

UNDERWOOD LIVESTOCK, INC.

IBLA 2003-21

Decided March 23, 2005

Appeal from a decision of the Battle Mountain Field Office, Bureau of Land Management, issuing a Finding of No Significant Impact and Decision Record approving the Underwood Fence Project. NV062-EA02-30.

Affirmed.

1. Environmental Quality: Environmental Statements--Grazing and Grazing Lands--National Environmental Policy Act of 1969: Environmental Statements

A party challenging BLM's decision to proceed with construction of a fence to protect public rangeland and a finding of no significant impact has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Mere differences of opinion provide no basis for reversal where the decision is reasonable and supported by the record.

APPEARANCES: Dalton Wilson, President, Underwood Livestock, Inc., Austin, Nevada; Jared C. Bennett, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Underwood Livestock, Inc., has appealed from the combined Finding of No Significant Impact and Decision Record (FONSI/DR) issued June 25, 2002, by the Field Manager and Assistant Field Manager, Battle Mountain Field Office, Bureau of Land Management (BLM), for Environmental Assessment (EA) NV062-EA02-30 (the Underwood Fence). This EA analyzed the anticipated impacts from the proposed construction of a 16-mile long fence to enclose the Underwood Allotment (Allotment), which embraces land located within the Simpson Park Wilderness Study

Area (WSA). The Field Manager approved the proposed action based upon the analysis presented in the EA, concluding that the rationale for the FONSI supports the decision.

The Underwood Allotment, approximately 20,500 acres of public lands, includes a portion of the west side of the Simpson Park WSA, an area of 49,670 acres in central Nevada. Beginning in 1978, combined cattle and sheep use was allowed for this allotment. The area of the WSA was identified in 1980, with livestock grazing retained as a “grandfathered” use. In 1982 an EA, FONSI, and Record of Decision (ROD) were issued for a fence along the complete western boundary of the Allotment and parts of the northern and southern boundaries as a measure to control livestock drift from other allotments. The segments on the north and south boundaries would extend into the WSA. The fence was completed in 1984, but livestock drift continued. In 1988 an EA, FONSI, and ROD were issued for further fencing to be located within the WSA and along the Allotment boundary, to be constructed by the Underwood Allotment permittee. It would effectively enclose the Allotment. The fence, however, was never constructed.^{1/}

In August 1999, the Trail Canyon Fire burned 106,600 acres in the Simpson Park Mountains. The Underwood Allotment was deeply affected, losing an estimated 85% of its vegetation. Approximately 30,000 acres of the west slope, or 60% of the WSA, was burned by the fire. The area of the fire was re-seeded during the winter of 1999-2000. The cost for reclaiming (cultural clearances, seed, aerial seeding, chaining, green-stripping) 19,200 acres of the Underwood Allotment was approximately \$1,020,000 (or about \$53 per acre). (EA at 2.) The Underwood Allotment was closed to grazing on February 11, 2000, to facilitate seedling survival and regrowth of burned vegetation. However, revegetation of the burn area was severely affected by drought and trespassing cattle from neighboring allotments.^{2/}

^{1/} Underwood Livestock was the Allotment permittee from 1956 through 1994, but has not held this grazing permit since 1995. In May 1988, Dalton Wilson (President of Underwood Livestock), the University of Nevada at Reno (whose interest in the project derived from the adjacent Gund and Russell Ranches), and BLM entered into a cooperative agreement to construct the Underwood Canyon Fence. Although some fencing supplies were “check[ed] out” by “a representative of Underwood Livestock,” the project was never begun and only a portion of the \$5,825.08 in materials provided by BLM was returned.

^{2/} It became evident that cattle from the adjacent “open” allotments were attracted to the succulent grasses and forbs cultivated in the burned areas because of a lack of heavy brush to impede them. (EA at 2.)

Although BLM initiated several trespass actions throughout 2000 and 2001, and was somewhat successful in the lower elevations of the burned area, the rugged terrain of the Simpson Park Mountains hindered effective trespass enforcement for most of the WSA. BLM, accordingly, proposed the project at issue here, the construction of about 16 miles of fence, “four strand barbed wire w/bottom wire smooth,” on the boundary of the Underwood Allotment not already fenced, i.e., the east boundary and the eastern portions of the north and south boundaries. It is the portion of BLM’s DR/FONSI determination approving the fence along the south boundary of the Allotment that appellant appeals.

In its statement of reasons (SOR), Underwood Livestock argues that BLM exceeded its authority by altering the WSA boundary to include Cottonwood Spring, for which appellant has a recognized water right. Thus, appellant challenges the DR/FONSI to the extent it “cuts off critical access to a water source which was not within the wilderness area.” (SOR at 3.) Appellant contends that BLM’s determination is tantamount to an unlawful taking. Underwood Livestock also argues that BLM failed to consider appellant’s gap fencing proposal as a reasonable alternative to the proposed action. In reply, BLM asserts that appellant failed to demonstrate any error in BLM’s analysis, either in the facts or in the law.^{3/}

Before we review the merits of this appeal, there are procedural issues that need brief attention. This matter is before the Board based upon a faxed notice of appeal reportedly “filed” with BLM on August 19, 2002. While the notice was dated by Dalton Wilson, President of Underwood Livestock, on August 15, 2002, and the transmission cover letter was dated August 16, 2002, these documents were not “date-stamped” by BLM and thus the timeliness of their receipt cannot be verified except by referring to the transmission data line appearing at the top of each sheet faxed: “AUG-17-2002 11:42 AM DEPAOLI FAMIGLIA 1 775 237 5527 P.[].” Departmental regulation 43 CFR 4.22(a) provides that a document is “filed” in the office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it. No extension of time may be granted for filing a notice of appeal. 43 CFR 4.22(f)(1); 43 CFR 4.411(c). Unlike the delivery of a certified letter, a fax transmission alone generates no evidence that notice was actually received. Cf. Animal Protection Institute of America, 124 IBLA 231, 233 (1992) (facsimile transmission of a document does not comply with the service requirements). However, in this instance BLM reports that the fax was transmitted on Saturday, August 17, 2002, and actually received by BLM staff on Monday,

^{3/} BLM also filed a Motion for Summary Dismissal (Motion) of the appeal on the basis that appellant failed to timely submit its SOR. The Motion was denied by Order dated March 13, 2003, noting the absence of prejudice in light of BLM’s failure to promptly forward the case file.

August 19, 2002. Had BLM not acknowledged receipt, filing of the notice of appeal clearly could have been an issue for review.^{4/} Accordingly, any concern over whether or when the notice of appeal was filed is moot.

Under 43 CFR 4.411(a), Underwood Livestock's notice of appeal was due 30 days after the date of service of BLM's decision. The "case file" forwarded by BLM does not show whether the DR/FONSI was served on any of the parties commenting on the EA, such as appellant. Departmental regulation 43 CFR 4.401(c)(1) provides that "[w]herever the regulations * * * require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau." As there was no certified or registered mail in this case to verify that a copy of the DR/FONSI was delivered to appellant's address of record, the 30-day appeal period cannot be established in that manner. Apparently, Wilson visited the Battle Mountain Field Office, BLM, on July 19, 2002, to obtain a copy of the EA. At that time, it was ascertained that appellant was inadvertently omitted from the mailing list (although the record does not verify that fact). Wilson was provided a copy of the EA and DR/FONSI at that time, along with an affirmation signed and witnessed by BLM employees that those documents were personally delivered to Wilson on that date. As this is the only evidence in the record to which we may refer, we must conclude that the decision appealed from was not served upon appellant until July 19, 2002. Thus, the notice of appeal was due 30 days later, or on August 18, 2002, a Sunday when BLM was closed. The notice acknowledged by BLM as filed on the next day it was open for business and was therefore timely. See 43 CFR 1822.14 (BLM considers the document timely filed if received in the office on the next day it is officially open).

[1] Concerning appellant's challenge to the DR/FONSI, it is well established that a party "challenging a FONSI must demonstrate by objective proof an error of law or fact, or that the EA failed to consider a substantial environmental problem of material significance." The Fund for Animals, Inc., 163 IBLA 172, 179 (2004); Rocky Mountain Trials Association, 156 IBLA 64, 71 (2001). In reviewing a FONSI and DR based on an EA, the Board will uphold those conclusions "if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant impacts will occur is reasonable in light of the environmental analysis." Colorado Mountain Club, 161 IBLA 371, 382 (2004). In its Answer to the SOR, BLM comments that "Appellant's factual arguments concern alleged alterations by BLM of the boundary of the WSA and Appellant's legal arguments concern the constitutional

^{4/} Receipt is usually ascertained by the date stamp affixed to the document by BLM. In this instance there was no such date stamp.

status of asserted water and forage rights.” (Answer at 4.) BLM asserts that nowhere has appellant shown error in BLM’s environmental review and conclusions.

We find that appellant’s challenge indeed lacks merit, both factually and legally. Appellant argues that it is “the owner of 20,500 acres in the Underwood Allotment.” (SOR at 1.) The record, however, shows that, except for several small parcels not even remotely relevant to this case, these lands are public lands managed by BLM. At one time, Underwood Livestock held a permit to graze livestock in the Underwood Allotment, but has not since 1995. Appellant does not offer evidence that it now has a claim of title in the land at issue. Rather, it has submitted on appeal a document entitled “Claim to Possessory Interests,” recorded with the Eureka County (Nevada) Recorder on March 6, 1995, and the Lander County (Nevada) Recorder on March 7, 1995. Therein Underwood Livestock claims a right for grazing livestock “to guarantee the ability to permanently use valid personal property stockwater rights.” (Claim to Possessory Interests at 1, ¶ 6.) The accompanying map depicts the traditional area of the Underwood Allotment. (Claim to Possessory Interests at 2.) However, there is nothing therein to show that Underwood Livestock possesses a water right in Cottonwood Spring adversely impacted by the appealed DR, or even that its assertion of permanent grazing rights has been duly recognized. As BLM notes: “Appellant’s self-serving document not only fails to show any evidence of ownership, it also fails to describe any of the rights Appellant claims BLM cannot regulate. * * * Appellant ‘present[s] no evidence * * * of the existence of such an easement or right-of-way deriving either from state or federal law,’ * * * providing access to Cottonwood Springs.” (Answer at 7.) BLM further notes that “Appellant has never applied for a Title V permit to access, divert, or convey his alleged water rights in Cottonwood Spring.” *Id.* at 7 n.3.

In any event, the crux of appellant’s arguments is that the EA changed the boundary of the WSA to enclose Cottonwood Spring. BLM affirms that the boundary of the WSA has not changed since its designation in 1980, as shown by WSA maps for 1980 and 1986. These maps and the map prepared for the EA shows Cottonwood Spring, in sec. 12 of T. 22 N., R. 47 E., to be at the center of the WSA, at least 1 mile from the nearest boundary. Moreover, both the EA map and the map appellant furnished for its Claim to Possessory Interests depict Cottonwood Spring to be at least a half mile from the south boundary of the Allotment where the fence is to be placed. It is evident that the Allotment boundary has always been positioned so as to include Cottonwood Spring within the Allotment. Appellant has failed to show factual error regarding placement of the fence project.

Appellant asserts that BLM lacks authority under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (2000), to regulate appellant’s access to alleged water rights predating FLPMA. Apart from its failure to substantiate a vested right to the waters of Cottonwood Spring, appellant does not show that BLM

could not act under these circumstances to temporarily suspend grazing use, modify grazing by erecting a fence, or restrict access to public lands.

The Department is obligated by law, including FLPMA, 43 U.S.C. §§ 1701(a) and 1751 (2000), and the Taylor Grazing Act, 43 U.S.C. § 315a (2000), and various regulations, including 43 CFR Subpart 4180, to manage public grazing lands to promote rangeland health. See also 43 U.S.C. § 1901(b)(3) (2000) (it is national policy to manage, maintain, and improve the condition of the public rangelands.) The Secretary, pursuant to section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (2000), is authorized to “make such rules and regulations” and to “do any and all things necessary to * * * preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range.” See also 43 U.S.C. § 1740 (2000) (authority under FLPMA to promulgate rules and regulations to carry out laws applicable to the public lands). Indeed, Congress has outlined range rehabilitation projects to be conducted by the Department, including “seeding and reseeding, [and] fence construction.” 43 U.S.C. § 1751(b)(1) (2000). While compliance with provisions of the Taylor Grazing Act and FLPMA relating to rangelands is committed to the discretion of the Secretary, implementation is delegated to BLM. Kelly v. BLM, 131 IBLA 146, 151 (1994); Yardley v. BLM, 123 IBLA 80, 89 (1992). BLM enjoys broad discretion in determining how to manage grazing privileges. Yardley v. BLM, 123 IBLA at 90.

The issue is whether BLM acted within its discretion by proposing to construct the subject fence. The record affords ample justification for the project which has not been rebutted by appellant. We find that the DR was not arbitrary; it was not capricious; and it was not inequitable.

Appellant also challenges the sufficiency of the EA and resulting FONSI with arguments such as BLM did not consider its suggested alternative. In order to convince the Board that BLM did not correctly implement its obligations under the National Environmental Policy Act of 1969 (NEPA), 40 U.S.C. § 4332(2)(C) (2000), an appellant must demonstrate error with objective evidence; mere differences of opinion provide no basis for reversal. Edward C. Faulkner, 164 IBLA 204, 209 (2004); Larry Thompson, 151 IBLA 208, 217 (1999). It is not enough to speculate and assert a desire for a different result, “without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance.” 164 IBLA at 209. As for appellant’s specific allegation, we find that BLM did consider its comments and concluded that this alternative was unacceptable as it would allow cattle to access the fire rehabilitation area through gaps in the fenceline. With respect to the overall project, if appellant wishes to show that it will fail to meet goals of rangeland health, it must substantiate the suggestion. We find that Underwood Livestock fails to meet its burden.

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.

Will A. Irwin
Administrative Judge

I concur:

T. Britt Price
Administrative Judge