

INTERIOR BOARD OF LAND APPEALS

Dona Jeanette Ong and Carie L. Nash

149 IBLA 281 (June 24, 1999)

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DONA JEANETTE ONG  
CARIE L. NASH

IBLA 96-387, 96-388

Decided June 24, 1999

Appeals of decisions by the Cascade Area Manager, Boise Field Office, Bureau of Land Management, rejecting desert land entry applications IDI- 31674 and IDI-31676.

Set Aside and Remanded.

1. Administrative Procedure: Decisions--Appeals: Generally--Rules of Practice:  
Appeals: Generally

When BLM issues a decision, it must ensure that the decision is supported by a rational basis, and that the basis is stated in the decision and demonstrated in the administrative record accompanying the decision. A case record provides this Board the information necessary for an objective, independent review of the basis for the decision, and an administrative decision is properly set aside and remanded if it is not supported by the record.

2. Applications and Entries: Generally--Desert Land Entry: Applications--Desert Land Entry: Classification--Public Lands: Administration--Withdrawals and Reservations:  
Effect of

A petition to have the land classified for entry is an integral part of an application for a desert land entry. When a petition-application is filed, the Bureau of Land Management should make a preliminary determination that it is regular upon its face and, if it is, determine whether the land should be classified as available for desert land entry. BLM may reject an application when the land has been withdrawn, segregated, or classified by decision of the Secretary or a proper delegate exercising his authority and therefore unavailable for entry.

3. Administrative Procedure: Decisions--Appeals: Generally--Desert Land Entry:  
Applications

A decision rejecting a desert land entry application which is not supported by a record showing that the

land was unavailable by decision of the Secretary, or by a proper delegate exercising his authority, or that the classification petition was reviewed by the State Director under procedures established by Departmental regulations will be set aside and the application will be remanded for a proper review.

APPEARANCES: Dona Jeanette Ong, Napa, Idaho, pro se; Carie L. Nash, Melba, Idaho, pro se; Kenneth M. Sebby, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Dona Jeanette Ong and Carie L. Nash have appealed two decisions by the Cascade Area Manager, Boise Field Office, Bureau of Land Management (BLM), dated May 1, 1996, rejecting their desert land entry applications. 1/ They have also requested stays of the decisions. On June 17, 1996, BLM filed answers to the statements of reasons and arguments in opposition to granting the stay petitions. On July 22, 1996, the Board issued an order staying the BLM decisions.

After review of the decisions, case files, and arguments raised by the parties we find that identical issues have been presented by the appeals, and have consolidated the appeals for review.

On April 23, 1996, Ong and Nash filed applications for entry under the Desert Land Act, 43 U.S.C. §§ 321-29 (1994). 2/ BLM determined that the applied-for lands had been designated an area of critical environmental concern (ACEC) and had not been designated as available for transfer from public ownership in the Cascade Resource Management Plan (RMP), approved July 1, 1988, and rejected both applications in its May 1, 1996, decisions.

Ong and Nash understand the ACEC designation referred to in BLM's decision to be the result of the presence of nests of the long-billed curlew. They claim that "[i]n the years that we have walked these lands,

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1/ When the Board received the Ong and Nash notices of appeal and petitions for a stay, their appeals were immediately docketed and assigned docket numbers IBLA 96-387 and IBLA 96-388, respectively. On June 3, 1996, the administrative records for these cases were received from BLM, and their appeals were docketed a second time and assigned docket numbers IBLA 96-395 and IBLA 96-396, respectively. The appeals inadvertently docketed as IBLA 96-395 and IBLA 96-396 were dismissed by order dated July 17, 1996.

