



MARY BYRNE, D/B/A/ HAT BUTTE RANCH

174 IBLA 223

Decided April 15, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

MARY BYRNE, D/B/A/ HAT BUTTE RANCH

IBLA 2007-73

Decided April 15, 2008

Appeal from a decision of the Field Manager, Lander, Wyoming, Field Office, Bureau of Land Management, granting an application for an access road right-of-way, but restricting the authorized uses of the right-of-way to less than unlimited use. WYW 167932

Affirmed.

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

Under section 501(a)(6) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(6) (2000), a decision to issue or impose conditions on a right-of-way is discretionary and will be affirmed when the record shows the decision to be based on a reasoned analysis of the facts involved, made with due regard for the public interest, and the appellant has failed to show error in the decision.

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

Section 102(2)(E) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(E) (2000), requires BLM to consider appropriate alternatives to a proposed action, as well as their environmental consequences. These alternatives include alternatives that will accomplish the intended purpose, are technically and economically feasible, and have a lesser or no impact. The burden is on the challenging party to present objective proof demonstrating error in BLM's selection and assessment of alternatives; mere disagreement or a

difference of opinion does not suffice to establish error in BLM's alternatives analysis.

APPEARANCES: Karen Budd-Falen, Esq., and Brandon L. Jensen, Esq., Cheyenne, Wyoming, for appellant; Andrea S.V. Gelfuso, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; John R. Hursh, Esq., Riverton, Wyoming, for *amici curiae*.

#### OPINION BY ADMINISTRATIVE JUDGE GREENBERG

Mary Byrne, d/b/a Hat Butte Ranch (Byrne), has appealed the November 1, 2006, decision of the Field Manager, Lander, Wyoming, Field Office, Bureau of Land Management (BLM), granting her application for an access road right-of-way (ROW) (WYW 167932), but restricting the authorized uses of the ROW to less than unlimited use.<sup>1</sup> Because BLM's decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and Byrne has not shown error in the decision, we affirm BLM's decision.

#### BACKGROUND

On December 7, 2005, Byrne filed an application for an access road ROW, pursuant to section 501(a)(6) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(6) (2000), and its implementing regulations, 43 C.F.R. Part 2800, seeking to upgrade and use an existing two-track road located on BLM-administered land in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 15, T. 42 N., R. 108 W., 6th Principal Meridian, Fremont County, Wyoming.<sup>2</sup> In the application, she stated that

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<sup>1</sup> In addition to Byrne's appeal, Jeff and Amy Miller and Bob and Evelyn Arnold filed separate appeals of BLM's decision (IBLA 2007-47 and IBLA 2007-85, respectively), and the Riverview Park Homeowners Association (Association) submitted a petition to intervene as *amicus curiae* in support of BLM in Byrne's appeal. By order dated Dec. 31, 2007, the Board granted the Millers' and the Arnolds' motions to dismiss their appeals and convert their status to that of *amici curiae* in support of BLM in Byrne's appeal and the Association's petition to participate as *amicus curiae*. Byrne has requested expedited consideration of her appeal. Because we are now deciding the appeal, her request is moot and need not be addressed further.

<sup>2</sup> The road is located within Power Site Reserve No. 6, established by Executive Order dated July 2, 1910. By letter dated Mar. 17, 2006, the Federal Energy Regulatory Commission concurred in the issuance of an ROW for the road subject to a stipulation reserving the right to require the removal or relocation of any structures or improvements found to interfere with any future use of the land for hydroelectric (continued...)

she needed to use the 140-foot long<sup>3</sup> and 30-foot wide road to connect her deeded property to Spruce Drive, a public road in the Riverview Park subdivision, in order to provide access to the planned site of her new home.<sup>4</sup> ROW Application, Ex. A at 1. She indicated that she had actively searched for other routes to the home site but had been unable to find an alternative that would provide year-round, affordable access. *Id.* at 1-2. She added that she had contacted the Riverview Park Homeowners' Association (Association) and had offered to join the Association and/or pay the same share of the subdivision roads' maintenance costs that the other homeowners paid. *Id.* at 3.

Even before Byrne's ROW application was filed, her planned use of the access road had generated consternation among some of the subdivision homeowners. Several of those homeowners and the Association contacted BLM to express their concerns about the impacts that increased traffic engendered by granting the ROW, including construction and commercial usage, would have on the subdivision roads and, especially, on the aging railroad flatcar bridge crossing the Wind River, which provided the only means for several homeowners to reach their property on the far side of the river. *See, e.g.*, Sept. 26, 2005, Association letter to BLM at 2 (shifting from the current casual use to more intensive use of the subdivision roads to access private ranch property might increase heavy construction traffic through the subdivision, possibly damaging the bridge and existing roadbeds and placing an undue liability and cost burden on residents, and the increased traffic, dust, road gravel displacement and noise would diminish residents' privacy and property rights).

