

INTERIOR BOARD OF LAND APPEALS

David R. Hinkson

131 IBLA 251 (November 22, 1994)

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**Editor's note: Reconsideration denied by order dated Jan. 18, 1995**

DAVID R. HINKSON

IBLA 92-235

Decided November 22, 1994

Appeal from a decision of the California State Office, Bureau of Land Management, declining to allow a desert land entry and returning the desert land entry application. CACA 29271.

Affirmed.

1. Appeals: Jurisdiction--Board of Land Appeals--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

BLM properly declines to allow a desert land entry and returns the desert land entry application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

APPEARANCES: David R. Hinkson, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

David R. Hinkson has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated January 8, 1992, declining to allow his desert land entry (DLE) and returning his DLE application (CACA 29271) because the land was classified such that agricultural uses were prohibited.

On November 18, 1991, Hinkson filed his DLE application pursuant to the Act of March 3, 1877, as amended, 43 U.S.C. §§ 321-339 (1988), seeking 320 acres of land situated in secs. 1 and 12, T. 16 N., R. 14 E., San Bernardino Meridian, San Bernardino County, California. He proposed

to irrigate the land by means of a drip-feed system with water taken from wells, for the purpose of producing pecans.

In its January 1992 decision, BLM stated that it was returning Hinkson's DLE application, noting that it could not allow the entry because the "1985 California Desert [Conservation Area] Plan, Amendment Two, shows that the lands \* \* \* are in a Multiple-Use Class L [(Limited Use)] classification which does not allow agricultural uses." BLM stated the plan only permits agricultural uses on "unclassified" land. Thus, it advised Hinkson that he would first have to seek an amendment of the plan changing the land classification to "unclassified," before BLM could allow the entry. Hinkson appealed from the January 1992 BLM decision.

The subject lands were designated part of the California Desert Conservation Area (CDCA) by Congress on October 21, 1976. Federal Land Policy and Management Act of 1976 (FLPMA), section 601, 43 U.S.C. § 1781 (1988). That area encompasses over 12 million acres of land owned by the United States. See American Motorcyclist Association v. Watt, 534 F. Supp. 923, 926 (C.D. Cal. 1981); aff'd, 714 F.2d 962 (9th Cir. 1983). The Secretary of the Interior was directed by section 601(d) of FLPMA, 43 U.S.C. § 1781(d) (1988), to prepare and implement a comprehensive, long-range plan for the management, use, development, and protection of public lands in the CDCA. The Secretary initially approved the CDCA Plan on December 18, 1980 (U.S. Department of the Interior, Bureau of Land Management, The California Desert Conservation Area Plan (1980) (CDCA Plan) at 162). Notice of approval of the plan and its availability was published in the Federal Register on January 14, 1981 (46 FR 3287).

In conjunction with promulgation of the CDCA Plan, the Department classified the land in the CDCA according to what were called "Multiple-Use Class Guidelines." These guidelines established four basic classifications: C (Controlled Use (Wilderness Management)); L (Limited Use); M (Moderate Use); and I (Intensive Use). <sup>1/</sup> See CDCA Plan at 13; American Motorcyclist Association v. Watt, 534 F. Supp. at 927. The CDCA Plan states, at page 14, that "[a]ll land-use actions \* \* \* on public lands within a multiple-use class delineation must meet the guidelines \* \* \* given for that class." In particular, the guidelines provide, in the case of classes C and L, that "[a]gricultural uses (excluding livestock grazing) are not allowed." See CDCA Plan at 15, Table 1; American Motorcyclist Association v. Watt, 534 F. Supp. at 927. The original guidelines also provided, in the case of classes M and I, that "[a]gricultural uses may be allowed on suitable land classified for these purposes." See CDCA Plan at 15, Table 1; American Motorcyclist Association v. Watt, 534 F. Supp.