2/ Ong seeks to enter approximately 316 acres consisting of the SE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub> NE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub>, and portions of the NE<sup>1</sup>/<sub>4</sub> NE<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub> NE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub>, NE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub>, sec. 30, T. 6 N., R. 2 W., Boise Meridian, Idaho. Nash has applied for an adjoining parcel of 320 acres consisting of the NW<sup>1</sup>/<sub>4</sub> and the SW<sup>1</sup>/<sub>4</sub>, sec. 29, T. 6 N., R. 2 W., Boise Meridian.

fewer than ten (10) Long-billed Curlews have been observed." They note that Peterson's: A Field Guide to Western Birds identifies cultivated lands as habitat of the long-billed curlew and state that cattle now graze on the land during nesting season, creating a danger to the nests and broods. They contend that the long-billed curlew could co-exist with their proposed use of the land for growing hay.

In its response to the Ong and Nash petitions for a stay, BLM contends that Ong and Nash cannot succeed on the merits. It argues that the Cascade RMP was developed in accord with section 102(1) of the Federal Land Policy and Management Act, 43 U.S.C. § 1701(1) (1994), which establishes a policy of retaining public lands unless BLM determines that disposal is in the national interest. (Answer at 5-6.) BLM states: "The lands selected by Appellant[s] were identified for retention and were also designated as an [ACEC] by the applicable planning process." Id. at 6. BLM also seeks to have the Board dismiss the case, arguing that the Board does not have jurisdiction to review either BLM decisions approving RMP's or "land classification determinations made by BLM pursuant to 43 C.F.R. Part 2400." Id.

After review of the record and applicable law, we find that BLM's decisions must be set aside and the case files remanded for further consideration by BLM. Two related matters compel this conclusion.

[1] First, the record submitted to the Board does not adequately support BLM's statements regarding the status of the lands Ong and Nash seek to enter. Partial copies of the master title plat (MTP) for T. 6 N., R. 2 W., Boise Meridian, have been placed in the case file. These copies identify a portion of sec. 30, which is covered by Ong's application, as "Non Suitable DLE," but there is no additional information about this classification. There is nothing identifying a land classification for the lands subject to Nash's application. BLM has provided a copy of the Record of Decision (ROD) adopting the Cascade RMP with its answer (Answer, Attachment A). On page 3 of the ROD, BLM states that three areas will be managed as ACEC's, and that: "The Long-billed Curlew Habitat Area, encompassing 61,000 acres between Emmett and Parma, will be managed to protect the largest nesting population in the western United States of long-billed curlew, a federally protected migratory species." However, the ROD does not otherwise identify the location of the Long-billed Curlew Habitat Area. BLM's answer also provides a map of a portion of the Cascade Resource Area showing areas designated for "moderate," "intensive," and "limited" management, and showing a part of T. 6 N., R. 2 W., as "limited management-special designations" (Answer, Attachment B). This map identifies some parcels as "transfers," but does not define these terms or identify the location of any ACEC or the Long-billed Curlew Habitat Area. <sup>3/</sup> The ROD also states

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<sup>3/</sup> An affidavit by BLM's attorney states: "[A]ttached hereto, marked Attachment B and incorporated herein by reference is a true and correct copy of pages 22-23, 36-38, and the relevant portion of Map 3, Alternative E (Proposed Plan) which was implemented by the RECORD OF DECISION set forth in Attachment A hereto." However, the pages are not part of

that only 560 of the 17,604 acres available for transfer from Federal ownership will be available under the Desert Land Act, but the record does not indicate where these 560 acres are found.

[When] BLM issues a decision, it must ensure that the decision is supported by a rational basis and that such basis is stated in the decision, as well as being demonstrated in the administrative record accompanying the decision. Burnett Oil Co., 122 IBLA 330, 332 (1992). As a general rule, an administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for the decision. Fred D. Zerfoss, 81 IBLA 14 (1984).

Carl S. Hansen, 130 IBLA 369, 375 (1994); see also Harvey E. Yates Co., 135 IBLA 373 (1996).