In a September 26, 2005, letter to BLM, the Association explained that the subdivision roads (Windriver Drive<sup>5</sup> and Windriver Court), which had been created to access subdivision lots and provided no outlet or throughway to properties outside the subdivision, had been dedicated to public use in the October 10, 1966, plat establishing the Riverview Subdivision. The Association informed BLM that Fremont County had refused to assume any responsibility for the roads and bridge because they did not meet current standards, so the homeowners had borne all the

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<sup>2</sup> (...continued)

development purposes. *See* stipulation 10 included in the granted ROW.

<sup>3</sup> In her appeal submissions, Byrne asserts that the road is actually 221 feet long. *See, e.g.*, Statement of Reasons (SOR) at 3 n. 1. Her application, however, explicitly states that the requested road is 140 feet long and the granted ROW only authorizes the use of 140 feet of public land. Use of land in excess of that amount has not been approved.

<sup>4</sup> The roads within the Riverview Park subdivision link the ROW to Highway 26/287.

<sup>5</sup> The bridge is part of Windriver Drive.

maintenance and improvement costs associated with them. *Id.* at 1. The Association further advised BLM that the bridge was

an aging railroad flatcar (*placed 30 years ago*) adequate for local traffic only. Bridge inspections in the last 10 years have revealed rusting, bracing separation and fatigue cracks. Spot welding has been the only remedy to address brace separation and fatigue cracks. The Association is responsible for all costs associated with bridge maintenance.

*Id.* The Association also stated that, based on informal review with local construction and utility firms and delivery and fire protection services, it had determined that loads exceeding 40,000 pounds gross weight would pose a danger to the bridge and subdivision residents. *Id.*

The controversy intensified after Byrne filed her ROW application, with additional e-mails and letters sent to BLM from concerned homeowners. The County confirmed to BLM, by letter dated June 29, 2006, that it did not maintain the roads within the subdivision and that such maintenance was provided by the adjoining landowners. The County also sent a letter dated June 29, 2006, to Byrne, advising her that the subdivision bridge had recently been inspected by a structural engineer who would not load-rate the bridge “because the supporting abutments were not placed at the reinforced axle areas that would normally support the weight of a loaded rail flatcar, resulting in potential structural weaknesses at or near the abutments,” and recommending that she contact the subdivision residents for further information.

In compliance with its responsibilities under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), in July 2006 BLM prepared and circulated for public comment a draft environmental assessment (EA) (EA WY-050-EA06-168)<sup>6</sup> analyzing Byrne’s proposed access road ROW.<sup>7</sup> BLM also held a public meeting on July 27, 2006, to discuss the ROW application. In addition to comments from Byrne, BLM received numerous comments

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<sup>6</sup> The case file does not include a copy of the draft EA although it does contain a copy of the final EA.

<sup>7</sup> In addition to Byrne’s access road ROW, the draft EA apparently also addressed ROW applications filed by High Plains Power, Inc., to bury a power line along the access road (WYW 167950) and by Dubois Telephone Exchange (DTE) to install a buried telephone cable along the access road (WYW 167955). DTE withdrew its ROW application on Sept. 7, 2006, and BLM granted High Plains Power’s ROW application on Sept. 13, 2006. These applications are not at issue here and will not be discussed further, except tangentially.

on the EA from the Association and subdivision homeowners both at the meeting and in e-mails and letters.

On July 17, 2006, Michael Kenney, President of the Association, sent BLM an e-mail, informing BLM that it appeared that Byrne was building a new road and bridge on private land in an old irrigation ditch. BLM received further information about the new road in an August 2, 2006, e-mail from Jeff and Amy Miller. The Millers stated that Byrne had constructed an alternative road and planned to build a new bridge to her home site from Highway 26/287, which began at the entrance of a ditch road west, off the highway and followed the ditch road several hundred yards before crossing the Wind River in the Crooked Creek area. They indicated that the new bridge over the river would be 60 feet long and 14 feet wide, with an 80-ton load rating, and would be set on concrete pillars, and that, given the magnitude of the new road and bridge, that new route could not be considered temporary or secondary. They added that if Byrne wanted fiber optic phone lines, the only viable access for those lines would be from the highway along the new road.

The Association's comments on the EA relied on Byrne's construction of the road and bridge along the old Riggs Ditch No. 1, which had not been used as an irrigation ditch for at least 20 years, as indicative of the fact that alternative access locations were available for inclusion in the EA. Aug. 4, 2006, Association Comments at 1; *see also* July 27, 2006, Comment Letter from the Millers, at 1 (identifying several current access routes to Byrne's property). The Association expanded on its earlier concerns related to the road ROW. Specifically, the Association requested that uses of the BLM road comply with the restrictions on commercial use and activity set out in the Riverview Park Subdivision Codes, Covenants, and Restrictions (CCRs), which, in keeping with the developer's intent that roads be used for residential ingress and egress, defined commercial activity as including all support activities associated with ranching, such as cattle operations, logging, guided hunting and fishing, commercial lodging, etc. Aug. 4, 2006, Association Comments at 1. The Association further noted that it had presented the question of who bears the ultimate responsibility for the safety and welfare of the public to the Fremont County Attorney and that, although additional research was being conducted, the general consensus was that

[e]fforts to have the bridge load-rated by the county and state failed because of county and state regulations regarding bridges not owned by the county or state. An effort to have the bridge load-rated by a professional and licensed structural engineer also failed. The engineer would not accept liability for load-rating the bridge because of incorrect installation. . . . The bridge is currently restricted, with only limited/local use recommended until liability issues are resolved and structure remediation measures are found.

Fremont County Road Standards. The subdivision road is not constructed to a safe width or adequate support base to accommodate prolonged commercial traffic. There is also a concern about emergency services.

*Id.* The Association also pointed out that Byrne had indicated in late July that all construction traffic would use the new road and bridge and had agreed to honor the 15 miles per hour subdivision speed limit and to participate in general road maintenance expenses to the same extent as other Association members, should the ROW be granted. *Id.*

Upon learning of the new road, BLM contacted Byrne to find out 1) if she was planning on using the new road and bridge as the primary access to her home site; 2) if the power and telephone utilities would be brought in from the existing lines along the new road and bridge to the home site;<sup>8</sup> 3) if she still needed the ROW across BLM land; and 4) if she did need the ROW, what the access road would be used for since commercial activity such as timber hauling would not be authorized. Aug. 7, 2006, e-mail from Leta A. Rinker, Realty Specialist, BLM (Rinker), to Byrne. Byrne responded that she was planning on using the road through the subdivision and over the ROW as her primary access; that DTE was exploring whether it was possible to bring fiber optic service in through the subdivision so that she could use the ROW to bring in power and phone as originally planned; that she had “built the construction road to use for any ‘commercial access,’ i.e., building our house;” and that it was her understanding that the State was going to log Hat Butte over the next few years and would remove the timber via the Teton Valley Ranch Camp road. Aug. 8, 2006, e-mail from Byrne to Rinker.

BLM issued the final EA and initial Finding of No Significant Impact (FONSI) and Decision Record (DR) on September 13, 2006. The EA extensively recounted the comments BLM had received on the draft EA, quoting *verbatim* significant portions of those comments addressing concerns about the structural integrity of the subdivision bridge and liability issues. EA at unnumbered ps. 2-6. The EA identified four alternatives, in addition to the No Action alternative: 1) the proposed ROW;<sup>9</sup> 2) an alternative crossing private property owned by the Teton Valley Ranch, which was rejected because the land owner had refused to give Byrne an easement across its property; 3) another route on private property, which was eliminated from

<sup>8</sup> BLM noted fiber optic telephone cable could only be brought in along the new road and bridge because it was not available from the subdivision.

<sup>9</sup> The EA erroneously characterized the proposed access road ROW as seeking casual use. See EA at unnumbered p. 7. No ROW is required for casual use of BLM land. 43 C.F.R. § 2804.29(a).

consideration because of the significant environmental damage that would be caused by construction; and 4) the newly constructed road, with the soon-to-be installed 160,000-pound capacity bridge capable of accommodating construction equipment and commercial traffic as well as casual use, located on the abandoned Riggs Ditch No. 1, which was not analyzed further because the alternative had not been developed at the time of the ROW application. *Id.* at unnumbered p. 7. The EA therefore focused its analysis on Byrne's proposed access road and the no action alternative, describing both the impacts and the necessary mitigation measures relating to air quality, cultural/paleontological resources and Native American Religious concerns, range resources,<sup>10</sup> socio-economics, vegetation/soils, and visual resources. EA at unnumbered ps. 12-13. The EA noted that the described mitigation measures, which were also included in stipulations to be attached to issued ROW grants, had been considered part of the proposed action in its impact analysis. *Id.* at unnumbered p. 14. The EA also identified unavoidable environmental impacts and cumulative impacts. *Id.*

In the September 13, 2006, FONSI/DR, the Field Manager denied Byrne's ROW application. In so doing, he stated that Alternative 4, the newly constructed road and bridge along the Riggs Ditch No. 1, was the preferred alternative for the access road to Hat Butte Ranch because this access road was located entirely on land belonging to the Ranch and therefore would not need an ROW.

