

DONALD C. OLSON

IBLA 89-522

Decided July 22, 1991

Appeal from a decision of the Bureau of Land Management, Kobuk, Alaska, District Office, denying application for reindeer grazing permit. FF-086404.

Affirmed.

1. Act of September 1, 1937--Administrative Procedure:
Burden of Proof- Evidence: Burden of Proof

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

APPEARANCES: Alma M. Upicksoun, Esq., Golovin, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Donald C. Olson (appellant) appeals from a decision by the Kobuk District Manager, Bureau of Land Management (BLM), dated May 19, 1989, denying his application to graze reindeer on public lands managed by BLM. The application, filed with BLM on March 2, 1989, embraces lands totalling approximately 893,000 acres on the Seward Peninsula, including the eastern portion of the Bendeleben Mountains, the Darby Mountains, McCarthys Marsh, and Death Valley, and all available vacant public land bordered by the Elim Indian Reservation and the Harry Karmun, Douglas Sheldon, and Tom Gray grazing permit areas. Appellant has proposed to graze approximately 500 reindeer initially, and to eventually build the herd to approximately 1,000 animals, with the intention of expanding the range to include lands provided by nearby villages.

BLM denied appellant's application, finding that reindeer would significantly compete with caribou and moose populations that inhabit and use the area for winter forage:

The probability that caribou will be utilizing habitat within this area during the winter months is high, thus leading to the potential for serious conflicts between reindeer and caribou.

Alaska Department of Fish and Game [(ADF&G)] observations indicate the Western Arctic Caribou Herd is still increasing. A review of existing literature clearly identifies reindeer/caribou competition interactions as conflicts that are serious, complex, and widely recognized by both reindeer and wildlife interests. Interaction between domestic reindeer and caribou involves transmission of disease, attraction and inclusion of reindeer into migrating caribou herds, and direct and indirect competition for winter forage.

Another major concern we have for this area involves the high concentrations of moose during the winter months in riparian areas and along hillsides in McCarthys Marsh. Moose are especially vulnerable to disturbances that could arise from reindeer herding operations.

(BLM Decision at 1).

On appeal, Olson challenges BLM's findings, arguing that the Western Arctic Caribou Herd Strategic Management Plan (WACHSM Plan) prepared by ADF&G does not contain data supporting the decision to deny his permit. Appellant contends that BLM's decision is antithetical to the purposes and policies of the Act of September 1, 1937 (Reindeer Industry Act), 25 U.S.C. §§ 500-500m (1988). Appellant further argues that even though ADF&G did not support issuance of the permit, three other State departments (Natural Resources, Environmental Conservation, and the Bering Straits Coastal Resource Service Area) reviewed the permit application and had no objections.

Appellant argues that BLM's conclusion that caribou and moose populations will be adversely affected by the introduction of his reindeer herd is unsupported. Specifically, he charges that his grazing application does not include areas known to be currently occupied by caribou, or with a high probability of being so occupied. Thus, he argues, the potential impact of his herd on caribou and moose populations would be minimal. He contends that it is ADF&G's policy to permit expansion of the reindeer industry when it minimally impacts caribou or other wildlife resources. He argues that the WACHSM Plan indicates that caribou are prone to large population fluctuations, and that subsequent decline in numbers could further reduce conflict between the herds.

The Decision Record prepared by BLM contains an environmental assessment (EA), which, along with other documentation in the case record, supports BLM's denial of appellant's application. The EA assesses the following three alternatives and their respective probable impacts upon the proposed affected areas: (1) issuance of a permit for unrestricted reindeer grazing; (2) issuance of a seasonal grazing permit for McCarthys Marsh; and (3) denial of the permit. The EA concludes that issuance of either an unrestricted reindeer grazing permit or a winter seasonal permit in the areas applied for by appellant would lead to significant conflict with terrestrial wildlife populations, including bear, wolf, caribou, and

moose (EA at 7-8, 10). ^{1/} The EA further concludes that subsistence use in McCarthys Marsh, protected by section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a) (1988), would be adversely affected by the proposal, owing to some "reductions in populations of species used for subsistence" due to a "reduction in availability of resources in McCarthys Marsh resulting from changes in the distribution, migration, or location of harvestable wildlife such as caribou and moose" (EA at 8). As to the second alternative, BLM identified an expected "reduction in availability of resources resulting from changes in the distribution, migration, or location of harvestable wildlife resources" (EA at 10).

With regard to the overlap of appellant's permit and caribou winter habitat, the EA states:

In 1987, caribou were in the Darby Mountains and were observed on the flats of McCarthy's Marsh between Telephone and Omilak Creeks. There have also been numerous observations of caribou in the Windy Creek area this winter; it was reported that a party of hunters harvested 30 caribou in this area in early March of 1989.

(EA at 2).

With regard to the location of moose habitat, the EA states:

Most of the high moose density habitat lies in the eastern portion of McCarthy's Marsh as well as upper Pargon Creek, Boston Creek, upper Fish River, Lava Creek, Telephone Creek, Mosquito Creek, and Omilak Creek. Much of the medium moose density habitat lies along the middle portion of Pargon Creek, Baker Creek, Wagon Wheel Creek, Windy Creek, Rathlatulik River, and lower Fish River. The low moose density habitat lies in the western portion of McCarthy's Marsh * * *.

(EA at 5).

The WACHSM Plan relied upon by appellant was developed by ADF&G and was approved by the Alaska State Board of Game in April 1984. In its May 17, 1989, letter opposing appellant's permit, ADF&G stated the following about the plan:

Both ADF&G and BLM are well aware of the incompatibility of reindeer and caribou on common ranges. There is a long and well-documented history of conflict between these animals in Alaska, involving forage resources, disease, predators, and loss of reindeer to caribou herds. Both agencies have established policy for reindeer grazing because of the degree of conflict between wildlife and reindeer grazing. In the Western Arctic Caribou Herd

^{1/} The EA noted that the second alternative would not pose a potential conflict with bears, which would be in hibernation during the winter months.

Strategic Management Plan (approved by the Board of Game in 1984), the department went on record as opposing the expansion of reindeer grazing into areas used by caribou. Since that time, the ADF&G has been involved, along with the BLM and the Reindeer Herders Association, with efforts to determine caribou use in several areas in proximity to existing reindeer grazing areas. Over the past few years McCarthy's Marsh and the surrounding mountains have been documented to support overwintering caribou. This use may increase as the Western Arctic Caribou Herd continues to grow from its present high numbers. [Emphasis supplied.]

(May 17, 1989, Letter at 1).

Maps submitted by appellant indicate that his application includes McCarthy's Marsh and the Fish River watershed, both of which were identified as moose and caribou habitat. While appellant avers that his grazing application does not include areas known to be currently occupied by caribou, or with a high probability of being so occupied, he has not provided the Board with evidence showing that BLM's and ADF&G's conclusions are in error. Appellant has made no affirmative showing that BLM erred in its decision that impacts of appellant's herd on terrestrial wildlife would be significant. Appellant produces no evidence to support his conjecture that the western arctic caribou herd is or will soon be in decline. Even if such evidence were presented, BLM could hardly take action that might hasten this decline.

Appellant argues that the District Manager's denial of his reindeer grazing permit is contrary to the stated purpose of the Reindeer Industry Act, supra. Section 14 of that Act authorizes the Department to issue rules and regulations specifically governing the grazing of reindeer on public lands:

In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof * * *; issue grazing permits; * * * and may issue rules and regulations to carry into effect the provisions of this section.

25 U.S.C. § 500m (1988). Regulations governing Alaskan reindeer grazing provide as follows:

Vacant and unreserved and unappropriated public lands are subject to inclusion in a reindeer grazing permit. Where these lands are within the natural migration routes of caribou, or when they have other important wildlife values, the lands may be included in a permit, at the discretion of the authorized officer after consultation with [ADF&G], subject to such special terms and conditions as may be jointly agreed upon. [Emphasis supplied.]

