

INTERIOR BOARD OF LAND APPEALS

Antonio J. Baca

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ANTONIO J. BACA

IBLA 95-428

Decided April 30, 1998

Appeal from a Decision of the State Director, New Mexico, Bureau of Land Management, denying protest to proposed Atalaya Peak Land Exchange. NM-92939.

Decision Affirmed; Appeal Dismissed in Part.

1. Environmental Quality: Environmental Statements– Exchanges of Land: Generally–Federal Land Policy and Management Act of 1976: Exchanges–National Environmental Policy Act of 1969: Environmental Statements–Private Exchanges: Protests–Private Exchanges: Public Interest

The BLM properly denies a protest to a proposed land exchange where the protestant fails to demonstrate that BLM violated the public interest requirement of section 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1994), or Executive Order No. 12898.

APPEARANCES: Antonio J. Baca, pro se; Grant L. Vaughn, 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 KELLY

Antonio J. Baca has appealed from a Decision of the State Director, New Mexico, Bureau of Land Management (BLM), dated April 6, 1995, dismissing his protest to the proposed Atalaya Peak Land Exchange, NM-92939.

The proposed land exchange would be consummated pursuant to section 206(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716(a) (1994), and would involve the transfer of 284.22 acres of selected public land in sec. 24, T. 17 N., R. 8 E., and sec. 33, T. 17 N., R. 9 E., New Mexico Principal Meridian, Santa Fe County, New Mexico, to Wilderness Estates Development and Gerald Wagner in exchange for 53.051 acres of offered private land in sec. 33, T. 17 N., R. 10 E., New Mexico Principal Meridian, Santa Fe County, New Mexico. The exchange

is primarily intended to protect the offered private land from any private development. Such land is situated adjacent to the Atalaya Mountain in an important viewshed east of the city of Santa Fe, New Mexico, adjacent to the Santa Fe National Forest. Also, the exchange will serve to remove small, isolated parcels of public land with insignificant resource values, all of which renders them difficult and uneconomic to manage, from BLM's jurisdiction. The BLM also intends that, once the exchange is consummated, the offered private land will be further conveyed to the Forest Service (FS), U.S. Department of Agriculture, in return for FS land in the Santa Fe National Forest.

By Record of Decision (ROD), dated February 3, 1995, the Area Manager, Taos Resource Area, New Mexico, BLM, decided to approve the proposed land exchange. He concluded that the exchange conformed to the Taos Resource Management Plan (RMP), which had identified the selected public land for exchange or disposal. See Taos RMP at 2-5, 2-9. The Area Manager also found, based on BLM's January 12, 1995, Environmental Assessment (EA), that the exchange was not likely to have a significant environmental impact. Thus, there was no requirement to prepare an Environmental Impact Statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994).

On March 19, 1995, Baca, who has long held grazing rights to the selected public land in sec. 24, T. 17 N., R. 8 E., New Mexico Principal Meridian, Santa Fe County, New Mexico, filed a protest, objecting to the proposed land exchange on two principal bases. First, he asserted that BLM's decision to go forward with the exchange, without considering his prior proposals to acquire the selected public land by either purchase or exchange, constituted improper disparate treatment. Second, Baca asserted that BLM's failure to include an analysis of any identified demographic differences between the proponents and opponents of the exchange in its EA violates the President's February 11, 1994, Executive Order (EO) No. 12898. 59 Fed. Reg. 7629 (Feb. 16, 1994).

In his April 1995 Decision, the State Director dismissed Baca's protest, concluding that the exchange was in the overall public interest and not affected by EO No. 12898 in any way. Baca filed a notice of appeal from that Decision, along with a petition to stay its effect. We denied the petition by Order dated June 27, 1995.

In his statement of reasons (SOR) for appeal, Baca reiterates and expands upon the two assertions in his protest. Before addressing his arguments in support of those assertions, a brief review of the applicable law is appropriate.

