

INTERIOR BOARD OF LAND APPEALS

Joe Iriart

v.

Bureau of Land Management

Utah Wilderness Association, Intervenor

126 IBLA 111 (April 27, 1993)

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JOE IRIART
v.
BUREAU OF LAND MANAGEMENT
AND
UTAH WILDERNESS ASSOCIATION, INTERVENOR

IBLA 91-183

Decided April 27, 1993

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., affirming a decision of the San Rafael Resource Area Manager, Moab District, Bureau of Land Management, denying an application for a change in kind of livestock from cattle to cattle and sheep. UT-06-89-04.

Affirmed.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

Where BLM denies an application to change livestock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an Administrative Law Judge when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

APPEARANCES: Nick Sampinos, Esq., Price, Utah, for appellant; Grant L. Vaughn, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Gary L. Johnson, Esq., Salt Lake City, Utah, for the Utah Wilderness Association.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Joe Iriart has appealed from the February 7, 1991, decision of Administrative Law Judge John R. Rampton, Jr., affirming a May 5, 1989, decision of the Area Manager, San Rafael Resource Area, Utah State Office, Bureau of Land Management (BLM). The Area Manager's decision denied a request by Iriart for a permanent change in kind of livestock from cattle to cattle and sheep grazing on the McKay Flat allotment on the basis that such use was in potential conflict with desert bighorn sheep.

Factual and Procedural Background

On December 9, 1988, Iriart filed with BLM a request for a permanent change of livestock grazing on the McKay Flat allotment from his present preference of 416 cows from November 1 to April 15 to 1,500 sheep from

November 15 to March 15 and 197 cows from November 1 to April 15. Subsequently, the Area Manager, San Rafael Resource Area, issued an environmental assessment (EA) which, among other things, considered the potential conflict between domestic and desert bighorn sheep in the McKay Flat allotment, in light of Iriart's request to convert his grazing preference in that area from cattle to cattle and sheep. The EA states that under the proposed action the estimated population of five desert bighorn sheep thought to occupy the area could be lost to disease in the first 3 to 5 years, and that there was also risk of disease transmission into adjacent healthy desert bighorn sheep populations (Exh. 2 at 10). The EA indicated that the diseases posing the greatest threat include pneumonia and chronic frontal sinusitis. Id.

After analyzing the available data, including the BLM Rangeland Plan for Managing Habitat of Desert Bighorn Sheep on Public Lands (Exh. A), the Utah BLM Statewide Desert Bighorn Sheep Plan (Exh. B), and the Desert Bighorn Sheep Management Plan, Moab District (Exh. C), the Area Manager concluded in his May 5, 1989, Notice Of Proposed Decision that in light of the analysis contained in the EA and the conclusions registered in the decision record of the EA, his proposed decision was to reject the use requested in the application and not allow a change of kind from cattle to cattle and sheep. Rather than filing a protest of the proposed decision, Iriart filed an appeal and requested a hearing. See 43 CFR 4160.1; 43 CFR 4160.3; 43 CFR 4160.4.

An evidentiary hearing was held before Administrative Law Judge John R. Rampton, Jr., at Price, Utah, on August 29 and 30, 1990.

At the hearing, Wayne Ludington, a BLM wildlife biologist, testified he helped write the EA, his principal concern being the desert bighorn sheep. In developing his opinion he relied upon literature available in his office and information provided by the Moab District wildlife expert (Tr. 281, 282). He developed his analysis using language from a similar EA prepared by another BLM office in the State (Tr. 312, 313). The information he reviewed for the EA expressed serious concern that domestic sheep may transmit life threatening diseases to desert bighorn populations (Tr. 281). Further, he was unaware of any scientific studies demonstrating that domestic sheep pose no threat to the desert bighorn (Tr. 282, 332). Ludington testified regarding the location of bighorn sightings reported by BLM in the south San Rafael area, including the McKay Flat (Tr. 282-94; Exh. 4). It was his opinion, as a result of his study of the sightings and his knowledge of sheep wandering off State sections on McKay Flat, that he was concerned that domestic sheep were likely to come into contact with desert bighorn with the risk of disease transmission.

On his behalf, Iriart called Dr. Bob LeRand Helman, a veterinary epidemiologist for the Idaho Department of Agriculture. For 4 years Helman had been involved with the Idaho Department of Fish and Game in a testing program for desert bighorn sheep for the purpose of identifying and quantifying the factors involved in bighorn sheep survival

and die-offs (Tr. 447-48). Helman testified that there was no correlation between nose to nose contact of domestic and bighorn sheep and diseases in bighorn sheep (Tr. 505-06).

In his summary of the testimony, Judge Rampton found that none of the experts who testified could testify with certainty that contact of domestic sheep with desert bighorn on the open range would cause a fatal infection in the desert bighorn population. He therefore stated that "[n]o finding can be made by me as a result of the testimony given that a change of use from cattle to cattle and sheep by the appellant on the McKay Flat allotment would cause the death of the transplanted desert bighorn sheep," but also noted that "such finding, however, is not necessary to resolve the issue here, which is, whether or not the decision by the Area Manager was arbitrary, unreasonable and not justified" (Decision at 8). Citing the Board's decision in Fasselin v. Bureau of Land Management, 102 IBLA 9, 14 (1988), Judge Rampton quoted the following standard of review: "Where BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious or inequitable only where it is not supportable on any rational basis.

The burden is on the objecting party to show that a decision is improper" (Decision at 9).

Applying this standard to the case at hand, Judge Rampton affirmed the decision of the Area Manager on the grounds that it was supported by reasonable evidence and not arbitrary.

Issues

On appeal, Iriat argues that the Area Manager's decision to deny his request for a change of use on his grazing allotment from cattle to cattle and sheep was not reasonable and rational because the Area Manager relied solely upon the information provided him by his staff, especially, wildlife biologist, Ludington. Iriat asserts that Ludington did little more than read a few articles regarding diseases in bighorn sheep prior to submitting his recommendation to deny appellant's request. Second, appellant argues that the Area Manager and Judge Rampton failed to consider that the BLM decision would not prevent contact between domestic sheep and desert bighorn sheep on the McKay Flat allotment in light of the fact that there are no physical barriers to prevent their intermingling on that allotment when domestic sheep are trailed through or are grazed on three adjoining allotments. Appellant asserts that, even if it could be conclusively proven that domestic sheep transmit fatal diseases to bighorn sheep, the addition of his herd on the allotment would make little difference to what is already happening. Third, appellant contends that he proved the Area Manager had no conclusive medical evidence that contact between domestic sheep and bighorn sheep would result in the decimation of the bighorn sheep that may exist on the McKay Flat allotment.

In answer to appellant's first argument, BLM asserts that the Area Manager's reliance on the EA was reasonable and rational, that Mr. Ludington is a trained wildlife biologist who relied on competent evidence available to him, and that there is no reason to challenge the validity of the EA or Judge Rampton's reliance on it. As to appellant's second argument, BLM responds that the existence of other domestic sheep in the general area was fully addressed at the hearing and in Judge Rampton's decision. BLM argues that the intent of its decision was not to guarantee no chance of contact between all domestic sheep in the area with bighorn sheep, but to merely prevent the increased chance of harmful contact between domestic and bighorn sheep on appellant's allotment. BLM responds to appellant's third argument by asserting that its decision was based on competent scientific evidence. Citing Fasselin v. Bureau of Land Management, supra, BLM argues that as long as its decision was supported by a rational basis, it cannot be overturned.

An answer to appellant's arguments was also submitted by intervenor Utah Wilderness Association. The Association argued that the Area Manager's decision was reasonable and rational, that it was supported by substantial evidence in the record, and that BLM was entitled to rely on the opinions of its own experts in making its decisions.

Statutory and Regulatory Background

Iriart's grazing permit was issued pursuant to section 3 of the Taylor Grazing Act of June 28, 1934 (the Act), as amended, 43 U.S.C. § 315b (1988). It is well established that implementation of the Act is committed to the discretion of the Secretary of the Interior. Charles Blackburn, 80 IBLA 42 (1984). For grazing districts on public lands, section 2 of the Act charges the Secretary to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315a (1988). The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1751-1753 (1988), amended the Taylor Grazing Act and reiterated the Federal commitments to the protection and improvement of Federal range lands. We note that nothing in the Taylor Grazing Act or FLPMA mandates, that in terms of BLM management of the public rangeland, livestock must take preference over wildlife. Charles Blackburn, supra at 48.

