

Editor's note: Appealed -- dismissed sub nom. Baca v. Menyhert, Civ.No. 88-1167-JB (D. NM, March 26, 1992); aff'd No. 92-2206 (10th Cir. March 11, 1994)

CITY OF SANTA FE ET AL.
(ON JUDICIAL REMAND)

IBLA 90-300

Decided September 11, 1991

Reconsideration of this Board's decision in City of Santa Fe, 103 IBLA 397 (1988), on remand from the United States District Court for the District of New Mexico.

Decision affirmed, findings entered.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

The fluctuation in value and addition of lands to equalize values are contemplated by the statutory exchange program and by the original Notice of Realty Action published by BLM. Such fluctuations are acceptable provided: (1) they are predicated upon appraisals updated in a manner consistent with the Uniform Appraisal Standards for Federal Land Acquisitions; and (2) the equalizing monetary payment does not exceed 25 percent of the value of the public lands and other interests being conveyed at the time of the exchange.

2. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Grazing and Grazing Lands--Grazing Permits and Licenses: Cancellation or Reduction

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

3. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Grazing and Grazing Lands--Grazing Permits and Licenses: Cancellation or Reduction

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

APPEARANCES: Shannon Robinson, Esq., Albuquerque, New Mexico, for Antonio J. Baca; Gayle E. Manges, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On August 15, 1988, this Board issued a decision styled City of Santa Fe, 103 IBLA 397 (1988), affirming a July 2, 1986, decision of the New Mexico State Director, Bureau of Land Management (BLM), approving land exchange NM 39284, proposed by Louis Menyherth (Menyhert). The City of Santa Fe, Richard Hager, a landowner in the area of the Federal parcel sought to be conveyed out of Federal ownership, and Antonio J. Baca (Baca), who held a grazing lease of the land to be conveyed, were parties to that administrative appeal. Baca appealed this Board's decision to the United States District Court for the District of New Mexico, where it was assigned Civil Action number CIV88 1167 SC.

In an order dated March 27, 1990, The Honorable Juan C. Burciaga, Chief United States District Judge for the District of New Mexico, denied BLM's Motion to Affirm the Administrative Decision and remanded the case to this Board for reconsideration. Judge Burciaga directed this Board to issue a written decision on reconsideration based solely upon the Board's assessment of the following two questions:

I. Whether a degree of fluctuation in the specific terms of this transaction as great as that disclosed in the sequence of land appraisals culminating in the appraisal dated July 28, 1988, as viewed in light of the appraisal tendered by affidavit at the present hearing before this Court and valuing the Santa Fe parcel at \$1,484,000, is contemplated by the statutory exchange program in general, and by the original Notice of Realty action in particular?

II. Whether, in the light of the Bureau's December 19, 1985, letter to Plaintiff Baca's attorney, its March 27, 1985, letter to Plaintiff Baca, and other communications of record, Plaintiff Baca has received the two-year notice required under 43 C.F.R. 4110.4-2 and any other applicable regulations?

Section 206(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716(a) (1988), authorizes the Secretary of the Interior to exchange public lands or an interest therein, if the public interest will be served by making the exchange. Section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (1988), requires that the exchanged lands be equal in value, and if they are not equal, the values are to be equalized by the payment of money to the grantor or to the Secretary, so long as payment does not exceed 25 percent of the total value of the lands or interests

transferred out of Federal ownership. 1/ Consistent with the statutory language, 43 CFR 2201.3(a) and (b) provides:

(a) No exchange shall be deemed suitable if it is not an equal value exchange; however such an exchange may include a money equalization pursuant to § 2201.5(c) of this title.

(b) Appraisals to determine whether the lands and interests in lands to be exchanged are of equal value shall be in accordance with the principles of the Interagency Department of Justice publication entitled "Uniform Appraisal Standards for Federal Land Acquisitions".

"Equal value exchange" is defined as an "exchange of lands, or interests therein, where valuations show that the interests being exchanged are of equal value." 43 CFR 2200.0-5(h). "Money equalization means balancing the differences in the equal value of the properties by a money payment made by either party." 43 CFR 2200.0-5(i).

The regulation found at 43 CFR 2201.5(c), entitled "Final requirements," states:

At the end of the period provided in the notice of realty action and upon a determination by the authorized officer that a particular exchange is acceptable, the owner or holder of the non-Federal land and interest shall provide the following:

* * * * *

(c) Taxes and equalizing money. * * *

(2) A money payment for equalization of value shall not exceed 25 percent of the value of the public lands and interests being conveyed, but the amount of the money payment shall be reduced to as small an amount as possible.

43 CFR 2201.7 "Acceptance of conveyance and removal of improvements," also provides:

(a) Acceptance of conveyance. If the title and other evidence required of the owner of the non-Federal lands and interests in lands are in conformity with the law and regulations, the authorized officer may accept title to the non-Federal property conveyed to the United States. A patent or other document of conveyance for the property exchanged shall be issued and a notice of

1/ While not directly at issue herein, we note FLPMA was amended on Aug. 20, 1988, 102 Stat. 1087, 1092, P.L. 100-409 §§ 3, 9, 43 U.S.C. § 1716(b).

the issuance of said conveyance documents shall be published in the Federal Register. The Governor and the head of local governments shall be immediately notified of the issuance of conveyance documents for public lands located within their respective jurisdictions. A money payment, if required to equalize values, shall be made by the appropriate party prior to or at the date of conveyance. [Emphasis added.]

The final valuation of the properties to meet the equal value requirement occurs at the time of "conveyance of lands and interests therein to a person at the same time there is a conveyance of lands and interests therein from the person to the United States." 43 CFR 2200.0-5(g) (definition of "exchange"). This interpretation is bolstered by the agency's response to comments on the appraisal section of the proposed regulation. "[A] comment on [the appraisal section] wanted the rulemaking to set a definite date when the valuation of the property subject to the exchange would be set and recommended the date of the notice of realty action." BLM responded:

This recommendation has not been adopted because the valuation of the property must be equal, or equalized by payment of the difference in valuation, at the date the exchange is made. The rulemaking provides for equalization on the date of the exchange and no change has been made." 46 FR 1637 (Jan. 6, 1981).

BLM filed a copy of "Uniform Appraisal Standards for Federal Land Acquisitions" (Uniform Standards), referenced in 43 CFR 2201.3(b), with this Board. Uniform Standards § B-4, which pertains to the updating of appraisals, states that:

When appraisals have been made any substantial period in advance of the date of negotiations for purchase contracts * * *, the appraisals must be carefully reviewed and brought up to date in order to reflect current market conditions. This is required, notwithstanding that it is incumbent upon the appraiser to recognize the general market value trends and carefully consider the value of the property if offered for sale over a reasonable period of time. Any change in the value estimate attributable to trending or updating should be fully supported by acceptable market evidence rather than by reference to a market index based on unidentified information.

The exchange now under consideration involves 280 acres of public land approximately 3 miles west of Santa Fe, New Mexico (the Federal Parcel), to be exchanged for Menyhart's conveyance of 8,083.53 acres of private lands (private lands) in Taos County, New Mexico.

Appraisal of Offered Private Land

On November 29, 1985, and February 20, 1986, BLM staff appraiser Timothy P. Heiser appraised the private lands at a fair market value of

\$966,000. 2/ That appraisal identified 25 comparable sales, 3 occurring in 1985, 7 between 1980-84, and 15 occurring in the 1970's. His appraisal was approved by a BLM staff reviewer on February 20, 1986.

James H. Finney (Finney), a contract appraiser hired by BLM, set the fair market value at \$837,000 on May 17, 1988. The market data for comparable sales identified by Finney in 1988 was based on then current sales data. 3/ Fourteen comparable sales were identified, two occurring in 1988, two in 1987, eight in 1986, and two in 1985.

Finney observed:

[I]t is suggested that raw land values in the Area grew substantially during the 1970's and early 1980's. This was true in most northern New Mexico areas where recreational and tourist industries and employment were growing rapidly in parallel to the popularity of the "sunbelt region." Real estate inflation rates which were high during this period came to an abrupt halt somewhere around 1984. A principal cause of this drop of inflation was the depressed oil and gas economics occurring within the neighboring regions of Oklahoma and Texas. These areas have traditionally been large supporters of the Area's tourist industry. Also, there are other factors such as reduced mining activities in the northern part of Taos County and a nation-wide backing off of real estate investments and land speculation. An overall observation of raw land tract sales over the past two years indicate [sic] prices to be basically stable. In some isolated comparisons of sales, a possible decline of value is indicated.

(1988 Finney Appraisal at 6). The 1986 BLM staff appraisal of the private lands focused on comparable sales during a period prior to the "abrupt halt" in 1984 identified by Finney.

2/ The appraisal divided the parcels into three groups (Groups A - C). Group A contained six isolated tracts of undeveloped grazing land (\$75 to \$85 per acre). Group B embraced a small partially improved hobby ranch unit comprised of unencumbered land (\$135/acre) and land subject to mining (\$45/acre). Group C was made up of recreation/rural homesite lands along Rio Grande Gorge, and was further classified as "north tracts" (\$150/acre) and "south tracts" (\$250/acre). BLM applied a 5-percent discount for "assemblage of multiple tracts." BLM determined that the discount was appropriate in an assemblage sale when each of the tracts is valued separately (BLM 1985 Appraisal of Private Land at 26).

3/ Finney compared the private lands to the comparable sales for access, view, and terrain features. He determined the market value of tracts A, B, and C, having "[d]ifficult access but relatively superior location because of view amenities" (1988 Finney Appraisal at 55), to be \$115/acre; Tract D, consisting of a small hobby ranch, the "Buffalo-Pinyon Ranch Unit," having

An updated appraisal of the private lands was performed by BLM, and the value was set at \$825,000 on February 18, 1988. A BLM staff reviewer approved both the 1988 Finney Appraisal and the 1988 BLM Appraisal on July 28, 1988, and elected to use the BLM updated appraisal. BLM's 1988 private lands appraisal bifurcated the lands for appraisal purposes with one appraisal addressing parcels scattered "from near the Rio Grande Gorge bridge to near the Colorado border" (Group A and C, 1985-86 BLM Appraisal) and the second examining a small ranch, the Buffalo-Pinyon Ranch Unit near Tres Piedras (Group B, 1985-86 BLM Appraisal). For the scattered parcels, BLM identified 16 comparable sales, pared the field to six, and relying on the most current values of \$100 per acre, (sales in 1986 and 1988) determined the fair market value of the scattered private parcels to be \$100/acre or \$495,300 (1988 BLM Appraisal at 8).

In the second bifurcated appraisal BLM gave weekend hobby ranches a greater market value than a solitary tract with no fences, water, etc. BLM identified three sales and two listings in the Tres Piedras area it considered to be comparable to the Buffalo-Pinyon Ranch Unit, compared location, size, access, and other factors, found a December 1986 sale of a small ranch adjoining the Buffalo-Pinyon Ranch at \$116.35 per acre to be the most comparable (1988 BLM Appraisal at 11-12), and determined the fair market value of that portion of the Buffalo-Pinyon Ranch Unit not encumbered by leases to be \$116 per acre. That portion encumbered by leases related to perlite mining was valued at \$39 per acre "based on the ratio used in the most recent sale of the subject" (1988 BLM Appraisal at 12).

As to the general real estate market, BLM observed:

Taos witnessed a number of speculative developments in the 1970's and early 1980's, some of them extending northwesterly from town to the Rio Grande. Lack of commitment by the developers, deep water wells and no electricity resulted in public outcry and stricter subdivision regulations which have notably affected speculative land sales. Recent changes in the Federal tax laws made interest no longer tax deductible. Numerous banks and savings and loans have been forced into bankruptcy due in large part to lending practices related to real estate. All of these factors have had an effect on the Taos area real estate market.

(1988 BLM Appraisal at 5).

fn. 3 (continued)

"superior access and locational amenities includ[ing] views, terrain and vegetation" (1988 Finney Appraisal at 55), at \$120/acre; and parcels E through J, "having difficult access and relatively inferior views and terrain features" (1988 Finney Appraisal at 56), at \$80/acre, for a total rounded off value of \$837,000.

Appraisal of Selected Public Land

The selected public land or Federal tract to be exchanged consists of 280 acres in sec. 24, T. 17 N., R. 8 E., New Mexico Principal Meridian, and is situated within the "environs and economic influence of Santa Fe in north central New Mexico about 5 miles west of downtown Santa Fe." The Federal tract is 1/2 mile northwest of Puesto Del Sol, a rural subdivision of 3-5 acre tracts (BLM Oct. 30, 1985, Appraisal Report of selected BLM lands (1985 BLM Appraisal of selected lands) at 9) and there is an existing development, Pinon Hills, adjacent to the north boundary of the Federal tract. Id. The land to the north of the Federal tract was sold as part of a 4,800-acre parcel to Santa Fe Ranch in early 1988 (Feb. 19, 1988, BLM appraisal of selected lands at 6).

BLM appraised the 280 acres on October 10, 1985, and calculated the fair market value to be \$3,500 per acre or \$980,000 (1985 BLM Appraisal of selected lands at 23), based on its finding that the highest and best use of the land was "rural homesite subdivision development" with 2-1/2 to 5-acre lots. Id. at 11. When appraising the Federal tract in 1985 BLM did an extensive market trend analysis, constructed a unit price/size curve based on sales data derived from 12 comparable sales and analyzed the relationship between unit price and size. Based on the size curve BLM adjusted the sale price of the comparables, and then compared the Federal tract to seven selected tracts based on location, access, terrain, trees, and neighborhood conditions. Id. at 20-23.

Two updated appraisals of the Federal tract were subsequently performed. On February 18, 1988, a BLM staff appraiser appraised the Federal tract and set the fair market value at \$700,000. On July 1, 1988, BLM's contract appraiser, Finney, appraised the Federal tract and set the fair market value at \$784,000.

In the 1988 BLM staff appraisal the appraiser examined historical selling prices of rural subdivision lot developments between 1980 and 1987, and determined that "[s]ince [1985] the number of sales has dropped significantly and land values have stabilized or even declined in some cases" (1988 BLM Appraisal at 9). Also found to be of importance was the fact that after adjusting for the time factor, the lowest prices were consistently associated with those tracts identified as having greater acreage.

BLM also matched pairs of sales in well-developed subdivisions and found that tracts purchased in 1981 realized a 20-percent-per-year appreciation between 1981 and 1987 but suffered a 10-percent loss in 1987. It examined larger tract sales and listings since 1983 and found that there were no known large tract sales since 1986. Id. at 10. BLM conducted a detailed examination of seven comparable tracts (a sale in 1985, a sale in 1988, and two listings, one of which involved four tracts (Montoya Estate listing)), and determined that the Federal tract was inferior to comparables sold at \$3,500, \$2,500, and \$3,450 per acre, and superior to the four parcels listing at prices between \$1,192 and \$2,127 per acre. Based on these

findings it determined the fair market value of the Federal parcel to be \$2,500 per acre or \$700,000.

Finney appraised the Federal tract at \$784,000 on June 1, 1988. Finney identified 14 comparables (1988 Finney Appraisal of Federal tract at 13-31) and prepared a graph of the size - price relationship which indicated that the per acre price is reduced by \$3 to \$4 per acre of increase in tract size. He then made the indicated adjustments to the comparable sales prices for a more accurate comparison with the Federal tract. Finney then compared size, access, and location, and determined that "value indications for the Subject property ranged between \$2,600 and \$3,100 per acre." Weighing the sale with the least gross adjustment Finney determined the market value of the Federal tract to be \$2,800/acre. BLM reviewed the two 1988 appraisals and found that they supported one another and were properly documented. In a letter dated July 28, 1988, the BLM staff appraisal was selected as most representative of the estimated fair market value.

In an attempt to show that BLM had not properly estimated the value of the Federal tract, Baca introduced a copy of the 1990 Santa Fe County Tax Assessor's Notice of property tax valuation (tax assessor's notice) into evidence by affidavit at the hearing before Judge Burciaga, and the district court's remand order refers to a value of \$1,484,000 appearing on the tax assessor's notice. However, Baca made no showing before the court and neither Baca nor any party has submitted evidence to this Board that would support a finding that the tax assessor's notices were based on an appraisal or appraisals conducted in a manner meeting the Uniform Standards, or the regulatory requirements set out above. Further, Baca has failed to show error in either of the 1988 appraisals, show that BLM or its contract appraiser failed to conduct those appraisals in conformance with the Uniform Standards, or submit a verifiable appraisal contradicting the 1988 appraisals. 4/

The record is replete with evidence that BLM and its contract appraiser, in updating appraisals on the private lands and Federal tract, relied on more than a projection of the falling market trends experienced after 1985. The record supports a conclusion that the subsequent appraisals were based on acceptable market evidence consistent with the Uniform Standards. The evidence used by the appraisers was the value of comparable sales. BLM and its contract appraiser engaged in a comparison of the identified comparables and the Federal parcel relative to parcel size, access, location, physical characteristics, and neighborhood. In appraising the

4/ This Board has consistently held that absent showing error in the appraisal method by a preponderance of the evidence, the agency's appraisal generally may be rebutted only by another appraisal. Gila Electronics, 117 IBLA 51 (1990). For example, based on the evidence before us, we are unable to determine whether the Santa Fe County Tax Assessor had arrived at the figure quoted by Baca by projecting from an earlier year or by conducting a comparable sales analysis.

offered private lands, the 1988 updated appraisals engaged in a comparison of comparables identified and the offered private lands with reference to size, access, view, and terrain features.

[1] The statutory exchange program and the original Notice of Realty Action (NORA) both contemplate fluctuations in value and terms. The adjustment to the exchange land values upon which subsequent estimated values are based are acceptable provided the adjustments are based on an appraisal updated in a manner consistent with the Uniform Standards and that the money payment for equalization of value at the time of the exchange does not exceed 25 percent of the value of the public lands and interests being conveyed.

It cannot be said that BLM is never obligated to issue a new NORA. To the contrary, 43 CFR 2201.1(b) provides that the "segregative effect of the [NORA] on the public lands shall terminate upon issuance of patent or other document of conveyance to such lands, upon publication in the FEDERAL REGISTER of a termination of the segregation or 2 years from the date of its publication, whichever occurs first." ^{5/} BLM rejected a proposal made by commentators on the regulation, as proposed, permitting extension of the 2-year period stating

that the two year period provided in the rulemaking should be adequate to complete the processing of an exchange. The [NORA] should not be issued in connection with an exchange until sufficient action has been completed to determine if the exchange is in the public interest and can go forward. At this point, the remaining work on processing an exchange should be completed within the two - year period covered by the segregation.

46 FR 1636-37 (Jan. 6, 1981).

The 2-year period did not expire in the instant case. The appeal of the NORA published June 6, 1985 (50 FR 23838), in July of 1986 suspended ^{6/} the effect of the NORA, and the 2-year segregation remained in effect, pursuant to 43 CFR 4.21 until this Board issued its decision on August 15, 1988, in City of Santa Fe, supra. On August 16, 1988, the 2-year period resumed with 1 year remaining. The record reveals that

^{5/} 1988 Amendments to the Act provide for a 5-year period of segregation. See 43 U.S.C. § 1716(i) (1988). However, 43 U.S.C. § 1716(g) (1988) states that

"[w]here the Secretary concerned and the party or parties involved in an exchange have agreed to initiate an exchange of land or interests therein prior to August 20, 1988, subsection (d) through (i) of this section shall not apply to such exchange unless the Secretary concerned and the party or parties involved in the exchange mutually agree otherwise." No evidence of an agreement is found in the record.

^{6/} In this case BLM and its contract appraiser performed the updated appraisals while the matter was on appeal to this Board. The effect of filing of the appeal suspended BLM authority to act on the subject matter

BLM accepted warranty deeds on the private lands on September 8, 1988, and patent No. 30-88-0073 issued to Menyhart on the same date, placing the date of exchange well within the 2-year period identified in the regulation. Baca filed his civil action in the United States District Court for the District of New Mexico on September 26, 1988.

We now turn to the second issue. Baca avers that the Board's decision finding that the March 1985 notice constituted the 2-year prior notification required by 43 CFR 4110.4-2 was in error because BLM notified his former attorney Patrick Casey on December 19, 1985, that "[a] final decision on the exchange has not been made and the grazing reduction is still a possibility. Mr. Baca will be formally notified of any such grazing reduction and the required two (2) year notification will be started on that date" (Baca's Memorandum Brief at 2). Baca insists that he has never been formally notified of the grazing reduction. Id.

Baca quotes Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-15 (1949):

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

* * * * *

"The fundamental requisite of due process of law is the opportunity to be heard" Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

* * * * *

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [citations omitted]. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance [citations

fn. 6 (continued)
on appeal. This suspension has never been interpreted so broadly so as to preclude BLM from preparation of appraisals or supplemental reports as to the correctness of its original decision. B. K. Killion, 90 IBLA 378 (1986); Benton C. Cavin, 83 IBLA 107, 114 (1984).

omitted]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals" American Land Co. v. Zeiss, 219 U.S. 47, 67, [31 S. Ct. 200, 207, 55 L. Ed. 82].

Baca contends that he never received notice, claiming that the alleged notice he received was intended to misinform him, causing him to hold a false belief that a formal notice would be forthcoming. Baca additionally cites Avis Gloves, Inc. v. United States, 188 F. Supp. 50 (USCC 1960), for the proposition that a notice must be clear, definite and explicit, and not ambiguous and contends, based on the following quote from Kansas & Missouri Railway & Terminal Co. v. Beal, Inc., 338 F. Supp. 1362, 1369 (D. Kansas 1972), 7/:

The law is well settled that one who bases legal action upon a required notice has the burden of making such notice adequate and effective; otherwise, it is not notice. Most especially, this should be a heavy burden upon quasi-public companies such as carriers, public utilities and insurance companies which are regulated by law, whose personnel or officers should know that law, and who have the capacity to maintain extensive and minute records. Ineptness should not justify legal award.

that the notice he received was inadequate. Quoting In Re Mortenson, 45 BR 764 (USBC 1985), Baca insists that, although there are circumstances where actual knowledge might eliminate the need for formal written notice, "these situations, however, are those which do not specify the form of notice to be given." Baca relates that the general rule is that where the form of notice is specified by statute, that form is exclusive." Id. at 765. See 58 Am. Jur. Notice §§ 22 and 23. In support of his argument Baca relies on Aqua Bar & Lounge, Inc. v. United States, 438 F. Supp. 655 (E.D. Pa. 1977), in which a defective notice of the sale of property rendered invalid a tax sale by the Internal Revenue Service (IRS). The court therein held that where a specified mode of giving notice is prescribed by statute, that method is exclusive and all others are ineffective where property rights are involved (Baca Memorandum Brief at 4).

Baca avers that D.C. Transit System, Inc. v. United States, 717 F.2d 1438 (D.C. Cir. 1983), involving several misleading notices is exactly on point. He notes that one of the notices at issue in that case referred to maps that required one to reconstruct the intent of the parties and quotes the following passage from the D.C. Circuit Court's opinion in that case: "Documents incorporated by reference into a public notice may impart constructive knowledge of their contents in many circumstances, but they may

7/ This case was erroneously cited by appellant as "338 F2 1362 (D.C. 1972)" and is cited correctly herein.

not be used to correct fundamental errors in the notice itself unless the notice expressly so warns." Id. at 1443.

Baca maintains that he reasonably relied on the December 19, 1985, written notice from the Taos Resource Area Manager, who exercised his apparent authority in stating "Mr. Baca will be formally notified of any such grazing reduction and the required two (2) year notification will be started on that date" (Baca Memorandum Brief at 4). Baca insists "no notice was received and such notice was required." Id. at 5.

In its answer to Baca's arguments BLM relates that the 10-year grazing permit in effect on March 27, 1985, was issued to Baca on March 1, 1979, and was to expire March 1, 1989. This permit provided for grazing livestock on public lands with an authorization of 1,706 animal unit months (AUM's). BLM states that a patent was issued on September 8, 1988, disposing of 280 acres formerly included in Baca's grazing permit to Menyhert (BLM Answer at 6). Since March 1, 1989, Baca has been authorized to graze livestock on the remaining public lands and the authorization remains at 1,706 AUM's.

BLM further avers that several documents in the administrative record provided Baca full notice and satisfied the requirements of 43 CFR 4110.4-2. First, BLM contends the letter of March 27, 1985, from Acting Taos Resource Area Manager Grandjean to Baca states:

[W]hen the Menyhert exchange is completed the public land acreage in your allotment will decrease by 280 acres, more or less, and 36 Animal Unit months (AUMs). Your grazing preference on the Antonio J. Baca Allotment #0543 will be reduced from 1706 AUM's to 1670 AUM's for a loss of 6 cattle year long.

BLM reasons that this notice providing for a decrease of 280 acres and, on that date, for a decrease of 36 AUMs was issued 3-1/2 years before the lands were patented to Menyhert. The letter clearly described the lands at issue, the parties involved, and the proposed exchange (Answer at 7). BLM argues:

In his letter of November 6, 1985 to Acting Taos Manager Niemeyer, by which objection is made to the [NORA], Baca's attorney * * * Casey acknowledges receipt of the March 27, 1985 letter. He argues, however, that BLM did not comply with the requirement of 43 CFR 4110.4-2 because the letter was notification "of a possible land exchange * * *" (emphasis supplied) and the time limits operate only when that action becomes probable. (Emphasis in original).

(Answer at 7-8).

BLM urges that the regulation requires only that notice be given and contains no wording as to whether the action is possible or probable. BLM submits that any exchange proposal is subject to a wide variety of problems which may prevent consummation of the action on the date of exchange. The regulations, BLM insists, do not presume that notification will wait until

the action is an accomplished fact (Answer at 8). BLM notes that Baca again received notice when served with a copy of the NORA in August 1985 which, among other things, deleted any decrease in grazing authorization. The NORA states that the "exchange proposal is consistent with recommendation L-7.3 in the Rio Grande Management Framework Plan (MFP). A BLM grazing allotment will be reduced by 280 acres, but the amount of grazing use will remain unchanged."

BLM states that Baca's attorney's letter of November 6, 1985, acknowledged the NORA notification that "a grazing allotment will be reduced by 280 acres." BLM argues that Baca's attorney apparently ignores the phrase in the NORA that "grazing use will remain unchanged" when alleging that the NORA does not specify what amount of grazing will be reduced. BLM insists the conveyance or patenting of the 280 acres is clearly anticipated by the NORA, the land to be patented is described, the status quo of the grazing authorization clearly stated, the exchange action characterized and this notice preceded the patenting by about 3 years (Answer at 9). BLM notes also that Baca was served with a copy of the State Director's July 2, 1986, decision confirming the NORA and that the transfer preceded the patenting by slightly more than 2 years. BLM avers finally that the IBLA decision of August 18, 1988, dealt with the notification issue, and this Board found that Baca was not deprived of notice or any other notice under the grazing regulation. Id. at 9.

Summarizing, BLM insists that before and during the exchange and after patent issued, Baca was at all times authorized to use 1,706 AUMs, even though 280 acres were patented on September 1988. BLM insists Baca's grazing authorization has not been decreased, even though Baca received the 2-year notice that a portion of the lands in his allotment were conveyed out of Federal ownership. Id.

[2] The regulation found at 43 CFR 4110.4-2(b) provides that "[w]hen public lands are disposed of or devoted to a public purpose which precludes livestock grazing, the permittees or lessees shall be given 2 years' prior notification * * * before their grazing permit or grazing lease and grazing preference may be canceled." This section must be read in pari materia with 43 CFR 2201.1(c), which additionally provides:

When the exchange of a tract of public land requires the cancellation of a grazing permit or lease in its entirety notice shall be given the permittee or lessee 2 years prior to disposal except in cases of emergency. * * * The publication of a notice of realty action shall constitute notice to the grazing permittee or lessee if notice has not been previously given.

As can be seen, 43 CFR 2201.1(c) expressly provides that publication of the NORA constitutes notice to the grazing permittee or lessee if notice has not previously been given. The law is well settled that duly promulgated regulations have the force and effect of law and are binding on the

Department and this Board. ANR Production Co., 118 IBLA 338 (1991), Conoco, Inc. (On Reconsideration), 113 IBLA 243 (1990). Consistent with 43 CFR 2201.1(c), we hold Baca received the 2-year regulatory notice.

[3] Even assuming arguendo that 43 CFR 2201.1(c) was not dispositive, Baca would still not prevail on the notification issue. Kansas & Missouri Railway & Terminal Co. v. Beal, Inc., supra, cited by Baca, involved a rail carrier's suit to recover, inter alia, demurrage charges claimed to have been made on behalf of defendant, Beal. Demurrage is chargeable by a carrier to a consignee according to Interstate Commerce Commission (ICC) regulations setting rates and bases for charges of such rates. ICC regulations prescribed when constructive placement notices were required to be sent incident to collecting demurrage and the required contents of said notices. In denying the rail carriers recovery of demurrage charges, the portion of the decision quoted by Baca must be read in light of the Kansas District Court, finding that defendant's actual notice of the car placements would have been legally sufficient where defective notices existed (id. at 1368), and that court's conclusion that:

Legal notification from carrier to consignee of the arrival and placement of a car being a necessary and lawful requirement and duty of the carrier, it follows that no legal demurrage charges can be made without proof of actual knowledge of such arrival and placement of the particular car by its consignee, or by proof of mailing of notice to the consignee. Here, the evidence of actual notification and/or knowledge to defendant consignee or their agents is at best conflicting. Plaintiff failed to meet its burden of proof in this regard.

Id. at 1367.

The required notice in Aqua Bar & Lounge, Inc. v. United States, cited by Baca, was governed by 26 U.S.C. § 6335 (1988), which details a prescribed method for giving the required notice. The court rebuffed actual notice arguments in that case because the statute required a particular method and the IRS failed to comply with a specific statutory mandate. In the case before us neither the statute nor the regulation prescribes the method for giving of notice. Thus, Aqua Bar & Lounge, Inc. v. United States is not controlling.

Two defective official public notices were at issue in D.C. Transit System, Inc. v. United States, supra, relied on by Baca. Actual notice or knowledge was not at issue in that case as "the [U.S.] government presented no evidence disputing D.C. Transit's lack of actual knowledge." Id. at 1440.

43 CFR 4110.4-2 requires 2-years prior notice but does not specify a particular form of notice or the required contents of such notice. The lack of such specific requirements distinguishes the notice at issue herein from the notices at issue in the cases relied on by Baca. Courts have held that

"[i]n general, if a statute or rule requires that notice be given, but fails to specify a particular form of notice, that which will constitute sufficient notice will be liberally construed." Garcia v. Industrial Comm. of Arizona, 685 P.2d 1336, 1340 (Ariz. App. 1984); Davidson v. Wee, 379 P.2d 744, 749 (Ariz. 1963); Yuma County v. Arizona Edison Co., 180 P.2d 868 (Ariz. 1947). Courts have also recognized generally that one having actual notice is not prejudiced by, and may not complain of failure to receive statutory notice. First National Bank v. Oklahoma Savings & Loan Board, 569 P.2d 993, 997 (Okla. 1977); 8/ Macon-Atlanta State Bank v. Gall, 666 S.W.2d 934, 940 (Mo. App. 1984).

In light of the foregoing we note that the March 27, 1985, letter from Acting Taos Resource Area Manager Grandjean to Baca clearly satisfied the regulatory notice requirement. Baca's attorney's November 6, 1985, letter did not deny receipt of the notice, but merely disputed its legal sufficiency.

Were we to find that the March 27, 1985, notice was vitiated by the December 19, 1985, notice from the Taos Resource Area Manager, Baca would not prevail as he received actual notice when he was served with a copy of the NORA in August 1985, more than 3 years before September 8, 1988. The NORA deleted any decrease in grazing authorization but also provided: "This exchange proposal is consistent with recommendation L-7.3 in the Rio Grande Management Framework Plan (MFP). A BLM grazing allotment will be reduced by 280 acres, but the amount of grazing use will remain unchanged."

Baca's attorney's November 6, 1985, letter acknowledged receipt of the NORA notifying Baca that his grazing allotment would be reduced by 280 acres. Overlooking the phrase in the NORA that, "grazing use will remain unchanged," Baca challenges the NORA because it does not specify what amount of grazing will be reduced.

Baca's attorney's response to the March 27, 1985, notice is evidence of receipt of the NORA which refutes any claim that Baca did not have actual notice 2 years prior to the proposed exchange. Baca's participation throughout the process leading up to the exchange, moreover, demonstrates that at no time (including after receipt of the alleged defective notice) was Baca prejudiced by any alleged failure to receive notice. Macon-Atlanta State Bank v. Gall, *supra* at 940. Although he asserts that he reasonably relied on the December 19, 1985, notice, Baca has failed to identify specifically how he has been prejudiced by this reliance. It is not as if Baca, in reliance on the notice, slept on his rights to participate in the process leading up to the proposed exchange. To the contrary, Baca actively challenged the regulatory sufficiency of the notice and participated in the exchange process. He was clearly afforded an opportunity to be heard.

8/ In support of this proposition the Oklahoma Supreme Court cited Converse v. Udall, 262 F. Supp. 583 (D. Or. 1966), *aff'd*, 399 F.2d 616 (9th Cir. 1969), *cert. denied*, 393 U.S. 1025 (1969). First National Bank v. Oklahoma Savings & Loan Board, *supra* at 997 n.12.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, on reconsideration this Board affirms its prior decision and enters the foregoing findings in writing as directed by the March 27, 1990, order of The Honorable Juan C. Burciaga, Chief United States District Judge for the United States District Court for the District of New Mexico.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge