

WILLIAM N. BRAILSFORD
FLYING TRIANGLE, INC.

IBLA 94-583

Decided August 7, 1997

Appeal from the Decision Record and Finding of No Significant Impact of the Area Manager, Monument Resource Area, Idaho, Bureau of Land Management, implementing the Little Beaver/Big Beaver Area of Critical Environmental Concern Habitat Management Plan and Allotment Management Plans for the Little Beaver, Big Beaver, and Cherry Creek Allotments.

Affirmed in part, referred for hearing in part.

1. Administrative Procedure: Hearings–Appeals: Generally–Grazing and Grazing Lands–Grazing Permits and Licenses: Appeals–Grazing Permits and Licenses: Hearings–Hearings–Rules of Practice: Appeals–Rules of Practice: Hearings

Where an appeal from a decision implementing habitat and grazing allotment plans raises issues involving grazing management in addition to an unrelated issue of road access restrictions, the grazing issues will be referred for a hearing before an Administrative Law Judge as required for decisions issued under 43 C.F.R. Subpart 4160, but the Board may retain jurisdiction to decide the issue that is not related to grazing.

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

In reviewing a BLM decision based upon a Finding of No Significant Impact, the governing standard is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance.

3. Environmental Quality: Environmental Statements—National Environmental Policy Act of 1969: Environmental Statements

A Decision Record/Finding of No Significant Impact will be affirmed if it is based upon a consideration of all relevant factors and is supported by the record, including an Environmental Analysis that establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the Environmental Analysis. A party challenging such a decision must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared.

4. Conveyances: Interest Conveyed—Patents of Public Lands: Generally—Rights-of-Way: Generally

A patent from the United States does not ordinarily convey an implied easement by way of necessity across public land in the absence of legislation by Congress.

APPEARANCES: Gary D. Slette, Esq., Twin Falls, Idaho, for Appellant; David A. Koehler, Area Manager, Monument Resource Area, Shoshone, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

William N. Brailsford and Flying Triangle, Inc., have appealed from the May 25, 1994, Decision Record and Finding of No Significant Impact (DR/FONSI) of the Area Manager, Monument Resource Area, Idaho, Bureau of Land Management (BLM), implementing the Little Beaver/Big Beaver Area of Critical Environmental Concern (ACEC) Habitat Management Plan and Allotment Management Plans (HMP/AMP) for the Little Beaver, Big Beaver, and Cherry Creek Allotments within the ACEC. Flying Triangle, Inc., is a sheep ranch with grazing rights in the ACEC. Brailsford is its president.

The Petition for Stay that accompanied Appellants' Notice of Appeal referred only to that portion of the Decision involving road access restrictions that Appellants contended would deprive them of access to their private property. By Order dated August 9, 1994, the Board denied Appellant's Petition for Stay, as well as BLM's Motion to Dismiss the appeal, finding that Appellants had standing under 43 C.F.R. § 4.410.

In their Statement of Reasons (SOR), Appellants argue that the HMP's decision to restrict motorized vehicle access in the ACEC constitutes a denial of access to their private land. For the first time, they raise objections to features of the HMP/AMP that relate to grazing use and management of the allotments only. More specifically, Appellants contend that the HMP/AMP improperly attempts to convert their spring grazing use to fall grazing use, an action for which BLM assertedly lacks authority, that the HMP/AMP proposes certain management practices and requirements on Appellants' private land, such as placement of closure signs and fences, and that the HMP/AMP contains comments and conclusions that are factually incorrect or groundless.

[1] Except for the issue concerning the road access restrictions and the related issue of the placement of closure signs, which BLM states will not be placed on Appellants' private land, all the other issues involve grazing management. In Animal Protection Institute of America, 120 IBLA 342, 344 (1991), with respect to grazing issues we stated:

Such decisions are issued under the regulations at 43 CFR Subpart 4160. The relevant regulation provides that any person whose interest is adversely affected by a final BLM decision under this part may appeal the decision for the purpose of a hearing before an Administrative Law Judge. 43 CFR 4160.4; 43 CFR 4.470. The right of appeal to an Administrative Law Judge for a hearing is grounded in section 9 of the Taylor Grazing Act dealing with grazing administration which directs the Secretary of the Interior to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer." 43 U.S.C. § 315h (1988). The right to a hearing on appeal from decisions of the authorized officer made in the administration of grazing districts has been recognized by the courts. See LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir.), cert. denied, 376 U.S. 907 (1964); Joel Stamatakis, 98 IBLA 4, 7-8 (1987).

Thus, Appellants' statutory right to a hearing on the grazing issues requires that we refer this aspect of the appeal to the Hearings Division for assignment to an Administrative Law Judge. Appellants' argument that closure of the road denies them access to their private land does not appear to be directly related to the grazing issues, and thus we retain jurisdiction to decide that issue. See, e.g., Alvin R. Platz, 114 IBLA 8, 97 Interior Dec. 125 (1990); Bob Strickler, 106 IBLA 1 (1988).

Environmental Assessment (EA) No. ID050-EA-93011 states that the ACEC was designated in the 1981 Sun Valley Management Framework Plan (MFP) as an Off-Highway Vehicle (OHV) closure area from December 1 through April 30, although year-round access was allowed for Precious Metal Technologies from 1988 to 1990. (EA at 26.) Among others, the EA lists Resource Management Objectives that include protection of crucial elk winter range habitat in

the ACEC from all motorized vehicle disturbances between December 1 and April 30, and protection of wildlife and watershed values by closing the ACEC to year-round motorized vehicle use, except via the main existing road in Little Beaver Creek by 1995. (EA at 28.) More particularly, the EA states:

All roads in the ACEC management area would continue to be closed to OHV travel between December 1 and April 30 to protect elk security cover. A metal barrier gate would be placed at the Golden Nugget cattleguard in T1N, R16E, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 6. The gate would be locked during this closure period to restrict OHV use of the ACEC. A sign would be placed at the gate explaining the OHV closure. This project would be developed in cooperation with the Rocky Mountain Elk Foundation (RMEF). An additional closure sign would be placed at the mouth of Cherry Creek.

Vehicle travel in the ACEC during other periods of the year would be restricted to the main road in Little Beaver Creek. All other roads and trails would be signed closed to year round travel. A locked metal closure gate would be installed at the Big Beaver drift fence to close the Big Beaver drainage to vehicles. Closure signs would be placed at the gate. Signs would also be placed at all trails on the ridge between Big Beaver and Camp Creek which would alert the public that there is no access through the Big Beaver drainage. This action addresses public safety, riparian condition, and soil stability.

(EA at 31.)

[2] Appellants question the accuracy, grounds, and logic of the HMP/AMP, and to the extent they relate exclusively to the access issue, we will address them, whereas we leave those that pertain to or implicate grazing issues to the hearing ordered herein. In reviewing a BLM decision based upon a FONSI, the governing standard is

whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance.

Committee for Idaho's High Desert, 137 IBLA 92, 96 (1996), citing Oregon Natural Resources Council, 131 IBLA 180, 186 (1994).

[3] A DR/FONSI will be affirmed if it is based upon a consideration of all relevant factors and is supported by the record, including an EA that establishes that a careful review of environmental problems has been

made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging a DR/FONSI must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. National Organization for River Sports, 137 IBLA 396, 401 (1997); Committee for Idaho's High Desert, *supra*, at 98.

Appellants first assert that if it is true that one of the most productive elk herds in the region resides in the ACEC, no change in management practices appears to be necessary. (SOR at 6.) Appellants next observe that the objective of acquiring other land within the ACEC by 1995 through land exchanges "will be impossible to accomplish * * * without the cooperation of neighboring private landowners" and that the negotiations to achieve this goal should occur before the HMP/AMP is implemented. (SOR at 6.) They further question the accuracy of the monitoring information regarding key native species that can be obtained from constructing exclosures, because wildlife and livestock will be excluded, although Appellants also caution that animals could be trapped within the exclosures. (SOR at 7.) It is asserted that the HMP/AMP failed to provide the evidence for its conclusion that resource and elk winter range conditions will not be improved unless the proposed action is implemented in the ACEC. (SOR at 7.) Lastly, Appellants express doubt that the negative effects on big game of a fence between the Camp Creek and Big and Little Beaver Allotments can be mitigated by intermittent gates. (SOR at 7-8.) Regarding the latter point, BLM correctly notes that it pertains to Alternative II, which was not selected.

Appellants' arguments are more in the nature of commentary rather than an enumeration of specific error in the facts, law, data, analytical methods, reasoning, or conclusions found in the DR/FONSI or MFP to which it is tied. Thus, Appellants have failed to carry their burden to establish demonstrable error by a preponderance of evidence.

Turning to the access question, a homestead patent was issued to Appellants' predecessor on December 18, 1939, pursuant to the Homestead Act, 43 U.S.C. § 161 (1970), repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, Oct. 21, 1976, 90 Stat. 2787. Appellants argue that "Congress intended the Appellants' predecessors, as well as Appellants, to have access to this property for settlement, pursuant to an easement by necessity. Without such an easement, settlement and development of the unappropriated lands of the United States would have been impossible," citing Montana Wilderness Association v. United States, 496 F. Supp 880, 886 (D. Mont. 1980). (SOR at 2-3.) Appellants also cite United States v. Dunn, 478 F.2d 443 (9th Cir. 1973), United States v. Clarke, 529 F.2d 984 (9th Cir. 1976), and State of Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979), in support of the contention that an "easement by necessity and/or an implied easement exists." (SOR at 3.) Appellants have offered no evidence or argument asserting that a necessity

existed at the time their land was patented. Montana Wilderness Association v. United States, *supra*, at 885.