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<sup>1/</sup> Designation for limited use (class L) "protects sensitive natural scenic, ecological and cultural resources, but provides for low intensity multiple use." American Motorcyclist Association v. Watt, 534 F. Supp. at 927.

at 927. However, by decision dated January 15, 1987, the District Manager, California Desert District, BLM, with the concurrence of the State Director, California, BLM, extended the prohibition of agricultural uses (excluding livestock grazing) to lands classified M and I. The latter decision stated that such uses would be permitted only on "unclassified lands." Finally, it stated:

If public land is found which may be potentially suitable for agricultural development, the applicant must first apply for a plan amendment to change the land to 'unclassified' before entry would be allowed or considered further. This would insure a consideration of both its agricultural potential as well as the public values associated with its retention in its current undeveloped state.

The District Manager's January 1987 decision effected "Amendment Two" to the CDCA Plan.

Appellant points out in his statement of reasons (SOR) for appeal that the CDCA Plan was developed by BLM under the land-use planning procedures mandated by section 202 of FLPMA, 43 U.S.C. § 1712 (1988). Further, appellant notes that any decision which eliminates one or more of the principal uses on a tract of more than 1,000 acres under this statutory authority shall be reported to the House and Senate which may adopt a concurrent resolution of nonapproval within 90 days, in which event the decision shall be promptly terminated by the Secretary. Appellant asserts that the CDCA Plan was rejected by Congress in 1981 and, hence, the classification of the land under the CDCA Plan as unavailable for agricultural use is without effect. Additionally, appellant argues that the land at issue has been designated as desert lands under the terms of the CDCA Plan and that, hence, upon satisfactory proof of reclamation of the land, he is entitled to a patent under section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1988).

[1] Proper resolution of this appeal is aided by an understanding of the status of the land prior to enactment of FLPMA. Vacant, unreserved, and unappropriated public lands in several western states including California were withdrawn in aid of classification "pending determination of the most useful purpose to which such land may be put." Exec. Order (EO) No. 6910, 54 I.D. 539 (1934). Section 7 of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. § 315f (1988), authorized the Secretary of the Interior, in his discretion, to examine and classify any lands withdrawn by EO No. 6910 which are more valuable or suitable for uses other than grazing and to open such lands to entry and disposal under the public land laws in accordance with such classification. 2/ In

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2/ Section 7 further provided that the "lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. § 315f (1988).

exercising his discretionary authority, the Secretary or his delegate is authorized to weigh and consider all factors which have a bearing on the suitability of the land for use or disposal including the effect on the public interest. Further, the fact that the land contains resources which would allow an applicant to meet the requirements of the law under which the application was filed does not require that the land be classified

for disposal under that law. See Nelson A. Gerttula, 64 I.D. 225, 228-29 (1957), aff'd sub nom. Carl v. Udall, 309 F.2d 653, 657 (D.C. Cir. 1962). Appellant has made no showing that the land was classified as available

for DLE applications prior to promulgation of the CDCA Plan notwithstanding his assertion that the land is ideally suited for reclaiming and raising pecans. The filing of an application to appropriate public land under the desert land law does not create any present right in the applicant

when classification is required before an application can be allowed. See Everett H. Adkins, A-28245 (May 23, 1960); see Bill K. Yearsley, 67 IBLA 97 (1982); Guy A. Martin, 26 IBLA 254 (1976).

The land classification provisions of the Taylor Grazing Act have now been superseded by the land-use planning provisions of section 202 of FLPMA under which the CDCA Plan was promulgated. Appellant does not dispute the fact that the subject lands are designated class L under the "Multiple Use Class Guidelines" of the CDCA Plan or that, under the plan, agricultural uses are not permitted on such lands. Rather, appellant contends that

BLM improperly declined to allow his DLE based upon the plan where the plan has never been approved by Congress. Appellant notes that, as directed by Congress, the plan was prepared by the Department pursuant to section 202 of FLPMA, 43 U.S.C. § 1712 (1988), and that subsection (e) of that section requires that the Secretary report to Congress "[a]ny 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." 43 U.S.C. § 1712(e) (1988). Appellant further argues that the Secretary was required by section 202(e) of FLPMA to obtain Congress' approval of such management decisions. He contends that the CDCA Plan (as a whole) constitutes a "management decision," within the meaning of section 202(e) of FLPMA, and that, since it excluded a principal or major use (DLE's) from large portions of the CDCA, the Secretary was required to report it to Congress and obtain Congress' approval. Appellant states that Congress "has not approved [the plan]" (SOR at 3). In the absence of approval, he argues that BLM was barred from precluding DLE's within the CDCA.

