

INTERIOR BOARD OF LAND APPEALS

Jerry W. Blair and Howard P. Blair

126 IBLA 296 (June 14, 1993)

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JERRY W. BLAIR  
HOWARD P. BLAIR

IBLA 89-317

Decided June 14, 1993

Appeal from a decision of Administrative Law Judge Joseph E. McGuire, affirming a decision of the Area Manager, Needles Resource Area, revising the Colton Hills grazing allotment boundary.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Land Use Planning--  
Grazing Leases: Cancellation or Reduction

A decision to redraw the boundary of a grazing allotment to inhibit the transmission of disease from cattle to bighorn sheep will be affirmed if the decision rests upon a rational basis, reflects consideration of all relevant factors, is supported by the record, and no reasons for modification or reversal are present.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Jerry W. Blair and Howard P. Blair have appealed from a decision of Administrative Law Judge Joseph E. McGuire, dated January 31, 1989, affirming a decision of the Needles Area Manager, Bureau of Land Management (BLM), revising the southern boundary of the Colton Hills grazing allotment No. 9002. The effect of the Area Manager's decision, dated October 5, 1987, was to reduce the area of this allotment by 5.46 percent, i.e., from 147,827 acres to 139,448 acres. No reduction in appellants' grazing preference occurred. The decision of the Area Manager was made to implement amendment No. 17 of the 1985 Plan Amendments to the California Desert Plan.

Amendment No. 17 was approved by the California Desert District Manager on January 15, 1987, in order to eliminate cattle grazing in an area shared by bighorn sheep. The amendment makes Interstate 40 (I-40) the new southern boundary of the Colton Hills allotment, and this highway is to serve as a barrier to prevent cattle from grazing in the Clipper Mountain foothills, south of the allotment.

The reasons for separating cattle from bighorn sheep were set forth in BLM's record of decision in these terms:

This alternative [making I-40 the new southern boundary] would provide the greatest protection for bighorn sheep, in response to concern of the public, as represented by the Desert District Advisory Council. Although only inconclusive evidence exists that cattle in this allotment carry livestock-related disease to bighorn sheep in the Clipper Mountains, elimination of grazing south of I-40 would ensure that this potential problem will not occur.

Separating bighorn in the Clippers from livestock would also be beneficial for research being conducted by the [California] Department of Fish and Game on the effect of grazing on the health and viability of bighorn herds in this region. [Emphasis added.]

(BLM Exh. 6 at 46).

At the hearing held by Judge McGuire, the Blairs disputed the notion that cattle may be injurious to bighorn sheep. In support of their view, appellants offered into evidence an article entitled "Livestock and Game Can Coexist," describing holistic resource management. No evidence of disease exists among cattle in the allotment, appellants argued (Tr. 45, 59).

Moreover, cattle improve the range grasses, the Blairs contended, by breaking up the soil with their hooves and by consuming grasses before fires occur (Tr. 34-36, 39-40, 42-45). Bighorn sheep will be benefitted by appellants' continued use of the disputed acreage because Chuckwalla Springs, a water source located immediately to the south of the original allotment boundary, will continue to receive regular maintenance, appellants argued (Tr. 100).

At the hearing, the Blairs emphasized the importance of the disputed acreage by pointing out that it is the site of early feed (Tr. 15). Blair family members have lived and worked in the general area since 1920 and have spent thousands of dollars in water improvements (Tr. 6, 21-23).

Testifying on behalf of BLM, David Jessup, D.V.M., a wildlife pathologist/veterinarian with the California Department of Fish and Game, stated that declining populations of bighorn sheep were often characterized by exposure to bluetongue virus, EHD (epizootic hemorrhagic disease), and to PI-3 (parainfluenza-3) virus (Tr. 111-12). Increasing populations were essentially free of such exposure. A study coauthored by Jessup for the American Veterinarian Medical Association recorded this data and was received at the hearing (BLM Exh. 10).

Jessup further testified that in one study of wild cattle in Anza Borrega Park, 100 percent of the cattle were positive for exposure to PI-3

virus, 63 percent were serum positive for bluetongue exposure, and 73 percent were positive for EHD (Tr. 114). A professional paper describing this study was also admitted into evidence (BLM Exh. 11).

Acknowledging that there is clearly room for interpretation whether cattle are "totally detrimental" to bighorn sheep, Jessup noted that cattle certainly appear to have a number of diseases that bighorn sheep get sick and die from" (Tr. 119). This conclusion and others appear in a third publication received by Judge McGuire (BLM Exh. 12).

Finally, Judge McGuire admitted into evidence a further study of cattle and mountain sheep in the Mojave Desert (BLM Exh. 13). This study by John Wehausen of the University of California suggests that cattle in the nearby Old Woman Mountains have been a major adverse factor for the mountain sheep population ever since grazing was expanded to the Old Woman Mountains in 1979.

In their statement of reasons (SOR), the Blairs contend that Judge McGuire's decision failed to address a number of issues. Appellants contend that although cattle will be prevented by I-40 from entering bighorn habitat in the Clipper Mountain foothills, bighorn will not be similarly deterred from entering allotment lands grazed by cattle. When water is not present south of I-40, the bighorn will leap any boundary fence to reach water in the allotment (SOR, Mar. 20, 1989, at 1). Appellants further contend that bighorn may be forced to cross I-40 in search of water and thereby endanger motorists.

Judge McGuire's decision also failed to address the fact that private property exists south of I-40, appellants state. Because the open range law applies here, any cattle leaving private lands would have to be fenced off public lands (SOR at 1). This duty would belong to BLM or to the State, appellants contend.

Finally, the Blairs reiterate their view that the California Department of Fish and Game has never attempted to test their cattle for disease. Sheep populations have declined in nearby parks, and no livestock are near these parks, appellants state.

[1] Implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315 (1988), is committed to the discretion of the Secretary of the Interior. Hugh A. Tipton, 55 IBLA 68, 71 (1981). A decision reached in the exercise of that discretion may be regarded as arbitrary or capricious only where it is not supportable on any rational basis. Colvin Cattle Co., 39 IBLA 176, 180 (1979).

The Blairs' grazing lease provides that it is subject to:

(a) modification, suspension, or cancellation as required by land use plans and subject to applicable law; (b) annual review and to modification of terms and conditions as appropriate; and (c) the

Taylor Grazing Act, as amended, the Federal Land Policy and Management Act, as amended, the Public Rangelands Improvement Act, and the rules and regulations now or hereafter promulgated thereunder by the Secretary of the Interior. [Emphasis added.]

(BLM Exh. 7). Based upon the above-quoted passage, it appears as an initial matter that BLM possessed the authority to alter the acreage of appellants' lease by adjusting lease boundaries.

The purpose of separating cattle from bighorn sheep, prevention of disease transfer, is a reasonable one, even though the question whether such transfer occurs is not free from doubt. BLM's action is consistent with several studies of cattle and bighorn in the general area. Appellants' alternative proposal to test cattle for disease, while plausible, does not render BLM's action unreasonable.

With respect to appellants' arguments on appeal, the record shows that BLM is aware that bighorn sheep may enter the grazing allotment and thereby thwart the agency's plan to separate cattle from sheep (Tr. 128, 130). Whether bighorn enter allotment lands appears to depend upon the presence of water in the Clipper Mountains. The record is clear that the Clipper Mountains have a number of water sources: Chuckwalla Springs; a big game drinker in SE¼ sec. 28, T. 8 N., R. 15 E., San Bernardino Meridian; Castle Dome; Bonanza Springs; Hummingbird Spring; and three other springs (Tr. 102-03). The presence of these water sources indicates that BLM's plan to separate cattle from bighorn sheep can succeed if these water sources are maintained.

The record further shows that BLM is aware that private property exists south of I-40 (Tr. 67). Appellants are incorrect that this fact will require BLM or the State to fence cattle off public lands south of I-40. Assuming, arguendo, that the lands at issue are within an open range area, 1/ Federal law prevails in this case. Colvin Cattle Co., supra at 180. Under Federal law, unauthorized use of Federal land by cattle constitutes a trespass, and damages may be assessed for such use. Rodney Rolfe, 25 IBLA 331, 338, 83 I.D. 269, 272 (1976).

BLM's decision to separate cattle from bighorn sheep is based upon a consideration of all relevant factors and is supported by the record. Whether or not cattle transmit disease to bighorn and whether or not I-40 will effectively separate these animals cannot presently be known with certainty. This, however, is not the test to review agency action. A rational basis exists for BLM's action, and appellants have failed to show that the decision was improper.

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1/ One example of an open range law is set forth in James E. Briggs v. BLM, 75 IBLA 301, 302 n.1 (1983). Quoted there is Arizona statute ARS 24-502, which states: "An owner or occupant of land is not entitled to recover for damage resulting from the trespass of animals unless the land is enclosed within a lawful fence."

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.

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James L. Byrnes  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge

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