

BEAR RIVER DEVELOPMENT CORPORATION, ET AL.

IBLA 98-308, IBLA 98-309

IBLA 98-311, IBLA 98-325

IBLA 98-334, IBLA 98-346

Decided July 19, 2002

Appeals from a decision of the Pocatello Resource Area Manager, Upper Snake River District Office, Bureau of Land Management, terminating an environmental assessment and denying a right-of-way application and proposed amendment of the Pocatello Resource Management Plan. IDI 29664.

Affirmed.

1. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements

BLM is vested with broad discretion to deny a right-of-way application in any case in which the authorized officer determines that granting the proposed right-of-way would be inconsistent with the purpose for which the affected public lands are managed; that the proposed right-of-way would not be in the public interest; or that the proposed right-of-way would otherwise be inconsistent with applicable law.

2. Environmental Quality: Environmental Statements–Rights-of-Way: Generally–National Environmental Policy Act of 1969: Generally

NEPA applies only to actions a Federal agency proposes to take and specifies procedures designed to produce relevant information concerning the environmental consequences of the Federal action proposed, before that action is taken. Departmental regulation 43 CFR 2802.4(d) mandates a completed EA in any case in which BLM determines to issue a requested right-of-way. Even when an EA is completed pursuant to 43 CFR 2802.4(d), BLM retains its discretionary authority to deny a right-of-way application.

3. Environmental Policy Act--Environmental Quality: Environmental Statements

Appellants bear the burden of demonstrating, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

4. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Although differing right-of-way applications may have facts or issues in common, BLM retains its broad discretion to weigh the totality of facts and circumstances in each case in determining the public interest.

APPEARANCES: W. Hugh O'Riordan, Esq., Jeffrey C. Fereday, Esq., and Thomas E. Dvorak, Esq., Boise, Idaho, for Bear River Development Corporation, Timothy O'Reilly, Bear River Ranch Owners Association, and Heinz Flurer, Salt Lake City, Utah; Michael T. Turville, Centerville, Utah, pro se; Bruce D. Williams, Morgan, Utah, pro se; Richard E. and Lynda L. Graham, Salt Lake City, Utah, pro sese; Randy and Coleen Thompsen, Roy, Utah, pro sese; William M. Ferry, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Bear River Development Corporation (BRDC), Timothy J. O'Reilly, individually and as vice president of BRDC, Heinz Flurer, individually and as president of the Bear River Ranch Owners Association (Association), and others who purchased land for subdivision home sites from BRDC have appealed from an April 24, 1998, decision of the Pocatello (Idaho) Resource Area Manager, Upper Snake River District Office, Bureau of Land Management (BLM), denying right-of-way (ROW) application IDI 29664 to construct a road, and a proposed amendment of the Pocatello Resource Management Plan (RMP) designating that road for vehicular use.

BACKGROUND

BRDC and O'Reilly sold and the individual appellants purchased land in the Bear River Ranch subdivision. 1/ BROOC and O'Reilly admittedly did not

---

1/ The subdivision was approved by the Franklin County Commissioners with the express acknowledgment that roadways to and within the subdivision were inaccessible to fire, emergency, police, and other vehicles and services.

secure a ROW before they began to sell land (AR at 97-98), 2/ but they expected to use an unimproved "jeep trail" crossing BLM lands located in sec. 9, T. 14 S., R. 40 E., Boise Meridian, in Franklin County, Idaho, to obtain access to the subdivision properties. (AR at 61, 111, 168-69, 199-200, 216-17, 218-19, 233-34, 257-58.) In the past, the jeep trail had been used "casually." 3/ See 43 CFR 2800.0-5(m). However, in November 1992 BLM informed BRDC and O'Reilly that they had no legal right of access over BLM land.

After learning that it had no access over public lands, BRDC continued to sell lots in the subdivision, until the acreage had been sold in its entirety. See Conversation Record dated September 19, 1995, AR 20. On February 23, 1993, BRDC and O'Reilly filed an application for a ROW for a seasonal (May 1 through December 1) road along approximately one mile of the existing jeep trail pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994). Previously, the jeep trail had been bladed periodically without BLM's authorization to do so, to ensure access from the subdivision to the Oneida Narrows Road, which runs parallel to the Oneida Narrows stretch of the Bear River. 4/

---

Any road maintenance, repair, or replacement, and all utility services to the subdivision were the sole responsibility of the owners, who also were required to explicitly waive any claim that Franklin County owed a duty to provide such services. (Administrative Record (AR) at 272, 259.) Further, the subdivision plat map recorded on Jan. 27, 1993, contained the following declaration:

"The access roadway as it turns off Highway No. 3 (except for about the one-half mile between said highway and the Twin Lakes Canal Company siphon, which is a County road), and any other access roadways to the subdivision, and all streets and roadways within the subdivision, are all privately-owned roadways and are not and shall never become public rights-of-ways [sic], public streets, or county roads. All such roadways and streets are expressly not dedicated to the public." (AR at 272.)

2/ It appears First American Title Co. issued title insurance, notwithstanding the lack of legal access over public land. See AR at 459-62.

3/ In its Reply, BLM clarifies this characterization, explaining that the jeep trail "was not classified for 'casual use' after the platting of the subdivision. Furthermore, the road was not classified for 'casual use' before the platting of the subdivision and the Area Manager was in error to refer to the road as such." (Reply at 13-14.)

4/ As described in its application, the ROW originally was for three segments of "reconstructed road" 6619 feet in length and 30' wide. Segment A was in sec. 9 (T. 14 S., R. 40 E.), Segment B was in sec. 27 (T. 13 S., R. 40 E.) and Segment C was in sec. 33 (T. 13 S., R. 40 E.). As amended in 1997 and as stated in the EA at 2-2, the proposed ROW would be approximately 6000 feet in length, incorporating approximately 800 feet of the jeep trail in the SE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> sec. 9 (T. 14 S., R. 40 E.). It is apparent from Figure 2-1 in the draft Environmental Assessment (EA) that the proposed ROW merely

The applicants claimed that the proposed ROW would provide the only reasonable and affordable access to the 207-acre subdivision (27 lots) and surrounding 1,313 acres (49 parcels), without which the land likely would remain undeveloped. (Decision at 2.) BLM initiated an EA to analyze the proposed ROW, <sup>5/</sup> which culminated in a draft EA dated March 17, 1998.

Only two alternatives were considered in detail in the draft EA: the proposed action of granting the ROW to construct a new single lane improved road and amending the RMP to designate the new road for vehicular travel, and a no-action alternative, which would effectively deny the ROW and RMP amendment. (Draft EA at 2-2.)

Four other alternatives were considered but not analyzed in detail: reconstruction of the jeep trail for the subdivision's use; denial of the ROW, coupled with the physical closure and rehabilitation of the existing trail; use of the PacifiCorp Bridge below Oneida Substation; and use of the road from Treasureton, Idaho. (Draft EA at 2-1.) In declining to consider reconstruction of the existing jeep trail, BLM stated:

Because of slopes up to 20% along the existing trail, reconstructing the existing trail would not safely accommodate increased public use and potential development. Additionally, construction of a surfaced road along this route could not be accomplished under the constraints of safe and practical engineering practices.

(Draft EA at 2-1.) The draft EA recited that the alternative of physical closure and restoration of the existing jeep trail was not analyzed in detail because "[t]o physically close and rehabilitate the existing trail would not meet the underlying need for access to the private lands." (Draft EA at 2-1.) BLM stated that closure and rehabilitation would require the preparation of environmental documentation necessary to comply with the

---

intersects the jeep trail at 4 points because of the switchbacks that are required to maintain a safe grade, before following the jeep trail for the last approximately 800 feet to reach the Bear River Ranch properties. It is thus clear that the bulk of the proposed ROW consists of the construction of new road. (Decision at 1-2; Draft EA, Fig. 2-1.)

<sup>5/</sup> By letter dated May 10, 1995, O'Reilly selected and agreed upon a cost reimbursement alternative to pay BLM the total actual costs of processing the ROW application in accordance with 43 CFR Subpart 2808, Reimbursement of Costs, and agreed that BRDC would provide a third party environmental consultant to be approved by BLM, to complete the scoping and environmental assessment for the ROW application. (AR 103-04.)

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4379 (1994). (Draft EA at 2-2.) The remaining two alternatives were eliminated from consideration because the affected private landowners refused to permit access. (Draft EA at 2-1.)

Instead of issuing a final EA and Decision Record, however, the Area Manager issued a decision denying the ROW application and RMP amendment, reasoning as follows:

The decisions, terms, and conditions of the Pocatello Resource Management Plan (RMP) and associated activity plans, amendments and designations have provided me a basis to conclude that amending the RMP and granting this right-of-way (ROW) is inconsistent with the purposes for which the public lands are being managed and is not in the public interest (43 CFR, 2802.4, CH. II, 10-1-97).

(Decision at 1.) The decision further stated:

An environmental assessment (EA) was initiated in 1996 in support of a possible amendment to the Pocatello Resource Management Plan to allow a grant of ROW. I recently terminated the EA when it became clear through the analysis that amending the RMP and granting [the] ROW would not be consistent with the purposes for which the public lands along the Oneida Narrows are being managed and would not be in the public interest. To conclude with the EA would only have caused yourself, as applicant, and the taxpayers, in general, wasted time and expense.

(Decision at 1.)

Noting that 60% of the subdivision adjoins public lands comprising the Oneida Narrows Research Natural Area, Area of Critical Environmental Concern (RNA/ACEC), and the Bear River Oneida Narrows Segment (BRONS), which is eligible for inclusion in the National Wild and Scenic Rivers system because of its outstanding resource values, the decision expressed concern for the potential cumulative impacts of development of the Bear River Ranch subdivision and the lack of information necessary to fashion mitigating measures. In particular, the decision concluded that it was reasonably foreseeable that the development of Bear River Ranch would entail construction of a road system to serve 60 different properties, construction of homes and/or siting of mobile homes, the construction of improvements, sewage and water delivery systems, and utilities to serve those properties. (Decision at 2.) The Area Manager concluded:

Even having sufficiently completed the EA, there remains a great degree of uncertainty and risk surrounding the potential cumulative and long term environmental effects to neighboring public lands resulting from the proposed development of Bear River Ranches. Determining the extent of these effects to public lands has been problematic in the EA given the lack of any plan(s) of community development, or covenants and restrictions on the kinds

of development and land use. Furthermore, there are few or no mitigation measures available to BLM to address cumulative effects, or the potential cumulative effects of development upon the neighboring BLM lands, especially on the RNA/ACEC and BRONS.

(Decision at 3.)

In a footnote to the decision the Area Manager stated: "Currently the BLM, Pocatello Resource Area[,] is preparing an EA to physically close and rehabilitate the existing jeep trail. Closure is expected to be complete by the fall of 1998." (Decision at 1 n.1.) 6/

As noted, BRDC, O'Reilly, and the Association appealed the decision, as did 22 other individuals and Flurer in his own behalf, and most moved for a stay of the decision. 7/ In our order of September 20, 1999, we denied BLM's request to dismiss the appeals of BRDC (IBLA 98-308), Flurer and the Association (IBLA 98-309), Michael T. Turville (IBLA 98-311), Bruce D. Williams (IBLA 98-325), Richard E. and Lynda L. Graham (IBLA 98-334), and Randy and Coleen Thompsen (IBLA 98-346) on various procedural and technical grounds, and we denied the requests for stay filed by these appellants as well. In particular, we found that these appellants' arguments regarding the draft EA had adequately articulated legal issues which were sufficient to survive the motion to dismiss.

On January 3, 2000, BLM again moved to dismiss the appeals of Flurer, the Grahams, the Thompsens, Turville, and Williams, on the ground of failure to file timely Statements of Reasons (SORs), as required by 43 CFR 4.412. By letter to the Board dated January 13, 2000, Flurer acknowledged that he and the remaining individual appellants had not filed SORs, instead choosing

---

6/ Despite this representation, BLM states that "[a] decision has not yet been made to close the jeep road." (Reply at 13 n.5.) In a previous order, we held that the closure of the jeep trail was beyond the scope of this appeal. (Order dated Sept. 20, 1999, at 8.) When and if BLM issues a decision closing the jeep trail, an adversely affected party could appeal it to this Board.

7/ On BLM's motion, as well as sua sponte, we dismissed the following appeals by order dated Sept. 20, 1999: Thomas H. and Alayne A. Barber (IBLA 98-310); John W. Blackburn (IBLA 98-312); William F. Morby (IBLA 98-313); Shawn Callister (IBLA 98-314); Michael P. Pullman (IBLA 98-315); Cindy Child (IBLA 98-316); Joe R. Hernandez (IBLA 98-317); Lorna and Jerry Bailey (IBLA 98-318); Ed Hernandez (IBLA 98-323); Steven Huntsberger (IBLA 98-324); Steven Fullmer (IBLA 98-326); Steven L. Brown (IBLA 98-327); Kenneth Merrill (IBLA 98-328); Dave Higbee (IBLA 98-344); H. Don and Dona Hancock, Vivian L. Hancock (IBLA 98-345); Frank D. and Astrid Kramer (IBLA 98-354); Raymon D. and Amy McDougal (IBLA 98-358); Bret Elton (IBLA 98-390), and mooted the stay requests filed by these appellants.

to rely on the submissions of BRDC, O'Reilly, and the Association to more fully present their positions. <sup>8/</sup> Eventually, because of the complexity of the issues in this case, some of which are not before the Board, by order dated February 6, 2001, we directed the parties to explore the feasibility of resolving their conflict through an alternative dispute resolution mechanism. That effort failed, and, as required by the February 6 order, upon notice from the parties, the appeal again became ripe for decision. <sup>9/</sup>

### ARGUMENTS ON APPEAL

In their SOR and Supplemental SOR (SSOR), <sup>10/</sup> BRDC, O'Reilly, and the Association contend that denial of the ROW application before completion of the draft EA violates NEPA and implementing regulations issued by the Council on Environmental Quality (CEQ), 40 CFR 1501.3, arguing that, among other things, NEPA requires agency officials to complete the environmental analysis to assess proposed Federal actions and utilize it in their decisionmaking before a decision is made. (SOR at 32-33.)

Appellants also argue that FLPMA, 43 U.S.C. § 1761 (1994), independently requires BLM to prepare an EA or an environmental impact statement when BLM considers granting a ROW. (SOR at 33-35.) Appellants assert that the evidence supporting the draft EA's cumulative impacts analysis is not sufficient to justify denying the ROW, that the draft EA did not identify any significant environmental impacts (SOR at 37-39), and that the record established before the decision to terminate the draft EA warranted a finding of no significant impact (FONSI). (SOR at 39, 43-46.)

Appellants further contend that the RMP limited travel in the Bear River area to designated routes and allowed casual use of the instant jeep trail as a designated route. (SOR at 40-42.) Citing Headwaters v. Bureau of Land Management, 914 F.2d 1174 (9th Cir. 1990), and James Shaw, 130 IBLA

---

<sup>8/</sup> Although the other individual appellants state that they rely on BRDC, O'Reilly, and the Association to advocate their position in this matter, it is clear that they are not represented by BRDC's, O'Reilly's and the Association's counsel, nor are their interests the same for all purposes. However, the individual Notices of Appeal, including the Notice of Appeal filed by Flurer, who proceeded as both an officer of the Association and in his own behalf, adequately stated the reasons why appellants believe the decision is in error. This is a sufficient basis for denying the motion to dismiss, and we do so now.

<sup>9/</sup> The parties filed their responses on May 21, 2001. BRDC's, O'Reilly's and the Association's response was styled a Motion for Order to Engage in Mediation, which is denied as moot.

<sup>10/</sup> Although appellants' pleadings actually are captioned "Response of [BRDC] and Timothy O'Reilly and Bear River Owner's [sic] Association," and "Supplemental Response of [BRDC] and Timothy O'Reilly and Bear River Owner's [sic] Association," it is clear that they are offered as the SOR required by 43 CFR 4.412. Both were filed with the Board on Dec. 9, 1999.

105 (1994), appellants contend that there is no causal relationship between the proposed Federal action and the cumulative impacts cited by the Area Manager. (SOR at 46-49.) Because BLM allowed casual use of the jeep trail over a period of many years and the subdivision was in existence when appellants applied for the ROW, appellants argue that the cumulative impacts in fact have materialized and are known, and thus “[i]t is arbitrary for the Area Manager to label the consequences of the use of the existing road as a cumulative impact to justify denying a [ROW] application. Any such ‘impacts’ occurred as a result of the allowance of casual use over a designated route.” (SOR at 50-51.)

As other arguments, appellants note that Idaho State law provides a private right of condemnation and state they have filed suit against private landowners to acquire access across their property by condemnation. 11/ Therefore, appellants conclude, BLM’s denial of the ROW application will not stop development of the subdivision. (SOR at 51.) They assert, moreover, that on November 22, 1999, the Franklin County Commissioners declared that the jeep trail is a ROW granted pursuant to Revised Statute 2477 (R.S. 2477). 12/ (SOR at 52-53.) According to appellants, “recognition of R.S. 2477 makes the alleged cumulative impacts not likely to result only from the requested right-of-way permit.” (SOR at 53.)