We find that section 601(d) of FLPMA does instruct the Secretary to prepare and implement a plan for the management, use, development, and protection of the CDCA "in accordance with section 1712 of [43 U.S.C.]." 43 U.S.C. § 1781(d) (1988). See American Motorcyclist Association v. Watt, 534 F. Supp. at 933-34. Section 202(e) of FLPMA, in turn, provides that any "management decision or action" that excludes one or more of the principal or major uses for 2 or more years on a tract of land of 1,000 acres or more shall be reported to the House of Representatives and the Senate.

43 U.S.C. § 1712(e) (1988). <sup>3/</sup> Further, "[i]f within ninety days from the giving of such notice \* \* \* the Congress adopts a concurrent resolution of nonapproval of the management decision or action, then the management decision or action shall be promptly terminated by the Secretary." 43 U.S.C. § 1712(e)(2) (1988). Thus, the statute does not provide that the decision must be approved by Congress in order to be effective. Rather, it provides that the Secretary must terminate the decision only where Congress takes affirmative action to disapprove of the decision. There is no evidence that Congress has adopted a resolution disapproving of the CDCA Plan, despite the fact that the Plan has been considered by Congress in the context of the subsequent debate over bills affecting the CDCA. See, e.g., 132 Cong. Rec. 28,196 (1986) (Statement of Congressman Chappie on S. 2061, "California Desert Protection Act of 1986"). <sup>4/</sup>

Appellant also challenges BLM's January 1992 decision declining to allow his entry on the basis that it constitutes a taking of his private property without the payment of just compensation and a deprivation of his property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. See SOR at 3, 4. We find that appellant has no property interest in the subject lands when the lands have not been classified as subject to DLE. See Richard S. Gregory, 96 IBLA 256, 257 (1987). <sup>5/</sup> With respect to EO No. 12630 which requires Government agencies to evaluate the effect of their administrative actions on constitutionally protected rights, we find that appellant has not provided evidence of any property rights which would be adversely affected by rejection of his application. Further, we note that EO No. 12630 is designed "to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable

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<sup>3/</sup> The report is not required prior to approval of a resource management plan which, if implemented, would result in such an elimination of a principal or major use. The report shall be submitted as the first action step in implementing that part of the plan which would require such an elimination of use. 43 CFR 1610.6.

<sup>4/</sup> Appellant also challenges designation of the subject lands as Class L, asserting that this is "not supported by any law" where the lands are already "classified as desert lands" under section 2 of the Act of Mar. 3, 1877, as amended, 43 U.S.C. § 322 (1988) (SOR at 3). As noted above, there is no evidence that the subject lands were classified for DLE under that Act. To the extent that appellant challenges the classification of the subject lands under the CDCA Plan, the review of such planning decisions is outside the jurisdiction of this Board. See Joe Trow, 119 IBLA 388, 393 (1991); Hutchings v. BLM, 116 IBLA 55, 61 (1990); 43 CFR 1610.5-2.

<sup>5/</sup> It appears that appellant has an interest in a ranch near the subject lands and claims ownership of associated water rights and improvements. See Letter to Congresswoman Vucanovich, dated Mar. 16, 1992, at 2. The BLM decision declining to allow appellant's DLE application cannot be construed as a taking of these property interests.

at law by a party against the United States, its agencies, its officers, or any person." EO No. 12630, § 6, 53 FR 8859, 8862 (Mar. 18, 1988).

To the extent that they are not discussed herein, we find appellant's other arguments clearly unsupported by the evidence or not in accordance with applicable law. See United States v. Foresyth, 100 IBLA 185, 254, 94 I.D. 453, 491 (1987).

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.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge

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