43 CFR 4310.1.

In this case, BLM denied the permit only after consultation with ADF&G, which expressly opposed issuance of a grazing permit on the lands requested by appellant. In its May 17, 1989, letter, ADF&G stated:

While reindeer grazing as an activity (at the stocking rates proposed) may be consistent with the Habitat Standard of the [Alaska Coastal Management Plan (ACMP)], that does not make it desirable to superimpose the activity upon caribou winter ranges and thereby create new conflict. As you know, it is often the reindeer industry that suffers losses as the result of reindeer and caribou conflicts. It does not serve the interests of the public, the herders, nor the resource management agencies to expand reindeer grazing in an area commonly used by caribou.

(May 17, 1989, Letter at 1). BLM's decision to reject appellant's application was made only after consultation with ADF&G, as required by 43 CFR 4310.1, and is fully supported both by ADF&G's opinion and its own decision record.

That Congress authorized the Department in its discretion to issue reindeer grazing permits implies that the Department is also authorized by Congress to refuse to issue such permits. United States v. Wilbur, 283 U.S. 414 (1931); Williams v. United States, 138 U.S. 514 (1890). The measure of the Department's authority to refuse to perform a discretionary act authorized by Congress is whether it has exercised a reasonable discretion. United States v. Wilbur, supra at 419. Under such circumstances, Congress does not authorize the Department to act arbitrarily. Williams v. United States, supra at 524. Appellant has not established that BLM's denial of the permit was in error or otherwise constituted an abuse of discretion, and we reject his argument that the denial of his reindeer grazing permit is contrary to the intent of the Reindeer Industry Act.

Appellant argues that even though ADF&G did not support issuance of the permit, three other State departments (Natural Resources, Environmental Conservation, and the Bering Straits Coastal Resource Service Area), reviewed the permit application and had no objections. We find no merit to this argument.

First, BLM is under no duty to consult with Alaska agencies other than ADF&G prior to issuance or denial of a permit. 43 CFR 4310.1. As noted above, ADF&G expressly recommended against granting the reindeer grazing permit.

Further, the record indicates that, on May 11, 1989, the State of Alaska Division of Governmental Coordination (DGC), evidently speaking for the State on behalf of the Alaska Departments of Natural Resources, Environmental Conservation, and Fish and Game, as well as the Bering Straits Coastal Resource Service Area Management Program, issued a "conclusive consistency determination" on behalf of the State. This determination set out pointed objections to the proposal:

Based on the review of your [Olson's] project by the Alaska Departments of Natural Resources, Environmental Conservation, and Fish and Game, and the Bering Straits [Coastal Resource Service Area Management Program], the state has determined that your project is consistent with the ACMP. Although the state can not find your proposal inconsistent with the ACMP definition of "habitat," we are concerned that the introduction of domestic grazers and wildlife [sic] could create many problems.

* * * * *

The McCarthy's Marsh/Bendeleben Mountain area has been commonly used by wintering caribou in recent years. ADF&G personnel have been involved in cooperative efforts with herders and other agencies to minimize caribou presence and movements in an effort to minimize conflicts with reindeer herds. The likelihood that caribou would be using habitat within or in close proximity to the proposed McCarthy's Marsh reindeer grazing is high. Under that condition, the potential for serious conflict between wildlife species and domestic grazers would be correspondingly great.

In addition, there are other wildlife resources which could be in conflict with reindeer herding. In particular, winter moose concentrations in riparian areas and along hillsides would be vulnerable to disturbance from herding operations at a time of the year when they cannot afford excess stress or energy expenditures.

Expansion of reindeer grazing into caribou winter habitat may not be in the best interest of the reindeer industry or the caribou winter habitat, as determined by the wildlife and land managers who must deal with the conflicts.

(May 17, 1989, Letter at 1). While appellant's argument might be accorded more weight had one of the agencies he names expressly disagreed with DGC's determination, we find nothing to indicate that such is the case here.

Accordingly, 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.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