[1] Section 206(a) of FLPMA provides that the Secretary of the Interior "may \* \* \* dispose of [a tract of public land] by exchange \* \* \* where [he] determines that the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a) (1994). In deciding what is in the public interest, the Secretary is required to fully consider

the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs.

43 C.F.R. § 2200.0-6(b); see 43 U.S.C. § 1716(a) (1994); City of Santa Fe, 103 IBLA 397, 399-400 (1988). In addition, the Secretary must find that the resource values that may be served by retention of the selected public land are not greater than the values gained by acquisition of the offered private land. 43 U.S.C. § 1716(a) (1994); 43 C.F.R. § 2200.0-6(b).

The decision whether to proceed with a proposed land exchange, especially the determination whether it is in the public interest, is committed, by section 206(a) of FLPMA and 43 C.F.R. Part 2200, to the discretion of BLM. 43 U.S.C. § 1716(a) (1994); 43 C.F.R. § 2200.0-6(a); Barrett S. Duff, 122 IBLA 244, 247 (1992). It will not be overturned unless the party challenging it demonstrates that it is contrary to the law, arbitrary and capricious, not supported on any rational basis set forth in the record, or, for any reason, not in accordance with the public interest. Brent Hansen, 128 IBLA 17, 21 (1993).

In his SOR, Baca asserts that the process employed by BLM in implementing the exchange is contrary to public policy and the intent of section 206 of FLPMA. He argues that BLM ignored his formal proposals to acquire the selected public land by either purchase or exchange by refusing to respond to his letters of November 6, 1992, and March 16, 1994.

In his November 1992 letter to the State Director, Baca stated that in order to avoid the substantial economic loss he would suffer from being unable to graze the public lands if a land exchange went forward, he was "formally proposing to the Bureau that the subject property be purchased by [him]" pursuant to 43 C.F.R. § 2711.3-3(a)(3). The "subject property" encompassed 3,039 acres of public land in T. 17 N., R. 8 E., New Mexico Principal Meridian, Santa Fe County, New Mexico, including the selected public land at issue here in sec. 24. Baca did not include the remaining public land at issue in sec 33.

In his March 1994 letter to the Taos Resource Area, Baca extended his original purchase proposal "to include the possibility of the exchange of properties." He did not identify which public lands he desired to acquire by exchange. Most importantly, neither did he identify any private lands which he intended to offer to BLM in exchange for the selected public lands. The BLM acknowledged receipt of Baca's proposal by letter dated

March 18, 1994, noting that it would, at a later date, consider all comparable exchange proposals on their merits. There is no evidence that Baca ever clarified his original exchange proposal or submitted another proposal.

The State Director concluded in his April 1995 Decision that Baca's March 1994 letter could not be considered a formal exchange proposal because it failed to identify the offered and selected lands for BLM's consideration. We agree. Absent Baca's identification of the lands offered and selected, BLM had no basis for ultimately determining, as required by section 206(a) of FLPMA and 43 C.F.R. § 2200.0-6(b), whether the acquisition of any private lands offered by Baca, together with the conveyance of any public lands sought by him, would serve any public purpose. Nor could it make any preliminary assessment, pursuant to 43 C.F.R. § 2201.1(c), whether to even proceed with the exchange proposal and then notify the public of the proposal pursuant to 43 C.F.R. § 2201.2.

As to Baca's November 1992 proposal, the mere fact that BLM chose to transfer the selected public land to the exchange proponents, rather than sell them to Baca, does not demonstrate that BLM erred in determining, as required by section 206(a) of FLPMA, that the current exchange is in the public interest. Baca's purchase proposal was subject to the exercise of BLM's discretionary authority under section 203(a) of FLPMA, 43 U.S.C. § 1713(a) (1994). 43 C.F.R. § 2710.0-3(a). Moreover, because transfer of the public land to Baca would not have achieved the primary purpose of the proposed exchange, viz., acquisition of the private land adjacent to Atalaya Mountain, BLM properly declined to consider such transfer. See Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hasteley, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993).

