

MAX WILSON

IBLA 92-231

Decided December 5, 1994

Appeal from a decision of the California State Office, Bureau of Land Management, returning desert land entry application CACA 29281.

Affirmed.

1. Administrative Authority: Generally--Appeals: Jurisdiction--Desert Land Entry: Applications--Desert Land Entry: Classification--Desert Land Entry: Lands Subject To--Federal Land Policy and Management Act of 1976: California Desert Conservation Area--Federal Land Policy and Management Act of 1976: Land-Use Planning--Rules of Practice: Appeals: Jurisdiction

BLM properly refuses to allow a desert land entry and returns the desert land entry application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land use plan or the classifications contained therein.

2. Applications and Entries: Valid Existing Rights--Applications and Entries: Vested Rights--Desert Land Entry: Applications

BLM's refusal to approve an application to make a desert land entry does not constitute a compensable taking of private property since the filing of a desert land entry application for public land does not create any present right or title in the land in the applicant, but only a right to have the application considered.

3. Desert Land Entry: Applications--Desert Land Entry: Cultivation and Reclamation

To the extent that a desert land entry application proposes to preserve acreage as desert, the application cannot be allowed since it conflicts with the

Desert Land Act's primary goal of changing desert to agricultural land through actual and permanent cultivation of land which in its natural state is unproductive.

APPEARANCES: Max Wilson, Mountain Pass, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Max Wilson has appealed from a decision of the Chief, Lands Section, California State Office, Bureau of Land Management (BLM), dated January 8, 1992, returning his petition-application filed under the Desert Land Act of March 3, 1877, as amended, 43 U.S.C. §§ 321-329 (1988), because the lands applied for had been classified as unavailable for agricultural use.

Wilson filed his petition-application on November 19, 1991, seeking to enter 320 acres of public land embracing the W½ sec. 14, T. 17 N., R. 14 E., San Bernardino Meridian, San Bernardino County, California. Although Wilson indicated that all of the requested 320 acres were irrigable and that he had a right to the permanent use of sufficient water to irrigate and permanently reclaim all of the irrigable portions of the land, he proposed to cultivate only the 40-acre subdivision identified on the maps submitted with his petition-application as Parcel 3, ultimately producing approximately 2,000 pounds of pecans per acre on the cultivated tract. ^{1/}

The lands described in Wilson's petition-application lie within the California Desert Conservation Area (CDCA) established by section 601 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781 (1988). Pursuant to section 601(d) of FLPMA, 43 U.S.C. § 1781(d) (1988), the Department promulgated the California Desert Conservation Area Plan in 1980. The plan, which was approved by two Secretaries of the Interior (see Eric L. Price, 116 IBLA 210, 210-11 (1990)), noted that, with the exception of approximately 300,000 acres (out of a total of approximately 12,000,000 acres of Federally owned lands), all lands within the CDCA had been placed into four multiple use classifications describing the level of use which would be allowed within any specific geographic area: C (Controlled), L (limited), M (Moderate), and I (Intensive). See CDCA Plan at 13-14. The plan also outlined various activities which would either be permitted or proscribed, depending upon the land classification applicable.

The lands included in Wilson's petition-application were designated in the CDCA plan as class L, a classification designed to provide for lower-intensity, carefully controlled multiple use of resources while ensuring the protection of sensitive "natural, scenic, ecological, and cultural resource values" found on the lands so classified. See CDCA Plan at 13. Under the 1980 plan, agricultural uses (excluding livestock grazing but

^{1/} In a request for expedited consideration filed on Aug. 18, 1994, Wilson explained that the remaining land "will be set aside as land not used for or by human habitation/development. These acres will be left as a small way to preserve this arid yet delicate and unique ecosystem."

including entry under the Desert Land Act) were precluded within areas designated as either class C or L, but were authorized on suitable lands within classes M and I. See CDCA Plan at 15. In 1985, the CDCA Plan was amended to close lands classified as class M or I from entry under the Desert Land Act, thereby restricting agricultural entry within the CDCA only to those lands which were unclassified. 2/

In its decision refusing Wilson's petition-application and returning it to him, BLM noted that, under the 1985 amendments to the CDCA Plan, only unclassified lands were subject to agricultural entry and, therefore, any applicant seeking to make such an entry on land classified under the CDCA Plan was required to first apply for a plan amendment to change the land to "unclassified" before the entry could be allowed. Rather than apply for such a plan amendment, Wilson pursued this appeal.

On appeal, Wilson objects to BLM's reliance on the CDCA plan as the basis for rejecting his petition-application, arguing that plan was never properly adopted in accordance with the requirements of FLPMA. Wilson contends that 43 U.S.C. § 1781(d) (1988) directed the Department to prepare and implement the plan for management of the CDCA in accordance with 43 U.S.C. § 1712 (1988), and that, under 43 U.S.C. § 1712(e)(2) (1988), the CDCA plan had to be approved by Congress in order to be effective.

Since Congress never approved the plan, Wilson insists that BLM was precluded from relying on the plan as the ground for rejecting his petition-application. Wilson also challenges the plan's classification of the land he seeks as unavailable for agricultural entry, asserting that, pursuant to section 2 of the Desert Land Act, 43 U.S.C. § 322 (1988), the land was already classified as desert land open to entry. Finally, Wilson claims

that his undisputed right to appropriate sufficient water to irrigate the lands requested entitles him to his desert land entry and that BLM's refusal to allow that entry constitutes a taking of his property without just compensation, violating not only his constitutional rights but also Exec. Order No. 12630, 3 CFR 554-59 (1989) (53 FR 8859-62 (Mar. 18, 1988)). 3/

[1] As a general matter, the Board of Land Appeals has the authority to review all decisions by BLM related to the use and disposition of the public lands. 43 CFR 4.1(b)(3); see 43 CFR 4.410(a). However, the Board does not have jurisdiction to substantively review decisions to approve or amend resource management plans, including land use plans as described by FLPMA, which "are designed to guide and control future management actions."

2/ We note that this amendment had no direct impact upon the rejection of appellant's application since the lands which he sought were classified as unsuitable for entry under the original 1980 plan.

3/ By order dated June 19, 1992, the Board denied Wilson's initial request for expedited consideration of his appeal. Although he has again requested expedited consideration, our resolution of the appeal at this time effectively renders moot the renewed request. Wilson has also requested an evidentiary hearing. Because the appeal raises no unresolved issues of material fact warranting a hearing, we deny this request.

See 43 CFR 1601.0-2, 43 CFR 1601.0-5(k); The Wilderness Society, 109 IBLA 175, 178 (1989); California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 141 (1989); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987); Oregon Shores Conservation Coalition, 83 IBLA 1, 2 (1984). Since the effect of adoption of such a plan is to establish general management policy rather than to implement decisions that affect specific parcels of land, approval of a plan is subject only to protest to the Director, BLM, whose decision is final for the Department. See Colorado Environmental Coalition, 130 IBLA 61, 65 (1994); The Wilderness Society, *supra*; 43 CFR 1610.5-2. Similarly, pursuant to the express language of 43 CFR 4.410(a)(1), the Board does not possess the authority to review land classification determinations made by BLM under the authority of 43 CFR Part 2400, and, therefore, consideration of whether the subject land is or is not properly classified as suitable for desert land entry is beyond its purview. See Keith P. Gunderson, 127 IBLA 16, 17 (1993); The Wilderness Society, *supra*; Duella M. Adams, 70 IBLA 63, 63-64 (1983).

Wilson adverts to section 601(d) of FLPMA, 43 U.S.C. § 1781(d) (1988), which directs the Department to prepare and implement a comprehensive, long-range plan for the CDCA in accordance with 43 U.S.C. § 1712 (1988), and notes that subsection (e)(2) of 43 U.S.C. § 1712 (1988) directs the Secretary to report to Congress "[a]ny management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more." Pointing out that this subsection further provides that if Congress adopts a concurrent resolution of nonapproval of the management decision or action within 90 days after receiving notice of the decision or action, "then the management decision or action shall be promptly terminated by the Secretary," Wilson argues that the CDCA plan was not validly promulgated pursuant to the procedural mandates of section 202(e)(2) of FLPMA, 43 U.S.C. § 1712(e)(2) (1988). ^{4/}

The problem with appellant's theory is that 43 U.S.C. § 1712(e)(2) (1988) applies, by its own terms, to "management decisions to implement land use plans developed or revised under this section." 43 U.S.C. § 1712(e) (1988). The CDCA plan is, itself, a land use plan, not a management decision implementing such a plan. See American Motorcyclist Association v. Watt, 534 F. Supp. 923, 926-27, 934, 935-36 (C.D. Cal.

^{4/} We note that a similar challenge to the CDCA plan was brought in American Motorcyclist Association v. Watt, 534 F. Supp. 923 (C.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983). In that decision, which involved a request for a preliminary injunction, the court rejected BLM's contention that its planning regulations did not apply to the CDCA plan and found that appellants were likely to prevail on their assertions that a number of procedural requirements of 43 U.S.C. § 1712 (1988) (though not expressly 43 U.S.C. § 1712(e)) had not been complied with. The court, however, refused to enjoin implementation of the plan because of the likely damage to the environment of the CDCA if such action were taken.

1981), aff'd, 714 F.2d 962 (9th Cir. 1983). Thus, the Secretary was not required to report adoption of the plan to Congress. See 43 CFR 1610.6.

The lack of any obligation to report the plan to Congress undermines Wilson's claim that congressional approval of the plan was required. Since Wilson has not demonstrated that BLM's adoption of the plan was fatally flawed, we find that we have no jurisdiction to review the CDCA plan or the land classifications contained therein.

Second, Wilson's assertion to the contrary notwithstanding, section 2 of the Desert Land Act, 43 U.S.C. § 322 (1988), which defined desert lands as lands "which will not, without irrigation, produce some agricultural crop" did not automatically classify any land as open for disposition under the desert land laws. On the contrary, by the express terms of the Act, the determination of the character of the land was "subject to the decision and regulation of the Secretary of the Interior" and such a determination was made only upon application to make entry under the Act. See United States v. Mackintosh, 85 F. 333 (8th Cir. 1898). 5/

Originally, determinations as to the character of the land sought to be entered were made upon the filing by the prospective entryman of the two affidavits required by the statute. However, pursuant to section 7 of the Taylor Grazing Act, Act of June 28, 1934, 43 U.S.C. § 315f(1988), virtually all land within the lower 48 States was withdrawn. Since that time, no entry under any of the public land laws is allowable unless the land has first been affirmatively classified as suitable to such entry. See 43 CFR 2521.2; Carl S. Hansen, 130 IBLA 369, 372 (1994). Thus, even lands meeting the Desert Land Act's definition of desert lands are not subject to entry under that Act if they have been classified as unavailable for agricultural entry in accordance with BLM's land use planning authority. See Keith P. Gunderson, supra; Duella M. Adams, 70 IBLA at 64. Since the CDCA plan classified the lands sought by Wilson as unavailable for agricultural entry, a determination which we have no authority to review, BLM properly rejected Wilson's application for those lands. Keith P. Gunderson, supra; Duella M. Adams, supra; see also 43 CFR 2450.6.

[2] We also find no basis for Wilson's claim that BLM's refusal to allow his desert land entry constitutes a taking of his property without just compensation. The mere filing of an application for desert land entry does not create any present right or interest in the land in the applicant, but only the right to have the application considered. Carl S. Hansen, supra; Richard S. Gregory, 96 IBLA 256, 257 (1987); Woodrow C. Stingley, Los Angeles 0153844 (May 7, 1965). Since Wilson had no right to the land sought by his petition-application, BLM's rejection of that

5/ That the mere fact that land was located within an area generally denominated as a "desert" did not mean that the land was of the character contemplated by the Act is readily apparent when one recognizes that both timber and mineral lands were expressly excluded from the purview of the Act, but both could clearly exist within lands generally referred to as "desert." See generally Vladimir P. Havlik, 61 I.D. 294 (1954).

petition-application did not constitute an unconstitutional taking of his property without just compensation. Cf. Richard S. Gregory, 96 IBLA at 258.

Nothing in Exec. Order No. 12630, 3 CFR 554-59 (1989) (53 FR 8859-62 (Mar. 18, 1988)), which directs executive branch departments to identify the takings implications of proposed regulatory actions and address the merits of those actions in submissions made to the Office of Management and Budget, impels a contrary result. Not only does that Order, which postdates both the CDCA plan and Amendment Two to that plan, apply only to Governmental actions which interfere with constitutionally protected property rights, which Wilson does not have in the land sought by his petition-application, but, by its own terms, the Order "is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person." 3 CFR 559 (1989) (53 FR 8862 (Mar. 18, 1988)). Accordingly, we reject Wilson's claim that BLM's rejection of his petition-application entitles him to compensation. ^{6/}

[3] In any event, Wilson's petition-application, as supplemented by his August 18, 1994, request for expedited consideration, fails to establish that Wilson substantially satisfies the requisites of section 1 of the Desert Land Act, 43 U.S.C. § 321 (1988), which provides for the entry of up to 320 acres of desert land upon a declaration by the entryperson that he or she intends to reclaim the tract of desert land by conducting water thereon. The primary goal of the Act is to change lands from a desert to an agricultural state and to secure the actual and permanent reclamation of land which is naturally unproductive. See Harry Gray Browne, 121 IBLA 218, 223 (1991); Nathan F. Gardiner, 114 IBLA 380, 384 (1990); William S. Archibald, 75 IBLA 236, 238 (1983); Brandon v. Costley, 34 L.D. 488, 498 n.3 (1906). Although Wilson seeks 320 acres of land, his petition-application indicates that he intends to cultivate only 40 acres of that land by growing pecans. Furthermore, his August 18, 1994, expedited consideration request explicitly states the remaining acreage, which he characterizes as a "safe haven" for indigenous plants and wildlife supported by the income generated by the pecan trees, "will be set aside as land not used for or by human habitation/development. These acres will be left as a small way to preserve this arid yet delicate and unique ecosystem."

While appellant's goals may be laudable, the fact of the matter is that Wilson essentially admits that he has no intention of reclaiming 280 of the 320 acres sought. Reclamation, however, is the sine qua non of the Desert Land Act. See Idaho Desert Land Entries - Indian Hill Group, 72 I.D. 156, 177 (1965). Thus, even if Wilson's petition-application were allow-able, which it is not, the identified 280 acres which he has no intention

^{6/} On appeal Wilson also argues that the CDCA plan, proposed California desert legislation, and various BLM actions violate his grazing and water rights. These issues are beyond the scope of this appeal.

of reclaiming would properly be excluded from the approved entry. See United States v. Zwang, 55 IBLA 83 (1981); United States v. Swallow, 74 I.D. 1 (1967). In light of the foregoing, it is clear that appellant's desert land entry application was properly rejected.

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.

James L. Burski
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

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