After additional e-mails and telephonic communications between Byrne and BLM personnel, the Field Manager issued a second FONSI/DR on September 27, 2006. In this FONSI/DR, rather than denying Byrne's ROW application, the Field Manager delayed consideration of the proposed ROW pending receipt of a modified application from her and any necessary additional analysis of the modified proposal.

Byrne and BLM conducted extensive negotiations over the terms and conditions of a new plan of development (POD) and modified application for the ROW. Of particular import was the language in condition 11 of the POD, which set out the authorized use of the ROW. In an e-mail dated September 21, 2006, Byrne had proposed the following language: "this road will accommodate vehicle access to [H]at [B]utte [R]anch. [E]xcept in emergencies, there will be no use of heavy equipment or semi trucks and trailers. [R]anch-associated use shall only be occasional. [T]here will be no commercial guiding or outfitting use, and no use for hauling timber." She explained that she was willing to forego any heavy equipment or semi-vehicle use, except in emergencies, but that she needed normal residential access comparable to that of the homeowners in the subdivision, including access

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<sup>10</sup> The proposed ROW is within the Hat Butte Allotment. Byrne is the lessee for that allotment and is authorized to graze 52 cattle on the allotment from June 1 through June 30 and from Sept. 1 through Oct. 30. See EA at unnumbered p. 10.

necessary for the provision of services such as, but not limited to, cleaning, repair, maintenance, and propane delivery, regardless of the types of vehicle utilized. While she agreed to the limited use set out in her suggested language, she pointed out that her property had been designated as a cattle ranch by the Internal Revenue Service and that she could not consent to any conditions that would jeopardize that designation, but that allowing occasional ranch-associated use of the ROW would be acceptable. She also noted that she held the grazing lease for the Hat Butte Allotment, which included the lands within the requested ROW, and therefore should have the normal rights associated with a grazing lease. She further agreed that no commercial hunting or fishing activity would be conducted on the BLM road and that no timber would be transported along that road.<sup>11</sup>

By letter dated October 10, 2006, BLM forwarded to Byrne a modified ROW application, consisting of the letter and the attached POD, and a copy of the stipulations to be attached to the ROW. The letter, condition 11 of the POD, and stipulation 17 of the ROW all specified that

[t]his proposed access road will be used for access to the Hat Butte Ranch and will be used primarily by passenger vehicles, two-wheel drive and four-wheel drive vehicles. Except in emergencies, there will be no use of heavy equipment or semi trucks and trailers. There will be no heavy equipment use (caterpillars, bulldozers, trackhoes, backhoes, etc.) on the access road. There will be no commercial guiding or outfitting use, and no timber hauling. The proposed access road may be used by emergency vehicles as necessary. Uses associated with ranching and normal residential access are also allowed, to include provision for services like (but not limited to) cleaning, repair, maintenance, propane delivery, etc.

See Oct. 10, 2006, letter at 1.

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<sup>11</sup> Byrne added that the former owner of the property, Burke Johnson, had told her that he had used the subdivision roads and bridge, as well as the BLM land, to drive and haul cattle, sometimes in heavy vehicles, and to provide necessary supplies and that he had leased the land to builders who had conducted a commercial logging operation that included transporting logs over the BLM road and the subdivision roads and bridge. In an e-mail dated Sept. 22, 2006, Rinker reminded Byrne that BLM was authorizing only the use of the 140 feet of BLM-administered public lands and she would have to negotiate with the Association about use of the subdivision roads and bridge.

Although Byrne suggested additional revisions to condition 11 of the POD (and stipulation 17 of the stipulations to be included in the ROW grant),<sup>12</sup> BLM declined to further rewrite the condition, explaining that the condition reflected her concerns and stated, as she had requested, the specific road uses and services mentioned in her previous communications. See Oct. 11, 2006, e-mail from Rinker to Byrne (sent at 12:26 PM). In a subsequent e-mail, BLM clarified various portions of the language in the condition<sup>13</sup> and advised Byrne that it was keeping copies of all the e-mail correspondence in case inquiries about the meaning of the condition and stipulation arose. See Oct. 11, 2006, e-mail from Rinker to Byrne (sent at 02:25 PM). Byrne signed the modified ROW application, including condition 11 of the POD, on October 18, 2006, adding the words “under protest” above her signature.

On October 20, 2006, the Field Manager issued the third FONSI/DR for the ROW, authorizing the ROW described in the modified application and POD. Byrne signed the ROW grant, which included stipulation 17, on October 30, 2006, again adding the words “under protest.” BLM executed the grant on October 31, 2006, and the Field Manager issued a formal decision issuing the ROW on November 1, 2006. Byrne timely appealed the decision issuing the grant.

#### ANALYSIS

On appeal Byrne challenges the Field Manager’s decision to limit the authorized use of the access road, asserting that she is entitled to unrestricted use of the ROW. She argues that BLM’s refusal to allow her unlimited road use and its imposition of stipulations restricting her use violate both FLPMA and NEPA. We disagree.

[1] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (2000), grants the Secretary the authority to issue ROWs for “roads, trails, highways, . . . or other means

<sup>12</sup> The suggested revisions provided:

This proposed access road will be used for access to the Hat Butte Ranch. Except in emergencies, there will be no use of heavy equipment (caterpillars, bulldozers, trackhoes, backhoes, etc., except as required in construction of the road) or semi trucks and semi trailers. There will be no commercial guiding or outfitting use, and no timber hauling. The proposed access road may be used by emergency vehicles as necessary. Uses associated with ranching and residential access are also allowed.

Oct. 10, 2006, e-mail from Byrne to Bob Ross, Field Manager.

<sup>13</sup> BLM specifically clarified that the construction equipment necessary to build the road identified in the POD was allowed during the road construction period. Oct. 11, 2006, e-mail from Rinker to Byrne (sent at 02:25 PM).

of transportation.” See also 43 C.F.R. § 2801.9(a)(6). Approval of an application for an ROW is a matter committed to the Department’s discretion. *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93, 104 (2008); *Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008); *Wiley F. & L’Marie Beaux*, 171 IBLA 58, 66 (2007); *D. J. Laughlin*, 154 IBLA 159, 163 (2001); *Cypress Community Church*, 148 IBLA 161, 164 (1999). A BLM decision approving or rejecting an application for an ROW ordinarily will be affirmed when the record shows that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM’s decision. *Santa Fe Northwest Information Council, Inc.*, 174 IBLA at 104; *Union Telephone Company, Inc.*, 173 IBLA at 327; *Kirk Brown*, 151 IBLA 221, 225 (1999), and cases cited. An ROW application may be denied if, *inter alia*, the authorized officer determines that the proposed use would not be in the public interest. 43 C.F.R. § 2804.26(a)(2); *Kirk Brown*, 151 IBLA at 225; see *Douglas E. Noland*, 156 IBLA 35, 39 (2001).

BLM may also impose conditions on an ROW if it provides a rational basis for that decision. *Wiley F. & L’Marie Beaux*, 171 IBLA at 66; *Mark Patrick Heath*, 163 IBLA 381, 388 (2004), and cases cited. Such terms and conditions may include those necessary to protect other lawful uses of the lands adjacent to or traversed by the ROW, to protect lives and property, and to otherwise protect the public interest in the adjacent lands. 43 U.S.C. § 1765(b)(ii), (iii), (vi) (2000).

To successfully challenge a discretionary decision, the appellant bears the burden 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.

*Santa Fe Northwest Information Council, Inc.*, 174 IBLA at 104, quoting *International Sand & Gravel Corp.*, 153 IBLA 295, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999). Conclusory allegations of error or differences of opinion, standing alone, do not suffice. *Stuart Krebs*, 147 IBLA 167, 172 (1999). Byrne must therefore show, by a preponderance of the evidence, that BLM erred in imposing stipulations restricting the access authorized in the granted ROW. *D. J. Laughlin*, 154 IBLA at 163-64, and cases cited; *Stuart Krebs*, 147 IBLA at 172. She has failed to meet that burden.

Byrne contends that, since her application for unlimited use of the ROW does not fall within any of the other categories set out in 43 C.F.R. § 2804.26(a) as

justifying rejection of an ROW application,<sup>14</sup> BLM may only deny her ROW application for unlimited access if the proposed use is not in the public interest. See SOR at 11, citing 43 C.F.R. § 2804.26(a)(2). She asserts that BLM has failed to adequately explain or demonstrate that an unrestricted ROW would not be in the public interest, especially since the proposed use is consistent with the purpose for which BLM manages the affected lands, the use will not result in any unnecessary or undue degradation, and no alternative access exists. SOR at 11.

Specifically, she points out that the public lands at issue are located within the Hat Butte Allotment, which she is authorized to use for cattle grazing; that the primary use of the land is livestock grazing; and that her use of the ROW to access her private property will not interfere with her use of the grazing allotment. *Id.* at 14-15. She also argues that BLM has not identified a single adverse impact to the public lands from the proposed use and that the use, therefore, will not result in the unnecessary or undue degradation which section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), requires the Secretary to prevent. See SOR at 15-17. Finally, Byrne maintains that no viable alternative access to the property exists because any alternative access across her private lands would result in severe environmental degradation to both rangeland resources and riparian areas. She avers that the requested ROW constitutes the historical access to the Hat Butte Ranch and that the previous owner used the BLM land to conduct all aspects of his ranching and livestock business and, since the creation of the subdivision, also used the subdivision roads and bridge to drive cattle and haul logs. *Id.* at 18-19. While acknowledging that her property can be entered directly from Highway 26/287, she asserts that other suggested routes over her land contain steep slopes and unstable soils and are either cost-prohibitive or technically difficult to build and maintain. *Id.* at 20-23. She further contends that the construction road and bridge along the Riggs Ditch No. 1 provide only temporary construction access, not permanent access, because the owner of the water rights for the ditch, Phillip Cross, has not relinquished those water rights and has allowed Byrne to use the ditch with the understanding that she will return it to him so he can use the ditch for irrigation purposes.<sup>15</sup> *Id.* at 23-24.

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<sup>14</sup> Under 43 C.F.R. § 2804.26(a), BLM may deny an ROW application if (1) the proposed use is inconsistent with the purposes for which BLM manages the described lands; (2) the use would not be in the public interest; (3) the applicant is not qualified to hold the ROW; (4) issuing the grant would conflict with FLPMA, other laws, or these and other regulations; (5) the applicant does not have the technical or financial capability to construct or operate the facilities within the ROW; or (6) the applicant does not adequately comply with a BLM deficiency notice or request for additional information necessary to process the application.

<sup>15</sup> Byrne estimates that, if Cross wants to irrigate while she is using the ditch road,  
(continued...)

Byrne's arguments ignore the fact that the underlying justification for BLM's determination that unlimited access would not be in the public interest was not that such use would be inconsistent with the purpose for which BLM manages the affected lands or would cause any unnecessary or undue degradation. Rather, BLM based its determination on its conclusion that unrestricted use of the access road ROW would not protect the interests of the subdivision homeowners. Although Byrne insists that BLM lacks jurisdiction to consider the impacts of the proposed ROW on public roads outside the confines of the public lands, *see* SOR at 37, section 505(b)(ii), (iii), and (vi) of FLPMA, 43 U.S.C. § 1765(b)(ii), (iii), (vi) (2000), requires BLM to protect other lawful users of lands adjacent to or traversed by an ROW, to protect lives and property, and to otherwise protect the public interest in the lands traversed by or adjacent to the ROW. Additionally, 43 C.F.R. § 2801.2(d) directs BLM to coordinate, to the fullest extent possible, all ROW related actions with, *inter alia*, interested individuals and appropriate quasi-public entities.<sup>16</sup> Thus, BLM clearly not only had the authority to consider the consequences of granting an unrestricted ROW on the subdivision homeowners, the subdivision roads, and the subdivision bridge, but, in fact, had the obligation to do so.

Byrne has not shown that BLM erred in determining that unrestricted use of the access road, which would necessarily entail unrestricted use of the subdivision road and bridge since the access road can be reached only by using those roads and bridge, would not be in the public interest because of the instability of the bridge. Although she attempts to counter the evidence in the record that the bridge is unable to withstand heavy loads, nothing she presents undercuts the validity of BLM's determination. Specifically, Byrne asserts that Peter Wendell, a recent past president of the Association, had advised her that the bridge was in fine shape. *See* Byrne Aff., attached to SOR, at 6, ¶¶ 32, 33. Wendell, however, did not do any of the recent maintenance and repair work on the bridge, and his opinion is outweighed by the evidence in the affidavit of Robert Arnold, a retired engineer who did perform that maintenance and repair work, elaborating on the structural problems associated with the bridge and the Association's inability to find an engineer willing to load-rate the bridge. *See* Arnold Aff., BLM Response to SOR (BLM Response), Ex. HH at ¶¶ 4, 5, 6, 9, and 11.

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<sup>15</sup> (...continued)

she will be required to spend approximately \$5,000 a month to install a pump and purchase diesel fuel to irrigate his fields or to reinstate the ditch should he so demand. Appellant's Motion for Expedited Consideration at 4-5, ¶¶ 9, 10; *see also* Byrne Affidavit (Aff.), attached to SOR, at 15 ¶ 95.

<sup>16</sup> NEPA also requires BLM to consider the indirect impacts of a proposed action on lands outside the project area. *See* 40 C.F.R. § 1508.8.

She also proffers a report prepared by Robert Lower, a professional structural engineer, which provided a load rating for the subdivision bridge. See Lower Report, attached to Appellant's Motion to Supplement Record on Appeal, at 1. That report rates the bridge at a maximum of H15-44 loading, which means that "it is safe to drive a straight truck with two axles over the bridge as long as it does not weigh more than 15 tons (30,000 pounds) or a tandem axle truck (3-axles) as long as it does not weigh more than 16 tons (32,000 pounds)." *Id.* This maximum load rating is actually lower than the 40,000 pound safe load limit set out in the Association's September 26, 2005, letter to BLM, cited above. Lower's load limit does not support the heavy commercial use, including cattle and logging trucks, sought by Byrne, but, in fact, coincides with the weight of light trucks, such as delivery, garbage, and propane trucks, the use of which is authorized in the granted limited ROW. See Aff. of William D. Carter, Jr., attached to Amicus Curiae's Memorandum in Opposition to the Points Raised by Appellant's Motion to Supplement the Record, at ¶¶ 3-7. In short, Byrne's own expert's opinion does not support her claim that the bridge can handle unlimited use by vehicles weighing over 32,000 pounds.<sup>17</sup>

The fact that alternative access may be problematic or more expensive does not undermine BLM's decision to impose stipulations limiting the access authorized in the ROW. See *D. J. Laughlin*, 154 IBLA at 164; *International Sand & Gravel Corp.*, 153 IBLA at 302; *Dwane Thompson*, 88 IBLA 31, 35 (1985) (absent an affirmative

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<sup>17</sup> Nor does Byrne's assertion that Burke Johnson, the former owner of her deeded land, used the access road and the subdivision roads and bridge to conduct ranching and commercial logging operations mandate that she be allowed the same uses. Regardless of whether Johnson's use was as extensive as Byrne avers (in its Sept. 26, 2005, letter at unnumbered p. 2, the Association describes Johnson's use as minimal and non-obtrusive, with the primary ranch operations taking place at the Johnson Cow Camp or corrals north of Highway 26/287), Johnson never applied for an ROW so BLM never analyzed or approved that use. In any event, Johnson's past use does not prove that the condition of the bridge has not deteriorated since that time or that Byrne's proposed regular, consistent, unlimited year-round use of the ROW as the main access to her property for both commercial and residential purposes would not have a greater impact on the bridge's structure than the past uses by Johnson. Similarly, Byrne's reliance on the lack of restrictions on the public's use of the BLM access road and the subdivision roads and bridge to undermine BLM's conclusion that unrestricted use of the ROW would not be in the public interest fails because the only use of the access road allowable without an ROW is casual use. See 43 C.F.R. §§ 2801.5(a), 2804.29(a). In any event, although BLM has the obligation to consider the effects that its grant of an unlimited ROW would have on the subdivision roads and bridge to ensure that the granted ROW would protect the lawful uses of the road and bridge, as well as lives and property, 43 U.S.C. § 1765 (2000), it does not control the general public's use of the roads and bridge.

showing that there is no possibility of access other than that sought in the ROW application, the applicant has failed to establish error in BLM's rejection of the application). Byrne's private property abuts Highway 26/287; thus she has direct access to her deeded land from the public highway and is not land-locked or surrounded by only public land. The access she seeks is not necessary to reach her property; rather, she requests the ROW to provide a direct route to the land she has chosen as the site for her new home.

Byrne elaborates on perceived problems with two alternative routes to her home site suggested by the Association, denominated alternatives B and C, including steep slopes, erosive soils, and hundreds of thousands of dollars in costs, and avers that she should not be required to expend those sums to improve access to her property when improved access along the BLM ROW already exists. SOR at 20-23. BLM questions the accuracy of her slope calculations, computing the actual maximum gradients of the suggested alternatives, measured by the "rise over run," as 12 percent for alternative B and between 1 percent and 2.5 percent for the two run segments of alternative C. *See* Aff. of Pam Olson, BLM Response, Ex. JJ at ¶¶ 6-8. Furthermore, although Byrne maintains that the road along the Riggs Ditch No. 1 is temporary, that claim is belied by the burial of fiber optic telephone cable under the road and the installation of an 80-ton load rated, 80-foot long bridge, set in concrete pillars, as part of that road. Byrne has not shown that no other access to her home site exists.

Byrne also objects to stipulation 17 attached to the ROW. This stipulation, which is identical to condition 11 of the POD, limits the use of the ROW to uses associated with ranching and normal residential access; prohibits the use of heavy equipment or semi trucks and trailers, except in emergencies, as well as commercial guiding or outfitting use and timber hauling; and allows use by emergency vehicles as necessary. As noted above, BLM may impose conditions on an ROW, including those necessary to protect other lawful uses of the lands adjacent to or traversed by the ROW, to protect lives and property, and to otherwise protect the public interest in the adjacent lands, if it provides a rational basis for that decision. *Wiley F. & L'Marie Beaux*, 171 IBLA at 66; *Mark Patrick Heath*, 163 IBLA at 388; *see also* 43 U.S.C. § 1765(b)(ii), (iii), (vi) (2000). Stipulation 17 derived from language suggested by Byrne herself, which she undoubtedly considered reasonable when she suggested it. She has presented nothing on appeal that demonstrates that the stipulation has no rational basis. The record amply establishes 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 when it included stipulation 17 in the ROW grant. Byrne has failed to meet her burden of showing that the Field Manager's decision to issue a restricted ROW violated FLPMA.

Byrne also asserts that the Field Manager's decision violated NEPA. Specifically, she contends that the EA failed to adequately analyze all reasonable alternatives, specifically the original application for unlimited access, as required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), and neglected to consider mitigation measures to minimize the impacts of the original application. See SOR at 27-35. These arguments are without merit.

[2] Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), requires BLM to consider "appropriate alternatives" to a proposed action, as well as their environmental consequences. See 40 C.F.R. §§ 1501.2(c), 1508.9(b); *Santa Fe Northwest Information Council, Inc.*, 174 IBLA at 116, and cases cited. These alternatives include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 C.F.R. § 1500.2(e); *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *Howard B. Keck*, 124 IBLA 44, 53 (1992). Consideration of alternatives ensures that the BLM decisionmaker "has before him and takes into proper account all possible approaches to a particular project." *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The burden is on the challenging party to present objective proof demonstrating error in BLM's selection and assessment of alternatives; mere disagreement or a difference of opinion does not suffice to establish error in BLM's alternatives analysis. See *Great Basin Mine Watch*, 159 IBLA 324, 354 (2003); *Coy Brown*, 115 IBLA 347, 357 (1990).

Contrary to Byrne's assertion, the EA, while not a model of clarity as far as its description of alternatives is concerned, plainly did consider her original application for unlimited use, which was the only access road ROW application before BLM at the time the EA was prepared.<sup>18</sup> See EA at unnumbered ps. 2-6 (extensively quoting and incorporating into the EA comments from the Association and individual subdivision homeowners addressing unlimited access.) In any event, Byrne does not suggest that the unlimited ROW alternative would have lesser impact than the alternatives considered, but simply that analysis of the unlimited ROW would not have revealed greater environmental consequences than those created by the modified ROW

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<sup>18</sup> Byrne appears to believe that the EA analyzed the modified ROW application. See SOR at 34. The modified application, however, was not submitted until October 2006, approximately one month after the Sept. 13, 2006, EA was issued. Thus her challenge to the EA's alternatives analysis seems to be based on a misapprehension.

application. SOR at 34. She therefore has not shown error in BLM's alternatives analysis.<sup>19</sup>

Byrne further contends that BLM's failure to consider her original application necessarily means that it did not analyze whether any adverse impacts of unlimited access could be mitigated. This argument fails not only because BLM did, in fact, address her original ROW application in the EA and identify in that document mitigation measures for the impacts to cultural resources, big game crucial winter range, and vegetation and soils (*see* EA at unnumbered 12-13), but also because the stipulations attached to the granted ROW incorporate measures designed to mitigate the impacts of unlimited use, including, *inter alia*, cultural resource protections (stipulation 1), big game time limit stipulations (stipulations 6-8), and soil and vegetation protections (stipulations 12 and 18), as well reasonable restrictions on use of the ROW (stipulation 17). Byrne has not shown error in this analysis.

To the extent not specifically addressed herein, Byrne's other 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 C.F.R. § 4.1, the decision appealed from is affirmed.

\_\_\_\_\_/s/  
Sara B. Greenberg  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
Bruce R. Harris  
Deputy Chief Administrative Judge

<sup>19</sup> We note that neither a completed EA nor a FONSI requires BLM to grant an ROW. *See Bear River Development Corp.*, 157 IBLA 37, 49 (2002). Thus a finding that granting unlimited use of the ROW would not have a significant impact on the environment does not limit BLM's discretion to deny such use pursuant to FLPMA.