At page 1 of its July 5, 1994, response to the Notice of Appeal and Petition for Stay, and at page 2 of its August 18, 1994, Answer, BLM referred to a letter dated June 9, 1994, from BLM to Appellants' counsel, which stated:

Mr. Brailsford will be given reasonable and customary access to his private land. We are willing to grant this access without requiring Mr. Brailsford to purchase an easement from the U. S. Government. We will coordinate passage through locked gates with Mr. Brailsford whenever he requires access for private land or ranching purposes.

In the July 5 response, BLM also referred to the existence of alternative access to the property across other privately owned property from the south and east of the area affected by BLM's decision.

In their July 7, 1994, response, Appellants state that "the alleged alternative access * * * is impassible by vehicles and has been for many years." (Response to BLM at 2.) We note, however, that the parties have not actually identified the road(s) they are referring to as "alternative access." As for BLM's June 9 letter, Appellants state that it is the only indication that BLM is willing to work with Appellants on the access issue, and that by allowing only some access, BLM is taking other rights of access away from them. Id.

[4] We have previously considered whether issuing a patent could subject other land owned by the United States to an easement by necessity and concluded that a patent from the United States does not convey an implied easement by way of necessity across public land in the absence of legislation by Congress. Sun Studs, Inc., 27 IBLA 278, 284-92, 83 Interior Dec. 518, 520-25 (1976); *see also* Alaska Pipeline Co., 38 IBLA 1 (1978). In Sun Studs, *supra*, at 285-86, we rejected the appellant's reliance on United States v. Dunn, *supra*, as controlling authority and noted that in United States v. Clarke, *supra*, the court declined to hold that Dunn supports the proposition that a patent may carry with it an implied right-of-way across public land. We referred to United States v. Rindge, 208 F. 611 (S.D. Cal. 1913), where the court stated that ways of necessity do not apply to Government grants because they are not rights granted by an act of Congress.

We noted that Article IV, Section 3, Clause 2 of the Constitution gives Congress the unlimited power to control and dispose of public land and noted that the Supreme Court has declared that "the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired." (Emphasis added.) Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). We referred to

"the established law that federal statutes granting property interests are construed in favor of the Government and that nothing passes by implication," citing United States v. Union Pacific Railroad Co., 353 U.S. 112, 116 (1957), Burke v. Gulf, Mobile and Ohio Railroad Co., 465 F.2d 1206, 1209 (5th Cir. 1972), and Walton v. United States, 415 F.2d 121, 123 (10th Cir. 1969). Sun Studs, supra, at 288-89.

Appellants' arguments do not persuade us to abandon our prior rulings at this time, particularly since they have made no showing that an easement was necessary at the time patent was granted. See generally United States v. Mendoza, 464 U.S. 154, 160-61 (1984); PacifiCorp, 95 IBLA 16, 18-19 (1986).

More fundamentally, however, it is not correct that the Decision denies Appellants access to their land, their assertions to the contrary notwithstanding. Appellants do not allege that they have actually been prevented from using the access they are accustomed to using, nor do they claim that they have applied for a right-of-way that was denied; indeed, BLM has stated that for the time being it will not require a formal easement, though it clearly has the authority to do so. See 43 C.F.R. Part 2800. In allowing access to Appellants, BLM is not obliged to provide access to the public generally, and accordingly, we affirm the Decision.

We nevertheless appreciate Appellants' concern that the Decision here affirmed makes no mention of the access promised in BLM's June 9, 1994, letter and reiterated in BLM's submissions to the Board in this appeal. We are confident, however, that so long as circumstances approximate those that existed at the time the Decision was issued, BLM will not construe it to deny Appellants "reasonable and customary access" to their land in the manner and to the extent set forth in the June 9 letter to Appellants' counsel. Should BLM deem it necessary to formally regulate or deny that access in the future, as it clearly can, the resulting decision can be appealed to this Board. For that reason, there is no need to respond to Appellants' speculation regarding the nature and extent of access in the event they cease sheep ranching or use their land differently.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed is affirmed with respect to its restrictions on vehicular access in the ACEC. With respect to the grazing allotment management issues, the case is referred to the Hearings Division for assignment to an Administrative Law Judge.

T. Britt Price
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

