



BRYAN LOLLICH

176 IBLA 239

Decided December 17, 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

BRYAN LOLLICH

IBLA 2008-192

Decided December 17, 2008

Appeal from a decision of the Ridgecrest (California) Field Office, Bureau of Land Management, denying a road right-of-way application. CACA 46310.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Nature of Decision--Rights-of-Way: Federal Land Policy and Management Act of 1976

The Board will affirm a BLM decision rejecting a right-of-way application under Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (2000), and 43 C.F.R. Part 2800, when BLM provides notice that additional information is needed to process the application and the applicant fails to provide the requested information.

APPEARANCES: Karen Budd-Falen, Esq., and Kathryn Brack Morrow, Esq., Cheyenne, Wyoming, for appellant; Erica B. Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Bryan Lollich has appealed from the March 25, 2008, decision of the Ridgefield (California) Field Office, Bureau of Land Management (BLM), denying right-of-way (ROW) application CACA 46310 for motorized vehicle use of the Surprise Canyon Road, also referred to as Route Panamint 71 (Route P 71), to access private property located within Death Valley National Park, administered by the National Park Service (NPS). Surprise Canyon Road passes through BLM-managed

property into the Surprise Canyon Area of Critical Environmental Concern (ACEC).¹ Lollich and 27 others are joint owners of the Independence Millsite, the private inholding involved in this case, near Panamint City at the terminus of Surprise Canyon Road. BLM rejected Lollich's ROW application under section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (2000), and 43 C.F.R. § 2804.26(6) on the basis that Lollich failed to provide the information necessary to process the application. For the reasons that follow, we affirm BLM's decision.

I. BACKGROUND

On March 16, 2000, the Center for Biological Diversity (the Center) filed for injunctive relief in the U.S. District Court for the Northern District of California requesting BLM to immediately prohibit grazing activities that may affect listed species. *Center for Biological Diversity v. BLM*, C-00-927 WHA (N.D. Cal. filed Mar. 16, 2000). The Center alleged that BLM was in violation of section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (2000), by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the CDCA Plan upon threatened and endangered (T&E) species. The case settled after several rounds of negotiations and a series of stipulations that eventually became a consent decree, through which BLM acknowledged that the activities authorized under the CDCA Plan may adversely affect T&E species and agreed to consult with FWS to insure that implementation of the CDCA Plan is not likely to jeopardize the continued existence of T&E species or result in the destruction or adverse modification of their habitat. *Center for Biological Diversity v. BLM*, C-00-927 WHA (N.D. Cal. Aug. 25, 2000) (consent decree). The consent decree provided, *inter alia*, that BLM would close Route P 71 to motorized vehicle use and that BLM would manage the closure through the installation of a locked gate.

On May 29, 2001, BLM published notice of a temporary closure order in the *Federal Register*, providing that Route P 71 would be closed to motorized vehicle use within the Surprise Canyon ACEC and that the closure would remain in effect pending environmental review of a final decision on the status of the road. 66 Fed. Reg. 29,163 (May 29, 2001). BLM prepared its 2001 EA for purposes of reviewing the environmental consequences of the interim closure, identifying no

¹ Surprise Canyon was designated an ACEC in the California Desert Conservation Area Plan of 1980 (CDCA Plan) in recognition of the area's significant natural and cultural resources. See Environmental Assessment (EA) for the Proposed Interim Closure of Surprise Canyon Route P 71 to Motorized Use (EA-CA065-2001-22), May 23, 2001 (2001 EA). The area is also within the larger West Panamint Mountains Wildlife Habitat Management Area (WHMA).

significant effects requiring preparation of an environmental impact statement (EIS) under section 101(2)(C) of the National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000).

BLM's closure order stated that exemptions to the closure may be granted to authorized entities, including holders of private property within Surprise Canyon, with the issuance of a key and an access agreement from BLM. 66 Fed. Reg. at 29,163. Surprise Canyon was to remain open to human use that did not entail the use of motorized vehicles. NPS closed its portion of Surprise Canyon Road in 2002. See BLM's Ex. 11.

On June 12, 2003, a deed was recorded with the Inyo County Recorder's Office by which Garrison and Sarah Norvell conveyed the Independence Millsite to Bryan and Kristan Lollich, and 27 other individuals or husband and wife couples, each to hold an undivided 1/28 percent interest in the property. See BLM's Ex. 5. Five days later, Lollich requested a key and a written agreement from BLM to access the Surprise Canyon Road. See BLM's Ex. 3. In response, BLM and NPS informed Lollich that accessing private property within Death Valley National Park by means of Surprise Canyon Road would require authorization from both the agencies. See BLM's Ex. 4.

BLM and NPS asked Lollich to provide additional information, including (1) a map of his private land in sufficient detail for them to determine the exact location in Surprise Canyon; (2) a copy of the ownership deed; (3) a description of activities that Lollich planned for his private property and on Federal land, enabling BLM and NPS to reach a determination of what constitutes adequate access for reasonable use and enjoyment of his private property; (4) a schedule of dates, number of proposed trips to and from the property, and the number of people who would be involved; (5) the number and type of vehicles intended to be used for access, and a detailed map of the route of travel intended to be used; (6) a description of any specific activities that he deemed necessary to enable him to successfully operate a motorized vehicle in Surprise Canyon for purposes of accessing his property, e.g., rock movement or vegetation removal; and (7) any specific measures he would take to protect the environment on Federal lands in Surprise Canyon from the effects of motorized access to his private property. *Id.*

In response, Lollich submitted a map, a copy of the deed evidencing his 1/28 percent ownership interest in the Independence Millsite, and otherwise declined to provide the requested information. Letter from Lollich to BLM dated July 15, 2003. In response to questions (3) through (7), he argued that the request for information was inconsistent with the consent decree in *Center for Biological Diversity v. BLM*, *supra*, and generally questioned the authority of the agencies to manage the Surprise Canyon Road so as to restrict his access. *Id.*

By letters dated August 14 and September 15, 2003, BLM informed Lollich that it and NPS were diligently analyzing the environmental ramifications of his request for a key and written permission for vehicular access through Surprise Canyon, as well as requests for access by 13 of the other owners of the 28 deeded interests to the Independence Millsite. *See* BLM Exs. 6, 7, and 8. On September 29, 2003, BLM and the NPS issued a “Supplement to the Environmental Assessment for Proposed Interim Closure of Surprise Canyon Route P-71” (EA Supplement) for purposes of evaluating “[t]he written requests by numerous co-owners of the patented Independence Mill site to access their property by use of motorized vehicle” EA Supplement at unnumbered 2. The agencies explained that the earlier interim closure of Surprise Canyon Road to motorized vehicle use applied to all members of the public, including those who owned private property in Surprise Canyon, and that the proposed action would entail, *inter alia*, issuing a key to a locked gate to owners of the private property consistent with the previous notice of interim closure of Surprise Canyon Road. *Id.* at unnumbered 2-3.

On October 24, 2003, the Ridgecrest Field Manager, BLM, issued a “Decision Record for Private Property Access Request to the Independence Millsite” (DR) making the following determination:

Based on my review of the Supplement to the Environmental Assessment for the Proposed Interim Closure of Surprise Canyon Route P-71 . . . , I have determined that the interim vehicle closure of Surprise Canyon applies to all members of the public, including individuals owning property in the Panamint City area, who do not have written authorization from the BLM and NPA to enter the area with a motorized vehicle.

[T]he BLM decision is to not provide landowners a key to the locked gate across Surprise Canyon based on their written requests in the form of letters. Because of the environmental damage to resources within Surprise Canyon that would result from the proposed landowner access to the Independence Millsite, I have determined that they must submit an application for a permit or right of way across federal land to access their property. Upon receipt of an application, the BLM would process the application according to federal laws and regulations governing federal land use and management. Close coordination with the National Park Service would be necessary since the subject private property is an inholding within Death Valley National Park.

DR at unnumbered 2 (emphasis in original). In this DR, the Area Manager discussed the applicability of the consent decree entered by the District Court in *Center for Biological Diversity v. BLM*:

The Consent Decree and Court Orders pertinent to this situation . . . applies only to the BLM. It does not exempt BLM from compliance with applicable laws and regulations in carrying out the provisions of the Court Order. In the case of Surprise Canyon, the Consent Decree and Court Orders indicate that owners of private land in the vicinity of Panamint City may receive a key to a locked gate, and an agreement from the BLM in order to access their property. The Court Order does not exempt BLM from following legal and regulatory procedures in addressing the landowner access requests. At this time there is not [sic] basis for BLM issuing keys and establishing such an agreement because decisions regarding landowner access have not been made. The NPS was not a party in the lawsuit or Consent Decree and, therefore, is not affected.

Id. BLM's decision was to deny unqualified motorized vehicle access to Surprise Canyon to the public, including property owners, explaining as follows:

Landowners of the Independence Millsite have submitted a request or demand for a key to the locked gate across Surprise Canyon for the purpose of driving off-road vehicles across federal [land] in Surprise Canyon to access their recently acquired property. Their request, if granted, would result in appreciable disturbance or damage to federal lands and resources, and therefore cannot be considered a casual use activity. Thus, in order to further consider landowner requests to access their property by driving off-road vehicles through Surprise Canyon, they must apply for a permit or right of way under the provisions received, [and] BLM will process it according to procedures in the regulations.

Id. at 3.

By letter dated November 14, 2003, the agencies informed Lollich that his request for a key to access Surprise Canyon and the information that he had submitted would be treated as pre-application information for processing as an ROW under section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (2000), as well as a related permit to be processed by NPS. They further noted that Lollich had not yet provided the information previously requested. By letter to BLM dated January 9, 2004, Lollich responded to the agencies' November 14, 2003, letter, submitting an application form for an ROW grant and arguing that BLM "has an obligation to honor

[his] valid existing right” and that any action taken by BLM to “limit or divest [his] rights is contrary to established legal principles” under R.S. 2477.² Jan. 9, 2004, Letter from Lollich to BLM. By letter dated March 8, 2004, BLM acknowledged receipt of Lollich’s ROW application form and informed him “that the information requested by the agencies was necessary to complete an assessment of the application in compliance with Federal law.” Mar. 8, 2004, Letter from BLM to Lollich. Lollich did not respond to BLM’s letter. By letter dated November 24, 2004, BLM informed Lollich that the various ROW applications implicated ongoing work by BLM and NPS in preparing an EIS, that the agencies would process the applications concurrently with the planning work underway, and that they would issue formal decisions “regarding vehicle route designation and Wild and Scenic River suitability.” Nov. 24, 2004, Letter from BLM to Lollich. Lollich did not respond to BLM’s letter.

On September 5, 2006, Lollich and others filed a complaint in the U.S. District Court for the District of Columbia seeking unfettered access to Surprise Canyon Road under the Quiet Title Act, 28 U.S.C. § 2409a(a) (2000), asserting as their interest in land their right to use Surprise Canyon Road under R.S. 2477. On December 7, 2006, BLM and NPS filed a motion to transfer and on February 7, 2007, the case was transferred to the U.S. District Court for the Eastern District of California. *See Friends of Panamint Valley v. Kempthorne*, Case No. CV F 07-0487 LJO TAG (E.D. Cal. filed Sept. 5, 2006). The Federal defendants, including BLM and NPS, moved to dismiss the complaint for lack of subject matter jurisdiction. The District Court granted that motion by order dated July 24, 2007, stating:

Plaintiffs have not demonstrated that under federal or California state law, they have a right, interest, or title to assert a claim against Federal Defendants under the Quiet Title Act Plaintiffs’ reliance on California law to discuss whether Surprise Canyon Road is a public highway pursuant to R.S. 2477 does not demonstrate that they may bring a quiet title action. Accordingly, this Court finds that Plaintiffs’

² Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), commonly referred to as R.S. 2477, was repealed by section 706(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2793 (1976). R.S. 2477 provided: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” *See Armando Fernandez*, 165 IBLA 41, 46 n.10 (2005). Although R.S. 2477 is no longer in effect, valid existing rights established prior to the Oct. 21, 1976, enactment of FLPMA were preserved by section 701(a) of FLPMA. *See* 43 U.S.C. § 1701 note (a) (2000); *see also Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005), and Memorandum by Secretary Gale Norton, “Departmental Implementation of *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005),” dated Mar. 22, 2006.

claim that they have a right “as members of the public, to use and maintain” Surprise Canyon Road [is] not cognizable under the Quiet Title Act

Friends of Panamint Valley v. Kempthorne, Case No. CV F 07-0487 LJO TAG (E.D. Cal. July 27, 2004) (order dismissing complaint). The District Court followed *Kansas v. United States*, 249 F.3d 1213, 1224 (10th Cir. 2001), in which the Tenth Circuit followed the principle that “[a] quiet title action may be brought by anyone claiming an interest in real property,” and that such “interest, however, must be some interest in the title to the property.” The District Court held that the Friends of the Panamint had not demonstrated the requisite interest under the Quiet Title Act.

On September 13, 2007, Lollich and the other 27 owners of the Independence Millsite filed with the California District Court a “Motion for Civil Contempt,” requesting that BLM be held “in civil contempt . . . for failing to provide access to private property owners to their private property, as allowed in the consent decree in [*Center for Biological Diversity v. BLM*, No. C 00-00927 WHA (Mar. 20, 2001)].” Motion for Civil Contempt at 1. Lollich contended that access to the Independence Millsite is protected by an exception in the consent decree, as well as section 708 of the California Desert Protection Act of 1994 (CDPA), 16 U.S.C. § 410aaa-78 (2000),³ and section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (2000).⁴ The District Court concluded that the

³ The CDPA designated certain lands in the California Desert as wilderness, established the Death Valley and Joshua Tree National Parks, and established the Mojave National Preserve. Section 708 of the CDPA provides:

The Secretary [of the Interior] *shall* provide adequate access to nonfederally owned land or interests in land within the boundaries of the conservation units and wilderness areas designated by this Act which will provide the owner of such land or interest the reasonable use and enjoyment thereof.

16 U.S.C. § 410aaa-78 (2000).

⁴ Section 1323(b) of ANILCA provides:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 as the Secretary deems adequate to secure the owner the reasonable use and enjoyment thereof: *Provided*,

(continued...)

exception relied upon by the proponents “reserved the issue of whether landowners could have access to inholdings. It did not create an affirmative right for landowners to have motor-vehicle access to the Surprise Canyon road.” Order Denying Motion for Civil Contempt at 7. The District Court rejected the proponents’ argument that BLM had violated several Federal statutes, including the above-cited provisions of FLPMA, ANILCA, and the CDPA, by not allowing them motorized vehicle access in accordance with their interpretation of the consent decree. The District Court stated:

Proponents are essentially arguing that the consent decree requires that BLM’s obligations under these laws trump its obligations under all others. The consent decree does require that BLM must follow federal and state laws, but that requirement is limited to BLM’s affirmative obligations under the consent decree. . . . All that was intended was that the affirmative obligations imposed by the decree were subject to the agency’s duties imposed by statute. Moreover, giving the inholders motor-vehicle access could run afoul of the agency’s NEPA obligations under the consent decree. The two foregoing reasons are sufficient by themselves to deny proponents’ request for motor-vehicle access to the inholdings. . . .

Id. at 8. The District Court further rejected proponents’ argument that BLM violated the consent decree by requiring them to submit applications for permits or ROWs, stating that the consent decree does not confer “some automatic right to have motor-vehicle access to the canyon road.” *Id.* at 8-9.

By letter dated October 12, 2007, BLM indicated to Lollich that it had not received the additional information requested in previous letters dated June 25, August 14, September 15, and November 14, 2003, that BLM deemed necessary to process his ROW application. BLM informed Lollich, *inter alia*, that the information was needed to complete his application and that his failure to provide it would subject his application to denial. Lollich did not respond to BLM’s letter.

By decision dated March 25, 2008, BLM rejected Lollich’s ROW application “[b]ased on [his] failure to provide . . . the information necessary to process [his]

⁴ (...continued)

That such owner comply with rules and regulations applicable to access across public lands.
16 U.S.C. § 3210(b) (2000).

In *Wilderness Watch*, 168 IBLA 16, 43-44 (2006), the Board summarized the “considerable debate” as to whether section 1323(b) of ANILCA applies to public lands outside Alaska in the following terms: “Suffice it to say that the Board has not reached a definitive conclusion on the point.”

application,” as BLM requested in the October 12, 2007, “application deficiency notice, and in accordance with Title 43 CFR 2804.26(6)” This appeal followed.

II. ARGUMENTS OF THE PARTIES

In his statement of reasons (SOR), Lollich argues that BLM’s denial of his ROW application violates section 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (2000). He reviews the pertinent Board cases interpreting and applying section 1323(b) of ANILCA and observes that “the issue of ANILCA application to BLM lands outside Alaska is still open.” SOR at 16, *citing Armando Fernandez*, 165 IBLA at 46. He argues that “should this Board determine that ANILCA is inapplicable to BLM lands outside the state of Alaska, the statute violates the Appellant’s rights under the First Amendment and the Fourteenth Amendment’s Equal Protection Clause because it treats similarly situated landowners in a different manner, and this application lacks a rational basis.” SOR at 17, *citing Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989), and *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999).

Lollich asserts that “[u]nder the CDPA, both Panamint City and the Surprise Canyon Road were specifically excluded from inclusion within the BLM Surprise Canyon Wilderness and the Death Valley National Park Wilderness.” SOR at 19. Further, Lollich emphasizes that “the CDPA contains a provision nearly identical to that contained in ANILCA, ensuring access to private lands surrounded by public lands.” *Id.* He concludes that BLM’s decision “is an unacceptable breach of the rights contained within ANILCA and the CDPA.” *Id.* at 20.

Lollich next argues that “BLM’s final decision . . . was arbitrary and capricious because it neither followed correct procedures for evaluating [his] right-of-way application, nor provided a reasoned analysis of the facts involved when it denied the application.” *Id.* He asserts that under 43 C.F.R. § 2804.25(b) (2007), if BLM “needs more information to adequately evaluate the right-of-way application, it should ‘identify this information in a written deficiency notice asking [the applicant] to provide the additional information within a specified period of time.’” *Id.* According to Lollich, although BLM’s “sole reason” for denying his ROW application was that he failed to provide BLM with requested information, BLM “never provided a ‘written deficiency notice’ as required by 43 C.F.R. § 2804.25(b).” *Id.* He claims that BLM sought the information prior to his ROW application, that the agencies had informed him “numerous times” that a decision on his application would not be reached until the NEPA process was completed, and that “[i]t was not until October 2007 . . . that the BLM sent a vague request for more information.” *Id.* at 21. He argues that the October 2007 request cannot be considered a “written deficiency notice” adequate under 43 C.F.R. § 2804.25(b). Further, he contends that, in response to BLM’s request, he in fact provided maps and a deed to the property, and that BLM failed to

provide the clarification he sought regarding the other items of information requested by BLM.

Lollich concludes that “the present record contains ample evidence upon which to base a determination that [he] has an enforceable right to access across federal land managed by the BLM.” *Id.* at 25. He asks that this matter be remanded to BLM with instructions to grant his ROW within an established time frame.

In response, relying upon *Kenneth W. Bosley*, 99 IBLA 327, 338-39 (1987), and 43 C.F.R. § 2804.26(a)(6), BLM argues that it may deny an ROW application “if the applicant fails to adequately comply with a deficiency notice or with any BLM request for additional information needed to process the application,” and that “[n]o particular form of deficiency is required.” Response at 10. BLM insists that “Lollich was informed at least 4 times . . . that the agencies needed additional information in order to process his access request.” *Id.* at 10-11. BLM describes Lollich’s failure to comply with its requests in the following terms:

During that four year period of time, instead of providing the information requested by the agencies, Appellant Lollich questioned the agencies’ request, filed litigation against the BLM seeking to hold it in contempt for failure to comply with a previously entered consent decree, filed separate litigation seeking ‘unfettered access’ to his property pursuant to an RS 2477 claimed right-of-way, and, in response to the last notification of incomplete information, did nothing. In its last notice of missing information, BLM informed Appellant Lollich of the consequences of his failure to provide this information, indicating that his ROW application could be denied. Five months after its last notice of missing or inadequate information, BLM issued its rejection decision and Appellant Lollich then filed this appeal.

Id. at 11.

BLM argues that Lollich fails to “address the reason BLM rejected the application, that being, missing information,” but rather “it brings up reasons that have not yet been properly placed before this forum, and are therefore inappropriate bases for appeal.” *Id.* BLM asserts that “Lollich does not argue that he submitted the missing or inadequate information,” but “[r]ather he challenges the rejection decision on the basis of ANILCA, FLPMA, CDPA, and the United States Constitution.” *Id.* at 12. BLM contends that Lollich has “not complied with the ROW requirements under FLPMA” and “on this basis [his appeal] is properly dismissed as premature.” *Id.* BLM reasons that “[b]oth ANILCA and the CDPA . . . require an analysis of adequate access and [that their applicability] cannot be determined under the facts of this case since Appellant Lollich has not provided BLM the information it deems necessary to

analyze the access request.” *Id.* at 13, citing *Armando Fernandez*, 165 IBLA at 47-48. BLM concludes that “[i]f and when a BLM decision is issued on the substance of a FLPMA ROW application, an appeal based on these additional authorities may be appropriate.” Response at 13, citing *Edward J. Connolly, Jr.*, 94 IBLA 138, 146 (1986); *Edgar W. White*, 85 IBLA 161, 163 (1985). BLM asks the Board to dismiss Lollich’s appeal as premature.

III. ANALYSIS

Under section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (2000), a decision to accept or reject an ROW application for a road is discretionary. *See, e.g., Santa Fe Northwest Information Council*, 174 IBLA 93, 104 (2008); *Wiley F. & L’Marie Beaux*, 171 IBLA 58, 66 (2007); *Mark Patrick Heath*, 163 IBLA 381, 388 (2004); *Douglas E. Noland*, 156 IBLA 35, 39 (2001). The Board will affirm a BLM decision approving or rejecting an ROW application where the record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and where no reason is shown to disturb BLM’s decision. *Santa Fe Northwest Information Council*, 174 IBLA at 104; *James Shaw*, 130 IBLA 105, 115 (1994); *Mark Patrick Heath*, 163 IBLA at 388. 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).

[1] Section 501(b) of FLPMA requires an applicant for an ROW to “disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way . . . which he [the Secretary] deems necessary to a determination . . . as to whether a right-of-way shall be granted . . . and the terms and conditions which should be included in the right-of-way.” 43 U.S.C. § 1761(b) (2000) (emphasis added). The Department’s regulations at 43 C.F.R. Part 2800, which govern BLM’s issuance of ROWs under FLPMA, authorize BLM to request additional information deemed necessary to process an ROW application, and to reject an application if the information is not provided. In 2003, when Lollich submitted his ROW application, the regulation then in effect provided:

The authorized officer may require the applicant for a right-of-way to submit such additional information as he deems necessary for

review of the application. All requests for additional information shall be in writing. Where the authorized officer determines that the information supplied by the applicant is incomplete or does not conform to the act or these regulations, the authorized officer shall notify the applicant of these deficiencies and afford the applicant an opportunity to file a correction. Where a deficiency notice has not been adequately complied with, the authorized officer may reject the application or notify the applicant of the continuing deficiency and afford the applicant an opportunity to file a correction.

43 C.F.R. § 2802.4(c) (2003).

Similarly, the Department's ROW regulations as revised in 2005 provide:

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 . . . and any needed cultural resource surveys or inventories for threatened or endangered species. If BLM needs more information, we will identify this information in a written deficiency notice asking you to provide the additional information within a specified period of time. . . .

43 C.F.R. § 2804.25(b) (2005); *see* 70 Fed. Reg. 21058 (Apr. 22, 2005).

In addition, 43 C.F.R. § 2804.26(a)(6) (2005), the provision relied upon by BLM in rejecting Lollich's ROW application, provides that BLM may deny an ROW application if the applicant does "not adequately comply with a deficiency notice (*see* § 2804.25(b) of this subpart) or with any BLM requests for additional information needed to process the application."

The record demonstrates that BLM requested additional information from Lollich and that BLM described the information sought in specific terms. Lollich did not submit the information. While Lollich faults BLM for not issuing a document identified as a deficiency notice, BLM aptly cites *Bosley*, 99 IBLA at 338-39, for the proposition that its requests clearly identified the information needed, regardless of the form used. In fact, the Board stated in *Bosley*, which involved the pre-2005 version of BLM's regulation:

Although BLM's decision . . . is not styled as a deficiency notice, it did inform *Bosley* that BLM considered his application to be "incomplete." It also apprised him of the deficiencies in his application and provided him an opportunity to correct them. Further, while the

regulation allows the authorized officer to provide the applicant with additional time to correct, if the response to the deficiency notice is insufficient, it also provides that in such a circumstance the authorized officer may reject the application.

Bosley, 99 IBLA at 339. Under section 501(b) of FLPMA and either version of the implementing regulations in effect during BLM's adjudication of Lollich's ROW application, BLM acted well within its authority in rejecting Lollich's application for failure to submit requested information.

BLM acknowledges that the provisions of ANILCA, FLPMA, and the CDPA relied upon by Lollich "may provide a basis for access to private property," but asserts that he has "failed to provide information 'deemed necessary' by the BLM to analyze [his] request for access in the first place." Response at 14. BLM states that its decision to reject Lollich's ROW application does not prejudice his "continuing opportunity" to file another application with the requested information. While BLM asks this Board to dismiss Lollich's appeal as premature, we conclude that the preferable result is to affirm BLM's decision on the basis given, *i.e.*, that BLM properly rejected Lollich's application, under the authority of 43 C.F.R. § 2804.26(6) (2007), for failure to comply with BLM's request for additional information. *See Wiley F. & L'Marie Beaux*, 171 IBLA at 68.

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

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge