

ALBERT YPARRAGUIRRE

IBLA 87-548

Decided November 4, 1988

Appeal from a decision of the Hollister Area Manager, Bureau of Land Management, closing the Panoche Hills Access Road at its upper gate. 8364 C-019.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Board of Land Appeals--Federal Land Policy and Management Act of 1976: Land Use Planning--Rules of Practice: Appeals: Generally

Approval or amendment of a resource management plan ~~is appealable to the Board of Land Appeals. However, any appeal is not affected by a specific finding of implementation of~~ a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is implemented. A BLM decision implementing a resource management plan calling for closure of a wildlife management area to vehicles during fire season will be affirmed when the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

APPEARANCES: Thomas X. Glancey, Esq., Palo Alto, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Albert Yparraguirre has appealed from a decision of the Hollister Area Manager, Bureau of Land Management (BLM), dated April 13, 1987, closing the upper gate of the Panoche Access Road during fire season while allowing the lower gate to remain open throughout the year. The Panoche Access Road crosses appellant's private lands in Fresno County, California, and connects County road J-1 with the Panoche National Cooperative Land and Wildlife Management Area (Management Area). ^{1/} BLM's decision stated that

^{1/} The Management Area is east of County road J-1, which runs north-south. The lower gate of the Panoche Access Road is located near the intersection of the Panoche Access Road and J-1. The upper gate is located at the entrance to the Management Area.

this Management Area would remain open for hunting and hiking throughout the year, but access during fire season would be limited to "walk in access" beyond the upper gate. A closure of the lower gate would bar vehicular traffic across the right-of-way, while a closure of the upper gate alone would permit vehicular access across the right-of-way but bar vehicular traffic beyond the point where the road enters BLM lands.

The instant appeal was filed pursuant to a stipulation between appellant and BLM wherein the parties agreed that "plaintiff [Yparraguirre] may, at his sole discretion, file an administrative appeal of the BLM's April 13, 1987 notice of intent to close the upper gate across the Panoche Access Road while leaving the lower gate open across the Panoche Access Road during fire season." Plaintiff's appeal would be filed directly to this Board pursuant to 43 CFR 8364.1, the stipulation provided. The stipulation further provided for dismissal of a lawsuit (No. CV-F-86-253 REC) filed by Yparraguirre seeking to compel BLM's closure of the Panoche Access Road during fire season. ^{2/}

The Panoche Access Road occupies lands described in an "access road easement" granted by appellant to the United States in 1965. This instrument granted "a perpetual easement and right-of-way, including but not limited to the right and privilege to locate, construct, relocate, maintain, control, and repair a roadway over and across" appellant's lands. The right-of-way also provided that the rights and privileges granted are "for the full use as a roadway by the Grantee, its licensees and permittees, including the right of access for the people of the United States of America for all lawful and proper purposes subject to reasonable rules and regulations of the Bureau of Land Management."

Yparraguirre objects to the Area Manager's decision because the effect of allowing the lower gate on the Panoche Access Road to remain open when the upper gate is closed during fire season is, in appellant's view, "to shift the risk of fire" from BLM to him. This occurs, appellant states, because visitors to the Management Area during fire season drive their vehicles past the lower gate to the closed upper gate where they park and camp out along the Panoche Access Road. These visitors have trespassed on his property, appellant states, deposited trash there, discharged firearms onto his land, and constructed barbecue pits for cooking food, thus creating a substantial risk of fire on his land. Yparraguirre states that BLM has long recognized that fires pose the most serious threat to the public's continued use and enjoyment of the Management Area.

In support of his objection, Yparraguirre quotes from section 102(a)(8) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1701(a)(8) (1982), wherein Congress provided that it is the policy of the United States that

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological

^{2/} Given the fact that BLM intended to close the upper gate, appellant appears to have been seeking closure of the lower gate by this lawsuit.

values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use * * *.

Appellant notes that FLPMA further provides that BLM, in the development of land use plans, shall "weigh long term benefits to the public against short term benefits." 43 U.S.C. | 1712(c)(7) (1982). Appellant also states that BLM is directed by regulation to consider the impact of its management policy on "local economies and uses of adjacent or nearby non-federal lands."

Yparraguirre acknowledges that BLM's purpose in allowing the lower gate to remain open during fire season is to accommodate dove and rabbit hunters. However, the number of such hunters is minimal, appellant contends, and hence the decision to keep the lower gate open during fire season does not represent a balanced management of the resources of the Management Area. Moreover, the record is devoid of any specific requests to open the lower gate during fire season or of any discussion of the fire risk involved, appellant states.

Yparraguirre also objects to BLM procedures in reaching its decision to keep the lower gate open during fire season. Appellant maintains that he was not advised of meetings to discuss the Panoche Hills Management Plan or the Hollister Resource Management Plan, contrary to 43 CFR 1610.2(d).^{3/} Appellant also charges a violation of 43 CFR 1610.2(a) which states that "[t]he public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments, and related guidance and be given early notice of planning activities."

Finally, Yparraguirre contends that BLM's decision to keep the lower gate open while closing the upper gate breached the easement agreement between himself and the United States. By so acting, appellant maintains, BLM has ensured that the access road will be used as a camping area or parking lot, but not a roadway. To use the Panoche Access Road as a roadway, as contemplated by the easement, BLM should keep the lower gate closed when the upper gate is closed, Yparraguirre declares.

The decision that appellant objects to can be traced to two management plans prepared by BLM: The Panoche Hills Management Plan (1982) and the Hollister Resource Management Plan (RMP) (1984). The first of these plans recommended limited vehicular access to the Management Area because of the threat of fire. Thus, this Plan stated that vehicles should be permitted in the Management Area only from the beginning of the quail and chukar season (around October 20) to the beginning of the fire season (around April 15). The plan does not specify what gate(s) would be closed to prevent vehicle

^{3/} This regulation states in part:

(d) A list of individuals and groups known to be interested in or affected by a resource management plan shall be maintained by the District Manager and those on the list shall be notified of public participation activities. Individuals or groups may ask to be placed on this list.

access during fire season. It is clear, however, that foot access beyond the upper gate would be permitted throughout the year. Id. at 20.

Implementation of this first plan was delayed until 1984. In May of that year, BLM issued the Hollister RMP, which provided in relevant part:

Resource Management Decisions

* * * * *

Recreation

1. Continue to manage the area as a Special Recreation Management Area to provide hunting opportunities on approximately 25,000 acres of public lands.

2. Vehicle use in the [Management Area] is limited to four-wheeled vehicles on designated routes from the beginning of upland game season to April 15. Foot access will be allowed year long."

[1] Departmental regulations make clear that approval and amendment of an RMP are not actions appealable to this Board. 43 CFR 1610.5-2(b); Wilderness Society, 90 IBLA 221, 224 (1986). These planning regulations, however, clearly distinguish between approval or amendment of a resource management plan and implementation of some portion of such plan or amendment. Thus, 43 CFR 1610.5-3(b) provides: "Any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is proposed for implementation." The definition of "resource management plan" in the regulations at 43 CFR 1601.0-5(k) provides that such a plan "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." Because the Area Manager's decision of April 13, 1987, implements the policy of the RMP limiting vehicle use in the Management Area, regulation 43 CFR 1610.5-2(b) is inapplicable. Jurisdiction to review the Area Manager's decision is set forth at 43 CFR 4.1.

The standard of review applied by the Board when reviewing an implementation decision of BLM is described in Wilderness Society, supra at 232:

BLM has the responsibility of administering the public lands and must be accorded the discretion necessary effectively to discharge its duties. So long as BLM's management decision is based on a consideration of all relevant factors and is supported by the record, the Board will not disturb it, absent a showing of clear reasons for modification or reversal; see A.C.O.T.S., 60 IBLA 1, 4-5 (1981); Oregon Shores Conservation Coalition, 83 IBLA 1, 5 (1984); Curtin Mitchell and Stand, 82 IBLA 275, 277-78 (1984); Magic Valley Trail Machine Association, 57 IBLA 284, 287 (1981).

Our review of the record reveals that the threat of fire and the demand for recreation are both present in the Management Area. BLM has repeatedly

acknowledged the hazards of fire in news releases and also in its planning documents. ^{4/} In its RMP, for example, BLM states at page 37:

MAJOR ISSUES - SIGNIFICANT RESOURCES

* * * * *

Fire Management: There have been numerous fires in the Management Area in the last 30 years ranging in size from small spots to large fires of over 2,000 acres, mostly related to equipment use. Wildfire easily kills nonsprouting shrubs (Atriplex polycarpa) important to wildlife in the area. Fire suppression activities (use of heavy equipment) may also damage sensitive resource values (cultural and RTE).

Immediately following this paragraph, BLM recognizes recreation as another major issue in the Management Area:

Recreation: Easements along the Panoche access road were acquired in 1965. The area receives about 10,000 visitor hours per year (70% upland game hunting; 30% sightseeing, birdwatching, picnicking). A portion of the area was heavily used by motor- cycles until closure to ORV use in 1970. Some motorcycle tres- pass and significant demand for opening the area to ORV use still exists.

Elsewhere in the RMP, BLM describes upland game hunting as "a primary and important use" of the Management Area. A substantial investment has already been made by BLM, California Department of Fish and Game, and sportsmen's groups to provide recreation opportunities and to improve wildlife habitat conditions, BLM states. Id. at 39. In addition, rock hounding is identified in the Panoche Hills Management Plan as requiring increased access. Id. at 16.

The record is replete with further references ^{5/} to the threat of fire and recreation demands in the Management Area. Our review reveals that BLM has struck a balance between these two competing forces by restricting vehicle access into the Management Area during the fire season. We decline to upset this balance, because it is clear that BLM's decision is based on a consideration of all relevant factors and is supported by the record. Appellant's disagreement with BLM's exercise of its discretion does not establish a violation of FLPMA or relevant regulations.

Appellant's objection to the procedures surrounding the Area Manager's decision is similarly unpersuasive. Whether or not appellant was notified of public participation activities as required by 43 CFR 1610.2(d) is

^{4/} See Appellant's Statement of Reasons, July 13, 1987, at Appendix A.

^{5/} See, e.g., Panoche Hills Management Plan (1982) at 16, 18, and 20; Panoche Hills Management Plan Draft Environmental Assessment (1981) at 24-25; and BLM Media Release, June 7, 1983.

disputed by the parties. ^{6/} What is clear, however, is that Yparraguirre voiced his opposition to BLM's action at a meaningful time in the planning process. Pleadings filed by appellant in his Federal lawsuit (No. CV-F-86-253 REC) reveal that Yparraguirre was advised "in or around 1982" that BLM was contemplating the action later taken by the Area Manager. ^{7/} Appellant also acknowledges that he had a "four year dialogue with BLM officials regarding his concerns over the proposed and actual opening and closing of the lower and upper gates." ^{8/} The record contains numerous Federal Register notices ^{9/} and news releases ^{10/} inviting the public to participate in BLM's planning process. We find that the opportunity for meaningful public participation in the planning process was adequately extended by BLM, and that appellant's "four year dialogue" with BLM evidences substantial participation on his part.

In order to address appellant's final argument, that the Area Manager's decision has breached the easement agreement between the parties, we must turn to the language of the granting instrument. When in 1965 appellant granted to the United States an easement for the Panoche Access Road, he conveyed lands described therein for use as a roadway. Further, the granting document contains no limitations on the use of the right-of-way, either in scope or time, and provides for the use of the right-of-way by BLM, its licensees and permittees, including the right of access for the people of the United States of America for all lawful and proper purposes. Such an unrestricted grant contemplates the use of the right-of-way for the intended purpose and all activities incidental thereto, subject only to those restrictions properly placed upon its use by the governmental entity responsible for its maintenance. See 39 Am. Jur. 2d Highways Streets and Bridges | 191 et seq. (1968). Thus, the uses made of the right-of-way, although perhaps beyond the expectation of appellant at the time he executed the agreement, are within the scope of the right-of-way grant. Therefore, we find no basis for the contention that, by closing the upper gate and allowing the lower gate to remain open, BLM has breached the right-of-way agreement.

^{6/} Appellant denies having received any of five notices/planning documents that BLM claims to have sent to him. See Declaration of Albert Michael Yparraguirre, July 13, 1987, at 3 and Declaration of Robert D. Rheiner, Jr., Dec. 22, 1985. The record contains a mailing list of interested persons compiled by BLM. Appellant's name and address are on this list.

^{7/} Opposition to Defendants' Motion for Summary Judgment, Jan. 20, 1987, at 2-3. See also Declaration of Albert Michael Yparraguirre, July 13, 1987, at 2.

^{8/} Opposition to Defendants' Motion for Summary Judgment, Jan. 20, 1987, at 11. At page 12 of this same pleading, Yparraguirre states: "Plaintiff [Yparraguirre] voiced his concerns during the time period in which the administrative process was ongoing, thereby presenting the BLM with an opportunity to consider those concerns, apply its expertise thereto, and correct its own mistakes in previously failing to heed those concerns."

^{9/} See, e.g., 49 FR 14590 (Apr. 12, 1984); 48 FR 44932 (Sept. 30, 1983); 47 FR 53385 (Dec. 30, 1982); 47 FR 27410 (June 24, 1982); and 47 FR 8410 (Feb. 26, 1982).

^{10/} See, e.g., BLM Media Releases dated Apr. 11, 1984; Oct. 10, 1983; June 18, 1982; and Feb. 23, 1982.

Notwithstanding our finding, we believe appellant has indirectly raised a serious question regarding the effect of BLM's decision to keep the lower gate at the entrance to the right-of-way open when the upper gate at the edge of BLM-managed lands has been closed because of fire danger. As previously noted, the right-of-way agreement has no restriction on use during periods of fire danger, and therefore it is within BLM's management prerogative to allow continued use of the road during those times. Likewise, it is within BLM's prerogative to close the road, either by closing the lower gate, as suggested by appellant, or by closing the road at the upper gate, as it now is doing. However, when the upper gate is closed because of high fire danger, and BLM continues to permit unrestricted use of the right-of-way by its permittees and licensees (which includes the general public) it may be opening itself to a cause of action if a fire is started on the right-of-way and spreads to appellant's land.

In its Management Plan BLM states that "[i]t cannot be overemphasized that one of the biggest threats to wildlife cover in this area is fire. Vehicular traffic should be limited * * * to the period between the beginning of quail and chukar season (around October 20) and April 15 or the beginning of fire season." Panoche Management Plan at 18. BLM is implementing this plan by allowing unrestricted vehicular access on the right-of-way, but closing the upper gate beyond the right-of-way, thus creating a "cherry stem" through appellant's property. It stands to reason that during the fire season the general public will drive to the end of the right-of-way and park their cars on the right-of-way in order to continue on foot (which is specifically permitted in the Management Plan). Panoche Management Plan at 20. There can be no doubt that BLM has been advised that during the periods when the upper gate is closed a portion of the right-of-way is used as a parking lot and campground, and that the campers build open fires on the right-of-way. It would seem that, by closing the upper gate, the activities BLM seeks to prevent have now been concentrated in that portion of the right-of-way adjacent to the gate, and BLM has created a greater risk of a fire starting in that area and spreading to appellant's lands than would be the case if either both gates were left open or if the lower gate were closed.

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

R. W. Mullen
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member