

SILVER CREEK RANCH, INC.
v.
BUREAU OF LAND MANAGEMENT

IBLA 95-405

Decided May 2, 1996

Appeal from an order by Administrative Law Judge Harvey C. Sweitzer dismissing as premature an appeal from a proposed multiple use decision issued by the Shoshone-Eureka Resource Area Manager, Bureau of Land Management. N6-94-22.

Affirmed.

1. Grazing Permits and Licenses: Appeals—Rules of Practice: Appeals: Protests—Regulations: Interpretation

Under 43 CFR 4160.3 and 4160.4 (1994), after a proposed multiple use decision was protested by several members of a group of persons who were directly affected thereby, the proposed decision did not become a final decision subject to appeal; an attempt to appeal the proposed decision by a member of the affected group who did not protest was therefore properly dismissed as premature.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; C. Wayne Howle, Esq., Deputy Attorney General of the State of Nevada, Carson City, Nevada, for the Nevada Division of Wildlife; Gale Dupree, Reno, Nevada, President Nevada Wildlife Federation, Inc.; Dan Heinz, Sparks, Nevada, Field Representative for American Wildlands.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Silver Creek Ranch, Inc. has appealed from a March 17, 1995, order by Administrative Law Judge Harvey C. Sweitzer that dismissed Silver Creek's appeal (N6-94-22) of the livestock grazing portion of a proposed multiple use decision issued on May 12, 1994, by the Shoshone-Eureka Resource Area Manager, Battle Mountain District, Nevada, Bureau of Land Management (BLM), for the Austin Allotment. Judge Sweitzer dismissed the Silver Creek appeal because, in the course of construing Departmental regulations 43 CFR 4160.3(a) and 4160.4 (1994), he found the May 1994 BLM decision was not a final decision from which an appeal could be taken, and that Silver Creek's appeal was premature as a result.

An appeal to this Board from Judge Sweitzer's order was filed on March 30, 1995, at which time Silver Creek requested that this appeal be consolidated with Filippini Ranching Company v. BLM, IBLA 95-131, a case that was dismissed on May 10, 1995, as prematurely filed. On February 26 and March 1, 1996, the Board received copies of petitions to intervene from the Nevada Division of Wildlife, American Wildlands, and Nevada Wildlife Federation, Inc. Because we affirm the order dismissing the Silver Creek appeal issued by Judge Sweitzer, however, the petitions to intervene are moot.

In the instant case, Judge Sweitzer found that the appeal filed by Silver Creek

was premature because it was not a final decision from which appeal could be taken. A proposed decision automatically becomes a final decision only "[i]n the absence of a protest." 43 CFR 4160.3(a). Because protests were timely filed by other affected interests, the proposed decision did not become a final decision. Because there was no dispositive decision affecting some interest of appellant, it cannot have been adversely affected by the action of any BLM official and it has no standing to appeal. See 43 CFR 4.470(a), 4160.4; cf. Paris Ranch et al., IBLA 94-679 (Order dated Oct. 4, 1994) * * *.

(Judge Sweitzer's Order at 2).

The proposed decision of May 12, 1994, dealt with livestock, wildlife, and wild horses and was not issued in full force and effect. The record indicates that BLM received three protests from interested parties, one concerning livestock grazing and two concerning wild horses, but none from Silver Creek; instead, Silver Creek waited until the time for protesting the decision had expired, and then filed what would have been a timely appeal, had the proposed decision become final. By letter dated June 20, 1994, BLM notified Silver Creek that because timely protests were filed by other interested parties against the May 1994 decision, it lacked finality under 43 CFR 4160.3(b) (1994) and was consequently not subject to appeal, but that a final multiple use decision, made after consideration of the protests received, would be later issued. On January 13, 1995, BLM issued the promised final multiple use decision in full force and effect, from which Silver Creek appealed the livestock grazing portion on February 6, 1995. That case, designated as N6-95-6, is now pending in the Hearings Division of the Office of Hearings and Appeals.

In a statement of reasons (SOR) filed in support of appeal, Silver Creek explains that this appeal was filed "to protect their interests" so that they might not be "barred from challenging" the decision ultimately issued by BLM in January 1995 insofar as it concerned livestock use (SOR at 4). The SOR reasons that the May 1994 decision was subject to appeal because Silver Creek did not protest the May 1994 decision and had no notice that others had done so, and also because the livestock section of the January 1995 decision dealing with Silver Creek's interests in the Austin Allotment remained unchanged from the May 1994 decision, except for

the fact that the 1995 decision was issued in full force and effect (SOR at 9, 10). Silver Creek also argues that, because it was necessary to file this appeal to protect their livestock interests, their appeals of the May 1994 and January 1995 BLM decisions should be consolidated, and that dismissal of their appeal from the May 1994 decision was an error (SOR at 13). Silver Creek contends that BLM prejudicially delayed the administration of this appeal by failing to timely transmit Silver Creek's appeal to the Hearings Division; it is said that this circumstance has required that Silver Creek "make drastic and immediate changes in their livestock management" (SOR at 16). Finally, Silver Creek concludes that BLM was without jurisdiction to issue the January 1995 decision. This is said to be so because the 1995 decision, which was placed into full force and effect, repeated the substance of the May 1994 decision; the effect of this approach to decisionmaking, according to Silver Creek, was to enable BLM to put the 1994 decision into full force and effect after the case had passed from BLM's jurisdiction and was under review by Judge Sweitzer. The result, according to Silver Creek, was prejudicial in fact and can only be cured by placing the 1994 decision into full force and effect and permitting the Hearings Division to review Silver Creek's appeal from the May 1994 decision, the January 1995 decision being void under the circumstances described.

[1] These arguments, however, fail to recognize that Judge Sweitzer's order turns on his interpretation of Departmental regulations 43 CFR 4160.3 and 4160.4 (1994). Postulating that an appeal in this case could only be taken from a final grazing decision, as provided by 43 CFR 4160.4 (1994), Judge Sweitzer analyzed the case presented by the Silver Creek appeal in the light cast by 43 CFR 4160.3 (1994), and concluded:

The regulations provide that "[i]n the absence of a protest, the proposed decision shall become the final decision of the authorized officer without further notice." 43 CFR 4160.3(a). "Upon the timely filing of a protest, the authorized officer shall reconsider his proposed decision * * * [and,] [a]t the conclusion to his review of the protest, the authorized officer shall serve his final decision on the protestant * * * and on other affected interests." 43 CFR 4160.3(b). The filing of "a" single protest requires reconsideration of the proposed decision and prevents it from automatically becoming "the" final decision of the authorized officer.

(Judge Sweitzer's Order at 3). After reaching this finding, he considered Silver Creek's argument that the decision was nonetheless final as to them, regardless of protests filed by others against BLM's proposal:

The regulatory language simply does not favor the result advocated by [Silver Creek]. If such a result was intended, one would expect the regulations to be worded more like the following: "The proposed decision shall become the final decision of the authorized officer without further notice with respect to any affected interest who does not timely protest the proposed

decision. Upon timely filing of a protest by an affected interest, the authorized officer shall, with respect to that affected interest, reconsider the proposed decision and issue a final decision." The present regulatory language does not contain any such qualifying language. [Emphasis in original.]

Id.

Silver Creek has not shown that this interpretation of Departmental rules is in error; the arguments advanced on appeal to this Board beg the question raised by this appeal by assuming that BLM's decision became final insofar as Silver Creek was concerned. The fallacy in this reasoning was correctly described by Judge Sweitzer's order. Because Departmental regulation 43 CFR 4160.3(b) (1994) prevents a proposed grazing decision from becoming final if it is protested, Silver Creek cannot maintain this appeal because the protested decision of May 1994 failed to achieve finality and only a final decision is subject to appeal under 43 CFR 4160.4 (1994).

Why BLM did not handle this matter as quickly as should have been the case for an appeal authorized by Departmental regulation is also explained by Judge Sweitzer's order; under the rules governing such cases as this, Silver Creek was not entitled to appeal. The argument that Silver Creek was nonetheless prejudiced by BLM's handling of the attempted appeal of the 1994 proposal is without foundation, for the appeal was premature, as was pointed out to Silver Creek in BLM's June 20, 1994, letter. Judge Sweitzer correctly found that Silver Creek was not harmed by this interpretation of Departmental rules, but was treated the same as were all others who were affected by BLM's May 1994 decisionmaking. While the administration of this grazing decision was complicated by the fact that there were multiple parties who were affected in different ways by BLM's decisionmaking, the pertinent rules governing proposed grazing decisions were regularly applied by BLM and by Judge Sweitzer. Inasmuch as Silver Creek contends the decision proposed in May 1994 and the final decision issued in January 1995 are substantially the same, any objections to the substance of the 1994 proposal may be stated with equal effect in the course of the pending appeal of the 1995 BLM decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's order appealed from is affirmed.

Franklin D. Amess
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