Under 43 CFR 4100.0-8, the authorized officer is required to "manage livestock grazing on public lands under the principle of multiple use and sustained yield and in conformance with the applicable land use plans." The term "multiple use" is defined in FLPMA as the management of the public lands and their various resource values "in the combination that will best meet the present and future needs of the American people" taking into account "long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to recreation, range, timber, minerals, watershed, wildlife, and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c) (1988).

Standard of Review

As correctly noted by Judge Rampton, when BLM adjudicates grazing privileges in the exercise of its administrative discretion, such action may be regarded as arbitrary, capricious, or inequitable only where it is not supported on any rational basis, and the burden is on the appellant to show that the decision was improper. Fasselin v. Bureau of Land Management, supra (and cases cited therein). While the BLM decision in this case was not an actual adjudication of grazing preference because appellant's current authorized use of the allotment was not affected, it is a decision arising under the grazing regulations in 43 CFR Part 4100, and we find the same standard to be applicable.

Discussion

In his first argument, appellant contends that the Area Manager's decision was unreasonable because he relied primarily upon the incomplete and biased information provided him by Luddington. In his third argument, appellant contends that while "BLM did not have any conclusive medical evidence that contact with bighorn sheep by domestic sheep will result in death to the bighorn sheep," appellant's expert witness "testified conclusively that within the range of reasonable medical probability," such contact does not result in the spreading of disease to bighorn sheep (Statement of Reasons at 4). Judge Rampton's findings regarding these issues were as follows:

In his decision, Mr. Dryden was guided by the advice from his experts who had reviewed the literature available to him on possible disease transmission from domestic to desert bighorn sheep; by three BLM planning documents, the range wide plan, the State wide plan, and the Moab District plan, all of which advised against permitting a change of use from cattle to domestic sheep in areas adjacent to or in close proximity to bighorn habitat; and by the information provided by public comment on the EA which was overwhelmingly against the change of use. Further, in view of the attempt by the appellant to use the benches and rocky slopes for his sheep, the possibilities for co-mingling are present for these are the areas also suitable for desert bighorn. Taking into consideration all the factors, the decision was by no means arbitrary and capricious. It may possibly be wrong, but it is not my prerogative to "second guess" the Area Manager even if I disagreed with him. As I view the evidence presented, the question of whether domestic sheep will inevitably transmit a fatal disease to the desert bighorn is still very much in doubt. But so long as the experts disagree, the Area Manager was within his prerogative to administer the public lands in a "multiple use" basis to protect all of the resources, including desert bighorn sheep.

(Decision at 9).

Our review of the record leads us to agree with Judge Rampton's findings that the Area Manager's decision was based on a variety of factors and

"was by no means arbitrary and capricious." The record provides no convincing evidence supporting appellant's assertions that the Area Director's reliance upon the information provided by Luddington was unreasonable or that the information was "incomplete and biased." We also find that the record supports Judge Rampton's conclusion that the experts disagree on the question of transmission of disease between domestic and bighorn sheep, and that under such circumstances, the Area Manager's decision was a proper exercise of his prerogative to administer public lands on a multiple use basis.

Lastly, appellant asserts in his second argument that BLM overlooked, and Judge Rampton failed to include in his analysis, the fact that there are already other domestic sheep in the general area. We find no merit in these assertions. First, it is evident that Judge Rampton took this fact into account. In his decision he referred to the testimony of appellant's expert witness, Helman, and stated, "In [Helman's] opinion, he sees no problem with putting domestic sheep in the allotment because there are already domestic sheep in the area * * *" (Decision at 8). Second, whether there are other domestic sheep near the bighorn habitat is irrelevant for the purposes of the Area Manager's decision. As BLM states in its answer at page 6, "[t]he decision was merely to preserve the status quo on appellant's allotment so as to not increase the chance of potentially harmful contact between domestic sheep and bighorn."

Conclusion

Based on our review of the record in this case, we conclude that the BLM decision is supported by a rational basis, and that appellant has failed show that the decision was improper. Accordingly, we also conclude that Judge Rampton's decision was correct and should be affirmed.

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 Administrative Law Judge is affirmed.

John H. Kelly
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge