

Appeals from decisions of the Acting State Director, Montana State Office, Bureau of Land Management, denying protests of proposed land exchange. MTM 76693.

Affirmed.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

Protests against an exchange are properly denied where protestants do not establish that the proposed exchange would be contrary to provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), applicable regulations, operative land-use management plans, or that the exchange will contravene the public interest.

2. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Grazing and Grazing Lands--Grazing Permits and Licenses: Cancellation or Reduction

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazier is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

APPEARANCES: John S. Peck, pro se, Melrose, Montana; Owen K. Speirs and Claire T. Speirs, pro sese, Melrose, Montana; Carl M. Davis, Esq., Dillon, Montana, for Jack Thomas; Charles Hahnkamp, pro se, Melrose, Montana; Karan L. Dunnigan, Esq., Office of the Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

John S. Peck, Owen K. Speirs, and Claire T. Speirs appeal from decisions of the Acting State Director, Montana State Office, Bureau of

Land Management (BLM), dated August 9 and 11, 1989, denying their pro-tests against an exchange of Federal and private land proposed to be made pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (1982). BLM proposes to exchange 760 acres of public lands in order to acquire 45 acres of private land from intervenor Charles Hahnkamp. ^{1/}

The 45-acre tract of private land to be acquired is part of an island in the Big Hole River, in Beaverhead County, Montana. See Notice of Realty Action, 54 FR 14170 (Apr. 7, 1989) as amended, 54 FR 22628 (May 25, 1989). The Federal lands to be exchanged are grazing lands also located in Beaverhead County. Because the private land to be acquired is recreational in character, it has greater value than the Federal grazing land for which it will be exchanged.

Part of the land exchanged will ultimately be transferred to intervenor Jack Thomas under an agreement entered into between Hahnkamp, Thomas, and BLM, dated March 27, 1989. This land, comprising 360 acres in secs. 17 and 20, T. 13 S., R. 5 W., Principal Meridian, Montana (Thomas tract), adjoins other property owned by Thomas and is currently rented by him for grazing. The remaining Federal acreage to be exchanged adjoins Hahnkamp's Cherry Creek Ranch (Cherry Creek tract) and will be directly conveyed to Hahnkamp, but is of insufficient value to compensate for the full value of the riparian tract obtained by BLM. The nature of the transaction between Hahnkamp, Thomas, and BLM, described by BLM as "pooling," allows Thomas to finance the remainder of the exchange between BLM and Hahnkamp, as explained by Thomas in his statement of reasons (SOR):

The [Thomas tract] lands are adjacent to Thomas' ranch build-ings and border Thomas' private lands * * *. By acquiring said lands Thomas will be able to use the same more efficiently in his livestock operations, control the sage brush, and increase the lands' productivity. For these reasons Thomas is willing to pay [Hahnkamp] \$24,800, the appraised value of the 360 acres, rather than continue leasing the same.

(Thomas SOR at 2). Intervenor Hahnkamp expands on this explanation in his SOR, stating that "BLM has a buyer, Jack Thomas, for other lands to be sold to generate the required funds to complete the exchange" (Hahnkamp SOR at 2). Similar three-way land swaps have been approved by the Department and the Federal courts. See National Coal Assn. v. Hodel, 825 F.2d 523 (D.C. Cir. 1987).

^{1/} The Federal land is described as the SW^{1/4}SW^{1/4} of sec. 17, and the NW^{1/4}NE^{1/4}, NW^{1/4}, S^{1/2}NE^{1/4}, and NE^{1/4}SE^{1/4} of sec. 20, T. 13 S., R. 5 W., and the SW^{1/4}SW^{1/4}, SW^{1/4}NE^{1/4}, SE^{1/4}NW^{1/4}, E^{1/2}SW^{1/4}, and SE^{1/4} of sec. 4, and the NW^{1/4}SW^{1/4} of sec. 3, T. 3 S., R. 9 W., Principal Meridian, Montana. Notice of Realty Action, 54 FR 14170 (Apr. 7, 1989); Amended Notice of Realty Action, 54 FR 22628 (May 25, 1989). The private land is a portion of lots 2 and 3 and a portion of the SE^{1/4}NW^{1/4} and the NE^{1/4}SW^{1/4} in sec. 2, T. 3 S, R. 9 W., Principal Meridian, Montana. Amended Notice, supra.

Both Hahncamp and Thomas have asked that this appeal be advanced on the docket to be considered out-of-turn, urging that economic and seasonal considerations involved in operating both their ranches in Beaverhead County require that this matter be decided immediately. BLM also requests expedited consideration of this appeal, arguing that delay may frustrate the exchange. This request has not been opposed. We have previously expedited consideration of such appeals, and do so here. The Wilderness Society, 110 IBLA 67 (1989).

Peck and the Speirs contest BLM's determination that acquisition of property in the Big Hole River is in the public interest. First, the Speirs argue that their ranch operation will be damaged by transfer of the Cherry Creek tract to private ownership because the Cherry Creek land now comprises part of Seven Springs grazing allotment, currently used by the Speirs, and the exchange will result in a diminution of permitted grazing on the allotment.

This objection was considered by the BLM decision of August 11, 1989, under review. There BLM stated, concerning the Cherry Creek tract, that:

We have further reviewed the records and have determined that 25 AUMs [animal unit months] of forage are currently allocated to the [Cherry Creek tract]. In the event that the proposed exchange becomes final, we will issue a proposed grazing decision to cancel 25 AUMs of your existing 230 AUMs of grazing preference in the Seven Springs Allotment. * * * This is in accordance with 43 CFR 4110.4-2(a) which states, "[w]here there is a decrease in public land acreage available for livestock grazing use within an allotment, grazing permits or grazing leases and grazing preferences shall be cancelled in whole or in part."

Id. at 1.

The Speirs contend that the Seven Springs allotment must remain unchanged if they are to continue to operate as a going concern, and that the Cherry Creek tract is of special importance to their operation because it provides a holding pasture. Their situation is said to be aggravated by prior actions taken affecting the allotment, they explain, "in view of the fact that in 1983 we gave up a portion of our grazing rights in the Seven Springs area by a fence realignment agreement with the BLM" (Speirs' Response at 1). They contend, concerning this matter, that "if the proposed land exchange is consummated, then the fence realignment of 1983 should be restored to its original line." Id.

Finally, both the Speirs and Peck allege that the riparian land BLM seeks to obtain by this exchange lacks recreational value to the public because the property is surrounded by private property and affords no direct access to motor traffic. Peck argues that for property to have recreational value to the public, the public must have safe and easy direct access. It is contended that the riparian property presently is in a high fire hazard area and is a source of potential tort liability to the United States. The Speirs suggest that the acquisition is unneeded because

"1/2 mile north of the proposed exchange the Department of Fish, Wildlife, & Parks has a developed campground with accommodations for camping, boating, restrooms and parking."

BLM points out that grazing land is not exempt from exchanges, citing Seven Star Ranch, Inc., 78 IBLA 366 (1984), and finds that a holder of a permit does not have a vested right in land covered by his permit, rely-ing on City of Santa Fe, 103 IBLA 397 (1988). Further, in response to the arguments advanced before this Board by Peck and the Speirs, BLM represents that the acquisition of private lands along the Big Hole River is in the public interest because "the lands have value for fishing, floating, camp-ing and wildlife habitat" (BLM Brief in Support of Government's Request to Expedite Appeal at 1). The decision to exchange, BLM states, was made considering provisions of 43 U.S.C. § 1716 (1982), regulations implementing the statute, the March 1987 Dillon Resource Area Lower Big Hole River Recreation Area Management Plan (Big Hole River Plan), the Land Pattern Review and Adjustment Supplement to State Director Guidance for Resource Management Plan in Montana and the Dakotas, dated June 1984, and preparation of a Land Report/Environmental Assessment (EA).

[1] The cited plans require BLM to maintain present land holdings while acquiring private lands offering high public value for recreation, wildlife, habitat, and lands along the Big Hole River. The Big Hole River Plan concludes that recreational values can best be preserved and enhanced through public ownership of lands in the Big Hole River corridor. Finding that the Big Hole River has a national reputation as a trout fishery, the plan observes that "[f]ishing is the main reason boaters float the river, while some use the river because of the easy level of floating, the scenery, and the proximity of the river." Id. at 1. ^{2/} The plan finds, at page 31, that BLM should "[a]cquire lands through exchange, purchase, or easement acquisition within BLM capabilities as opportunities occur to provide for increased recreational opportunities or protect scenic resources."

The Big Hole River Plan does not exclude land within the Big Hole River corridor from acquisition because it lacks direct access through other public land. We have recognized before that direct land access is not the only criterion for effective land management. City of Santa Fe, supra at 401. Access, or lack of access, does not affect the United States in the same way that a private landowner would be affected. Leo Sheep Co. v. United States, 440 U.S. 668 (1979). (In the Leo Sheep Co. decision, involving a road built to provide public access to a recreation area, the Court pointed out that the United States, unlike a private landowner, has the power of eminent domain.) Id. at 680. We cannot say that BLM's decision to acquire riparian property to which the principal means of access

^{2/} The Big Hole River has over 22,000 users annually, with a projected 4-percent annual growth in use; estimated densities of "2,400 catchable fish per mile" are found in the river (Big Hole River Plan at 9, 15). The Montana Department of State Lands has commented that river use is heavy enough to require that a maximum daily use level be established, and urges that a "sign-up-for maximum users per day" policy be implemented. Id. at D-4.

will be by water is contrary to the provisions of 43 U.S.C. § 1716 (1982), implementing regulations at 43 CFR Subpart 2201, the operative management plans, nor that it contravenes the public interest to do so. This tract, an island in the stream of the Big Hole River, is acquired to provide boating and wading access to fishermen; lack of other access to the place may be seen as an advantage. In this case, the decisionmaker found that the location of the tract was advantageous for the purpose for which acquisition of the land was sought. There is no proof to the contrary of record before us.

Similarly, allegations that access of the sort that exists will pose problems concerning fire, trash removal, or public safety are not supported by the record. The Big Hole River Plan considers how these matters should be handled, and BLM's decisions under review acknowledge that such matters are of concern to BLM and that it is prepared to deal with them. There is no foundation in the record, therefore, to support an argument that BLM will not properly administer the riparian land in the same manner in which it administers other similar riparian tracts in Montana.

43 U.S.C. § 1716 (1982) allows for exchanges of public land following a determination that the public interest will be served. The Secretary, in considering the public interest, "shall give full consideration to better Federal land management and the needs of the State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife." *Id.* The weight to be given to every element bearing on such decisionmaking is left to the discretion of the Secretary. National Coal Assn. v. Hodel, *supra* at 532. We find that BLM considered the relevant factors necessary to decisionmaking and correctly determined the public interest would be served by making an exchange of Federal grazing for private riparian land of high recreational value.

[2] A holder of a grazing permit does not have a vested interest in the permitted land. City of Santa Fe, *supra*. Use of the Cherry Creek tract by the Speirs for grazing under such a permit does not, therefore, bar exchange of the permitted land for private land, consistent with proper management of the public lands. City of Santa Fe, *supra* at 402; Seven Star Ranch, Inc., *supra*. While the Speirs may be adversely affected by exchange of the Federal lands, this fact is not sufficient to show that the exchange is not in the interest of the United States. Although reduction of the Speirs' total allowable grazing in the Seven Springs allotment is incidental to the exchange of the Cherry Creek tract, we find no error in the decision to allow the exchange to proceed despite this result. While the exchange may be detrimental to the Speirs it appears that it is, as BLM found, in the best interest of the United States. There has been no contrary showing nor has there been any showing that there is an error in the exchange or that it is contrary to law. See Seven Star Ranch, Inc., *supra*.

The 1983 decision to move a fence in the Seven Springs allotment to which the Speirs now object is not properly before us on appeal. To invoke the jurisdiction of this Board, the Speirs were required to file a notice of appeal within 30 days of BLM's decision concerning the fence. They do not allege that a notice of appeal was filed from the 1983 decision to move

their fence. No timely notice of appeal having been filed, this Board is without jurisdiction to consider the merits of their claim. 43 CFR 4.411; Texasgulf, 114 IBLA 66, 72 (1990); Stewart L. Ashton, 107 IBLA 140 (1989).

Nonetheless, as BLM's decision recognized, Departmental regulation 43 CFR 4110.4-2(b) requires that when lands are transferred out of public ownership a grazing permittee shall be given 2 years prior notice of the fact and be compensated reasonably for authorized range improvements before the grazing permit is canceled. No improvements are alleged to have been constructed in this case. The record shows that BLM notified the Speirs of the pending exchange on July 1, 1988. Under the circumstances, therefore, it appears that the proposed exchange may take place in July 1990, all else being regular.

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

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge