in. DeLong denied doing this. (Note to File by Gore dated May 30, 1995, UTU-74004.)

On August 24, 1995, DeLong telephoned Gore to complain that the work being done by Willoughby exceeded that typical of an exploration trench and claimed that large piles of material completely blocked the road. (Note to File by Gore dated August 24, 1995, UTU-73368 and UTU-74004.) In response to DeLong's call, BLM conducted a field inspection on August 25, 1995. The inspection report noted that work had been confined to the trench, except material had been piled on the road to the northeast. A sketch accompanying the inspection report shows a trench 300 feet long, 15 to 20 feet wide and varying in depth from less than 1 foot up to 2 feet, except at the place where the trench cuts into the road, which at that point was 4 feet deep. The sketch also indicates a pile of material deposited on the road creating a berm 2 feet tall and 50 feet wide at a distance of approximately 35 feet from the trench. Another berm is shown across the trench at the place where the trench cuts the road. This berm is shown to be 5-1/2 feet tall, measured from the trench floor, which means it rose 1-1/2 feet above the road surface. We have discussed the trenching in detail because it shows that the road has not interfered with Appellant's exploration of its claim, and certainly has not imperiled mining activities.

Furthermore, no harm is shown by the fact that Appellant may find reason to traverse the DeLong-Meeks road to reach its mining claim. By its terms the right-of-way is open to public use, but to the extent Appellant chooses not to use the road, it appears that it can use Manganese Wash Road instead. 6/

6/ The record shows that Jay Leavitt not only opposed the DeLong and Meeks access road, but apparently was intent on restricting public travel on the Manganese Wash Road as a matter of protecting his mining operation, minimizing opportunities for theft and vandalism from the claim site, and protecting public safety in crossing the Santa Clara River. (Note to File by Gore dated May 15, 1995, UTU-73831.)

To the extent Appellant intends to argue or suggest that the right-of-way grant is not in the public interest, we note only that it is the Department's objective under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1994), to grant rights-of-way to any qualified individual, business entity, or Governmental entity and to regulate, control, and direct the use of rights-of-way to protect the natural resources of affected lands, and to prevent unnecessary or undue degradation thereof. 43 C.F.R. § 2800.0-2(a) and (b). As there is no question that DeLong and Meeks are qualified persons, we perceive no error in the Decision.

[2] As the authorized representative of the Secretary of the Interior, BLM has broad general discretion to accept or reject a right-of-way application pursuant to section 501 of FLPMA, 43 U.S.C. § 1761 (1994). Tom Cox, 142 IBLA 256, 257 (1998); Kenneth Knight, 129 IBLA 182, 183 (1994); C.B. Slabaugh, 116 IBLA 63, 65 (1990). A decision by BLM regarding such an application normally will be affirmed where the record demonstrates that it was based upon a reasoned analysis of the factors and circumstances involved, with due regard for the public interest, and no reason to disturb the decision is shown on appeal. Allen D. Miller, 132 IBLA 270, 278 (1995); J.E. Lepetich, 129 IBLA 255, 259 (1994). To prevail in a challenge to a BLM decision granting an application to use Federal lands, the challenging party must demonstrate by a preponderance of the evidence that BLM erred in the information or data upon which it relied or in reaching its conclusions. No such error has been shown here.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

T. Britt Price
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

