



MARK PATRICK HEATH

175 IBLA 167

Decided July 18, 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

MARK PATRICK HEATH

IBLA 2007-199

Decided July 18, 2008

Appeal from a letter issued by the Field Manager, Royal Gorge (Colorado) Field Office, Bureau of Land Management, offering a right-of-way grant for an access road and parking area. COC-60553.

Dismissed in part; reversed in part; affirmed in part; set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under section 501(a)(6) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761(a)(6) (2000), when BLM exercises its discretion to grant a right-of-way and imposes a condition on that right-of-way, it must provide a rational basis for its decision to impose the condition. The 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 BLM did not act on the basis of a rational connection between the facts contained in the record and the choice made.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under 43 C.F.R. § 2804.25(b), BLM may require a plan of development for improvement or upgrade of a road along a right-of-way. BLM's authority to require a plan of development is not limited to situations involving construction of a new road.

3. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under section 504(i) of FLPMA, 43 U.S.C. § 1764(i) (2000), and 43 C.F.R. § 2805.12(g), BLM may require a right-of-way holder to post a bond sufficient to secure the expected costs of rehabilitating the affected public lands if construction of the road over the right-of-way is not completed and the right-of-way is abandoned, even if such a bond has not previously been required of other right-of-way holders in the area.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where BLM requires a bond to secure rehabilitation costs in the event construction of a road over a right-of-way is not completed and the right-of-way is abandoned, and an appellant has shown error in the analysis underlying various elements of the amount of the bond or has shown that elements of the bond amount are not rationally justified, the bond amount will be set aside and the issue remanded to BLM for recalculation of the bond amount.

5. Constitutional Law: Generally--Rights-of-Way: Conditions and Limitations

This Board is not the proper forum to decide a right-of-way holder's claims that imposition of various conditions on his right-of-way grant violates equal protection requirements of the due process clause of the Fifth Amendment to the U.S. Constitution.

APPEARANCES: Jack M. Merritts, Esq., Denver, Colorado, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEATH

Mark Patrick Heath has appealed a "Right-of-Way Grant Offered, Rental Fees Estimated" (Grant Offer) transmitted to Heath by a May 10, 2007, letter from the Royal Gorge, Colorado, Field Office, Bureau of Land Management (BLM). As explained more fully below, we dismiss one portion of the appeal as premature,

affirm certain provisions of the Grant Offer, reverse certain provisions, and set aside and remand certain provisions.

### *Background*

#### *A. The 2001 ROW Grant Offer and the Previous Administrative Appeal*

This case has a long and difficult history. Many of the details need not be reviewed to address the issues now before us. In an earlier related decision, this Board considered an appeal by Heath from BLM's October 4, 2001, offer of a right-of-way (ROW) grant under the same serial number, COC-60553, for access in three segments to patented land that Heath owns on Bighorn Mountain in Boulder County, Colorado. In *Mark Patrick Heath*, 163 IBLA 381 (2004), Heath challenged, *inter alia*, BLM's rationale for limiting the third and final segment of his proposed access road to a 3-foot-wide pedestrian trail, contrary to Heath's application for the entire access to consist of a vehicular road. 163 IBLA at 382. It is useful to quote certain portions of the background discussion from that decision to set out most of the facts pertinent here:

Heath had applied for a ROW in 1997 to provide road access from Sunshine Canyon Drive to the patented Big Horn lode mining claim that is near the top of Big Horn Mountain, northwest of the city of Boulder, Colorado. Heath had intended to use the road to access a single family detached residence he intends to build on his claim. Heath contends that BLM erred when it limited his access in segment 3 to a pedestrian trail instead of a road that would provide vehicular access.

Heath's efforts to obtain vehicular access to his property in order to build a home have been long and arduous. The route Heath selected crosses patented land as well as public land, and portions of the route across the public land are subject to unpatented mining claims. When Heath met with BLM on August 7, 1997, he was advised that it was BLM's policy to not issue a ROW until legal access had been obtained across the intervening private lands. . . . Establishing his right of access across the private land involved litigation . . . .

An understanding of the geographic setting of the claim and the ROW is necessary for a proper appreciation of the issues in this appeal. The Big Horn lode claim is located near the top of Big Horn Mountain. Its northeast end lies at an elevation of about 8200 feet, and the claim extends about 1500 feet down the side of the mountain to an elevation of about 7600 feet at its southwest end. The maps in the record show

that the claim is one of numerous patented and unpatented mining claims, and irregular parcels of public land in that area. . . .

Heath indicated that he wanted to use two existing roads running southerly from Sunshine Canyon Drive to reach the northeast endline of his patented claim. The first is an old wagon road corresponding to segment 1, which Heath believed to be a public road, sometimes referred to as the Gold Hill Road, and the second was a spur road, sometimes referred to as the Bighorn Road, that corresponds to segments 2 and 3. BLM's EA [Environmental Assessment] describes the segments as an existing road:

[The first] segment is an old wagon road that originally comprised a portion of the road from the city of Boulder to the town of Gold Hill, running east and west over the northern slope of Bighorn Mountain. In 1887, another road (Sunshine Canyon Drive) running further to the north was constructed to provide better access. Now, this old wagon road can be entered only from the west end from Sunshine Canyon Drive; overgrowth and a steep embankment prevent it from being entered from the east.

. . . .

The second segment is a portion of a spur road running southerly off the public road identified as Segment 1, and has been used historically as access to the Bighorn Lode. This road had been utilized, but does not appear to have been maintained, during recent years. It is basically a wandering trail through openings, with a few trees removed for convenience. Segment 2 extends from the point where it leaves segment 1 to the crest of the hill, as shown on the survey plat.

The third segment roughly parallels the route of the spur road from the end of segment 2 to the Bighorn Lode. . . .

(EA at unnumbered page 2.)

Boulder County has played a major role in the events leading to this appeal. Because of the size of the claim, to build a home on his property, Heath must obtain approval of a subdivision exemption application, which the County was willing to process only if Heath

could provide proof of legal access to the claim. (May 20, 1997, letter from Ruth Cornfeld Becker, Deputy County Attorney, to David S. Williamson, Esq.) The reason for Boulder County's interest in the area is indicated in BLM's EA:

Bighorn mountain was designated as a Natural Landmark in 1978 by Boulder County in their Boulder County Comprehensive Plan. Boulder County considered it a prominent part of the heritage of Boulder County and, as such, warranted the designation for possible future acquisition and/or special land use considerations. Boulder County has had a long-standing application for the area under the Recreation and Public Purposes Act. The application has been complicated by the fractured land pattern and questions of access. Interest in the preservation of the area remains high, and Boulder County continues to seek resolution of these issues.

(EA at unnumbered page 3.)

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Attempting to satisfy BLM's requirement that he have access across private lands, Heath first tried to negotiate easements with other landowners in the area. He was successful with the exception of one holdout landowner near the beginning of segment 1, who refused to grant access. Heath filed a lawsuit to have the old Gold Hill road a declared public road. Boulder County intervened in the proceedings and opposed Heath, stating concerns about the road itself and the effect a public road would have on the county's plans to acquire the private land on Big Horn Mountain as open space. Assistant County Attorney Leslie Lacy explained: "If the road is declared not public, it will dramatically affect the market value, and then we could purchase it." (The Mountain-Ear, Aug. 5, 1999, p. 4.) The trial court ruled against Heath, but the Colorado Court of Appeals reversed, finding that the road was a public road. *Heath v. Parker*, N. 99CA2436 (Colo. Ct. App. Nov. 24, 2000) [30 P.3d 746].

163 IBLA at 382-85 (footnotes omitted).

In the previous appeal, the Board found that there were material issues of fact regarding BLM's conclusion in the October 2001 offer of a ROW grant to limit the third segment of the ROW to a pedestrian trail. 163 IBLA at 388. Therefore, the

Board referred the case to an Administrative Law Judge (ALJ) for an evidentiary hearing.<sup>1</sup>

There were numerous filings and submissions while the case was pending before the ALJ. Among other things, Heath submitted to BLM engineering plans and drawings for the proposed road on Segment 3. The ALJ extended the time for the hearing to allow BLM to conduct further environmental analysis. BLM completed a second Environmental Assessment on August 10, 2006 (2006 EA). Ultimately, BLM offered to revise the ROW grant to allow vehicular access along the entire access road. BLM filed a Motion for Remand on January 24, 2007, for that purpose. Heath rejected the proposed revision because it included stipulations and conditions with which he did not agree, further asserting that a remand would be contrary to the Board's direction that a hearing be held. Appellant's Response to Second Motion for Remand, dated Feb. 5, 2007, at unpaginated 3-7. The ALJ held a prehearing conference on the same day in an attempt to settle the case, at the conclusion of which he understood that the parties had reached a tentative agreement, as indicated in the ALJ's February 6, 2007, letter to the parties. However, the parties were unable to resolve their differences and finalize an agreement.

The ALJ rescheduled the hearing, but before the hearing was held, BLM filed a "Motion for Rulings" requesting that the ALJ rule on its Motion for Remand. BLM contended that the issue which the Board sent the case to the Hearings Division to resolve, *i.e.*, the basis for limiting part of the access road to a pedestrian trail, was no longer relevant. Motion for Rulings dated Mar. 13, 2007, at 4. Rather, counsel for BLM asserted, the relevant issues were disputed stipulations and conditions in a proposed ROW that had not yet been offered, and he stated: "Upon remand, BLM would offer Heath a ROW grant as set forth in the motion and modified in BLM's March 2, 2007, letter. If Heath desired, he could *appeal the stipulations and conditions at that time.*" *Id.* (Emphasis added.) Although Heath again objected to remand, the ALJ granted the motion, indicating that because BLM no longer supported the original decision that the Board had referred to the ALJ, the appropriate course was to allow BLM to issue a "new decision," which Heath could subsequently appeal if he desired. Mar. 22, 2007, Order granting Motion for Remand at 3 ("Heath may then appeal the new decision if he so desires.").

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<sup>1</sup> A briefing prepared for the BLM State Director dated Aug. 28, 2001, approximately five weeks before the pedestrian trail ROW was offered, acknowledged: "This decision could, however, effectively prevent Mr. Heath from being able to utilize his parcel as a home site since home construction activities would require the use of heavy equipment." Aug. 28, 2001, Briefing at unpaginated 2. Whether vehicular access was necessary to Heath's use and enjoyment of his property was one of the issues to be addressed at the hearing.

B. *The Current ROW Grant Offer and the Instant Appeal*

On May 10, 2007, BLM issued the Grant Offer. “Segment 3” of the offered ROW would extend over 626 feet of public lands and be 70 feet wide.<sup>2</sup> The proposed ROW also specified a parking area at the end of Segment 2 and the beginning of Segment 3 “of a loop with the center undisturbed, with a pull-out area wide enough to park two vehicles, and is a total of 50 feet by 50 feet.” Proposed ROW grant, paragraph 2.b. Heath appealed by letter dated May 25, 2007, challenging the amount of the required performance bond and some of the special stipulations attached to the grant, as discussed more fully below.

BLM filed a Motion to Dismiss on June 7, 2007, on the grounds that the Grant Offer is not a final decision and therefore is not appealable under 43 C.F.R. § 2805.10(b). Heath opposed the motion. The Board denied that motion in a decision dated August 23, 2007. *Mark Patrick Heath*, 172 IBLA 162 (2007).

Heath filed his Statement of Reasons (SOR) on July 3, 2007. He asserts generally that BLM “conditions the right-of-way grant on several stipulations and conditions which are not legally or economically feasible for Mr. Heath or anyone else to comply with and, therefore, effectively still deny Mr. Heath any reasonable use and enjoyment of his property in violation of applicable statutes and regulations.” SOR at 6. Specifically, he challenges the following provisions:

1. In BLM’s letter dated May 10, 2007, transmitting the proposed ROW grant, BLM quoted 43 C.F.R. § 2807.17(c), which provides: “Your failure to use your right-of-way for its authorized purpose for any continuous 5-year period creates a presumption of abandonment.” Heath asserts that Boulder County “consistently delays the processing of . . . home building permits in the mountainous areas of that county, such as where Mr. Heath proposes to build his home, often for several years at a time.” SOR at 7. At the very least, Heath argues, “delay necessitated by compliance with Boulder County regulations should not be considered as part of any five year delay referenced by the BLM in its latest right-of-way offer.” *Id.* Thus, Heath asks this Board to “either remove such a stipulation or condition from the right-of-way grant offered to Mr. Heath, or at the very least, restrict the BLM from pursuing any presumption or determination of abandonment so long as Mr. Heath

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<sup>2</sup> According to the proposed ROW grant, paragraph 2.b., Segment 1 is 2,222 feet long and 40 feet wide. Segment 2 is 391 feet long and 30 feet wide. The centerline survey attached to the Grant Offer showing the location of Segments 1, 2, and 3 shows that parts of Segment 2 and part of Segment 3 cross private lands. In other words, the BLM lands over which the ROW would be granted are not contiguous. The lengths of the ROW given here are the portions that cross public lands.

pursues obtaining the necessary permits from Boulder County and pays his annual rent for the right-of-way grant.” *Id.*

2. Special Stipulation 2 (proposed ROW grant, Exhibit B, at 2) requires a “separate plan or plans of development” to “address improvement of Segments 1 and 2 of the Right-of-way, and construction of the loop area for parking.” It requires Heath to submit “standard or typical cross-sections of the road to be constructed, maintained, or reconstructed as directed by the authorized officer.” It then gives specific directions regarding what the cross-sections should include. Heath asserts that BLM has no authority to require preparation and approval of such plans for segments not on BLM property. SOR at 8. He also asserts that by this stipulation, BLM is trying to further Boulder County’s goal of using Segments 1 and 2 for one of the main access routes to a proposed park on Bighorn Mountain by requiring Heath to pay for engineering drawings on those two segments even if he cannot ultimately build his home. *Id.* He also argues that construction of the driveway and the loop area must comply with county regulations which BLM has routinely accepted for other ROWs in the area without requiring separate plans of development and approval, and that Special Stipulation 2 therefore is “premature.” *Id.* Finally, Heath argues that a turnout of less than 20’ x 20’ would be more than adequate for two cars, with much less environmental impact than the 50’ x 50’ parking loop the proposed ROW grant requires. *Id.*

3. Special Stipulation 4 (proposed ROW grant, Exhibit B, at 3) requires Heath to “provide copies of the required permits from Boulder County, either the site plan review, the limited impact review, or documentation that neither permit is required, for construction, reconstruction, or maintenance on the road.” The same paragraph further provides that “an approved building permit must be provided for construction of a home on the holder’s [Heath’s] private parcel . . . prior to issuance of a notice to proceed from the [BLM] authorized officer.”<sup>3</sup> Heath argues that neither these nor similar stipulations were imposed upon other ROW grants on Bighorn Mountain. SOR at 9. Heath also argues that BLM is without authority to demand such approvals for non-BLM land, including approval of construction of a home, as a condition to an ROW grant. *Id.* Heath also raises the possibility that Boulder County “may well not grant such permits without Mr. Heath having the unconditional right to build the entire driveway.” *Id.*

4. Special Stipulation 7 (proposed ROW grant, Exhibit B, at 3) requires Heath to post a bond in the amount of \$230,000 (\$61,400 for Segment 2 and

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<sup>3</sup> Special Stipulation 5 prohibits Heath from initiating construction or other surface-disturbing activities on the ROW without prior written authorization from the authorized officer, which is to be by written notice to proceed from the authorized officer.

\$168,600 for Segment 3) before the authorized officer will issue a written notice to proceed. Heath must maintain the bond “until restoration of disturbed areas and other requirements relative to the construction phase of the project have been accepted by the authorized officer.” Heath first argues that he has discovered no other ROW grants on Bighorn Mountain or in other similar areas that ever required a bond of that magnitude. SOR at 9. Heath asserts that other ROWs for a much longer distance and which caused considerably more environmental impact have been issued either with no bond or only a nominal amount (*e.g.*, \$1,000). *Id.* Heath asserts that the bond requirement “is no more than a transparent effort by the BLM to make it financially impossible for Mr. Heath to build the short (approximately 600 foot long) Segment 3 of his driveway. The amount of the bond is deliberately inflated with exaggerated costs and other fees that are contrary to BLM regulations and are without precedent.” SOR at 9-10.

Specifically, Heath argues that (1) inclusion of a 25 percent “Profit and Overhead Premiums” exceeds any compensation expected in private industry; (2) a 25 percent “Remote Site Premium” is unreasonable because of the proximity of the site to the City of Boulder and local contractors would not consider such a premium reasonable; (3) the 15 percent added for construction administration is excessive because only a handful of site visits by BLM would be necessary; (5) the 15 percent added for contingency is unnecessary because the itemized cost breakdown is comprehensive; (6) the 19 percent “service charge” is unexplained; and (7) a bond for Segment 2 is unnecessary because that segment will be part of the vehicular access to Boulder County’s proposed park and therefore will not need restoration (*i.e.*, by Heath after construction of his driveway over Segment 3). SOR at 10-11.

BLM filed its Answer on September 21, 2007. Heath filed a “Supplement to Statement of Reasons” (SOR Supplement or SOR Supp.) on November 16, 2007. In that document, in addition to further explanation of his objections, Heath added another legal theory, *i.e.*, that the stipulations to which he objects deny him equal protection of the laws under the Fifth Amendment to the U.S. Constitution because he allegedly is being treated differently from other similarly situated ROW holders. SOR Supp. at 10-13. BLM filed an “Answer to Supplement” (Answer Supplement or Answer Supp.) on December 4, 2007. The arguments asserted in these pleadings will be addressed in the analysis below.

### C. *Applicable Standard of Administrative Review*

[1] Section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (2000), authorizes the Secretary to grant rights-of-way for roads, trails, and other means of transportation. Section 505 of FLPMA, 43 U.S.C. § 1765 (2000), empowers the Secretary to impose various terms and

conditions on the ROW. *See also* 43 C.F.R. § 2805.12. As we noted in the first decision in this matter:

Under section 501(a)(6) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761(a)(6) (2000), a decision to issue a right-of-way is discretionary. *See Douglas E. Noland*, 156 IBLA 35, 39 (2001), and cases cited therein. When BLM uses its discretionary authority to reject an application for a land use authorization, it must provide a rational basis for its decision. *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *George W. Philp*, 141 IBLA 195, 197 (1997); *Burnett Oil Co.*, 122 IBLA 330, 332 (1992); *The City of Chico*, 119 IBLA 136, 138-40 (1991). It is likewise well established that if BLM wishes to impose a condition upon a land use authorization, it must provide a rational basis for its decision. *James M. Chudnow*, 70 IBLA 225, 226 (1983); *James E. Sullivan*, 54 IBLA 1, 2 (1981).

163 IBLA at 388. Recently, in *Wiley F. & L'Marie Beaux*, 171 IBLA 58 (2007), we reiterated:

When BLM uses its discretionary authority to reject an application for a land use authorization, or to impose a condition upon such use, it must provide a rational basis for its decision. *Mark Patrick Heath, supra*; *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *James M. Chudnow*, 70 IBLA 225, 226 (1983); *James E. Sullivan*, 54 IBLA 1, 2 (1981). 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.*, 153 IBLA 293, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999).

171 IBLA at 66. Therefore, the questions before us are whether, with respect to each of the provisions and conditions that Heath disputes, he has shown error in BLM's analysis, or the lack of a rational connection between the facts and BLM's choice, by a preponderance of the evidence. For convenience, we will address those questions in the same order presented in Heath's SOR. We address Heath's equal protection claims last.

*Analysis*

I. *Presumption of Abandonment under 43 C.F.R. § 2807.17(c)*

BLM argues that the opportunity to rebut a presumption of abandonment under 43 C.F.R. § 2807.17(c) adequately addresses Heath's concern regarding the possibility that Boulder County may delay processing of a building permit for Heath's home or other necessary permits from the County. Answer at 31. After creating the presumption of abandonment after 5 years of non-use of a ROW, 43 C.F.R. § 2807.17(c) further provides:

BLM will notify you in writing of this presumption. You may rebut the presumption of abandonment by proving that you used the right-of-way or that your failure to use the right-of-way was due to circumstances beyond your control, such as acts of God, war, or casualties not attributable to you.

Heath acknowledges this provision. SOR Supp. at 14. He argues, however, that

the only reasonable interpretation of that regulation would limit the BLM's assertion of any presumption of abandonment to circumstances in which the right-of-way had already been constructed and Mr. Heath thereafter failed to use that right-of-way for some reason within his control and not, as interpreted by BLM, by Mr. Heath's "failure" to show some undefined "progress" toward "accomplishing the requirements for a Notice to Proceed."

SOR Supp. at 15. At this point, BLM has not yet granted the ROW, and obviously has not notified Heath that it presumes the ROW to have been abandoned. Thus, there is no action by BLM based on a presumption of abandonment that is appealable to this Board. We therefore dismiss the portion of Heath's appeal concerning the presumption of abandonment as premature.

II. *Special Stipulation 2 — Separate Plans of Development*

In support of the provision in Special Stipulation 2 requiring separate plans of development addressing improvement of Segments 1 and 2 of the proposed access and construction of the loop area for parking, BLM cites 43 C.F.R. § 2804.25(b), which provides: "BLM may require you to submit additional information necessary to process the application. This information may include a detailed construction, operation, rehabilitation, and environmental protection plan, *i.e.*, a 'Plan of Development,' and any needed cultural resource surveys or inventories for threatened or endangered species. . . ." BLM further cites 43 C.F.R. § 2805.10(a)(2) (mis-cited

in the Answer as section 2804.10(a)(2)), which provides that a grant “[m]ay include terms that prevent your use of the right-of-way until you have an approved Plan of Development and BLM has issued a Notice to Proceed.”

In its Answer, BLM acknowledges that Special Stipulation 2 “does not apply to non-public land.” Answer at 32. In other words, BLM recognizes that it cannot require a development plan for those portions of the access that are not on public lands. In his SOR Supplement, Heath notes that as a result of the *Heath v. Parker* litigation, BLM acknowledges Segment 1 to be a public road. He asserts that Segment 1 therefore is under the exclusive control and maintenance of Boulder County. SOR Supp. at 18. The affidavit of BLM civil engineer Mike Mitrision, executed on December 4, 2007 (Mitrision Second Affidavit), attached to the Answer Supplement, acknowledges this (at 7) and states that this segment “is outside the area of concern of the Engineer’s Opinion of Probable Cost.” BLM’s Answer Supplement notes that the surety bond requirement in Special Stipulation 7 “only covers improvements and disturbances made for construction of the access road over public lands in segments 2 and 3, and not segment 1, because no such improvements are required for segment 1.” Answer Supp. at 9. If no improvements are required for Segment 1, no plan of development is necessary. Therefore, the requirement to submit a plan of development is reversed with respect to Segment 1.

Addressing Heath’s argument that Special Stipulation 2 is “premature” because construction of the driveway and the loop area must be made in compliance with county regulations, BLM argues that Heath has not cited the regulations or explained why they would make the stipulation premature. Therefore, BLM concludes, Heath’s argument is simply unsupported opinion, not preponderant evidence. Answer at 33. BLM also maintains that Heath’s assertion that BLM is trying to get Heath to pay for the engineering drawings even if he cannot obtain approval to build his home is unsupported in the record. *Id.* at 32-33.

We agree that on the present record, Heath has not shown why Boulder County regulations would obviate a requirement that BLM regulations would impose. Moreover, at this point, whether or when Boulder County would use Segment 2 as part of a road to the park it intends to establish is entirely speculative. We acknowledge that the record shows that Boulder County plans reflect the intended use of Segment 2 as Heath asserts, but the County appears to be encountering serious difficulties in its efforts to acquire land for the proposed park on Bighorn Mountain. It is unclear whether the plans for a park will ever come to fruition. Heath has not shown that the requirement for a plan of development is an effort to impose on him costs that Boulder County otherwise would bear.

[2] In his SOR Supplement, Heath appears to challenge the requirement to submit a plan of development at all for Segment 2 on the ground that a roadway will

not have to be “constructed” because Segment 2 is an existing road that is currently driveable and “only minimal upgrades and routine maintenance” are needed “with no additional engineering necessary.” SOR Supp. at 17-18. Both of the supporting affidavits Heath attached to the SOR Supplement (from a professional excavator and professional landscaper) opine that the existing road simply needs to be “bladed” and widened slightly to 16 feet, with proper cross drainage and installation of any appropriate culverts. Affidavit of Leon Milacek, SOR Supp. Ex. F, ¶ 3.a, and affidavit of Allison Peck, SOR Supp. Ex. G, ¶ 3.a, quoted in SOR Supp. at 17.

BLM’s Answer Supplement does not respond to or refute Heath’s affiants’ assertions regarding what work needs to be done on Segment 2, and for purposes of this analysis we will accept them as accurate. However, in our view, Heath’s position reflects too narrow a reading of the word “construction” in the regulation. When building or widening a dirt road, it appears that “blading” would constitute “construction.” If the upgrades through “blading” and installation of any appropriate culverts that Heath envisions constitute all the construction that is necessary, Heath may so specify when he submits a plan of development. (There is nothing in the regulation that prevents a plan of development from being relatively simple if that is all the circumstances call for.) Moreover, a plan of development also includes “operation” under 43 C.F.R. § 2804.25(b) quoted above, and is not strictly limited to “construction.” “Operation” would appear to include functions such as “blading” even if blading does not constitute “construction.” We therefore affirm the requirement to submit a plan of development for Segment 2.

With respect to a separate plan of development for the “loop area for parking,” we note that paragraph 2.b of the proposed ROW grant provides: “The parking area, at the point of terminus of Segment 2, consists of a loop with the center undisturbed, with a pull-out area wide enough to park two vehicles, and is a total of 50 feet by 50 feet.”<sup>4</sup> Heath’s SOR Supplement re-emphasizes his argument that a much smaller area (a 20’ x 20’ pullout) is adequate for two vehicles according to BLM’s stated objective, rather than the loop of 50’ x 50’ dimensions described in the proposed ROW grant. Heath argues that the additional loop area is unnecessary because the driveway itself would be used as backup and maneuvering space. SOR Supp. at 19; attached affidavit of Mark Heath dated November 16, 2007, SOR Supp. Ex. H, ¶ 5.j. BLM’s response is that this is simply Heath’s opinion and that he “has not submitted construction specifications” for the smaller area or shown that a smaller “loop” would allow vehicles to maneuver safely. Answer at 33; Answer Supp. at 9-10. BLM cites the affidavit of Jan S. Lownes, a Staff Supervisor at BLM’s Royal Gorge Field Office (attached to the Answer Supplement), who asserts, at 3, that “[c]onsideration was

<sup>4</sup> We infer that BLM envisions an essentially circular loop 50 feet in diameter, which would require new construction of approximately 157 feet ( $50' \times \pi$ ) of new road that does not presently exist.

given” to the “ability of several vehicles to move safely.” Yet she acknowledges that when Heath submits the plan of development, “it is possible that an alternative approach would be approved.” *Id.*

In view of BLM’s willingness to reconsider the size of the parking loop and the serious questions Heath raises concerning the size of that loop, we set aside the requirements of paragraph 2.b and Special Stipulation 2 that Heath submit a separate plan of development to construct a 50’ x 50’ parking loop, and remand this issue to BLM for reconsideration of the appropriate size of the parking area. The effect of this action on the amount of the bond required under Special Stipulation 7 is addressed below.

### III. *Special Stipulation 4 — Permits from Boulder County*

As noted above, Heath objected in his SOR to the requirement of Special Stipulation 4 that he provide (1) either the site plan review, the limited impact review, or a document from Boulder County that neither is required, for the construction of the road, and (2) a building permit for construction of the home, before the BLM authorized officer would issue a notice to proceed. Heath asserted that this requirement had not been imposed on other ROW holders, that BLM lacked authority to require county permits for either the road or the home as a condition of granting the ROW, and that the County might not grant such permits unless Heath has the unconditional right to build the entire driveway. SOR at 9.

In response, BLM asserted that these arguments were merely Heath’s opinion. In any event, in BLM’s view, even if (1) the arguments regarding alleged disparate treatment were true, (2) these requirements maximized the possibility of a presumption of abandonment arising under 43 C.F.R. § 2807.17, and (3) there was a possibility of contradictions between county and BLM requirements, that would not establish that the special stipulation was irrational. Answer at 34-35. While BLM acknowledged that it does not have jurisdiction over private land, it maintained that it was rational to condition approval of construction of the road on the ROW over public lands on Heath obtaining the permits for construction of the road and house on private lands because without them, “Heath will have no need for the road and its construction would be a waste of time.” *Id.* at 35.<sup>5</sup>

In his SOR Supplement, Heath reiterates his position, additionally couching the disparate treatment argument in equal protection terms. In response to BLM’s argument that he would have no need for the road absent the permits, Heath argues:

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<sup>5</sup> As noted previously, Segment 3 of the proposed access crosses both public land, for which Heath seeks the ROW, and some private land.

To the extent that the BLM would still argue that Mr. Heath may build a “road to nowhere” if it does not require him to first obtain a permit for his residence, such an assumption of irrational behavior on the part of Mr. Heath by the BLM forms no “rational” basis for including this Special Stipulation in Mr. Heath’s right-of-way grant. . . . The simple reality is that neither Mr. Heath nor any other person in his position would begin to spend the tens of thousands of dollars necessary to build his driveway if he did not know he could use his driveway to access the home he plans on his private property at the end of that driveway. Without convincing evidence that Mr. Heath would act irrationally by building the road prior to getting his permit for his home, BLM has no basis for inclusion of this requirement in Special Stipulation 4.

SOR Supp. at 20-21. Stated differently, Heath argues that presuming irrational behavior on the part of a ROW applicant is not a rational basis for a stipulation or condition in a ROW grant. BLM did not respond to this argument in its Answer Supplement.

To the extent Heath is arguing that it is irrational for BLM to include a stipulation that he obtain a building permit for the house before being allowed to construct Segment 3 and construct or improve Segment 2 of the ROW because if Heath is rational he would not do so anyway, then one might ask why he objects to the stipulation. It appears that the concern underlying Heath’s argument is that he expects that Boulder County will put him in a “Catch-22” situation by denying the permit unless BLM grants authorization to construct the ROW.

With respect to BLM’s authority to include stipulations such as Special Stipulation 4 in ROW grants, 43 C.F.R. § 2805.12 (captioned “What terms and conditions must I comply with?”) provides in relevant part:

By accepting a grant, you agree to comply with and be bound by the following terms and conditions. During construction, operation, maintenance, and termination of the project you must:

. . . .

(i) Comply with project-specific terms, conditions, and stipulations, including requirements to:

. . . .

(5) Ensure that you construct, operate, maintain, and terminate the facilities on the lands in the right-of-way in a manner consistent with the grant; [and]

(p) Comply with all other stipulations that BLM may require.

We believe this rule grants BLM sufficient authority to include stipulations in ROW grants that ensure that the ROW will be used for its intended purpose. We agree with BLM that requiring a building permit for the house and “either the site plan review, the limited impact review, or documentation that neither permit is required, for construction, reconstruction, or maintenance” of the portions of Segments 2 and 3 that cross private lands before Heath is allowed to proceed with construction of Segments 2 and 3 of the ROW on public lands is a rational means of doing so.<sup>6</sup> We also agree with BLM that assuming, *arguendo*, Heath is factually correct in his assertion that no other ROW grants to access residences on private property on Bighorn Mountain include a similar stipulation, that fact of itself does not prohibit BLM from including this type of stipulation for the first time.

That brings us to Heath’s concern that Boulder County might deny Heath a building permit for the house, or for construction or maintenance of the portions of the road/driveway crossing private lands, unless BLM first grants authorization to construct the ROW, thus leaving Heath trapped between contradictory requirements imposed by the County and BLM. The ROW offered by BLM would provide Heath with legal access to his property, thus satisfying the County’s requirement that he have such access before it issues the permits. *See* May 1, 2006, e-mail from Rich Koopman, Resource Planning Manager, Boulder County, to counsel for BLM on the subject “Bighorn Mountain/Mark Heath Building Proposal,” stating that the County’s Land Use code requires legal access before a site plan review application can be processed. Because the ROW grant would provide that legal access, no “Catch-22” situation, in which neither the County nor BLM will act until the other acts first, arises.

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<sup>6</sup> Heath sought the ROW for the purpose of building a home on his patented land. The planned driveway was designed to accomplish that purpose, which would include allowing necessary construction equipment to access the property. Should Heath decide not to build a house and instead use the property for some other purpose (e.g., weekend visiting or camping), and therefore not need a building permit for a house, he may modify his ROW request or submit a new request for a ROW accordingly.

#### IV. *Special Stipulation 7 — Bonding Requirements*

As noted above, as a condition of the authorized officer issuing a written notice to proceed, Special Stipulation 7 requires Heath to post a bond in the amount of \$230,000 (\$61,400 for Segment 2 and \$168,600 for Segment 3) “until restoration of disturbed areas and other requirements relative to the construction phase of the project have been accepted by the authorized officer.”

##### A. *Authority for and Purpose of the Bond*

Section 504(i) of FLPMA, 43 U.S.C. § 1764(i) (2000), provides:

Where he deems it appropriate, the Secretary concerned may require a holder of a right-of-way to furnish a bond, or other security, satisfactory to him to secure all or any of the obligations imposed by the terms and conditions of the right-of-way or by any rule or regulation of the Secretary concerned.

BLM regulations at 43 C.F.R. § 2805.12 provide that by accepting a ROW grant, a grantee agrees to abide by certain terms and conditions including:

(g) If BLM requires, obtain, and/or certify that you have obtained, a surety bond or other acceptable security to cover any losses, damages, or injury to human health, the environment, and property in connection with your use and occupancy of the right-of-way, including terminating the grant, and to secure all obligations imposed by the grant and applicable laws and regulations.

Under the statute and regulation, BLM has discretion in determining whether a ROW bond is necessary. In *Robert A. Erkins*, 121 IBLA 61 (1991), BLM conditioned the grant of a ROW for a reservoir expansion on the ROW holder furnishing a bond for reclamation of the land affected by the ROW to protect the Government from loss if the reservoir expansion was not completed or if the required reclamation was not performed when the right-of-way was terminated. After observing that FLPMA section 504(i) authorized this action, we upheld cancellation of the ROW grant after the bond was cancelled and no new bond furnished. 121 IBLA at 64. *See also, e.g., Frank A. Keele*, 107 IBLA 296, 301 (1989); *Mallon Oil Co.*, 104 IBLA 145, 152 (1988).

According to BLM, the purpose of the bond requirement in the instant case is

to ensure that, if Heath abandons or is unable to complete his entire road and house construction project and the need for his access road over public lands in segments 2 and 3 no longer exists, BLM will have

sufficient funds to rehabilitate public land resources disturbed by construction of the road to their pre-disturbed condition.

Answer at 25; *see also* Answer Supp. at 11, *quoting* letter dated Mar. 2, 2007, from BLM's counsel to Heath's counsel.

Heath does not appear to challenge BLM's authority under the regulation generally, but asserts that BLM may not impose this requirement on Heath because BLM has not required other ROW holders in the area to post similar bonds of like magnitude, even when the other ROW exceeds the length of the proposed ROW here. *See* SOR at 9; SOR Supp. at 22. Heath quotes the provisions from ROWs granting access to several other properties in the area, noting that none of the bonds for purposes identical or similar to the bond here exceeds \$1,000. He further notes that the same authority to require a bond, whether under the present regulation or its predecessor provision originally promulgated in 1980 (*see* the former 43 C.F.R. § 2803.1-4 (1994)), has been in place for approximately 27 years, during which the other ROWs were issued and their bond amounts set. SOR Supp. at 22-25.

Heath further notes that "none of the other right-of-way grants attached hereto have any bond requirements conditioned on the satisfactory construction of the house to be accessed by the driveway in question as asserted by the BLM as one of the purposes of the bond" in BLM's Answer at 25, quoted above. SOR Supp. at 25. Heath asserts that at the very least, Special Stipulation 7 should be modified to clarify that the purpose of the bond is not to maintain it indefinitely on the possibility of some future abandonment after it is completed, but to maintain it "to the time when the construction phase of the road (but not the house) have been completed to the satisfaction of the requirements concerning such construction in the other conditions and stipulations" in the proposed ROW grant. *Id.* at 26.

In its Answer Supplement, BLM asserts that the conditions for the issuance of the other ROW grants Heath cites are not similar to Heath's, citing the attached affidavits of BLM employees Lownes and Roy L. Masinton. According to the Lownes affidavit, at 1-2, ¶ 3, three of the four ROWs Heath cites cover the same (or part of the same) route in the Bighorn area crossing terrain similar to Heath's, were processed between 13 and 24 years ago, and have since been closed. Lownes states that a portion of that route was never constructed, that the portion that was constructed did not serve a residence and was abandoned, and that BLM has no funds with which to rehabilitate the road. Lownes states:

It will remain indefinitely as a "road to nowhere" until funding can be found to reclaim it. Ms. Weed, the last remaining grant holder on this road was unable to get the required permits from Boulder County to proceed. Similar situations have since taught the BLM the importance

of adequate bonding and assuring that proper County permits can be acquired.

*Id.*<sup>7</sup> Masinton's affidavit, at 2, ¶ 7, is to similar effect. In other words, BLM is requiring a bond from Heath because of lessons learned from previous problems. Thus, in BLM's view, even if the bond required of Heath is "unprecedented" relative to other ROW grants on Bighorn Mountain, it is an appropriate exercise of BLM's authority under the regulation and consistent with its policies. Answer Supp. at 14.

With respect to the scope of the purpose for the bond, BLM asserts:

[I]t is not unreasonable to anticipate that Heath may abandon construction of his access road or house on his property for any number of foreseeable reasons, *e.g.*, cost or lost personal interest, and it would be in the public interest to rehabilitate public resources injured or lost by his incomplete construction project. If Heath abandons his project prior to completion, he may have constructed a road that ends for no apparent reason in the woods and provides no utility for public purposes. Absent a house on his property, he will have no need for vehicular road access to his property for its reasonable use and enjoyment. If abandonment occurs, it would be in the public interest to restore public land resources injured by construction work on his road to their pre-disturbed conditions to prevent soil erosion and lost resources.

Answer Supp. at 12-13.

[3] We agree with BLM to the extent that the fact that it did not obtain bonds from other ROW grantees to fund rehabilitation of now-closed ROWs does not prohibit BLM from requiring an appropriate bond from Heath to secure the costs of rehabilitating the land covered by the ROW if construction on Segment 2 and Segment 3 is abandoned or is not completed. There is no principle of law that prevents an agency from learning from its mistakes and in the future exercising authority that it already possesses under the statute and regulations to correct those errors. The fact that BLM did not require higher bonds (or any bonds) of the other grantees when granting their applications many years ago does not constitute an interpretation of the regulation that would bar the agency from requiring a more adequate bond in the future.

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<sup>7</sup> Lownes also asserts that the fourth ROW Heath cites was an existing road on nearly level grade that needed only maintenance. Therefore, Lownes states, there were no resource concerns requiring a bond. *Id.*

However, we disagree with the position BLM has asserted in its Answer and Answer Supplement that Special Stipulation 7 requires Heath to maintain the bond through completion of construction of a house on the property. That stipulation, as quoted previously, requires that Heath maintain the bond “until restoration of disturbed areas and other requirements *relative to the construction phase of the project* have been accepted by the authorized officer.” (Emphasis added.) The “project” is the construction of the driveway on the ROW. There is nothing in the proposed ROW grant that implies that the term “construction phase of the project” includes construction of the planned house.

We also question whether BLM has the authority to require Heath to maintain a bond through completion of the house once construction of the driveway is completed. If Heath obtains the building permit for the house, as Special Stipulation 4 requires before a notice to proceed will be issued, BLM has greater assurance that the ROW will be used for the purposes intended. Once Heath has a building permit for the house, he may undertake construction of Segments 2 and 3, which he presumably would have to complete before he could build the house. If Heath completes construction of Segments 2 and 3 of the driveway, and restoration of any areas disturbed as a result of that work to the satisfaction of the authorized officer, the purpose of the bond has been fulfilled.

Special Stipulation 7 does not require, and we question whether BLM could require, Heath to construct the house on a specific timetable at peril of losing the ROW and having to rehabilitate it to its pre-disturbed state. Unless Heath fails to use the ROW for a continuous period of 5 years, it cannot be regarded as abandoned under 43 C.F.R. § 2807.17(c) simply because the house may not be complete. Therefore, there is no basis on which to compel Heath to continue to maintain the bond for reclamation of a ROW on which work has been completed. Thus, to the extent Special Stipulation 7 may be regarded as ambiguous, we interpret the phrase “construction phase of the project” to refer to construction of the driveway on the ROW.

Finally, Heath asserted that a bond for Segment 2 is unnecessary because that segment will become part of the vehicular access to Boulder County’s proposed park, and, therefore, will not need restoration by Heath (after construction of his driveway over Segment 3). SOR at 10-11. As noted above, whether or when Boulder County would use Segment 2 as part of a road to the park it intends to establish is speculative at this point, and it is unclear whether the plans for a park will ever come to fruition. Heath’s argument in this respect therefore lacks merit.

It is unnecessary to address the question of the timing of submitting the bond, *see* SOR Supp. at 26-27, because BLM has agreed with Heath’s position that the bond

should be posted before obtaining the written authorization of the authorized officer to proceed with construction. Answer Supp. at 11-12.

We therefore affirm the requirement to post an appropriate bond. The next series of issues pertain to whether there is error in the BLM's analysis regarding the amount of the bond that BLM is requiring.

B. *The Amount of the Bond*

In the preamble to the final rule in which 43 C.F.R. § 2805.12 was promulgated, BLM discussed the comparable provision at 43 C.F.R. § 2885.11(b)(7), which addresses ROWs for oil and gas pipelines issued under the Mineral Leasing Act, 30 U.S.C. § 185 (2000), and which was promulgated as part of the same rulemaking. BLM explained:

We received many comments regarding bonding for right-of-way grants. . . . We believe that the bond amount should be set on a case-by-case basis and the amount is dependent on the nature and risk of an authorized use. . . .

Several commenters said that BLM must identify how we determine the amount of the bond. Commenters said that BLM should list those factors, which the agency considers when setting the amount of the bond. We did not change the final rule as a result of this comment. We believe it reasonable to establish the bond amount on a case-by-case basis. This decision will be part of the administrative record for the case. Among the factors that we will use to determine bond amounts are the expected costs to the agency to restore and reclaim disturbed areas and to repair damage to scenic, aesthetic, cultural, and environmental values and to protect public health and safety. Those costs can include both direct costs for things such as equipment and labor and indirect costs for administrative overhead costs.

70 Fed. Reg. 20,970, 21,043 (Apr. 22, 2005). The same principles apply to FLPMA ROW bonds.

Heath disputes several elements of the calculated bond amount. An individual challenging the amount of a bond that BLM requires must show error in BLM's decision. *See Pilot Plant, Inc.*, 168 IBLA 193, 199 (2006), and cases cited; *see also Daryl Richardson*, 125 IBLA 132, 136 (1993).

The elements making up the total original bond amount in this case were itemized in what BLM calls an “Engineer’s Opinion of Probable Cost” (EOPC) to rehabilitate the lands traversed by Segments 2 and 3 that was attached to BLM’s May 10, 2007, letter transmitting the proposed ROW grant. For convenience, we will use the term “original EOPC” to refer to the two pages titled, respectively, “BLM Portion of Segment 2 of Heath Road Rehab Opinion of Probable Unit Cost” and “BLM Portion of Segment 3 of Heath Road Rehab Opinion of Probable Unit Cost” that were attached to that letter.

In his original SOR, as noted above, Heath challenged the added 15 percent (of estimated costs) “contractor overhead,” the 10 percent “contractor profit,” the 25 percent “Remote Site Premium,” the 15 percent for construction contract administration, the 15 percent for “contingency,” and the 19 percent “service charge.” In its Answer, BLM argued generally that Heath’s objections were unsupported by evidence, and relied on an affidavit of Mitrision dated September 20, 2007 (Mitrision First Affidavit), attached to BLM’s original Answer. Answer at 26-27, 37-39. That affidavit asserted that the unit costs stated in the original EOPC “are an average of historical contracted costs paid by BLM for similar items.” Mitrision First Affidavit at 3. He further averred that the additions for contractor overhead, contractor profit, remote site premium, and contract administration by a responsible engineer “are standard and reasonable margins for costs of a construction project in Colorado and have been similarly applied to EOPCs prepared by BLM for similar projects,” *id.*, although no documentation or examples of these assertions were included.

BLM’s Answer Supplement and the Mitrision Second Affidavit revised the amount of the Special Stipulation 7 bond downward as a result of discovering “certain typographical and mathematical errors” in the original EOPC. Answer Supp. at 16. The new bond amount is \$185,000 — \$45,000 lower than the original amount. The changes were (1) to reduce the unit cost for road base removal from \$100 to \$10; (2) to reduce the cost of grass seed, mulch, hay, etc.; and (3) to reduce the costs of the respective percentage add-ons (for contractor overhead, contractor profit, remote site premium, construction contract administration, and contingency) accordingly. Mitrision Second Affidavit at 3-8.

Further arguments regarding particular cost elements were included in BLM’s Answer, Mitrision’s first affidavit, Heath’s SOR Supplement and attached affidavits, and BLM’s Answer Supplement and Mitrision’s second affidavit. Therefore, we will address the respective cost elements separately.

1. “Contractor Overhead” and “Contractor Profit”

In submitting his SOR Supplement, Heath attached the affidavits of Leon Milacek, owner and operator of a Boulder excavation firm since 1989, and Alison

Peck, owner and operator of a Boulder landscaping firm since 1984. Both of these affiants state that as contractors, their profit and overhead are built into the charges for time and materials and are not billed separately. Milacek affidavit at 2, ¶ 3.h; Peck Affidavit at 3, ¶ 3.f. Mitrision responds to this in his second affidavit by stating:

Since Mr. Milacek intends to make no profit or cover his overhead in this project I assume that he is doing the work on a pro bono basis. While this is a nice gesture it is not a true reflection of the real world costs of operating a business of any kind.

Mitrision Second Affidavit at 8. *See also id.* at 9. This statement does not refute Milacek's point. Mitrision's original EOPC as well as the revised EOPC incorporated into his second affidavit expressly state that the unit costs for the functions identified (e.g., "road base removal," "culvert removal," "flared end sections removal," etc.) are "an average of historical contracted costs *paid by the BLM* for similar items" (emphasis added) — *i.e.*, an average of historical costs that BLM has paid to private contractors for the types of functions listed. That unit cost presumably would have included the contractor's time in performing such functions. Mitrision does not assert anywhere that the contracts BLM has used for these functions are "cost-plus" contracts, under which the price paid is calculated on the basis of the contractor's actual costs (whatever they may be) plus an agreed 10 percent profit margin. Nor does Mitrision assert (nor do the copies of bids for BLM projects appended to Mitrision's second affidavit reflect) that contractors separately billed BLM for "overhead" under such contracts as a flat percentage (15 percent) of all other costs. Further, we would not expect that contracts for the kinds of work involved here ordinarily would be so structured.

Under these circumstances, and based on the existing record, Heath has met his burden to show error in BLM's analysis with respect to these two elements of the bond amount.

## 2. "Remote Site Premium"

Heath asserted that the 25 percent remote site premium is unreasonable because the site is close to the City of Boulder and no local contractor would consider it reasonable. SOR at 10. In response, Mitrision asserted that the 25 percent remote site premium compensates a contractor located in Boulder for the "added costs of employee time, fuel, and materials delivery required to drive from Boulder up the approximate nine miles of Sunshine Canyon Road to reach the site." Mitrision First Affidavit at 3 n.1. Milacek states in his affidavit attached to Heath's SOR Supplement that it is standard practice for contractors to charge a "relocation fee" of a few hundred dollars to move between job sites in the primary geographical area in which they work (which includes all of Boulder County). Milacek Affidavit at 2, ¶ 3.g.

Peck's Affidavit states that the company charges a mobilization fee of 6 percent. Peck Affidavit at 2, ¶ 3.e. Both Milacek and Peck state there was nothing to justify the remote site premium in the BLM estimate, and that such a fee would make their firms non-competitive except in the context of a no-compete bid.

Mitrision's second affidavit responds by stating:

28. Mr. Milacek states in his affidavit that he has never worked in a remote location but if he did it would cost an additional "\$200.00". It is apparent that Mr. Milacek's lack of experience at remote sites has left him ignorant of the costs involved to get labor, materials, and fuel to work at a remote site.

29. It takes approximately an hour to reach the work site in a four wheel drive vehicle. This amounts to at least a two hour round trip for anyone attending the site. Based on a standard 10 hour, construction work day this implies that 20% of the day is consumed by traveling to the site. I do not know how Mr. Milacek can cover a 20% increase in a several thousand dollar [sic] by adding an additional "\$200.00" to his estimate.

Mitrision Second Affidavit at 9.

First, Mitrision mischaracterizes Milacek's affidavit. Milacek did not say that he had never worked at a remote site. The import of his affidavit is that locations within Boulder County are not remote sites. Mitrision's attempt to undermine the opinion of an excavating contractor who has been in the business in Boulder for almost 20 years on the basis of a mischaracterization of his statement does not refute that statement.

Second, Mitrision's arguments on their face lack some credibility for several reasons. For travel to the work site to take an hour, the average driving speed would be approximately 9 miles per hour. However, maps in the record show that the route from Boulder to the beginning of Segment 1 of the proposed ROW (the road judicially declared to be a public road) is over an established paved road, Sunshine Canyon Drive (County Road 52). Assuming that by the term "work site" Mitrision is referring to the beginning of Segment 2, only 2,222 feet (less than a half mile) of the route from Boulder is over the unpaved road of Segment 1 on Bighorn Mountain. It strains credulity to assert that vehicles going to the work site can make no better time than an average of 9 mph over a route of which more than 95 percent is paved road.

In addition, one would not expect that the prices BLM has paid to other contractors for similar work — prices that BLM states were the basis for the averages

used in the original EOPC and the revised EOPC — would all have involved contracts for work in the immediate neighborhood of the contractor's offices. Undertaking road building or rehabilitation work more than 9 miles from where a contractor is located can only be routine for those engaged in that business.

Neither BLM nor its employee Mitrision have explained why the fact that the site is 9 miles out of the City of Boulder would increase the costs of rehabilitation of this rather short ROW (if Heath does not finish it) by 25 percent — more than \$24,500, according to the revised figures in paragraphs 11 and 13 of Mitrision's second affidavit — over what they would be if the work was a few miles closer at the foot of the Front Range. We therefore find that the "remote site premium" of the magnitude included in the EOPC lacks rational justification.

### 3. *"Construction Contract Administration"*

Mitrision stated that the 15 percent for construction contract administration covers costs of additional engineering that may be needed to complete rehabilitation (for example, "if the road is never finished and the site is left in a mess"), and the costs of the BLM contracting officer and project inspector through the final inspection. Mitrision First Affidavit at 3 n.2. Milacek and Peck assert that any "construction administration fee" is built into the cost estimates for time and materials. Milacek Affidavit at 2, ¶ 3.h; Peck Affidavit at 3, ¶ 3.f.

Mitrision's first affidavit suggests that he had two elements in mind regarding the construction contract administration element of the EOPC. The first was additional engineering that may be needed if the road is not finished and "the site is left in a mess." The second is supervision by the BLM contracting officer and project inspector (it is unclear if the two are necessarily different people). It would appear that if the construction of the road on the ROW is not finished and the project is abandoned, the site likely would be "left in a mess" (whatever that means) to some extent, and that remediation of a "mess" would be part of the contract to rehabilitate the ROW for which a contractor would submit a bid. One would expect that remediating a "mess" left by unfinished work would be taken into account in the time component of a contract bid or price. The same is true of supervision by contractor employees of the work of subordinate contractor employees. Mitrision did not cite any instance in which a contractor billed BLM separately for additional engineering work for "mess" remediation or for supervision of work by contractor personnel.

At the same time, it is proper to include a reasonable estimate of the costs for time necessary for BLM supervision and inspection. Mitrision's revised EOPC shows more than \$14,600 allotted to construction contract administration, but he has not explained how he derived that figure. While some amount for contract administration by BLM is appropriate, the amount allotted to this in the revised EOPC

does not appear to be rationally connected to the facts as they are currently known. Moreover, the relationship between contract administration and the additional percentage charged for administrative fees by BLM's Business Center (discussed below) is unclear.

#### 4. "Contingency"

BLM also asserted that the 15 percent "contingency" was justified because "[t]he mere fact that a cost is itemized does not eliminate unforeseeable contingencies from arising." Answer at 38. Milacek and Peck assert that amounts for contingencies are built into the time and materials estimates. Milacek Affidavit at 2, ¶ 3.h; Peck Affidavit at 3, ¶ 3.f. Mitrision's second affidavit responds: "All projects come with contingencies. They are unpredictable but it is inconceivable to assume that a project will be completed with no changes. Included [sic] no contingency fee in an estimate is a sure way to cause project failure or contractor bankruptcy." Mitrision Second Affidavit at 8.

It appears that the opposing affiants are talking past each other to some extent. From the contractor's perspective, some amount for unforeseen contingencies most likely would be incorporated into the time and materials estimates on which the contractor's bid is based. From BLM's perspective, a contingency would involve additional work and associated costs that were unforeseen at the time a contract was entered into. It may turn out, for example, that more work than originally anticipated is necessary. We believe it is reasonable for BLM to include in the amount of the bond required to secure reclamation costs some additional amount for unforeseen contingencies. Whether 15 percent is reasonable under the circumstances has not been addressed in the arguments made in this appeal.

#### 5. "Service Charge"

BLM and Mitrision stated that the 19 percent administrative charge is for indirect costs and is imposed by the BLM National Service Center under IM 2007-087, dated March 15, 2007. *Id.* at 3-4; Answer at 38-39.<sup>8</sup> In *Nevada Power Co. v. Watt*, 515 F. Supp. 307 (D. Utah 1981), *aff'd and remanded*, 711 F.2d 913 (10th Cir. 1983), a case involving a deposit for costs for preparation of an

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<sup>8</sup> BLM did not attach a copy of IM 2007-087, but stated that a copy of the predecessor IM, IM 2006-046, was sent to Heath's counsel on Feb. 21, 2007. Answer at 38-39. A copy of IM 2006-046, which expired on Sept. 30, 2006, was attached to a letter dated Feb. 21, 2007, from counsel for BLM to Heath's counsel. Why BLM has not included in the record a copy of the specific IM on which it relies is not explained. As explained below, there are discrepancies in the record regarding the percentage to be applied to the direct costs to derive the indirect costs.

environmental impact statement in connection with a FLPMA ROW application, the court noted:

“Indirect costs” are costs that cannot be identified with a particular right-of-way project. They include salaries of general administrative personnel; costs of certain organizational components such as the BLM Record System Division, Office of Equal Employment Opportunity, and safety officers; and miscellaneous expenses such as telephone bills, office space rental, postage and employee transfer costs. Indirect costs are added to the direct costs by charging the applicant an additional percentage of the direct costs.

515 F. Supp. at 311.<sup>9</sup> *See also Public Service Co. of Colorado v. Andrus*, 433 F. Supp. 144, 147-48 (D. Colo. 1977).

BLM applied this percentage method to calculate indirect costs (what the original EOPC called “National Service Center Administrative Service Charge”) associated with rehabilitation work if the ROW construction were not completed, but there are differing statements in the record regarding what percentage rate should be applied to the direct costs. IM 2006-046 specified a 19.7 percent rate, but that IM expired on September 30, 2006. As noted previously, IM 2007-087 is not in the record. The original EOPC applied a 19 percent rate. Mitrision’s second affidavit, at 8, states that the rate is 17.3 percent. On the existing record, we cannot determine whether the proper rate is 19 percent or 17.3 percent or some other rate. This issue must be remanded to BLM. The proper rate also will be applied to an amount for direct costs that is adjusted for the reasons explained in Mitrision’s second affidavit and must be further adjusted for the reasons discussed below.

#### 6. *Other Errors in the Bond Amount*

In both the original EOPC and the EOPC as revised by Mitrision’s second affidavit, the same direct cost elements and the same unit costs for each element were used for both Segment 2 and Segment 3. Heath denies that Segment 2 will involve the same magnitude of rehabilitation costs as Segment 3. As support for Heath’s position, Milacek states that he visited the site of the existing and proposed driveway on October 9, 2007. Milacek Affidavit at 1, ¶ 2.e. He states that Segment 2 (like Segment 1) is an existing road and is driveable. Milacek states that in his view, some upgrade is in order in view of lack of maintenance, but asserted that what was needed was for the road to be “bladed, widened slightly to 16’ with the proper cross

<sup>9</sup> The costs were assessed under rules promulgated under the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (2000), and section 201 of the Public Land Administration Act, the former 43 U.S.C. § 1371, which was repealed by FLPMA.

drainage, and culverts (if any) installed at appropriate location/s.” *Id.* at 1-2, ¶ 3.a. Milacek further asserts that “[a]dditional roadbase should not be required for Segments 1 and 2, making any removal for reclamation unnecessary. The existing material, and that material that is produced during maintenance, is rocky and will break up to create a satisfactory surface.” *Id.* at 2, ¶ 3.c. He further states that these segments “have not contributed to washouts or erosion after over a century of being unmaintained,” and the blading upgrade he proposes “will not impact the stability of the surrounding area either.” *Id.* at 2, ¶ 3.d.

Neither BLM’s Answer Supplement nor Mitrision’s second affidavit contain contrary assertions or evidence. Moreover, BLM’s 2006 EA observes that “[t]he increase in erosion from Segments 1 and 2 would be small and probably immeasurable compared with the current situation.” 2006 EA at 14.

In our view, Heath has raised significant questions as to whether rehabilitation of Segment 2, if he does not finish the driveway and abandons the ROW, would require the same rehabilitation costs as might be required for Segment 3, over which no road currently exists. Therefore, on remand BLM should reevaluate and recalculate potential rehabilitation costs for Segment 2.

Heath also maintains that Special Stipulation 2, which requires the 50’ x 50’ parking loop, “unnecessarily increases the construction costs assumed by BLM” which, in turn, “erroneously inflate the construction costs which Mr. Mitrision has assumed as the basis for his calculation of the eventual costs of rehabilitating these portions of the proposed driveway.” SOR Supp. at 19. In view of our conclusion above that the requirement to construct the 157-foot-long loop is questionable, we agree. It is unclear whether Mitrision included the costs for the loop in the estimates for Segment 2 or for Segment 3 in the original and revised EOPCs, but in either event the estimated rehabilitation costs must be recalculated in conjunction with BLM’s reassessment of the appropriate size of the parking loop.

With regard to Segment 3, Milacek asserted that should construction of the driveway be abandoned, “all measures necessary for the reclamation of Segment 3 will already be in place. Standard construction techniques, particularly in the mountain areas of Boulder County, call for stockpiling of cut/fill material, boulders suitable for retaining walls and landscape features, among others.” *Id.* at 2, ¶ 3.e. (In the context of this paragraph, we infer that “all measures necessary” refers to all materials necessary.) In other words, Milacek asserts that standard practice in this area will leave material cut during construction and not used as fill available on the site for use as fill in the event rehabilitation is necessary.

BLM’s Answer Supplement and Mitrision’s second affidavit do not refute or address these assertions. We note that Mitrision sent an e-mail to Lownes on May 5,

2006, answering several questions that Lownes had posed in a message the previous day. Those questions and answers include the following:

- *Whether large amounts of blasting or heavy bulldozing will be required to establish a suitable width for safe vehicle driving on the proposed road [i.e., on Segment 3].*

The portion of road on BLM [land] may not require any blasting. I don't know what you mean by large.

- *Whether excess rock and fill materials will go into retaining walls. If not, whether the rocks or fill materials will have to be pushed over the steep slopes.*

Good point. The retaining walls are faced with rock from the excavations, but the general notes in the plans do not appear to address what should be done with any "extra" rock. We can add steps for this by modifying the following specs as necessary . . . .

May 5, 2006, e-mail at unpaginated 1. This appears to be generally consistent with Milacek's assertions with respect to cut material being available as fill for rehabilitation of the portions of Segment 3 on BLM land.

Both the original EOPC and the EOPC as revised by Mitrision's second affidavit anticipate cutting more material (2,060 cubic yards (cy) total) than fill (1,330 cy). Why this would be so in a rehabilitation, as opposed to a construction, operation — particularly in view of having at least most of the material cut during construction and not used as fill on site, as Milacek and, apparently, BLM contemplate — is not apparent and is not explained.

Therefore, on remand, BLM should recalculate the estimated costs for rehabilitation of Segment 3, should construction of the driveway be abandoned, to take into account how much fill could be expected to already be on site as a result of the construction work, how much additional fill might need to be obtained, and how much, if any, additional cutting would be necessary during rehabilitation.

[4] For all of the reasons discussed above, it is necessary to set aside the bond amount and remand to BLM to recalculate it in light of this decision. In an effort to expedite processes that have already dragged on for years, and to avoid factual disputes and the potential necessity for a hearing to resolve such disputes, we encourage the parties to attempt to reach an agreement as to an appropriate bond amount in light of the preceding discussion.

V. *Equal Protection Claims*

[5] As mentioned previously, Heath's SOR Supplement couches many of his arguments in terms of equal protection rights under the due process clause of the Fifth Amendment to the U.S. Constitution. *See, e.g.*, SOR Supp. at 10-13. This Board has long held that it is not the proper forum for deciding constitutional questions. *See Rainer Huck*, 168 IBLA 365, 400 (2006); *Fred E. Payne*, 159 IBLA 69, 80 (2003); *Carey Horowitz*, 138 IBLA 330, 345 (1997); *Laguna Gatuna, Inc.*, 131 IBLA 169, 173 (1994); *Organized Sportsmen of Lassen County*, 124 IBLA 325, 330 (1992); *Slone v. Office of Surface Mining Reclamation & Enforcement*, 114 IBLA 353, 357-58 (1990).

Thus, we will not address Heath's constitutional equal protection claims here. They would properly be submitted to the Federal courts.

In addition, we do not believe that Heath has been subject to an unequal application of the relevant statute and regulations. *See Alyeska Pipeline Service Co.*, 167 IBLA 112, 130 (2005). The fact that BLM has learned from adverse experience that it should use the authority it possesses to require proper bonds or other conditions in the context of certain ROW grants does not imply that Heath has been the victim of an unequal application of the law. Otherwise, failure on the part of an agency to use its authority in early cases would operate to deprive it of that authority in all future cases. That is not the law, and we therefore reject this argument.

*Conclusion*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we —

- (1) dismiss that portion of the appeal regarding the presumption of abandonment as premature;
- (2) reverse the requirement in Special Stipulation 2 to submit a plan of development for Segment 1;
- (3) affirm the provision in Special Stipulation 2 requiring a plan of development for construction or improvement of Segment 2;
- (4) set aside the requirements of paragraph 2.b and Special Stipulation 2 to submit a separate plan of development to construct a 50' x 50' parking loop, and remand this issue to BLM for reconsideration of the appropriate size of a parking area;

(5) affirm Special Stipulation 4 with regard to the requirement to obtain (1) a building permit for the house, and (2) either the site plan review, the limited impact review, or documentation that neither permit is required, for construction, reconstruction, or maintenance on the road before the authorized officer will issue a notice to proceed;

(6) affirm the requirement of Special Stipulation 7 to post an appropriate bond to secure potential costs of rehabilitation of the ROW in the event the driveway is not completed and the ROW is abandoned; and

(7) set aside the bond amount and remand to BLM for recalculation of the bond amount consistent with this decision.

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge

I concur:

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