Baca also argues that BLM acted contrary to public policy and the intent of section 206(a) of FLPMA by not consulting with the Agua Fria Village Association (Association) or at least inviting it to participate in the decisionmaking process. He states that the village of Agua Fria, which lies near the selected public land on the western outskirts of the city of Santa Fe, will be adversely impacted economically, culturally, and environmentally by the exchange.

In his SOR, Baca states that the Association has asked him to present their concerns regarding the exchange, and attaches copies of letters from the Association to BLM and the Santa Fe Conservation Trust. However, there is no evidence that Baca is entitled, under 43 C.F.R. § 1.3, to practice before the Department on behalf of the Association. Nor is there anything to indicate that he is an officer, full-time employee, or even a member of the Association, which is made up of residents of the village of Agua Fria. Thus, to the extent that Baca raises arguments on behalf of the Association, that aspect of the appeal is dismissed. See Resource Associates of Alaska, 114 IBLA 216, 218-19 (1990).

Even if we considered this aspect of the appeal, it is clear that BLM afforded the Association and other members of the public ample opportunity

to participate in the process leading up approval of the proposed exchange. Prior to preparation of the EA, BLM published a notice of the proposed exchange, pursuant to 43 C.F.R. § 2201.2, in newspapers of general circulation in the area of the exchange, affording a 45-day public comment period. Following issuance of the ROD, BLM published notice thereof, pursuant to 43 C.F.R. § 2201.7-1, affording another 45-day public comment period, in those same newspapers. There is simply no basis for concluding that the decision to conduct the exchange was made "outside the scope of public scrutiny." (SOR at 6; see City of Santa Fe, 103 IBLA at 401.)

Also, we find no evidence in the record, nor has Baca identified any, demonstrating that the Agua Fria community might be adversely affected by the proposed exchange. The BLM, as required by section 102(2)(C) of NEPA, considered the impacts of the proposed exchange on the human environment in its EA, and could find no likely adverse effects from that exchange. (EA at 5-6.) In addition, we find no evidence that BLM did not, as required by section 206(a) of FLPMA, duly consider the needs of the local people in deciding that the exchange was in the public interest.

Baca's second assertion is that BLM violated EO No. 12898 in deciding to go forward with the proposed exchange. He argues that BLM failed, as required by that Executive order, to consider the fact that the exchange will have a "disproportionately high adverse environmental effect" on the predominant minority population in the nearby village of Agua Fria. (SOR at 8.)

Executive Order No. 12898 generally requires every Federal agency, including BLM, to make achieving "environmental justice" part of its mission "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its \* \* \* activities on minority populations \* \* \* in the United States." 59 Fed. Reg. 7629 (Feb. 16, 1994). While the Order affords no right, enforceable by any member of the public against BLM, should BLM fail to live up to this mandate, id. at 7632-33, it is still proper to inquire as to whether it did so, since the Order binds BLM. See Mendiboure Ranches, Inc., 90 IBLA 360, 365-70 (1986).

In his April 1995 Decision, the State Director essentially concluded that BLM was not in violation of EO No. 12898 because, since it had found that there would be no adverse environmental impacts, there was no disproportionately high and adverse environmental effect on a minority population which BLM was required by that Order to identify and address. Baca offers no evidence that there is likely to be an adverse environmental impact, let alone one that may have a disproportionately high and adverse effect on the minority population in the village of Agua Fria. Thus, we agree with the State Director that BLM did not violate EO No. 12898.

Except to the extent that they have been expressly or impliedly addressed in this Decision, all other errors of fact or law raised by Baca are rejected on the ground that they are contrary to the facts and law or are immaterial.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed, and the appeal is dismissed in part.

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John H. Kelly  
Administrative Judge

I concur.

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James L. Burski  
Administrative Judge