Appellants make two final arguments in their SOR. First, they assert that the subdivision is surrounded by Federal and private lands, and as such, it is "landlocked" as the term has been construed by courts interpreting provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (1994), creating an independent entitlement to access. (SOR at 54-55.) 13/ Second, they argue that the decision of the

---

11/ Nothing in the present record would support a finding that appellants have in fact secured alternative access.

12/ Congress granted ROWs for the construction of highways over public lands which were not reserved for public uses pursuant to sec. 8 of the Mining Law of 1866. Sec. 8 was codified as Revised Statutes 2477, 43 U.S.C. § 932 (1970). In our order of February 6, 2001, we rejected appellants' motion for leave to supplement the record with an affidavit going to the issue of whether the jeep trail is properly considered an existing ROW under R.S. 2477.

13/ Appellants did not seek an ROW grant under ANILCA or request that BLM adjudicate this issue. Moreover, BLM disputes appellants' assertions that their lands are contiguous to, and landlocked by, private and Federal public lands, and contends that Federal law does not create an obligation to provide access pursuant to 16 U.S.C. § 3210 (1994). (Answer at 16-17.) Whether and to what extent ANILCA may apply to the facts of this case is unsettled. Compare, e.g., Montana Wilderness Association v. United States, 655 F.2d 951, 957 (9th Cir. 1981), cert. denied, 455 U.S. 989, 102 S.Ct. 1612 (1982) with United States v. Smsky, 271 F.3d 595 (4th Cir. 2001), and Board of County Commissioners, Albany County v. Federer Development Co., 682 P.2d 1062, 1066 (Wy. 1984).

Area Manager was unreasonably delayed, and should be set aside pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(1) (1994). (SOR at 55-58.)

Appellants' SSOR offers "further examples from other [ROW] cases which make the conduct of Area Manager Jeff Steele \* \* \* in terminating the EA and denying the requested [ROW] permit seem arbitrary and capricious and otherwise in violation of the standards of the [APA]." (SSOR at 2.) These examples, according to appellants, show (1) that no other ROWs have been denied in the Pocatello Resource Area (SSOR at 2-3); (2) that steep topography did not prevent a FONSI in a 1998 ROW decision (SSOR at 3-5); (3) although one ROW decision was made by an individual acting as Area Manager, Steele determined to make the Bear River decision himself (SSOR at 5-6); (4) that the designation of a route as a travel route has not been a factor in other ROW decisions (SSOR at 6-7); and (5) that James Shaw, *supra*, presents the same factual scenario as Bear River, yet that ROW was granted by Area Manager Steele. (SSOR at 7-9.)

BLM sees the controversy differently. In its Answer, BLM states that "the issue before the Board is whether the Area Manager acted within his discretion when he denied the right-of-way application IDI 29664 and the amendment of the Pocatello RMP [footnote omitted]." (Answer at 4.) Citing Mountain Home Highway District, 147 IBLA 222, 226 (1999), BLM argues appellants have not carried their burden of showing error in the decision and that, pursuant to section 501(a) of FLPMA, 43 U.S.C. §§ 1761(a) (1994), and the regulation at 43 CFR 2802.4(a), BLM lawfully exercised the Secretary's delegated discretionary authority to reject a ROW application when the authorized officer determined that the proposed ROW would be inconsistent with the purpose for which the public lands are managed, and the ROW would not be in the public interest and would otherwise be inconsistent with applicable law. (Answer at 4-5.)

BLM further asserts that, under 43 CFR 2802.4(d), a completed EA is not "required to deny a ROW application" (Answer at 7, emphasis in original), reasoning that after initiating an EA to evaluate the application, the Area Manager correctly exercised his discretion to deny the application when he determined that there was adequate reason in the record to do so. (Answer at 8.)

Additionally, BLM asserts that BRDC's proposed ROW was a nonconforming use of the subject public lands under the 1988 RMP and, for that reason as well, BLM was correct to reject BRDC's ROW application.

14/ According to

---

14/ The proposed route is in an area designated Type 4 in the RMP. A Type 4 designation signifies: "All vehicles limited to designated routes." (Map 16, Ex. A to Answer.) To the extent the ROW application proposes the

BLM, denial of the ROW application reflects a reasoned analysis and appropriate concern for the public interest, in light of (1) the potential harm to the views in the Oneida Narrows area, citing AR at 609, 688, 757-59 (Answer at 9-10); (2) serious public health and safety questions due to the inaccessibility of the subdivision, which cannot be reached by fire and emergency vehicles, and the absence of county services; (3) increased potential for wildfires and other natural disasters, citing AR at 272, 606, 607, 609, 659, 660 (Answer at 11); (4) loss of habitat, citing AR at 495, Ex. D of 541, 652, 654, 655, 662, 679 (Answer at 12, 13); and (5) increased risk of soil erosion, soil instability and impacts on water quality on neighboring public lands and special areas as a result of development, citing AR at 611, 680-81, 786 (Answer at 14-16). Further, BLM notes that it is required to protect ACECs as a priority under sec. 202(c)(3) of FLPMA, 43 U.S.C. § 1712(c)(3) (1994). (Answer at 13.)

### ANALYSIS AND DECISION

The only issues ripe for review at this time are whether BLM could properly terminate the EA process and deny the ROW application, questions which turn on BLM's discretionary authority. We begin with FLPMA, under which appellants' ROW application was filed. See 43 U.S.C. § 1761 (1994). Implementing regulations governing ROWs appear in 43 CFR Part 2800. This appeal specifically concerns the provisions of 43 CFR 2802.4, Application processing. 15/

---

construction of a new road, it could not have been designated in the 1988 RMP. It appears that the jeep trail never was designated for vehicular travel. (Answer at 5-6; see also AR at 371, 373-74.) This argument is unpersuasive, however, because BLM planned to designate the road for vehicular use by amending the RMP if the ROW was granted.

15/ BLM and the Forest Service, U.S. Department of Agriculture (FS), issued a "preproposed outline of procedures" for granting rights-of-way on Nov. 14, 1977, which invited public comment. In the subsequently proposed rules for 43 CFR Part 2800, BLM and FS responded to comments on the outline. 44 FR 58106 (Oct. 9, 1979). None of the comments specifically raised 43 CFR 2802.4. However, commenters expressed the view that decisionmaking on ROWs should occur at the local level, as well as concern that "broad discretionary authority could be abused by individual line officers, resulting in unreasonable interpretation of criteria and a wide variation of decisions." 44 FR 58107. BLM and FS responded that the basic process would be supplemented by guidance contained in agency Manuals and training at the local level and reiterated: "Even within this framework, the authorized officer has discretion within his decisionmaking to allow flexibility for case-by-case analysis." 44 FR 58107. In response to the succeeding comment, the agencies again acknowledged that "action on a project can be tailored to its particular needs and circumstances." 44 FR 58107. There has been no comment upon the provisions of 43 CFR 2802.4 in subsequent rulemaking affecting 43 CFR Part 2800.

As stated, BLM cites 43 CFR 2802.4(d)(1) to support its contention that an EA is required only when a ROW is to be granted and, by implication, that no EA is required if the ultimate decision is to deny the application. Citing 43 CFR 2802.4(c), BLM further contends that the authorizing officer properly may request such additional information as may be necessary to review a ROW application, suggesting that the EA in this case was appropriately used to obtain additional, necessary information. (Answer at 7-8.)

The regulation governing application processing, 43 CFR 2804.4, states the following, in material part:

(a) The authorized officer shall acknowledge, in writing, receipt of the application and initial cost reimbursement payment required by subpart 2808 of this title. An application may be denied if the authorized officer determines that:

(1) The proposed right-of-way or permit would be inconsistent with the purpose for which the public lands are managed;

(2) That the proposed right-of-way or permit would not be in the public interest;

(3) \* \* \* \* \*

(4) The right-of-way or permit would otherwise be inconsistent with the act or other applicable laws; or

(5) \* \* \* \* \*

(c) The authorized officer may require the applicant for a right-of-way grant to submit such additional information as he deems necessary for review of the application. All requests for additional information shall be in writing. Where the authorized officer determines that the information supplied by the applicant is incomplete or does not conform to the act or these regulations, the authorized officer shall notify the applicant of these deficiencies and afford the applicant an opportunity to file a correction. \* \* \*.

(d) Prior to issuing a right-of-way grant or temporary use permit, the authorized officer shall:

(1) Complete an environmental analysis in accordance with the National Environmental Policy Act of 1969;

(2) Determine compliance of the applicant's proposed plans with applicable Federal and State laws;

(3) Consult with all other Federal, State, and local agencies having an interest, as appropriate; and

(4) Take any other action necessary to fully evaluate and make a decision to approve or deny the application and prescribe suitable terms and conditions for the grant or permit.

(e) The authorized officer may hold public meetings on an application for a right-of-way or temporary use permit if he determines that such meetings are appropriate and that sufficient public interest exists to warrant the time and expense of such meetings. \* \* \*

\* \* \* \* \*

43 CFR 2802.4 (emphasis added).

[1] We believe it clear that 43 CFR 2802.4(a) recognizes BLM's broad discretion to deny a ROW application for any of the reasons enumerated in the regulation. See International Sand & Gravel Corp., 153 IBLA 295, 298 (2000), and cases cited; see also Red Rock Hounds, Inc., 123 IBLA 314, 318 (1992); American Motorcycle Association, 119 IBLA 196, 198 (1991); Cascade Motorcycle Club, 56 IBLA 134, 137 (1981). BLM also has the authority to require such additional information as the authorized officer may deem necessary to understand and review the application fully, including information developed utilizing an EA. 43 CFR 2802.4(c). BLM is not shorn of its discretionary authority under FLPMA to deny an application under subparagraph (a), however, merely because it commences preparation of an EA. No such limitation appears in FLPMA, or in NEPA and its implementing regulations, see 40 CFR § 1500.6, and none has been cited by appellants. Accordingly, when BLM has determined that it has sufficient information to reject an application, it can properly terminate an EA process and exercise its discretionary authority to deny the application pursuant to 43 CFR 2802.4(a). In reviewing such a decision, the test is whether the facts of record justify the conclusion that BLM had acquired "sufficient information" to rationally support the decision made. International Sand & Gravel Corp., *supra* at 299; Terry Kayser, 136 IBLA 148, 150 (1996); Dvorak Expeditions, 127 IBLA 145, 151 (1993); Red Rock Hounds, Inc., *supra* at 318.

[2] With respect to the sufficiency of the information before BLM, appellants argue that a FONSI was warranted and, in making that argument, assume that BLM had determined to grant the ROW or would have been bound to do so. This brings us to the other aspect of BLM's discretionary authority. NEPA applies to actions a Federal agency proposes to take and specifies procedures designed to produce relevant information concerning the environmental consequences of the Federal action proposed, before that action is taken. 42 U.S.C. § 4332(C) (1994). Accordingly, subparagraph (d) of 43 CFR 2802.4 requires a completed EA in any case in which BLM determines to issue a requested ROW. It does not require an EA to reject a ROW application. Even when an EA is completed pursuant to 43 CFR 2802.4(d), BLM retains its authority to deny the ROW application, 43 CFR 2802.4(d)(4), because, as has been held innumerable times, NEPA does not mandate a particular result. It is, instead, a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural

Resources Defense Council, Inc., 435 U.S. 519, 558 (1978); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Von L. and Marion Sorensen v. BLM, 155 IBLA 207, 217 (2001); Newmont Mining Corp., 151 IBLA 190, 201 (1999); Paul Hermat, et al., 146 IBLA 80, 102 (1998); Colorado Environmental Commission, 142 IBLA 49, 52 (1997), and cases cited therein; Independent Petroleum Association, et al., 133 IBLA 65 (1995). As the Supreme Court stated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989):

[I]t is now well settled that NEPA does not mandate particular results, but simply prescribes the necessary process. \* \* \* If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. \* \* \* Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.

Thus, neither a completed EA nor a FONSI is tantamount to approval of a ROW grant: BLM could still determine to elect the no-action alternative and deny the application. 43 CFR 2802.4(d)(4).

[3] The Secretary of the Interior is authorized under section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), to grant rights-of-way over public lands for "roads, trails, highways, \* \* \* or other means of transportation." Approval of an application for a ROW, however, is a matter wholly committed to the Department's discretion. D.J. Laughlin, 154 IBLA 159, 163 (2001); Cypress Community Church, 148 IBLA 161, 164 (1999). As we have said, to successfully challenge a discretionary decision,

[t]he burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

International Sand & Gravel Corp., *supra* at 299; Utah Trail Machine Association, 147 IBLA 142, 144 (1999). Thus, appellants must show that BLM erred in rejecting the application on the grounds stated. D.J. Laughlin, *supra* at 163-64, and cases cited; Stuart Krebs, 147 IBLA 167, 172 (1999); Mountain Home Highway District, *supra* at 226.

In general, appellants have argued that the evidence supporting the cumulative impacts analysis did not furnish a sufficient basis for denying the application, that the draft EA did not identify any significant environmental impacts, and that the draft EA warranted a FONSI. (SOR at 37, 39.) Further, they argue that the cumulative impacts are presently known, since

the jeep trail has been used by ranchers, recreationists, and hunters over the years. (SOR at 50-51.) 16/

In his decision, the Area Manager assumed that the proposed ROW would be the only “reasonable and affordable access” to the site 17/ and concluded that issuance of the ROW would not be consistent with the purposes for which the public lands were being managed and would not be in the public interest. The Area Manager found that three consequences were “‘reasonably foreseeable’ with regard to development of Bear River Ranches.” (Decision at 2.) He identified those actions as: (1) development of an internal road system, (2) construction of homes and water and sewage delivery systems, and (3) construction of utility or electrical power structures to service the development. All three actions are properly categorized as “indirect effects.” 18/

---

16/ This latter argument cannot be sustained. The proposed ROW is for a new road, the greater portion of which does not follow the existing jeep trail. In any event, the use appellants seek goes well beyond present use and includes the impacts of growth and development facilitated by a new road specifically designed to accommodate increased vehicular travel.

17/ PacifiCorp initially had resisted use of its bridge for reasons of public safety. PacifiCorp suggested that the County assume responsibility for the operation and maintenance of the bridge as a public road (AR at 531), and had offered applicants a temporary use permit (AR at 489-94) while the ROW application was pending, which appellants refused (AR at 485-86). Use of PacifiCorp’s bridge appeared to be settled until appellants began talking about a new route across PacifiCorp land, which PacifiCorp refused. (AR at 443.) Ultimately, PacifiCorp agreed to negotiate an easement, but only if BLM granted the ROW. (AR at 470.) Also, the record suggests questions regarding the discussions with Don Workman and others that may have occurred concerning the possibility of obtaining a right of access across their private land (AR at 435-36). As stated previously, although appellants allege that they possess a private right of condemnation, an assertion BLM challenges (Reply at 17-18 n.8), they apparently have not acquired other access. One BLM comment on the draft EA noted that the draft EA should mention a May 9, 1997, letter from the applicant demonstrating unsuccessful efforts to secure access through non-public lands. In any event, it is clear that when the Area Manager made his decision, no other alternative had been perfected, and appellants have not submitted or proffered any evidence warranting a different conclusion now.

18/ CEQ regulations define “effects” that an agency must consider in its environmental analyses, expressly including “indirect effects”: “Indirect effects \* \* \* are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 CFR 1508.8(b).

Appellants rely upon the comparison of alternatives provided in the EA as Table 2-1 in asserting that "nothing in the record documents the reasoning relied upon in the Area Manager's Decision." (SOR at 37.) A closer look at Table 2-1, as well as BLM's comments on the EA and record citations provided by BLM in its Answer at 9-16, show otherwise and provide adequate support for the Area Manager's decision. In appellants' view, the impacts identified warranted a FONSI, and they cite portions of the record as evidence that certain BLM staff "fully expected" the Area Manager to issue a FONSI. <sup>19/</sup> (SOR at 39.) However, this is not sufficient to show by a preponderance of evidence that the decision is not supported by a record showing that BLM considered the relevant factors and acted on the basis of a rational connection between the facts thus determined and the choice made. International Sand & Gravel Corp., supra at 299. To the contrary, the record shows that BLM considered the important aspects of the issues.

[4] As noted, appellants point to other ROWs <sup>20/</sup> which had been issued in the Pocatello Resource Area to support their contention that the decision was arbitrary and capricious, and they allege that BLM's decision was unreasonably delayed under the APA, 5 U.S.C. § 706(1) (1994). (SOR at 55-58.) They argue that they have been subjected to disparate treatment, contending that the "Mink Creek Permit" at issue in James Shaw, supra, presented cumulative impacts "substantially similar" to those in the record in the present case (SSOR at 7-9); that in "most" cases in the Pocatello Resource Area, applications have been processed far more quickly than BRDC's application; and that the Area Manager chose not to require a plan of development in 1995. Further, appellants question the "timing of the refusal to designate or publish notice that this stretch of road was a designated route within the Oneida Narrows travel area." (SOR at 57.)

The flaw in appellants' argument lies in assuming that, because on their face applications may have features in common, BLM lacks discretion to

---

<sup>19/</sup> Appellants rely upon AR 637 and 632-33. We note that these are notes to the file which show, among other things, that the Area Manager was urged by Rob Jagggers to identify one of the two alternatives discussed in the draft EA as a "preferred alternative," and recommended that the draft EA include an unsigned FONSI when it was published. Whether and to what extent a staff person's recommendations should be accepted and acted upon was the Area Manager's decision to make, and the Area Manager's failure to follow such recommendation does not necessarily demonstrate that he acted arbitrarily and capriciously.

<sup>20/</sup> Appellants provided copies of the ROW issued to the Franklin County Translator District #1 for an access road, IDI-32294, effective Mar. 24, 1998; ROW IDI-32585 issued to Nu-West Industries, Inc. for an access road to a phosphate mining operation, effective June 9, 1998; ROW IDI-32748 issued to Don P. or Joan Archer, for an existing access road to private property, effective Feb. 4, 1999; ROW IDI-33153 issued to R&B Forestry, Inc. for use of an existing road as a timber haul road, effective Oct. 19, 1999; and the EA and Decision Record for the access road at issue in James Shaw, supra, ID-030-93-007.

weigh the totality of the facts and circumstances differently in each case in determining the public interest or the degree of consistency with the purposes for which the affected public land is managed. We can express no opinion regarding the factual similarities or distinctions among the grants submitted by appellants and whether they compel the same result, because, of course, there is far more to the record of a discretionary decision than the grant instrument itself, and most of the ROW decisions cited were not appealed.

Despite some similarities between the instant case and James Shaw, supra, Shaw is distinguishable. In Shaw, the applicant proposed a ROW across public land to access private land upon which a proposed subdivision was to be built. In an EA, BLM analyzed the proposed action, an alternative called the “Spur Road Deletion” in which a lesser ROW would be granted, and the no-action alternative. BLM chose the “Spur Road Deletion,” and Shaw and another individual appealed, asserting that construction of the ROW would allow development of the private land and cause unacceptable impacts to the public land. The Board affirmed BLM’s decision.

First, the Board found that BLM was not required to consider the “indirect effects” of granting a ROW when it appeared likely that the applicant “would build the subdivision even if he had to provide access to Mink Creek Road over the privately-owned strip of land connecting Mink Creek Road with his subdivision.” James Shaw, supra at 114.

Second, and most important, the Board found that the approved action provided benefits not provided by the no-action alternative. The Board stated:

BLM concluded that taking the no action alternative and denying this right-of-way would result in the construction of a road on private lands, creating similar environmental impacts. The record also shows that a safer intersection with Mink Creek Road can be built on public lands, providing for adequate turn-out room for a school bus stop and mail drop area. The public land route is more level and offers more visibility. Further, steeper terrain on private land with tighter turns could pose greater danger from cars to wildlife, bicyclists, and pedestrians.

James Shaw, supra at 115.

In the present case, appellants indicated to the Area Manager that access over public land was the only “reasonable and affordable” access to

the subdivision. <sup>21/</sup> The record therefore supports the conclusion that denying the ROW application would protect public lands and resources and provide substantial environmental benefits. Thus, the record adequately supports the conclusion that denial of the ROW application was in the public interest, just as granting the ROW in James Shaw was in the public interest.

With respect to whether other or "most" ROW applications are processed in less time and the assertion of unreasonable delay, we note that this is an extraordinary case with many stakeholders, contending interests, and shifting views. Rather than looking only at the number of years that have elapsed since the application was filed, we agree with one court's observation that the tribunal "should examine all the relevant circumstances in order to weigh intelligently plaintiff's interest in prompt action against the countervailing public interests." Utah International, Inc. v. Andrus, 488 F. Supp. 962, 974 (D. Utah 1979).

In this case, events affecting the processing time included, among other things, completing a Wild and Scenic River assessment and decision; O'Reilly's amendment of the application in 1997; the time he required to decide whether he wanted to reimburse BLM for its costs in conducting an EA or retain a consultant from BLM's list of acceptable consultants and the time he required to raise the necessary funds; the revocation of a power site withdrawal that affected the application; the issuance of certain intervening appealable decisions to BRDC and O'Reilly; efforts to ascertain and negotiate alternate access routes; other required activities, such as the cultural resource inventory, archaeological inventory, threatened and endangered species clearance, and biological assessment and evaluation; and the unusual level of correspondence between the agency, the parties, legislators, and the interested public. There were other factors affecting the time line, including some missteps on BLM's part with respect to billing actions necessary to draw against BRDC's funds after they were deposited with the agency, as well as the Area Manager's absence for reasons of health and the time he required to reach his decision. Although this matter has been a long time in the making, the record as a whole shows slow but steady progress, and we are not persuaded that appellants have established unreasonable delay or a refusal to act within the meaning of the APA.

It is not clear whether the jeep trail was intended to be designated as a vehicular travel route, but based on the record, it was not designated as

---

<sup>21/</sup> Although appellants make broad assertions that access to the subdivision through alternate means is now or will be possible, the only relevant question presented to us is what effects were "reasonably foreseeable" at the time an environmental analysis was undertaken (see 40 CFR 1508.8(b)) and at the time the ROW application was adjudicated, as part of BLM's assessment of the "public interest" under 43 CFR 2802.4(a)(2). If circumstances have since changed, appellants may file a new ROW application.

such when the Pocatello RMP was prepared in 1988. 22/ See AR at 371, 373-74. Appellants argue that the lack of a vehicular travel route designation has never served as the basis for denying a ROW in the Pocatello Resource Area, but this issue was only one of several affecting the Area Manager's deliberations, and not among those he directly relied upon in his decision. 23/

Finally, with respect to requiring a plan of development, we perceive no abuse of discretion in concluding that a plan of development was not necessary early in the process. Neither the regulations nor the BLM Manual specifies that the authorizing officer shall require a plan of development to perfect a ROW application. Whether to submit a plan is the applicant's choice in the first instance, and fundamentally a matter of deciding that such a plan could more accurately or completely describe the proposed ROW project:

Plans of development may be offered by an applicant with any right-of-way application. Plans of development shall always be required at the application stage when (1) toxic substances (as defined in the Toxic Substances Control Act of 1976, as amended, 15 U.S.C. 2601, et seq.) are proposed for use or storage, or will be generated (used) during any phase of the project, (2) an environmental impact statement is necessary, and/or (3) the project proposal is major in scope.

BLM Manual H-2801-1, Ch. I.A.1, Reason for Use (Rel. 2-264 (3/8/89)); see also 2801.32B.e. (Rel. 2-263 (3/8/89)) (which contains the instructions for completing SF-299, the application for a ROW). Moreover, regardless of whether BLM requested it, nothing prevented appellants from submitting a plan of development, or any other information or document they believed would support their application or aid the review process. 24/

To summarize, we hold that BLM may reject a ROW application for any of the reasons set forth in 43 CFR 2802.4(a), and that it may, pursuant to 43 CFR 2802.4(c), require any information it believes necessary to evaluate

---

22/ As previously stated, on appeal BLM contends that the trail was not even classified for casual use. See n.3, supra.

23/ To the extent that lack of a vehicular travel designation in the RMP is an implied ground of BLM's decision, we note that the specific RMP provision cited was paragraph (3), which states: "The Pocatello RMP states that 'transportation development may be permitted based on the consideration of the following criteria: (1) Type of and need for the proposed facility (2) Conflicts with other existing or potential resource values and uses [and] (3) Availability of alternatives and/or mitigation measures [1988, Final EIS, page 46.]'" (Decision at 2.)

24/ The subdivision plat was recorded in Franklin County, and it included a plan of development. Thus, BLM argues that "[t]he Area Manager did not need to 'speculate' on the consequences [of granting the ROW] and their impacts on the public lands." (Reply at 12.)

the application, including an EA. In its discretion, BLM may complete the EA to obtain needed information, or it properly may determine that it has acquired sufficient information to make a reasoned decision rejecting the application without completing the EA, as 43 CFR 2802.4(d) requires a completed EA only when the application is to be granted. We find that appellants have not shown by a preponderance of the evidence that the Area Manager committed a material error, that he failed to consider all relevant factors, or that his determination of the public interest was not supported by the record in this case.

On June 28, 2002, Bear River filed a document styled “Appellants’ Request for BLM to Engage in Mediation and Renewed Motion for Order to Engage in Mediation.” On July 9, 2002, BLM filed its response thereto. Our decision does not preclude the parties from subsequently negotiating a solution to the access question, and accordingly, appellants’ request and motion are denied as moot.

To the extent not specifically addressed herein, appellants’ arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

---

T. Britt Price  
Administrative Judge

We concur:

---

Bruce R. Harris  
Deputy Chief Administrative Judge

---

David L. Hughes  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the majority analysis so far as it goes, I write separately for the purpose of more fully addressing two issues raised by the dissent.

The first issue that I believe may warrant further consideration concerns the assertion that the old access provided to the Bear River Ranch subdivision might be an R.S. 2477 right-of-way and the relevancy this possibility has to the consideration of appellant's application for a right-of-way under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761 (1994). The majority argues that the matter is not properly before the Board because, *inter alia*, a request that BLM issue a FLPMA right-of-way is necessarily inconsistent with the simultaneous assertion that the access being sought is already authorized by an existing R.S. 2477 right-of-way. See supra at 44 n.11. The dissent challenges this position by arguing that there is ample precedent for considering the question of whether an R.S. 2477 right-of-way already exists in the context of a pending FLPMA right-of-way application. See generally infra at 78-82. My view is that, while both assertions are correct, so far as they go, it is the majority's position that properly applies, given the context in which the instant appeal arises.

It seems to me axiomatic that the existence of an R.S. 2477 right-of-way represents an appropriation of land such that the United States no longer has authority to diminish or interfere with the rights conveyed under that Act. See generally Limitation of Access to Through-Highways Crossing Public Lands, 62 I.D. 158 (1955). Certainly included among actions prohibited would be the issuance of a FLPMA right-of-way traversing or crossing the R.S. 2477 right-of-way since, once an R.S. 2477 has come into existence, rights of access to such a right-of-way would be determined by State law. Id. at 163. Thus, an individual seeking to obtain a FLPMA right-of-way cannot be heard to justify issuance of the right-of-way on the ground that a pre-existing R.S. 2477 right-of-way exists covering all or part of the requested route because, if such a right-of-way were in existence, BLM would be required to reject the FLPMA application to the extent of any conflict. Cf. Filadelfia Sanchez, 147 IBLA 217, 219 (1999) (a color-of-title applicant necessarily admits, for purposes of consideration of his or her application, that title to the land sought is in the Government and may not, therefore, assert ownership of the land as a reason for granting the application); accord, Jerome L. Kolstad, 93 IBLA 119, 122 (1986); Benton C. Cavin, 83 IBLA 107, 109 n.2 (1984).

On the other hand, when an application is filed seeking issuance of a right-of-way under FLPMA, BLM not only has the authority to examine the question of whether an R.S. 2477 already exists which provides alternate access to a property, there are times when it would be required to do so. Thus, situations may arise where BLM determines that a requested route of access ought not to be granted because adequate access in the form of an

outstanding R.S. 2477 right-of-way already exists which would make the requested FLPMA right-of-way unnecessary. This would be an example of when BLM might, as a matter of discretion, properly decide to examine whether an R.S. 2477 right-of-way exists.

A different situation obtains when questions arise whether or not the route of a proposed FLPMA right-of-way coincides, in whole or in part, with the route of an alleged R.S. 2477 right-of-way. In such a situation (which is the situation arguably presented by the instant appeal), I would agree that BLM would be required to determine whether or not the R.S. 2477 right-of-way existed prior to the issuance of any FLPMA right-of-way, since the existence of an R.S. 2477 right-of-way would, if established, deprive BLM of the authority to grant a FLPMA right-of-way over the same land.

However, and it is here that I part company with the dissent, rejection of the right-of-way does not require a determination of whether or not an R.S. 2477 right-of-way exists unless the basis for the rejection is, itself, premised on the existence of the R.S. 2477 right-of-way. In other words, if BLM decides for reasons wholly apart from the asserted existence of an R.S. 2477 right-of-way that it will not grant the requested FLPMA right-of-way, there is no legal necessity for it to determine, in the course of adjudicating the FLPMA right-of-way, whether or not an R.S. 2477 right-of-way already exists since the existence of an R.S. 2477 right-of-way would only provide cumulative reasons for rejection. And, if the Board, on review, concludes that ample independent reasons exist for rejecting the right-of-way, it, too, is not required to delve into an examination of whether or not an R.S. 2477 right-of-way traverses all or part of the proposed route of access.

All of the cases cited by the dissent which involve R.S. 2477 rights-of-way are reflective of the above approach. <sup>1/</sup> Thus, in Carl H. Alber, Jr., 100 IBLA 257 (1987), the Board affirmed a decision of BLM effectively rejecting a FLPMA right-of-way application because of his failure to sign certain stipulations. The Board, however, noted that, if Alber were to reapply for a right-of-way, BLM should consider whether the existing access road was a "public highway" under R.S. 2477, which would "preclud[e] the necessity" of granting a FLPMA right-of-way.

In Dean R. Karlberg, 98 IBLA 237 (1987), the issue arose whether a right-of-way which BLM intended to authorize conflicted with an existing R.S. 2477 right-of-way. The Board held that BLM was required to determine whether or not the R.S. 2477 right-of-way existed before it could grant the FLPMA right-of-way. Similarly, in Nick DiRe, 55 IBLA 151 (1981), BLM had rejected a FLPMA right-of-way application on the ground that the route requested was a pre-existing R.S. 2477 right-of-way. While the Board reversed BLM's decision, it did not do so on the ground that BLM was wrong

---

<sup>1/</sup> The decision in Martin Hackworth, 141 IBLA 249, 252-53 (1997), involved not an R.S. 2477 right-of-way, but rather an R.S. 2339 right-of-way issued under the authority of section 9 of the Mining Law of 1866, 14 Stat. 251, 253, 43 U.S.C. § 661 (1970).

in its assumption that, if an R.S. 2477 right-of-way existed, BLM lacked authority to grant the requested right-of-way. Rather, the Board reversed BLM because the record did not support BLM's factual finding that the road in question was a public highway under R.S. 2477. Id. at 156.

Finally, to the extent that the dissent relies on this Board's decision in Homer Meeds, 26 IBLA 281, 83 I.D. 315 (1976), as supporting the proposition that "R.S. 2477 and FLPMA [right-of-way] analyses are not 'mutually exclusive' even with regard to a single road" (infra at 81), its reliance is singularly misplaced.

The appeal in Homer Meeds involved an attempt by BLM to close a haul road which had been used by the State of Oregon in connection with a BLM material source right-of-way. While the State did not oppose closure of the road, a number of local residents did object. These residents appealed BLM's action to the Board, recounting the long use of the road in question by members of the public. After a detailed analysis of the varied issues presented by the appeal, the Board ultimately set aside BLM's decision and remanded the matter to BLM for further consideration, including consideration by BLM of whether the road in question qualified as an existing R.S. 2477 right-of-way.

The foregoing facts are undisputed. What is disputed is the relevancy of this decision to the matters presently before the Board. As noted above, the dissent asserts that Homer Meeds supports its view that appellant may simultaneously apply for a FLPMA right-of-way while arguing that part of the area traversed by the proposed right-of-way is an already existing R.S. 2477 right-of-way.

The fact of the matter is that not only did Homer Meeds not involve a FLPMA right-of-way, it could not have involved a FLPMA right-of-way for the simple reason that FLPMA was not enacted until two months after the decision in Homer Meeds issued. <sup>2/</sup> Correctly understood, the Board's decision in Homer Meeds totally supports the majority's refusal to examine the R.S. 2477 question in the confines of the instant appeal.

The one fact that is absolutely essential to understanding the approach taken in the Homer Meeds decision is that it involved the question of whether an R.S. 2477 right-of-way existed on Oregon and California (O&C) revested lands. The reason this fact is of such paramount importance is that, while normally rights under R.S. 2477 were acquired without any action on the Federal Government's part (see United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D.Nev. 1963)), in 1957 the Department had adopted regulations (formerly codified at 43 CFR 2822.1-2 (1976)) which required the filing of an application as a precondition to obtaining an R.S. 2477 right-of-way over O&C revested lands.

---

<sup>2/</sup> Thus, while Homer Meeds issued on Aug. 26, 1976, FLPMA was not adopted until October 21 of that year.

In Homer Meeds, the Board noted that the evidence tendered on appeal "forcefully" suggested that a public right-of-way had pre-existed the adoption of the regulation in 1957. But the Board also noted that, in any event, there appeared to be no current bar to the filing of an application to acquire a right-of-way in accordance with 43 CFR 2822.1-2 (1976), i.e., under R.S. 2477. Thus, when the Board stated that "it is appropriate that the Bureau review the propriety of its action for its own purposes and to ascertain whether it should either alter its position or receive and adjudicate an application under 43 CFR 2822.1-2 (1976)," it was merely holding that BLM should examine the question of whether an R.S. 2477 already existed (which would make BLM's closure of the road erroneous) and, if not, whether it should accept an application to allow the initiation of rights under R.S. 2477. If either of these questions were answered in the affirmative, BLM's actions to close the road would clearly be forestalled.

The decision in Homer Meeds would support imposition of a requirement that BLM determine whether an R.S. 2477 right-of-way existed if BLM were attempting to close the jeep trail involved in the present appeal. But it clearly did not so act in the decision under appeal herein. When the dissent suggests that BLM has already "effectively made its decision to close the road," it indulges in purely speculative adjudication, which is speculative not only to the extent that it assumes BLM will act to close the road but, further, that it will do so without first analyzing whether or not an R.S. 2477 right-of-way exists. <sup>3/</sup> Such a speculative approach to decisionmaking has repeatedly been rejected by the Board in other contexts as, in essence, a request for an advisory opinion (see e.g., Chevron, U.S.A. Inc., 154 IBLA 88, 91-92 (2000); Bowers Oil and Gas, Inc., 152 IBLA 12, 18 (2000); Animal Protection Institute of America, 116 IBLA 239, 241-42 (1990)), and is properly rejected herein.

In summary, I believe the majority decision declining to examine the question of whether the jeep trail is an established R.S. 2477 right-of-way is, given the posture of this appeal, totally appropriate and fully in accord with prior decisions of this Board.

The second issue which I wish to examine in greater detail relates to the dissent's assertion that, under section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (1994), BLM may be required to provide Bear River Ranch "reasonable and affordable" access. <sup>4/</sup> In doing so, the dissent seemingly places much reliance on this

---

<sup>3/</sup> The fact that BLM might have barred maintenance of the road by various individuals would not necessarily violate the dictates of R.S. 2477 even if such a road were found to exist since there has been absolutely no showing in the instant case that Idaho state law authorizes private maintenance of public highways. In any event, if, as the dissent asserts, citations have been issued by BLM, it would seem to me that the appropriate time for the Board to consider this issue would be in the context of an appeal from those citations.

<sup>4/</sup> I am constrained to point out that, even if section 1323(b) applies nationwide and even if it be deemed to apply to the facts of this case, the

Board's holding in Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984), that section 1323(b) of ANILCA applies nationwide. This citation, itself, is improper, since in Southern Utah Wilderness Alliance, 127 IBLA 331, 100 I.D. 370 (1993), the Board noted that the Utah Wilderness decision had been vacated by the Board in an Order dated February 26, 1986, at the direction of the Federal District Court for the District for Utah (*id.* at 366, 100 I.D. at 389), and the Board expressly directed that the decision in Utah Wilderness Association, *supra*, was "no longer to be cited." *Id.* at 333, 100 I.D. at 371.

I fully recognize that the prohibition against citing the decision in Utah Wilderness Association, *supra*, was not meant to be preclusive of relying on the rationale utilized in that decision. But, this is not what the dissent does. Rather than analyzing the rationale of the majority's approach in Utah Wilderness Association, the dissent merely repeats its conclusion, *viz.*, that section 1323(b) applies nationwide. This failure to examine the difficult construction problems presented by section 1323 of ANILCA, problems which not only led me to separately concur in Utah Wilderness Association, *supra*, but which led the Ninth Circuit Court of Appeals in Montana Wilderness Association v. U.S. Forest Service, 655 F.2d 951 (1981), *cert. denied*, 455 U.S. 989 (1982), to opine that "[s]ubsection (b), therefore, is arguably limited by its terms to Alaska, though we do not find it necessary to settle that issue here" (*id.* at 954, emphasis supplied), allows the dissent to play fast and loose with judicial precedent, because it facilitates the dissent's use of cases applying section 1323(a) of ANILCA interchangeably with cases involving the applicability of section 1323(b). In fact, if one culls out the section 1323(a) cases, there are only four cases cited which even arguably involve section 1323(b): the Board's decision in Utah Wilderness Association, *supra*; the Ninth Circuit's decision in Montana Wilderness Association, *supra*; the decision of the United States Court of Federal Claims in Pleasant Country, Ltd. v. United States, 37 Fed.Cl. 321 (1997); and the decision of the Fourth Circuit Court of Appeals in United States v. Smksy, 271 F.3d 595 (2001).

I have already noted that this Board's decision in Utah Wilderness Association, *supra*, has no precedential value and that the Ninth Circuit in the Montana Wilderness Association case had actually intimated that, in its view, section 1323(b) did not apply nationwide. This leaves only the decision in Pleasant Country as precedent supporting the dissent's implicit suggestion that section 1323(b) applies nationwide, since, as I shall show *infra*, the decision in Smksy, far from supporting the dissent's position, clearly supports the view that section 1323(b) does not apply nationwide.

---

fn. 4 (continued)

statute, itself, has no requirement that the access be "affordable." The implicit suggestion that, because an individual inholder might not be able to afford reasonable access provided under ANILCA, BLM must do more to accommodate the inholder has no basis in either ANILCA or the cases cited by the dissent.

If one reads the decision in Pleasant Country, it is clear that nothing in that decision even purports to analyze whether section 1323(b) applies nationwide; rather, it assumes that such is the case. In Pleasant Country, the Federal Claims Court simply cited section 1323(b) and declared that "[t]his provision is applicable to all lands administered under the FLPMA." 37 Fed.Cl. at 327. While the Court cited four cases in support of this conclusion, three of the cases cited involved the applicability of section 1323(a). The only cited case which actually involved section 1323(b) was this Board's decision in Utah Wilderness Association, *supra*, which had already been vacated by the Board and was, therefore, no longer precedential even within the Board. I would submit that the precedential value of the decision in Pleasant Country is essentially non-existent.

Far more puzzling is the dissent's reliance on the decision in United States v. Smsky, *supra*. Contrary to the dissent's analysis, nothing in Smsky even faintly supports the dissent's declaration that, because appellants herein assert that they used the existing trail to access the Bear River Ranch subdivision for decades, "the Smsky court would require the government to determine whether an Idaho state law easement was in existence when FLPMA was enacted." *Infra* at 86.

The facts of the Smsky case are as follows. In 1935, the Smskys' predecessors-in-interest deeded a 742.5 acre parcel of land located in West Virginia to the Forest Service, expressly reserving to themselves a 6.98 acre interior tract. Access to this interior holding was, at the time of the Smsky litigation, afforded by a 2.6 mile road through the Monongahela National Forest. In 1996, apparently owing to concerns about the Smskys' increased use of the road and its possible effects on an endangered plant species, the Forest Service demanded that the Smskys apply for a special use permit to use the road. The Smskys refused and the Forest Service sought an order compelling them to apply for a permit. The District Court for the Northern District of West Virginia granted summary judgment for the United States and the Smskys appealed. The Fourth Circuit Court of Appeals vacated this determination and remanded the matter in United States v. Smsky, *supra*.

The issue which was examined in considerable detail by the Court of Appeals was whether the land conveyed to the Forest Service in 1935 was, at the time of its conveyance, impressed with an easement by implication. The Court first emphasized the distinction between an easement by necessity and an easement by implication <sup>5/</sup> and then examined West Virginia state law to confirm that West Virginia did, indeed, recognize the existence of easements by implication. *Id.* at 599-600. The Court next examined the District Court's conclusion that there was no existing necessity for an easement by implication at the time of the original conveyance to the

---

<sup>5/</sup> The Court pointed out that "[u]nlike easements by necessity, these rights by implication 'could be lost only by adverse possession by the owner of the servient land' \* \* \* [t]hat is, continuing necessity is not required." 271 F.2d at 599 (citations omitted).

Forest Service (a requirement for the application of an easement by implication) because access was provided by then-existing provisions of the Forest Service Organic Act, particularly 16 U.S.C. § 478 (1994). For a number of reasons, including the fact that the original conveyors were not "actual settlers" at the time of the conveyance, the Court concluded that 16 U.S.C. § 478 (1994) would not have been applicable at the time of conveyance and, thus, there was an existing necessity for an easement by implication at that time. *Id.* at 600.

The Court then turned to the arguments pressed by the United States on appeal that, regardless of "whatever common law access the Smskys may otherwise possess," the Forest Service Organic Act, FLPMA, and ANILCA "preempt those rights." *Id.* at 601. The Court, however, found it unnecessary to determine to what extent Congress could abridge common law property rights because it found that none of the cited statutory provisions purported to do so. *Id.* at 601-04. Accordingly, the Court remanded the matter to the District Court for a factual determination as to whether or not the land which had been acquired by the Forest Service in 1935 was impressed with an easement by implication which would obviate any need for the Smskys to obtain a special use permit to use the existing road.

Absolutely nothing in the Court's analysis supports the dissent's position on the applicability of ANILCA. First of all, it is axiomatic, as the Court in *Smsky* expressly noted, that when the Federal Government acquires land from private citizens, the scope of the rights acquired is necessarily determined under state law. *Id.* at 504; *James A. Simpson*, 136 IBLA 77, 79 (1996). This is not the same as asserting, as the dissent does, that rights to Federal lands which have never left the public domain can be created solely by the application of state law. Such is demonstrably not the case and flies in the face of basic Federal supremacy with respect to its own lands. *See California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 281-83 (1982); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *LSMJ Exploration Group*, 74 IBLA 185, 190 (1983). One might as plausibly argue that rights can be acquired against the Government by adverse possession in accordance with state law, an argument which, while often presented, has been repeatedly rejected both by this Board and the Federal courts. *See, e.g., United States v. California*, 332 U.S. 19 (1947); *United States v. Gossett*, 416 F.2d 565 (9th Cir. 1969); *Albert M. Lipscomb*, 99 IBLA 217 (1989), *aff'd* 906 F.2d 545 (11th Cir. 1990); *Estate of Edna Turney*, 123 IBLA 354, 357 n.7 (1992). Given the logic of the position the dissent appears to be espousing herein, it is unclear whether the dissenters desire to revisit that question and provide new insights into what has, at least heretofore, been considered a settled area of the law.

Second, and even more remarkably, the dissent actually cites *Smsky* immediately following the dissent's declaration that the dissenters believe that *Utah Wilderness Association* "was correctly decided." *Infra* at 85. While the dissent cites *Smsky* merely for the proposition that it "demonstrates that the question of whether section 1323(b) of ANILCA applies to access rights across public lands nationwide is not settled" (*infra* at 86), any fair reading of that decision would lead one to conclude that

the Court had no question that section 1323(b) was, in fact, limited solely to Alaska.

While the Smsky decision directly considered the applicability of section 1323(a) to the case before it, since National Forest lands were involved, it did address the applicability of section 1323(b) nationwide, though scarcely in a manner which would give any sustenance to the dissent. Thus, while the Court admitted that, "in isolation," section 1323(a) "appears to apply to all national forests," the Court also noted that section 1323(a) "is the only part of the entire statute that could plausibly apply outside of Alaska." 271 F.3d at 602. Indeed, the Court immediately proceeded to an analysis of the actual language of the two provisions. After setting out the text of the two subsections, the Court noted:

While the statute does not define the term "National Forest System," it does define the "public lands" as certain public lands "situated in Alaska." 16 U.S.C. § 3102(3). This gives rise to a strong presumption that the nearly identical language in the immediately preceding subsection also applies only to Alaska.

Id. 6/

Far from supporting the dissent's view that section 1323(b) should be applied nationwide, it would seem to me that the Court was essentially arguing that section 1323(a) should be limited to Alaska, notwithstanding the contrary ruling by the Ninth Circuit in Montana Wilderness Association.

Admittedly, the Smsky Court refrained from actually ruling on this matter because of its view that, regardless of whether or not section 1323(a) applied nationwide, it was not applicable with respect to the Smskys' claimed easement. Id. at 603. Nevertheless, the dissent's citation of the Smsky decision, given the dissent's expressly stated assertion that Utah Wilderness Association "was correctly decided," is a truly "dubious" exercise.

This Board noted in Southern Utah Wilderness Alliance, supra at 366-67 n.18, that the question whether section 1323(b) has nationwide applicability remains "that open," and, in my view, the dissent has provided nothing which would end the debate, at least not in a manner to the dissent's liking.

---

6/ It was the use of the term "public lands" in the context of section 1323(b) of ANILCA, a use which is not replicated in section 1323(a), which led the Court in Montana Wilderness Association v. U.S. Forest Service, supra, to conclude that section 1323(b) was "arguably limited by its terms to Alaska" since "public lands" was defined in ANILCA as "lands situated in Alaska which, after the date of enactment of this Act, are Federal lands." 16 U.S.C. § 3102(3).

The problem with treating the application of section 1323(b) as equivalent to the application of section 1323(a) is not merely that it fosters the perception that the question of the nationwide applicability of section 1323(b) is already resolved and need not be reexamined, a perception which, I believe I have shown, is demonstrably false. Equally perniciously, it allows for the assumption to take hold that any factual situation in which section 1323(a) would provide access rights to lands within the National Forest system must also be held to provide rights under section 1323(b) to lands managed by BLM under FLPMA. Unfortunately, this secondary assumption ignores the very real difference in coverage afforded by the language of those two sections.

Thus, section 1323(a) provides, in relevant part, that the Secretary of Agriculture "shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof" (emphasis supplied). Section 1323(b), on the other hand, provides that the Secretary of the Interior "shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof" (emphasis supplied). Notwithstanding the implicit assumption of the dissent, this difference in wording results, I would submit, in a significantly different scope in the application of these two standards.

With respect to National Forest lands within the jurisdiction of the Forest Service, ANILCA applies whenever the land to which access is sought is "within the boundaries of the National Forest System." In other words, it is not necessary that the land be actually surrounded by National Forest lands; it is enough that the land be simply within the boundaries of the National Forest. Not so, with respect to public lands managed by the Secretary of the Interior under FLPMA. Section 1323(b) expressly requires that the lands to which access is sought be "surrounded" by public lands managed by the Secretary under FLPMA. It is undisputed that the Bear River Ranch subdivision is not surrounded by public land but rather is adjacent to private lands as well. See, e.g., Response of Bear River Development Corp. at 53-55. Thus, regardless of whether or not section 1323(b) of ANILCA applies nationwide, it is clearly not applicable to the case under appeal. 7/

---

7/ Appellants attempt to avoid the clear implication of the language of section 1323(b) of ANILCA by relying on the decision of the Wyoming Supreme Court in Board of County Commissioners, Albany County v. Federer Development Co., 682 P.2d 1062 (Wyo. 1984), in support of the proposition that a property surrounded on three sides by Federal land is "surrounded" within the meaning of ANILCA. I do not agree. Even leaving aside the fact that the lands involved in the Wyoming case were Forest Service lands and thus subject to section 1323(a) rather than section 1323(b), and ignoring as well the fact that the Court's discussion was clearly dictum since, as the Court, itself, noted "the only evidence is to the effect that the

For the foregoing reasons, as well as those set forth in the majority opinion, I agree that the decision of the Pocatello Resource Area Manager should be affirmed.

---

James L. Burski  
Administrative Judge

---

fn. 7 (continued)

Forest Service will supply any needed permits," the fact of the matter is that the land involved was surrounded by Forest Service lands. Thus, the land involved was in the shape of a right triangle with the hypotenuse being Interstate 80 and the other two legs of the triangle being Forest Service lands. However, as the decision's recounting of the testimony adduced makes clear, the Interstate was built on lands which the previous owner had transferred to the Forest Service to permit it access across his private lands. Thus, in fact, the parcel in the Wyoming case was "surrounded" by Forest Service lands.

## ADMINISTRATIVE JUDGE HEMMER CONCURRING:

It would be easier to respond to the dissent if it focused exclusively on advising the public of legal issues that will trouble the future if the majority opinion goes forward, rather than the purported motive of the Board to “reach to affirm” BLM, or that of BLM to base its actions on “demonstrable bias.” I attempt below to focus briefly on three points.

First, James Shaw, 130 IBLA 105 (1994), does not control whether BLM erred in conducting review under the National Environmental Policy Act, as amended, 42 U.S.C. § 4332(2)(C) (1994) (NEPA), in this case. The case comes to us on a record where BLM considered indirect impacts as required by 40 CFR 1508.8(b). The dissent would find BLM to have committed reversible error for having done so, on the theory that Shaw compels that result. I would sooner reverse Shaw than read it as compelling us to reverse BLM for adhering to the Council on Environmental Quality (CEQ) regulation.

In Shaw, the Board chose not to reverse BLM when the agency did not consider “indirect effects” that could result from granting the right-of-way; BLM said these same effects were destined to occur in any event. In that case, the applicant “would build the subdivision even if he had to provide access to Mink Creek Road over the privately-owned strip of land connecting Mink Creek Road with his subdivision.” 130 IBLA at 114.

Here, by contrast, the issue before us is whether BLM committed legal error in considering indirect impacts during NEPA consideration. The parties’ posture before us is thus entirely different from the posture of the appellant in Shaw. Effectively, the dissent would construe Shaw to have invalidated the requirement of the CEQ regulation that an agency must consider indirect effects in undertaking NEPA evaluation, by virtue of the fact that the Shaw decision sustained an EA in the absence of an analysis of indirect effects there. The Board may not invalidate a duly promulgated regulation of the CEQ, and Shaw did not purport to do so. I find the dissent’s construction of Shaw to be impermissible in that it would require an agency to disregard CEQ regulations on certain facts. That construction would further deprive me of discretion in looking at the facts, case by case, in the future, on the basis of an analysis that appears to derive from the dissent’s view as to the alleged motives of Mr. Steele. This is too thin a reed on which to establish precedent such as the dissent would impose.

Second, given the facts admitted by the dissent, the analysis of the Alaska Native Interest Lands Conservation Act (ANILCA) in this case appears to be to be misplaced. There seems no dispute that section 1323(b) of ANILCA involves access to privately owned lands surrounded by public lands, as defined in the statute. 16 U.S.C. § 3210(b) (1994). See also Adams v. United States, 3 F.3d 1254, 1255, 1258 (9<sup>th</sup> Cir. 1994) (discussing section 1323(a) (applicable to lands within a National Forest administered by the Secretary of Agriculture); United States v. Jenks, 22 F.3d 1513, 1516 (10<sup>th</sup> Cir. 1994) (same). The dissent concedes that the property at issue here is not surrounded by public land, but rather that there are private access

possibilities that the company claims are too expensive to consider. (Dissent at 8, 25 (discussing alternative of access over non-public lands)).

Third, the most significant part of the dissent, in my view, is its raising of the general point of view that access to the Bear River parcel must be provided by BLM. The dissent has raised the thorny and convoluted issues that surround what access must be provided across Federal lands, under what authority, and in what circumstances. The difference between my position and that of the dissenters on this point is that I do not believe they have correctly applied the case law to the facts of this case, nor can the Board or a reviewing court do so until facts are more fully developed. As noted above, even if ANILCA section 1323(b) ultimately were found to apply outside of Alaska, it would not govern this situation. See Administrative Judge Burski, concurring, supra. To the extent the dissent has focused on a common law private right of access, I think the cases are not as clear as the dissent suggests in defining what would be required on the facts of a particular case. Rather, the 9<sup>th</sup> Circuit stated in Adams that the questions of what access might append to a tract, under common law or other statutory authority, depend on “almost exclusively questions of fact.” 3 F.3d at 1255. The circuit in that case found that Adams was entitled to an access easement to an inholding within a national forest along a Forest Service road under section 1323(a) of ANILCA, subject to regulation under the Federal Land Policy and Management Act (FLPMA). Even in discussing section 1323(a), however, the courts start their analyses with the statutory authority and terms under which, and existing when, the private landowner acquired the land interest in question. See also Jenks, 22 F.3d at 1513. Such issues are not fully developed in this record.

Without attempting to describe the federal court cases one by one, I think it is clear that the cases have not yet fully analyzed the interplay among FLPMA, ANILCA, and the common law in all fact patterns. I do not find any precedent to compel an obligation on BLM’s part to provide any sort of right-of-way an applicant might demand. If the Board did consider the argument raised by the dissent regarding rights that attached to the acquisition of the tract at issue, such review would require a more surgical application of law to facts not yet developed in the record to determine the source and nature of any obligation, consistent with the opinions on which the dissent relies. I would leave to the parties the proper raising of any legal issues based on record facts which support them instead of speculating as to facts and obligations now.

---

Lisa Hemmer  
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN THE RESULT:

Our dissenting colleagues argue BLM was mistaken, and we are mistaken, to divorce consideration of the R.S. 2477 status of the road from the denial of Bear River's right-of-way application. For better or for worse, that decision was made in the panel's February 6, 2001, order denying Bear River's motion to supplement the record with the Workman affidavit, a decision made in full awareness that the affidavit was germane to the R.S. 2477 issue.

In that February 6, 2001, order, the panel also recognized that "a decision on such issues will neither grant appellants the relief they seek nor ensure that BLM ultimately can protect the environmental resources and values of the Bear River area." For that reason, the panel directed the parties to try alternative dispute resolution as a means "to fashion an answer to their dilemma that addresses all their concerns." The panel did so because it recognized that "[a]t this juncture, it appears likely that a Board decision would do little more than prolong a conflict that is already nearly eight years old."

Regrettably, the parties did not succeed. However, in my view, it would be inadvisable at this late date to reconsider the wisdom of the panel's February 6 order. Rather, I think it more circumspect to answer the question we have been asked – can BLM's decision, as imperfect and limited as it may be, be affirmed – and leave it to the parties to find their way forward to a satisfactory resolution of the remaining questions. Ultimately, the parties are in a much better position to control their future than we are.

---

Will A. Irwin  
Administrative Judge

ADMINISTRATIVE JUDGE ROBERTS DISSENTING:

We find the decision of a majority of this Board's members no less explicable than the April 24, 1998, decision of Jeffrey S. Steele, Manager of the Pocatello Resource Area, Bureau of Land Management (BLM), rejecting the right-of-way (ROW) application of Bear River Development Company (Bear River), Timothy J. O'Reilly, individually and as vice president of Bear River, Heinz Flurer, individually and as president of the Bear River Ranch Owners Association, and others (collectively referred to as "Bear River" or "appellants"), for access across public land to a subdivision on private property. The original ROW application covered approximately three-quarters of a mile of an existing road which has been in use since the property was homesteaded in 1926. Counsel for Bear River provides the following succinct, and verifiable, factual account of the process that led to Bear River's appeal:

After purchasing this property in 1992, subdividing it in accordance with Idaho state law, procuring title insurance, which insured access, and making several sales, Bear River was informed that it needed to apply for a Right of Way Permit to use the [existing] Road. Bear River applied for such a permit in February, 1993, culminating in Area Manager Jeff Steele's decision five years later to deny the application.

(Bear River Response at 4.) Steele's decision, which he issued after "severe and unfair delays" and "misleading statements," to quote counsel for Bear River (Response at 5), runs contrary to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994), the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 through 4379 (1994), the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210 (1998), section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970)(R.S. 2477), and the dictates of common sense.

According to the majority, the "rational basis" for denying Bear River's ROW is to avoid the "cumulative effects" that would result from its issuance. The ROW, if granted, would provide access to homes on land that is privately owned and to which the right of enjoyment is derived from a patent issued by the United States. In affirming, the majority upholds as an exercise of discretion a BLM decision reached in a context of demonstrable bias which ignores appellants' access rights and which fails to contain a rational analysis of the record sufficient to sustain the decision. In reaching to affirm Steele's decision, the majority ignores this Board's precedent on standards of review in ROW cases, misapplies the standard it purports to follow, and commits numerous errors of law and analysis.

In particular, BLM erred in failing to consider appellants' right of access over the existing road which was the initial route sought in the ROW application. Although there is substantial evidence in the record that would tend to support the existence of an R.S. 2477 ROW for the access

road, BLM expressly declined to consider this question in the present adjudication. The existence of an R.S. 2477 road would have a significant impact to adjudication of appellants' FLPMA ROW application, and it is error for BLM to fail to consider the question in this context. In the event the existing road is not found to qualify under R.S. 2477, relevant case law supports a right of reasonable access across the public lands to the private land by successors of the patentee. Further, this case is strikingly similar on the material facts and issues to James Shaw, 130 IBLA 105 (1994), in which the Board affirmed a BLM decision to issue a ROW across public lands for access to a subdivision on private lands. The majority seeks to distinguish this precedent on the basis that the applicant in that case had an alternative access option and, hence, the development of the subdivision could not be considered an indirect effect of the ROW. Yet the majority acknowledges that the R.S. 2477 ROW issue was never "investigated by BLM." The failure to consider the access question requires a remand to BLM.

Significantly, the BLM decision failed to analyze the cumulative or indirect impacts of development of homes on the Bear River Ranch lands or the potential for mitigation of those impacts. Rather, the decision speculated in conclusory terms that there would be adverse impacts to public lands and, hence, approval of an ROW was not in the public interest. This is inconsistent with Board precedent requiring that the exercise of discretion to deny an ROW be supported on a rational basis in the record. While the Board will not substitute its judgment for that of BLM officials with expertise in a matter, BLM's discretionary decision must be supported by a rational analysis on the record.

The failure of BLM to consider appellants' access rights, distinguish relevant case precedents, to analyze the cumulative impacts upon which it purported to rely, or to consider potential mitigation measures is made more egregious by the extensive delays in adjudicating the application and the lost opportunity to obtain a more adequate record. BLM assured Bear River that the original ROW application, which covered what is variously termed the "jeep trail," "existing road," or "designated road," would require, as a routine matter, a review and approval process of 60 to 90 days. The six-year adjudication period was not due to the fact that BLM's administrative burdens kept it from addressing the application earlier. Rather, during that six-year period, Bear River and BLM staff worked together, and Bear River responded to whatever concerns were expressed by BLM staff.

After six years and a cost to Bear River of tens of thousands of dollars, Steele issued a decision that concludes with the following cavalier comment: "To conclude with the EA [environmental assessment] would only have caused yourself, as applicant, and the taxpayers, in general, wasted time and expense." (Steele's Decision at 1.) Counsel for Bear River is correct that Steele's "[d]ecision is replete with conclusions not supported by the EA or by any cited document in the record." (Appellant's Reply to BLM's Response in Opposition to Granting a Stay and Motion to Consolidate at 3.) Bear River demonstrates by a preponderance of the evidence that the BLM decision is not supported by a rational basis in the record.

In reviewing the record, we have verified the accuracy of the following summary of the history of Bear River's ROW application:

This appeal is a result of severe and unfair delays, misleading statements by BLM, and an eventual decision. The first delay occurred shortly after receiving the Application in 1993, when the BLM placed a "hold" on processing the Application for two years while the BLM Area Manager lobbied local officials to support a study of the area for Wild and Scenic Rivers Designation. The private land within Bear River Ranches Subdivision is not within the wild and scenic corridor. Neither is the majority of the length of this road. When the study was completed, the wild and scenic corridor was designated "recreation," which allowed right of ways. The Area Manager next directed his staff to find a way to charge the applicant more money, i.e., to turn this into a category V cost recovery by directing that an independent, objective third party contractor be hired to produce a "non-biased" EA. The Area Manager also required amendment of the Pocatello Resource Area Management Plan in order to designate the existing road as a designated road, despite not having ever introduced this requirement on a similarly situated right of way application. The Area Manager balked when the EA contractor, the international engineering firm of Dames & Moore, found no significant impacts. After all of these hurdles were met and over five years had elapsed, the Area Manager nevertheless made the extraordinary decision to terminate public review of the detailed EA prepared by Dames & Moore.

(Bear River Response at 5.)

Many facts in the record reflect Area Manager Steele's clear bias against the Bear River ROW application. In August 1992, BLM informed Bear River that the title commitment it had secured was incorrect and that there was no legal ROW over the jeep trail to access the development. "Bear River was encouraged by BLM to file a right-of-way application to secure access to the road, and Bear River was repeatedly told by BLM officials that there was no problem with the requested right of way and it would take 60 to 90 days to receive approval." *Id.* at 9. Timothy J. O'Reilly was informed "that it would be a routine matter, taking from 60 to 90 days." *Id.* at 9-10. The record indicates that the ROW application for which Bear River originally applied on February 22, 1993, coincided with the existing trail.

In a Decision Record and EA dated August 1, 1994, BLM Realty Specialist Debbie Kovar stated:

This application has been on hold pending the Wild Scenic Eligibility/Suitability Consideration. There is an existing road. The proposal is to reconstruct the existing road and bring it up to the specification, i.e., grade, erosion control, etc. The length is 6,619 ft long and 30 ft. wide. The use

period is between May 1<sup>st</sup> through December 1<sup>st</sup> each year with a vehicle load of 10 to 30 vehicles per week. This road would access a county approved summer home subdivision in Franklin County. This subdivision is adjacent to a Research Natural Area (RNA). The road is within approximately 300 to 400 feet of the RNA.

(Administrative Record (AR) at 235.) In August, Kovar solicited comments from BLM staff on the proposed ROW. While the staff expressed some concerns about "cumulative impacts" of the subdivision, the members of the staff agreed that the effects of the road could be mitigated. (AR at 254.) For example, staff member Jamie Arnold had "no concerns if existing road is brought up to engineering standards." Id. A Mr. Brainard similarly stated "no concerns if existing road is used and brought up to standard." Id.

As noted by counsel for BLM, in connection with Kovar's preparation of the Decision Record and EA for the ROW across the existing road, the Pocatello Resource Area Archaeologist Lisa Cresswell stated, in an October 14, 1994, "Determination of Significance and Effect Record," that no significant cultural resources were found and that the ROW project would have no adverse effect. (AR at 250.) Also, on December 2, 1994, BLM staff member Geoff Hoglander recommended full clearance on a threatened and endangered wildlife worksheet, noting that a sensitive species of rock squirrel had been found near the road, but that "the existing road does not pose a threat to the animal." (AR at 240.)

On March 23, 1995, Kovar met with Steele to discuss a decision letter and a "Right-of-Way Cost Recovery Category and Fee Determination Record," which she had drafted, as well as what remained to be done in processing Bear River's ROW application. Kovar's view was that the EA could be prepared as a Category IV matter, for a processing fee of only \$925.00. Steele wrote across the draft of this letter: "Debbie - lets discuss. I will be here all day tomorrow." He insisted on the preparation of a Category V letter. In a note dated March 31, 1995, Kovar stated:

As a compromise, I suggest that if he wanted a Category V, that's what we would do; but, I suggested that we may want to require a third party consultant to do the EA. A third party consultant would allow for a non-bias [sic] party with a fresh approach. He agreed and said to put together another decision letter for a Category V with the applicant providing a consultant. (Emphasis added.)

(AR at 201.) As a result, the engineering firm of Dames & Moore was selected to prepare the EA.

In her notes regarding the March 23, 1995, meeting, Kovar stated that "Steele wants a Plan of Development included with the application." Id. However, on March 27, 1995, "he decided that the Plan of Development [was] not needed with the application." Id.

The rationale the Board offers for affirming BLM's decision to reject Bear River's ROW application is that BLM has "broad discretion" in such matters. In other cases, the Board has properly judged BLM's exercise of discretion in evaluating ROW applications against meaningful criteria. For example, the Board stated in John Dittli, 139 IBLA 68, 77 (1997), that a BLM decision rejecting a ROW application filed pursuant to section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), will be affirmed by the Board when the record demonstrates that BLM has reasonably analyzed all pertinent factors, with due regard for the public interest. "However, the record must substantiate the conclusions made by BLM, which formed the basis for its rejection." Id., citing Peregrine Broadcasting Co., 62 IBLA 133, 137 (1982); Patrick O. Brown, 55 IBLA 336, 338 (1981). The Bear River ROW decision fails to meet this standard.

While the exercise of discretion is not beyond the reach of this Board's de novo review authority, it is clear that discretionary ROW decisions must be measured against meaningful criteria, as articulated in, e.g., Alvin R. Platz, 114 IBLA 8, 15-16, 97 I.D. 125, 128-29 (1990):

A BLM decision to grant or deny an application for a right-of-way is generally an exercise of the discretion granted to the Secretary under section 501 of [FLPMA]. As an appeals board acting on behalf of the Secretary, we have "plenary authority to review de novo all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of public policy or public interest in cases involving the exercise of discretion unless "the scope of appellate review by or on behalf of the Secretary [has been diminished or constrained] by the Secretary himself in a duly promulgated regulation, or by the Congress through enacted law." United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983). When we review a BLM decision granting or denying an application for a right-of-way, we look to see whether the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason is shown to disturb the decision. Dwane Thompson, 88 IBLA 31, 35 (1985); Nelbro Packing Co., 63 IBLA 176, 185 (1982); Stanley S. Leach, 35 IBLA 53, 55 (1978); Jack M. Vaughan, 25 IBLA 303, 304 (1976). In this case we conclude that a preponderance of the evidence establishes that a complete ban on motorized access deprived appellants of their existing rights.

### Access Rights

The majority in this case limits its review to the discrete issue of whether Steele correctly denied the ROW application for what it refers to as a "new road," and places the status of the "existing road" off limits, mistakenly reserving for future adjudication a myriad of pertinent issues that were raised and ignored during Steele's consideration of Bear River's ROW. The majority has been as steadfast as BLM in its refusal to consider the issue of appellants' access rights in adjudicating the ROW application:

In a footnote to the decision the Area Manager stated: "Currently the BLM, Pocatello Resource Area [,] is preparing an EA to physically close and rehabilitate the existing jeep trail. Closure is expected to be complete by the fall of 1998." (Decision at 1 n.1.) 6/

---

6/ Despite this representation, BLM states that "[a] decision has not yet been made to close the jeep road." (Reply at 13 n.5.) In a previous order, we held that the closure of the jeep trail was beyond the scope of this appeal. (Order dated September 20, 1999, at 8.) When and if BLM issues a decision closing the jeep trail, an adversely affected party could appeal it to this Board.

(Lead Opinion, 157 IBLA at 42).

As late as May 1995, the file demonstrates that Steele considered the existing trail to be a road "designated" for vehicular travel. The record contains substantial evidence of an existing access road along the course of the initial ROW application. On September 23, 1992, shortly before the Bear River ROW application was submitted, Steele stated in a letter to members of the public:

Enclosed you will find a copy of the Pocatello Resource Area Off-Road Vehicle Designation Plan. This plan is a combination of the designations defined and identified in the 1980 Pocatello Off-Road Vehicle Designation Plan and the 1988 Pocatello Resource Management Plan/Environmental Impact Statement (RMP/EIS). \* \* \* We have tried to maintain existing uses as much as possible.

(Affidavit of Thomas Dvorak, November 29, 1999, Ex. 4.) The map legend that accompanied the map stated that the "accompanying maps showed existing roads and trails and designated routes for off-road travel," and that a dashed line indicated an "Existing road or trail," while a solid line indicated a "Designated Route." Id. at Ex. 5. The map showing Oneida Narrows depicts the existing road in question as a solid line, or as a designated route. Id. at Ex. 6. Aerial photographs in the record taken in 1964 show the road clearly. (Dvorak Affidavit at Ex. 3.) The stark contrast in the photographs between the road and the surrounding lands suggests that the road was either improved and/or received significant use.

As late in the process as May 19, 1995, everyone involved, including Area Manager Steele, was operating on the assumption that the ROW application was for access along the existing road. On that date, Steele stated in a letter to Idaho Senator Larry E. Craig that the "road is pre-existing and allows for casual use." (AR at 096.) 1/ Steele addressed

---

1/ "Casual use" is defined as "[a]ctivities that involve practices which do not ordinarily cause any appreciable disturbance or damage to the public lands, resources or improvements and, therefore, do not require a right-of-way grant or temporary use permit under this title." 43 CFR 2800.0-5(m).

concerns expressed in Senator Craig's letter about the processing of the Bear River ROW application, advising that "[t]his road would provide legal access to the Bear River Ranches development:"

The jeep trail is an existing physical access and allows for casual use. Previously, few people used the jeep trail ("road"). When the Bear River Ranches development was approved, the use of this "road" greatly increased. Therefore, the use of this "road" can no longer be considered casual use. In order to support a much higher level of use, the "road" would need to be improved, including culverts, water boards, road base, etc.

Id. On June 26, 1997, five years after BLM informed Bear River that it would need to formalize its use of the existing road through the ROW application process, Dames & Moore was contacted regarding "a reasonable alternative to the proposed right-of-way." It was then that BLM Acting Area Manager Terry Lee Smith sent Dames & Moore a letter recommending elimination from further analysis Bear River's proposed ROW location across the existing road. Also eliminated was the alternative of access through non-public lands, on the basis that "costs, in addition to the unwillingness of certain landowners to negotiate any kind of ROW, has made the possibility of non-public access unreasonable." The new focus of the EA, as specified by BLM, was to be on the following three alternatives:

1. a "no action/no grant" alternative analyzing the more obvious impacts associated with leaving the existing route "as is".
2. a "no grant" alternative that would call for rehabilitation and physical closure of the existing route.
3. a granting of ROW - while simultaneously amending the Pocatello Resource Management Plan and designating a public road through the preliminary route surveyed on June 13<sup>th</sup> - that would include rehabilitation and physical closure of existing route. This alternative will also include an analysis of the "indirect effects" resulting from the subdivision and development of the approximate 1500 acres accessed through the proposed ROW.

(AR 437-39 (June 26, 1997, letter from Terry Lee Smith to Dames & Moore).)

On November 12, 1997, Dames & Moore submitted its preliminary EA to BLM for review and comment, with the preferred alternative, or the proposed action, reflecting alternative three above. (AR 807-845.) On January 20, 1998, Steele wrote to Bear River providing an opportunity to mitigate any impacts of the proposed ROW by adopting stipulations to the application, prepared by BLM, to which Bear River agreed on January 21, 1998. (AR 795-97.) On January 29, 1998, Steele submitted comments to Dames & Moore and asked that the stipulations be incorporated into the document. (AR at 752; see Bear River Response at 26.)

The R.S. 2477 Question

Both the BLM decision and the majority opinion err by expressly ignoring the R.S. 2477 issue. Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), commonly referred to as R.S. 2477, was repealed by section 706(a) of FLPMA, Pub.L. No. 94-579, 90 Stat. 2793 (1976). R.S. 2477 provides: "The right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." Although R.S. 2477 is no longer in effect, valid existing rights established under R.S. 2477 prior to October 21, 1976, were preserved by section 701(a) of FLPMA. FLPMA "repeals R.S. 2477 and its open-ended grant of rights-of-way over public lands while explicitly protecting R.S. 2477 rights-of-way in existence on the date of the FLPMA's passage." Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988), overruled on other grounds, Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992), quoted in Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.Supp.2d 1130, 1133 (D. Utah 2001). Ordinarily the determination whether an R.S. 2477 road is a public highway is left to the state courts (see Alfred E. Koenig, A-30139 (Nov. 25, 1964)), but an exception has been recognized where a determination by BLM is necessary to facilitate proper administration of the public lands. Sierra Club, 111 IBLA 122, 128-29 (1989); Leo Titus, Sr., 89 IBLA 323, 338, 92 I.D. 578, 587 (1985). This case presents such an exception.

In an order issued on February 6, 2001, the Board denied appellants' motion to supplement the record to include an affidavit of Don C. Workman in which he states that the road over which appellants request an ROW has "existed in basically the same form as it exists now, as a Jeep trail, and in the same location, since at least 1948." The Board denied the motion for the following reason:

Obviously, Workman's affidavit is offered to refute BLM's contention that the requested right-of-way in fact contemplates the construction of a new road, and to that extent, it is not new evidence, but cumulative of allegations made by appellants. In addition, however, we recognize that the Workman affidavit is also germane to the issue of whether the jeep trail is properly considered an existing right-of-way under Revised Statute 2477, a question that was neither considered by BLM nor addressed in the decision here appealed, but looms large in the background of this appeal.<sup>2/</sup> Consequently, appellants' request for leave to supplement the record, if granted, could inject a complex and unsettled issue into the controversy. Moreover, in our order of

---

<sup>2/</sup> In Bear River's response to BLM's Answer filed on Dec. 2, 1999, appellants stated that the Board of Commissioners of Franklin County issued a "Proclamation and Acknowledgment of Public R.S. 2477 Right of Way Over Cave Mountain Road," dated Nov. 22, 1999. According to appellants, this Proclamation and Acknowledgment was filed among the real property records of the County as Instrument No. 208262. A copy of this document was not submitted to the Board, however, and the "Cave Mountain Road" appellation does not appear anywhere in the record.

September 20, 1999, at 8, we specifically determined that the closure of the jeep road, which also has implications for a Revised Statute 2477 right-of-way claim, was beyond the scope of these appeals and therefore would not be considered. Accordingly, we find it appropriate to deny the request for leave to supplement the record.

(Order dated February 6, 2001.) (Emphasis added.) At footnote 11, the majority acknowledges the relevance of the R.S. 2477 issue, but justifies ignoring the question on the ground that appellants filed a ROW application (which they assert to be a mutually exclusive right which would not be required if R.S. 2477 access rights existed) and, alternatively, that appellants never filed a formal claim supported by evidence and facts.

The majority's observation that whether the jeep trail is an "existing right-of-way under Revised Statute 2477" was not "considered by BLM nor addressed in the decision here appealed" is inaccurate. On April 4, 1995, Kovar documented a telephone conversation with a representative of Bear River who called, requesting information on the existing road "qualifying/ identified as R.S. 2477." She responded that "this road was never designated an R.S. 2477 Road. The road is not an R.S. 2477 Road." As noted by counsel for Bear River, "[t]here is no evidence of any analysis by Kovar or any other BLM official of the status of this road in light of the law and regulations governing R.S. 2477." (Bear River Response at 19.) The record demonstrates that BLM was in fact presented with the R.S. 2477 issue, and even prepared language for Dames & Moore to include in the EA on how it should be addressed. That BLM chose to ignore the question, and that Steele failed to address it in his skeletal decision, does not place it beyond the de novo review authority of this Board.

We agree that Workman's affidavit offered "cumulative" information, but we disagree with the majority's ruling not to include it in the record on the basis that it "could inject a complex and unsettled issue into the controversy." This Board should not shrink from resolving a critical, and relevant, issue merely because it might be "complex and unsettled." In evaluating an ROW application, BLM is required to consider all relevant factors. Whether the existing trail constitutes an R.S. 2477 road is a relevant factor. If the trail does in fact qualify as an R.S. 2477 road, then BLM lacks the authority to close it, meaning that the very impacts BLM seeks to avoid in determining that as an engineering matter it cannot be upgraded will continue to take place and perhaps become more severe as the Bear River subdivision is developed. Moreover, if the existing trail is an R.S. 2477 road, then BLM is exceeding its authority in restricting its use. BLM would be well-advised to determine the legal status of the existing road before continuing to take the outrageous action of issuing trespass citations in connection with its maintenance.

The refusal of BLM and the majority opinion in this case to consider the implications of access rights pursuant to an R.S. 2477 right-of-way is contrary to controlling legal precedent. It has been recognized that consideration of the existence of an R.S. 2477 ROW is required when BLM closure of a road has been protested by a party asserting regular public

use of the road since well prior to repeal of R.S. 2477. Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976). Contrary to the majority analysis, it is clear that BLM has effectively made its decision to close the road despite its expressed intent to issue a further EA and decision on this matter. Thus, the record indicates that maintenance of the deteriorating road has been barred by BLM and citations issued.

On January 22, 2002, the Board received an affidavit from Heinz Flurer, President of Bear River Ranch Owners' Association, Inc., in which he states:

3. I have been directly told by representatives of the BLM that if any owner within Bear River Ranches conducts any maintenance upon the road at issue in this case, they will be cited and/or arrested for trespass. One of our members has already been cited. This citation was issued despite the fact that he did not conduct or cause any maintenance to be conducted. He paid the \$250.00 fine rather than take time off from work and travel to and from Denver, Colorado, to Pocatello, Idaho to appear in federal court.

4. In the absence of maintenance on the road over the last four years, its condition has seriously deteriorated, and the road is now impassible except for a four-wheel-drive vehicle. Any moderate rainfall will render the road impassible for a period of time even to a four-wheel drive vehicle. Since the area has received above average snow fall already this year, I fear that the road is very close to becoming permanently impassible.

(Bear River's Motion to Expedite (Second Affidavit of Heinz Flurer at 2)). Steele has yet to issue a decision to close the existing road, and so its status remains unresolved, yet BLM is treating Bear River property owners as if they are in trespass by using it. It is apparent that Steele, BLM, and the majority of this Board's members are attempting to accomplish by fiat what the administrative review process is supposed to resolve. BLM's discretion, however broad, does not extend so far, and this Board should not indulge it.

It is well established that BLM is required to consider the prior existence of a ROW for a road or water diversion structure apparently constructed pursuant to the self-executing grants established by R.S. 2477 (road) or the Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (formerly codified at 43 U.S.C. § 661 (1970)) <sup>3/</sup> (water diversion structure), when adjudicating an application for a FLPMA ROW for the improvement. Martin Hackworth, 141 IBLA 249, 252-53 (1997); Carl H. Alber, Jr.,

---

<sup>3/</sup>This Act was subsequently amended effective Oct. 21, 1976, to repeal the self-executing grant for constructed structures, FLPMA, § 706(a), 90 Stat. 2793.

100 IBLA 257, 260 n.4 (1987); Dean R. Karlberg, 98 IBLA 237 (1987); Nick DiRe, 55 IBLA 151 (1981). These cases make it clear that the two issues are not "mutually exclusive." Now, if we assume, as BLM and the majority maintain, that the FLPMA ROW is for a new, separate road, the "mutually exclusive" statement is even less convincing. If it is ultimately determined that the existing trail qualifies as an R.S. 2477 road, the public interest may best be served by BLM's issuing a FLPMA ROW for another, separate road, one that, as a matter of public interest, would better serve the subdivision and minimize what are described as "cumulative" and presumably negative impacts to the public lands. The majority is correct that "where a valid R.S. 2477 ROW exists, no FLPMA authorization is needed," to the extent that no FLPMA authorization is needed for use of the existing R.S. 2477 highway. However, the majority cites no authority for the proposition that BLM is precluded from granting a FLPMA ROW separate and apart from the existing road, which could qualify as an R.S. 2477 road. There is simply no logic to, or legal basis for, the majority's analysis on this point.

As is apparent from the quote from the Board's Order above, the Board was acutely aware of the R.S. 2477 issue as it relates to the existing road and the interrelated matter of the ROW application. Based upon the authority discussed below, we would remand this matter to BLM for a determination of the legal status of the road, which appellants contend has been used for over 50 to 80 years and which is currently in use.

An example is Dean R. Karlberg, *supra*, in which the facts and legal issues are similar to those involved in the Bear River matter. Karlberg had appealed from a BLM decision requiring payment in advance of \$375 for rental of a right-of-way, together with a monitoring fee of \$40, for a total payment of \$415. In his statement of reasons, Karlberg stated: "The road is existing. In fact there are presently three separate routes of access which have been in existence and use since the 1930's. \* \* \* I would estimate that the present road is used by an average of fifty cars per day." In a letter to Karlberg, BLM made statements reminiscent of those made when Bear River was being encouraged to file an ROW application for access across the existing road: "We see no reason why the right-of-way will not be granted because the road already exists on the land and has been used for many years." Relevant to the R.S. 2477 discussion as it pertains to Bear River, the Board observed that "[t]hese statements by both BLM and appellant indicate that neither has considered the legal status of the road which is the subject of this appeal," and that "[i]t appears possible that no right-of-way is needed for this road, which may be a public road established under [R.S. 2477]." 98 IBLA at 239.

In explaining that Karlberg's appeal presented circumstances where adjudication of the R.S. 2477 question was proper, the Board provided the following analysis:

In Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985), we described the exceptional case where adjudication of [the R.S. 2477] question would be necessary:

An exception to this rule was developed by the decisions in Nick DiRe, 55 IBLA 151 (1981), and Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976). The purpose of this exception, as explained in DiRe and Meeds, was to permit BLM to make determinations respecting R.S. 2477 rights-of-way in cases where a determination would be helpful in the administration of the public lands. In Meeds, the Board concluded BLM's adjudication of the possible existence of such a right-of-way was necessary where a road closure proposed by BLM was protested because the road was claimed to be a public road established under R.S. 2477. The Board agreed this case was a special circumstance of "administrative concern" which could justify the effort and difficulty necessarily involved in making a determination normally reserved to the state courts because "it is appropriate that the Bureau review the propriety of its actions for its own purpose \* \* \*." *Id.* at 26 IBLA 298-99, 83 I.D. at 323. (Emphasis supplied.) The Board was careful, however, to point out this exception was to be limited in application, and would not extend to cases involving private claims. This exception for purposes of administrative necessity was again applied in Nick DiRe to the situation where an application was made for a private road right-of-way across an existing trail said to be an R.S. 2477 road. Relying upon the "administrative concern" exception created by Meeds, the DiRe Board concluded adjudication of the R.S. 2477 issue in the case was proper, stating:

Therefore, while the question of the existence of a "public highway" is ultimately a matter for state courts, BLM is not precluded from deciding the issue where it is considering an application for a private access road right-of-way, under section 501 of FLPMA, *supra*. The potential conflict is properly a matter of administrative concern.

Id. at 89 IBLA at 338, 92 I.D. at 587.

98 IBLA at 239-40.

The Board concluded that Karlberg's case fit into the described exception to the general rule, and that BLM should have inquired into whether the ROW involved was a public highway by operation of R.S. 2477. The Board stated that if, as both Karlberg and BLM assert, the road had been subject to public usage since the 1930's, state law should be examined to determine whether the road was in fact and law already a public highway. The Board vacated and remanded the case to BLM, stating that should BLM conclude that the road falls under R.S. 2477, BLM should not charge Karlberg fees for maintenance or use of the road. This holding is relevant to the Bear River case, because it states the obvious proposition that if the existing trail is covered by R.S. 2477, BLM lacks the authority to dictate the terms of its maintenance.

The majority's analysis of the Bear River matter is inconsistent with the Board's decision in Homer D. Meeds, cited above, in which the appellant had appealed a BLM decision dismissing his protest to BLM's closure of a haul road. The Board stated that the "evidence at hand suggests forcefully" that the public had used the road for several decades, and that the road qualified as an R.S. 2477 highway. The Board set aside BLM's decision to close the road and remanded the matter to BLM for a consideration of the R.S. 2477 question, but significant for the Bear River case, it queried whether there was "any current bar" to the filing of an ROW application pursuant to 43 CFR 2822.1-2. The majority must have been unaware of the following analysis when it observed in footnote 11 that a consideration of the R.S. 2477 issue and a FLPMA ROW application are "mutually exclusive":

[W]here, as in this case, the BLM has ordered the road closed to public use, and has dismissed a protest of that action, and the record shows that both the closure and the dismissal of the protest were ordered by the Bureau without any consideration having been given to the possible implications of [R.S. 2477], it is appropriate that the Bureau review the propriety of its actions for its own purposes and to ascertain whether it should either alter its position or receive and adjudicate an [ROW] application under 43 CFR 2822.1-2.

16 IBLA at 298-99, 83 I.D. at 323. Homer D. Meeds involved the question of whether BLM could close one existing road, while, as the majority repeatedly points out, the Bear River case involves two separate roads that intersect in a very minimal way. In Homer D. Meeds, the Board made clear that R.S. 2477 and ROW analyses are not "mutually exclusive" even with regard to a single road. The Board set aside and remanded BLM's decision with "instructions to consider first whether a public way has already been established under the statute and, if not, to afford the appellant and/or other applicants [an opportunity] to file an application to establish such a public way in accordance with the regulation." Id. at 299, 83 I.D. at 323-24. The Homer D. Meeds approach strikes us as one that the Board should follow in the Bear River case.

Another example is Carl H. Alber, Jr., 100 IBLA 257 (1987), in which Alber appealed from a BLM decision providing that his ROW application would be considered withdrawn and the case closed if the ROW grant with attached stipulations were not executed and returned to BLM. Alber failed to comply. In affirming BLM's decision, the Board suggested that Alber could file another FLPMA ROW, and that if he did, "BLM should consider whether the existing access road constitutes a 'public highway' under [R.S. 2477], thereby precluding the necessity for a FLPMA right-of-way." 100 IBLA at 260 n.4, citing Dean R. Karlberg, supra. The Board noted that the Land Report, at page 2, stated that the road had been "used for access to [appellant's] property for many years," and that "[t]his may have been sufficient to have created a 'public highway' under State law." Id., citing Nick DiRe, supra at 155; see also, Blue Mesa Road Association, 89 IBLA 120, 125-26, n.3 (1985).

The R.S. 2477 question has been raised and virtually ignored on a repeated basis throughout the Department's consideration of the Bear River matter. The record is clear that the existing trail has been used to gain access to the private property now being developed as the Bear River subdivision for 50 to 100 years, depending upon the source. Proper adjudication of the ROW application requires examination of the question of whether BLM has the authority to close the existing trail and reclaim it, thereby denying appellants the only "reasonable and affordable" access to their property. The Board's insistence that closing the existing trail is irrelevant to whether to approve the ROW is misguided. If the trail is in law and fact an R.S. 2477 road, BLM has no authority to close it, and Bear River has the right to maintain if not upgrade it, commensurate with the use as it has evolved, with BLM's approval, over the years. The Board leaves Bear River in the posture of seeking an R.S. 2477 determination, or of again obtaining access rights over private property, with the result that BLM will have excluded itself from any dialogue about how access to the subdivision is used and maintained. In approving the FLPMA ROW application, with the stipulations Dames & Moore incorporated into the EA at BLM's request and with Bear River's approval, BLM could have remained involved in the process. In the transparent and illegal attempt at closing down the Bear River subdivision, BLM has forfeited that opportunity.

#### The Consequences of Denying Bear River Its "Only Affordable and Reasonable" Access

Aside from the R.S. 2477 issue, in denying to Bear River the only "reasonable and affordable" access to the subdivision, with the expectation, if not deliberate design, that the subdivision will not be developed, BLM and the majority raise serious legal questions as to whether they have the authority to categorically deny Bear River a right of access to the subdivision. Under State of Utah v. Andrus, 486 F. Supp. 995 (1979), and Utah Wilderness Association, 80 IBLA 64 (1984), 91 I.D. 165 (1984), while it is arguable that BLM may impose reasonable restrictions upon any ROW granted to Bear River, it cannot deny access altogether. Area Manager Steele's decision to deny the Bear River ROW application and to close and rehabilitate the existing trail, effectively denying the 60 or so private landowners any, much less "reasonable," access to their property appears contrary to applicable law. The Board upholds Steele's approach because as a conceptual matter it must in order to distinguish James Shaw. If other access exists and the subdivision will be developed independent of whether BLM approves the ROW, then Steele's approval of the ROW in James Shaw and the denial of Bear River's ROW application underscores the arbitrary and disparate nature of his action.

We will begin with Steele's emphasis on the fact that the Bear River subdivision is surrounded by public lands comprising the Oneida Narrows Research Natural Area, Area of Critical Environmental Concern (RNA/ACEC), and the Bear River Oneida Narrows Segment (BRONS), which is eligible for inclusion in the National Wild and Scenic Rivers system. Steele stated that "there are few or no mitigation measures available to BLM to address cumulative effects, or the potential cumulative effects of development upon the neighboring lands, especially on the RNA/ACEC and BRONS." (Steele's

Decision at 3.) Section 12(b) of the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1283(b)(1994), provides that "[n]othing in this section shall be construed to abrogate any existing rights, privileges, or contracts affecting Federal lands held by any private party without the consent of said party."

Alvin R. Platz, *supra*, demonstrates Area Manager Steele's error in relying upon the fact that the Bear River property is surrounded by an area eligible for designation as a wild and scenic river area as a reason to deny the Bear River ROW. At issue in Alvin R. Platz was a BLM decision denying appellants access by motor vehicle to their property surrounded by an area designated as a wild and scenic river area under the WSRA. The Board reversed BLM's decision, stating that "denying appellants' access to their private property by trail bike in this case amounts to an abrogation of 'existing rights' within the meaning of section 12(b) of the WSRA." The Board was persuaded that the appellants had demonstrated by a preponderance of the evidence that when the WSRA was enacted they had "routinely used a motorbike to come and go." 114 IBLA at 17, 97 I.D. at 130. BLM based its decision upon its position that motorized access would cause more damage to the surrounding terrain than non-motorized access. The Board was unpersuaded that "such additional damage, which in any event would not appear to be significantly greater, justifies denying appellants the mode of access to their property which has been, according to the record, the primary mode of access for the last three decades." 114 IBLA at 19, 97 I.D. at 131.

The Board in Alvin R. Platz referred to the preamble to the regulations promulgated to implement the WSRA in stating that relevant "private property access" was not to be abrogated:

Specifically, with regard to private property access, we note that in the preamble to the final rule found at 43 CFR 8351.2-1, BLM responded to the comment that it "cannot restrict uses of or close private lands, water inholdings or valid rights of access in wild and scenic areas," by saying that it "is not attempting to restrict uses of or close private lands or rights," and that "[s]ection 8351.1-1(a) has been rewritten to make this clear." 45 FR 51740 (Aug. 4, 1980).

114 IBLA at 23, 97 I.D. at 133. Again, Area Manager Steele's effort to bolster his decision with reference to the fact the Bear River subdivision is surrounded by a wild and scenic rivers area calls into question his authority to order the jeep trail closed. Further, his discussion of that fact reflects his misunderstanding of the significance of the area considered for eligibility for inclusion in a wild and scenic rivers area. If Bear River's right of access is secured under section 12(b) of the WSRA, then the FLPMA ROW Bear River ultimately applied for and was rejected by Steele is unnecessary.

Counsel for Bear River rightfully contends that in denying Bear River the only "reasonable and affordable" access to the subdivision, Area Manager Steele raises an additional series of issues which arguably have

not been resolved by this Board or the courts. See Utah v. Andrus, *supra*; Montana Wilderness Ass'n v. U.S. Forest Service, 655 F.2d 951 (9<sup>th</sup> Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); and this Board's opinion in Utah Wilderness Association, *supra*. Apart from the question of the existence of an R.S. 2477 ROW, the courts have recognized the implied right of access by patentees across public lands to reach their private lands when the patented tract is separated from the highway by unpatented lands or lands held by third parties. United States v. Dunn, 478 F. 2d 443 (9<sup>th</sup> Cir. 1973). In Dunn the court ordered a hearing on the question of whether the landowners were entitled to an easement by necessity for access to their land. The court in Montana Wilderness Ass'n v. United States, 496 F. Supp. 880 (D. Mont. 1980), *aff'd* 655 F.2d 951 (9<sup>th</sup> Cir. 1981), found the Dunn decision persuasive on the question of whether a way of necessity can exist against the Government. *Id.* at 885. Noting three prerequisites for an easement by necessity, including title to two tracts initially held by the same party, severed by conveyance of one of the tracts, and a situation where an easement is necessary for the owner of the dominant tenement to use his land, the Montana Wilderness court found it was further necessary to look to the intent of the parties to the patent as gleaned from the statute under which patent issued. *Id.*; see Kinscherff v. United States, 586 F.2d 159, 161 (10<sup>th</sup> Cir. 1978). A determination of a landholder's patent or common law access rights has been held "pivotal" to the process of obtaining a permit for use of Forest Service lands. United States v. Jenks, 22 F.3d 1513, 1518 (10<sup>th</sup> Cir. 1994). The Jenks court noted, with respect to lands patented under the Homestead Act, the existence of "an implied license" of settlers to use public lands for unimpeded access to their property, citing Buford v. Houtz, 133 U.S. 320, 326 (1890). 22 F.3d at 1515.

Subsequent to passage of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. §§ 3101-3233 (1994), the courts have recognized that the right of access to privately owned land surrounded by Federal lands is protected by § 1323(a) (National Forest lands) and § 1323(b) (public lands) of ANILCA. 16 U.S.C. § 3210(a) and (b) (1994). These provisions of ANILCA provide such right of access as the "Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof." Further, these ANILCA provisions have been held to apply to public lands and national forest lands outside of Alaska. Adams v. United States, 3 F.3d 1254, 1258 (9<sup>th</sup> Cir. 1993); Montana Wilderness Ass'n v. U.S. Forest Service, *supra*; Mountain States Legal Foundation v. Espy, 833 F. Supp. 808, 816-17 (D. Idaho 1993); Pleasant Country, Ltd. v. United States, 37 Fed. Cl. 321, 327 (1997), *citing* Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984). Some courts have held that the common law easement by necessity has been preempted by Congressional passage of § 1323 of ANILCA. Adams v. United States, 155 F.3d 787, 794 (9<sup>th</sup> Cir. 2001) (national forest lands); Adams v. United States, 3 F.3d at 1259 (national forest lands); see Pleasant Country, Ltd., 37 Fed. Cl. at 326-27 (public lands). In the Jenks case the court held that the permit procedures required in connection with access pursuant to ANILCA were not inconsistent with the common law right of access stemming from the patent. 22 F.3d at 1518. The lesson of these cases is that, while access may be regulated through the terms of a right-of-way or permit

to protect the public lands, access across public lands necessary to allow the owner of private lands the reasonable use and enjoyment of those lands may not be simply denied as BLM did in this case.

In Utah Wilderness Association the Board engaged in an application of Utah v. Andrus, *supra*, and Montana Wilderness Ass'n v. U.S. Forest Service, 655 F. 2d at 951. The central question in deciding Utah Wilderness Association was whether Shell Oil Company's right of access by means of a road ROW across Federal land, leased by Shell from the State of Utah, is protected by section 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1998), which provides:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under [FLPMA] as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with the rules and regulations applicable to access across public lands.

Judge Amess, writing for the majority, concluded that section 1323(b) applies nationwide, and secured Shell's access across Federal land to its leased property, where Shell wanted to drill an oil exploration well. Judge Burski, concurring in the result, made a somewhat dubious statement, *i.e.*, essentially that since the question has not been definitively answered by the Federal courts, it is not for this Board to address the issue. We see no reason why this Board should refrain from construing relevant law, Federal or otherwise, in the appropriate context. In any event, both the majority and Judge Burski agreed in Utah Wilderness Association that BLM's granting Shell access to its leased property was not only reasonable, but required, independent of whether section 1323(b) applied. On the date of ANILCA's passage in the House of Representatives, a number of Congressmen described the changes that had been adopted from the Senate version of the Bill. Congressman Aucoin explained, regarding section 1323(b): "The bill we are to approve today grants private inholders carte blanche access across national forest and public lands nationwide." 126 Cong. Rec. 29262-63 (1980). In denying Bear River its only "reasonable and affordable" means of access to its property, Steele and the Board in its majority opinion run contrary to section 1323(b) of ANILCA, if the majority in Utah Wilderness Association was correctly decided, as we think it was. <sup>4/</sup>

---

<sup>4/</sup> I am aware that the Board's decision in Utah Wilderness Association was vacated as moot by U.S. District Judge Jenkins of Utah, but such fact does not deprive this Board of revisiting the issue in the appropriate case, such as this.

In Alvin R. Platz, *supra*, the Board revisited, but did not decide, the issue of whether sec. 1323(b) applies nationwide. As noted, the Board ruled that BLM lacked the authority to deny appellants motorized access

The recent decision in United States v. Smsky, 271 F.3d 595 (4<sup>th</sup> Cir. 2001), while dealing with acquired lands, demonstrates that the question of whether section 1323(b) of ANILCA applies to access rights across public lands nationwide is not settled. The Smskys appealed from a U.S. District Court order requiring them to apply for a Forest Service special use permit in order to use a 2.6-mile road through the Monongahela National Forest, which provides the sole access to their home. The Smskys argued that the government lacked the authority to regulate their "implied easement" across the public land to their inholding. The government contended that the National Forest Service Organic Act of 1897 (Organic Act), 16 U.S.C. §§ 473-82, 551 (1998), FLPMA, and ANILCA preempt whatever "common law access rights the Smskys may otherwise possess." 271 F.3d at 601. The District Court ruled in favor of the government.

The Fourth Circuit vacated the District Court's order and remanded the case for further review, ruling that the Federal legislation invoked by the government was inapplicable, and therefore did not preempt state law. First, the Court ruled that because the Smskys conveyed the land surrounding their retained property to the government, the Organic Act did not apply. Second, with regard to FLPMA's application to easements existing when it was enacted, the Court stated:

FLPMA also has no application to existing common law easements. Section 1761(a), selectively quoted by the government, authorizes the Secretary to "grant, issue, or renew rights of way," but does not authorize regulation of existing easements. Likewise, section 1764(c) states: "Rights-of-way shall be granted, issued, or renewed pursuant to this subchapter under . . . regulations or stipulations. . ." Nowhere does FLPMA address existing state law easements.

271 F.3d at 601. Inasmuch as the existing trail in Bear River has been utilized to access the private property for decades, the Smsky court would require the government to determine whether an Idaho state law easement was in existence when FLPMA was enacted. If so, FLPMA would not govern the existing trail, which has been used for decades to access the private inholding.

---

fn. 4 (continued)

across public land to their private property under sec. 12(b) of the WSRA. The appellants argued that sec. 1323(b) of ANILCA applies nationwide, citing the Board's decision in Utah Wilderness Association, *supra*, in which the Board ruled that "Shell has a right of access to the state land in section 36 by virtue of section 1323(b) of ANILCA." 80 IBLA at 77, 91 I.D. at 173. The Board responded as follows: "Because we decide in this case that appellants' right of access is secured by section 12(b) of the WSRA, we need not address whether such access would be secured by sec. 1323(b) of ANILCA as an independent matter." 114 IBLA at 12 n. 2, 97 I.D. at 127 n. 2.

The Court also reviewed the debate as to whether subsection 1323(b) of ANILCA applies only to public lands in Alaska or to public lands nationwide, then stated: "But we need not decide the geographic scope of ANILCA today, however, because, as we discuss below, even if we accepted the contention that ANILCA applies outside of Alaska, we would still hold that it does not apply to the Smskys' claimed easement." Id. at 603. The Court stated that "Section 1323(a) merely authorizes the Secretary to provide access to inholders (who may otherwise lack access); it does not purport to affect existing rights, and it does not mention state law." Id. The Court concluded that "ANILCA applies only to those who lack rights of access under state law," and was not intended to wipe the public lands "clean of any and all easements, implied or express." Id. A reading of the Smsky ruling indicates that the passage of FLPMA and ANILCA did not affect existing rights of access to the Bear River property. See also Adams v. United States, 3 F.3d 1254 (9<sup>th</sup> Cir. 1993); Fitzgerald v. United States, 932 F.Supp. 1195 (D.Ariz. 1996).

### The "James Shaw" Precedent

Counsel for Bear River characterizes James Shaw and the Bear River case as "nearly identical," an observation which is compelling. The fact that Area Manager Steele issued the decision in James Shaw is prima facie evidence of the arbitrary and disparate nature of his action. James Shaw and Bear River both involve decisions which Steele issued for ROW applications across public lands for access to private subdivisions in the same BLM Resource Area. Steele approved one and denied the other on facts that could hardly be more parallel. In its discussion of James Shaw, the majority infers that the dissent would hold that "nearly identical facts" deprive BLM of the discretion to reach a different result and requires this Board to compel a like result. Our position is that "nearly identical facts," as well as nearly identical legal issues, compel BLM, and ultimately this Board, to adequately explain why relevant Board precedent does not apply, and to engage in at least an adequate effort to distinguish the cases. The majority signals to BLM that it may "decide a case one way today and a substantially similar case another way tomorrow, without a more reasonable explanation than is offered here." Doubleday Broadcasting Co., Inc. v. Federal Communications Commission, 655 F.2d 417, 423 (D.C. Cir. 1981).

A brief review of James Shaw reveals the inconsistency in Steele's manner of handling the Bear River ROW application. In James Shaw, the proposed action, as described in the EA, was as follows:

The public land is located three and one half miles southeast of Pocatello in the lower Mink Creek area \* \* \*. The main access road would extend southeast from Mink Creek Road across BLM [lands] to Mr. Henderson's property located adjacent to the southeastern portion of the public land. A spur road would diverge southwest off of the southern portion of the main access road providing access to block #1 of the subdivision. The [right-of-way], except for the spur road, would follow the route of an existing unimproved road present on public land. \* \* \* The

applicant proposed the road be used in perpetuity on a year around basis.

(Draft EA at 1-2, quoted in James Shaw, supra at 106-07.)

The objections raised in the comments submitted in response to the Draft EA in James Shaw, and raised by the appellants therein, are strikingly similar to Steele's reasons for rejecting the Bear River ROW. Those objections related not so much to the ROW, but to the "impact of increased residential development in the Mink Creek area." Id. at 112. In its EA, "BLM addressed only direct impacts of the road that could result either from initial construction and repaving of the road or from later use of it. No off-site environmental impacts, including the impacts of the subdivision on private land, were considered." Id. The final EA which Steele signed in James Shaw stated that "the EA was being written in response to the right-of-way action and to address impacts on public lands, and that it did not address the impacts associated with the development of private lands." Id. at 109 (emphasis added).

The Board in James Shaw stated that BLM should have addressed indirect effects, "including reasonably foreseeable changes in land use or population density, provided those effects are caused by its action," because "[a]gencies like BLM have been required by the courts to consider the effects of private development where it is likely to be facilitated by Federal action, or at least made likely." Id. at 113. The Board nevertheless affirmed Steele's decision, concluding:

[I]t cannot be said that the Federal action in this particular case is the cause of the impacts associated with private development, as BLM's decision to grant the right-of-way in this case is not the physical cause of any "indirect effects" associated with the construction of the subdivision. This is evident when one realizes that the subdivision would very likely proceed even if BLM denied Henderson's application for a right-of-way.

Id. at 114. The Board emphasized that "it appears likely (based on the information in the record) that Henderson would build the subdivision even if he had to provide access to Mink Creek Road over the privately-owned strip of land connecting Mink Creek Road with his subdivision." Id. Thus, the Board agreed that "taking the no action alternative and denying this right-of-way would result in the construction of a road on private lands, creating similar environmental concerns." Id.

Counsel for appellants herein point out that the Bear River "subdivision already existed and should not be considered a cumulative impact," and that "[e]ighty years of use by the public, ranchers, miners, homesteaders and Bear River Ranches establish long-term use." (Bear River Response at 50). Moreover, counsel for appellants make a point that brings the instant case into more parallel focus with James Shaw:

Additionally, under Article 1, Section 14, of the Idaho Constitution and Section 7-701 of the Idaho Code, a right to [e]minent domain over private land is conferred. Appellants have filed suit against adjacent private landowners to condemn a private right of way across their property. Thus, to say that as a consequence of denying this road right of way application, no development will occur within the subdivision, is to engage in speculation. Such speculation is not permissibly deemed a cumulative impact.

(Response at 51). Thus, in accordance with James Shaw, while it was proper for Steele to consider cumulative impacts in evaluating the Bear River subdivision's effects on the ROW, it was improper to invoke such impacts when the EA fails to support it.

Moreover, there is a fundamental fallacy in the principal reason given for Steele's decision, *i.e.*, the "cumulative effects of development upon the neighboring lands" of the privately owned land that would be served by the FLPMA ROW. This stated reason becomes totally irrelevant, and James Shaw completely apposite, if Bear River has other means of access to the subdivision, since those effects would occur regardless of BLM's action on the ROW application. Thus, as a matter of logic, the relevance of the cumulative or indirect effects analysis is necessarily contingent upon a finding that there is no other access to the subdivision. If there is other access, and development of the subdivision is all but inevitable, despite Steele's effort to eliminate it, BLM's "cumulative effects" rationale necessarily fails. The issue then becomes whether the public interest is better served by granting Bear River access to the subdivision by issuing a FLPMA ROW over which BLM would have some measure of control, or by denying the ROW so that Bear River could gain access to the subdivision in a manner over which BLM would have no control whatsoever. We find it inescapable that before the Board can determine whether BLM's "cumulative effects" analysis provides a rational basis for BLM's decision, it must first determine whether alternative access exists. This the Board refuses to do in emphatic terms.

In distinguishing James Shaw, the majority's primary argument is that the applicant in Shaw owned land over which he could construct alternate access to the subdivision if BLM denied the ROW, while the Bear River case presents the situation where an ROW across public land is the only "reasonable and affordable" access to the subdivision, and where the decision to deny the ROW prevents the development of "the subdivision, at least for the foreseeable future." The record does not support the majority's assertion that if BLM's denial of Bear River's ROW application is upheld the subdivision will not be developed. Such a viewpoint is foolhardy in the extreme. In its attempt to distinguish James Shaw from the Bear River case, the majority emphasizes repeatedly that the ROW requested by Bear River represents the only "reasonable and affordable" access to the subdivision. The majority's perception that as a result of denying the ROW application the Bear River subdivision will not be developed, and that its elimination is in the public interest, raises a series of troubling questions which the majority also chooses to ignore.

Abuse of Discretion

In an order issued in this case on September 20, 1999, the Board stated: "Our review of the record prompts us to remind BLM that, while it has considerable discretion in deciding whether to grant an ROW application, its discretion is not unfettered. A decision must be supported by the record." (Order at 14-15.) At some point thereafter, the Board lost its way in its adjudication of this appeal. Now, the majority states that "[a]pproval of an application for a ROW \* \* \* is a matter wholly committed to the Department's discretion." The majority not only relieves BLM of any meaningful standard in considering Bear River's ROW application, it engages in a shallow effort to distinguish James Shaw, supra, a case that counsel for Bear River correctly characterizes as "nearly identical" on the facts and law. Objective review leads to a conclusion that the Shaw case was correctly decided and reflects a careful analysis which is lacking in the present majority opinion. As valid and persuasive precedent, the Board should follow James Shaw now, rather than engaging in an unconvincing effort to distinguish it from the Bear River case. The majority now signals to BLM that with regard to ROW applications, BLM operates in a sphere of discretion that is indeed "unfettered."

One of the principal reasons cited by Steele for denying the ROW application was that "[d]etermining the extent of these [potential and cumulative and long term environmental] effects has been problematic in the EA given the lack of any plan(s) of community development, or covenants and restrictions on the kinds of development and land use." (Emphasis added). The majority "perceive[s] no abuse of discretion in concluding that a plan of development was not necessary early in the process." As noted, this was a process that BLM assured Bear River would require, as a routine matter, 60 to 90 days. In fact, Steele's declaration that a plan of development was "not needed" took place a full three years after Bear River was informed that it should file an ROW application to formalize access across a road that had been in use for decades. In view of the fact that Steele had declared that a plan of development was "not needed," the majority's analysis misses the point when finding that BLM did not abuse its discretion in rejecting the application without requiring a plan of development. Since BLM had previously declined to request a plan of development, it could not rationally support its decision to reject the ROW on a finding that: "Determining the extent of these effects to public lands has been problematic in the EA given the lack of any plan(s) of community development." (BLM Decision at 3.) In this context, we are unable to accept the relevance of the majority's contention that: "[R]egardless of whether BLM requested it, nothing prevented appellants from submitting a plan of development, or any other information or document they believed would support their application or aid the review process." (Lead Opinion, 157 IBLA at 54.)

While "NEPA does not mandate a particular result," as the majority notes, it is certainly "a procedural statute designed 'to insure a fully informed and well-considered decision.'" (Majority Opinion at , quoting Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)). Steele's decision is neither "fully

informed" nor "well-considered," and is so superficial as to amount to a clear violation of the very NEPA principle cited by the Board in its favor. His termination of the EA at the virtual end of the process is not supported by either the draft EA or the record. He states in footnote 1 that BLM "is preparing an EA to physically close and rehabilitate the existing jeep trail." Clearly, his purpose is to deny to Bear River its "only reasonable and affordable" means of access to its property, naively believing that in doing so the subdivision will not be developed. The NEPA process contemplates the preparation of an EA which would evaluate closure of the existing road as an alternative. To make the decision beforehand subverts the process in a manner that should not be countenanced by this Board. There is an inherent conflict in his terminating the EA process which everyone believed would lead to the issuance of an ROW, albeit not the one originally applied for, and ordering the preparation of an EA to support a decision to close the existing road.

The "Comparison of Alternatives," set forth in the "Draft Plan Amendment and Access Road Improvement Environmental Assessment," is contrary to the analysis and conclusion offered in Steele's decision:

The Proposed Action alternative would result in no change to the majority of the resources in the project area. There would be a loss of approximately 1.1 acres available to grazing due to the increased width and length of the proposed road. Rock squirrels, a state listed sensitive species, may be affected by increased mortality from road kill and target shooters as a result of improved access. Property tax revenues to Franklin County would be expected to increase. Public health and safety would improve as a result of the proposed road conforming to BLM engineering and safety standards. Sediment delivery to the Bear River would increase during the first 2 years after construction, after which sediment levels would decrease for several more years before stabilizing at a rate below that of existing conditions. Illegal off-road vehicle access would be expected to decline with the Proposed Action.

(Draft EA at 2-4).

The record verifies the following observation by counsel for Bear River:

BLM Staff comments to the draft EA \* \* \* support that the draft final EA does not justify the broad conclusions reached in the April 24, 1998, Decision. The nearly completed EA did not report any significant impacts to environmental factors, thus warranting a FONSI. Indeed this is the action that Project Lead Jagers fully expected Area Manager Steele to take.

(Bear River Response at 39.) The principal reason cited by Steele in denying the ROW is the concern for the "potential cumulative and long term environmental effects to neighboring public lands resulting from the proposed development of Bear River Ranches." (Steele's Decision at 2). As

demonstrated by counsel for Bear River, the Draft EA does not support this conclusion. See Bear River Response at 39.

In his decision, Steele states that "[d]etermining the extent of these effects to public lands has been problematic in the EA given the lack of any plan(s) of community development, or covenants and restrictions on the kinds of development and land use." Id. This acknowledged inadequacy of the record is inexcusable, given that Steele chose not to require a plan of development despite being urged by his staff to do so. Moreover, Steele states that "there are few or no mitigation measures available to BLM to address cumulative effects." Id. Again, the fact that Steele submitted to Dames & Moore, with Bear Rivers' agreement, a series of stipulations to minimize such speculative impacts appears to contradict his statement. Steele terminated the EA process and rejected the ROW with little more explanation than that it would be time-consuming and expensive. He had already spent six years and the cost to Bear River of having an internationally known contractor prepare the EA, which upon completion, he terminated.

In returning briefly to John Dittli, supra, we reiterate the Board's statement that "the record must substantiate the conclusions made by BLM, which formed the basis for its rejection." 139 IBLA at 77. John Dittli involved the BLM denial of a road ROW because of the impacts construction, maintenance, and/or use of the road would have on visual resources and deer habitat. As in the Bear River case, BLM rejected the ROW application, stating that "it was 'inconsistent' with certain land use planning directives, and thus the purpose for which the land was managed." Id. at 68. The Board set aside BLM's decision and remanded the case on the basis that BLM's review failed to encompass "an adequate consideration of appropriate measures to mitigate any identified adverse impacts to public lands resources, as well as the option of taking less drastic action, including granting the right-of-way subject to appropriate stipulations." Id. The Board directed BLM on remand to reconsider the ROW, and "specifically address whether the adverse impacts to visual resources and deer habitat in the area of the proposed activity might be mitigated, such that a right-of-way could justifiably be granted, subject to appropriate stipulations." Id.

In Bear River's case, as noted above, such mitigation measures were considered, a series of stipulations were drafted by BLM and presented to and accepted by Bear River, and they were included with the EA developed by Dames & Moore. Even so, the majority approves the rejection of the ROW, citing "the lack of information necessary to fashion mitigating measures." Once the EA was completed and ready for Steele's "preferred alternative" determination, and then distribution for public comment, Steele terminated the EA process and issued his decision rejecting the ROW. He then ordered another EA to justify physically closing the existing trail to the subdivision. This action was not supported either by the Dames & Moore EA or

his own analysis. In fact, it is blatantly inconsistent with the approach he took in James Shaw, *supra*. 5/

The Takings Implications of Denying Bear River All "Affordable and Reasonable Access"

Area Manager Steele's decision, as affirmed by a majority of this Board's members, denying to the Bear River appellants any "reasonable and affordable" access to their property, is inconsistent with United States v. Security Indus. Bank, 459 U.S. 70, 82 (1982), wherein the Supreme Court declined to construe a statute "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the takings clause," quoting NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979).

The majority's assertion that "the decision to deny the ROW prevents the development of the subdivision" raises the question of whether BLM's decision results in a taking of the private property. We maintain that BLM must allow "reasonable" access to the property, with "reasonable" regulation, which Bear River was eminently willing to negotiate. Utah v. Andrus, *supra*, supports this position. Therein, the District Court stated that there was very little in the record regarding the "taking issue," but recognized that "when regulation reaches the point of seriously impinging on 'investment backed expectations,' it can constitute a taking," citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and Goldblatt v. Hempstead, 364 U.S. 590 (1962). In the Court's view, there was "a substantial question of a taking in this case if access to federal claims are indefinitely prohibited or if alternative access is unreasonably expensive." 498 F. Supp. at 1011. The Court found that the facts in the case were not sufficiently clear for the formulation of a ruling on the matter, but in sending the case back to BLM for a reconsideration of the road access question, it made clear that under the Fifth Amendment, BLM could not "prohibit access or be so restrictive as to make economic development competitively unprofitable." *Id.* These principles surely apply to the Bear River case. See Fallini v. Hodel, 963 F.2d 275 (9<sup>th</sup> Cir. 1992); Stewart Hayduk, 133 IBLA 346, 359 (1995) (Byrnes concurring)(BLM made "no mention that it performed a Takings Implications Assessment pursuant to Exec. Order No. 12630, ["Government Actions and Interference with Constitutionally Protected Property Rights," 53 F.R. 8859 (March 18, 1988)]."

---

5/ There is credence to Bear River's assertion that the Area Manager's denial of its ROW application seems arbitrary and capricious in light of BLM's response to Freedom of Information Act requests filed on behalf of Bear River. Counsel for Bear River states that "[t]he BLM was unable to locate any right of ways that had been denied in the Pocatello Resource Area within the past ten years." (Bear River's Supplemental Response at 2.) According to counsel for Bear River, 11 applications were filed for ROWs in the Pocatello Resource Area, and "[n]one were denied." *Id.* at 3.

Conclusion

To summarize, even within the strict parameters set by the majority of the Board's members, Bear River demonstrates by more than a preponderance of the evidence that Steele's decision fails to reflect a reasoned analysis of the factors he considered. Moreover, when viewed in the context of the record, there is little to support the view, held by Steele and the majority, that a decision to deny the ROW application is in the public interest. In this context, the Board should set aside BLM's decision and remand the matter with instructions that BLM complete a meaningful review of "all pertinent factors, with due regard for the public interest," including, but not limited to, the access issue. BLM exceeds its authority in denying the Bear River appellants all "reasonable and affordable" access to their property. They must be accorded "reasonable" access, even if it is ultimately decided that such access is subject to "reasonable" regulation.

---

James F. Roberts  
Administrative Judge

We Concur:

---

Gail M. Frazier  
Administrative Judge

---

C. Randall Grant, Jr.  
Administrative Judge

---

R. W. Mullen  
Administrative Judge