[2] Second, the decisions must be set aside because the Ong and Nash applications have not been reviewed under procedures established by Departmental regulations. As a result of section 7 of the Taylor Grazing Act of 1934, 43 U.S.C. § 315f (1994), all vacant, unreserved, and unappropriated public land in most Western states, including Idaho, was withdrawn from settlement, location, sale, and entry until classified as available for entry. E.O., 54 I.D. 539 (1934); see 43 C.F.R. § 2400.0-3; Max Wilson, 131 IBLA 306, 310 (1994); see also E.O., 55 I.D. 188 (1935). For this reason, a desert land entry application must be accompanied by a petition to have the land classified for entry. 43 C.F.R. § 2450.1; Carl S. Hansen, supra at 372. Item 16 of the desert land entry applications filed by Ong and Nash (commonly referred to as a "petition-application") states: "If the lands described in this application have not been classified as suitable for desert entry \* \* \*, please consider the application as a petition for such classification."

Departmental regulations provide:

Upon the filing of a petition-application, the authorized officer shall make a preliminary determination as to whether it is regular upon its face and, where there is no apparent defect, shall proceed to investigate and classify the land for which it has been filed. No further consideration will be given to the

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fn. 3 (continued)

attachment B, and we do not know what specific designations apply to T. 6 N., R. 2 W., or what they provide. The terms are commonly used in RMP's, but do not necessarily have the same meaning in each plan. To the extent a decision relies upon approval of an RMP, a complete copy of the plan, its supporting environmental impact statement, and other documentation providing details of the adopted plan should be part of the record on appeal.

merits of an application or the qualifications of an applicant unless or until the land has been classified for the purpose for which the petition-application has been filed.

43 C.F.R. § 2450.2.

Over the years the Department has recognized a number of exceptions to this rule. BLM may reject a desert land entry application because the land is unavailable without considering whether it should be classified as suitable for desert land entry. Applications for unsurveyed lands may be rejected because they are not available under the Desert Land Act. 43 U.S.C. § 326 (1994); George J. Chachas, 62 IBLA 310 (1982). BLM may also reject applications for withdrawn lands, Gerald W. Marlin, 98 IBLA 128 (1987); Richard S. Gregory, 96 IBLA 256, 257 (1987), and cases cited therein, and for lands which have been classified for multiple-use management and segregated from entry by publication of notice in the Federal Register, Bill K. Yearsley, 67 IBLA 97, 99 (1982), and cases cited therein. These lands are not "unreserved." 43 C.F.R. § 2520.0-8; see 43 C.F.R. § 2440.3. In addition, when land has been affirmatively classified as unsuitable for desert land entry, BLM is not required to reconsider the classification in response to a desert land entry application. <sup>4/</sup> 43 C.F.R. § 2450.6(a); Keith P. Gunderson, 127 IBLA 16 (1993); Rulon Van Tassel, 33 IBLA 221 (1977); Ralph G. Faulkner, 26 IBLA 110, 113 (1976), aff'd, Faulkner v. Watt, No. 1-77-99 (D. Idaho Nov. 16, 1979), aff'd, 661 F.2d 809 (9th Cir. 1981). Thus, an application for lands which have been withdrawn, segregated, or classified by decision of the Secretary, or a proper delegate exercising his authority, see 43 U.S.C. § 1714(a) (1994), may be rejected without deciding whether to classify the land as suitable for desert land entry. See also Max Wilson, supra at 307, 310 (Secretarial approval of the California Desert Conservation Area Plan).

When these exceptions do not apply, the regulations provide that the State Director is to issue a proposed classification decision. 43 C.F.R. § 2450.3(a). Protests of the proposed decision may be filed with the State Director, who then issues an initial classification decision. 43 C.F.R. § 2450.4. That decision is subject to review by the Secretary, upon his own motion or as a result of a motion by a party, and if the Secretary does not take action, the State Director's initial decision becomes final for the Department. 43 C.F.R. § 2450.5. Because the decision was made by the Secretary, or he has allowed it to become final, it is not appealable to this Board which exercises his review authority. See 43 C.F.R. §§ 4.1, 2450.5(d).

[3] The case files now before use do not show that the land designations referred to by BLM – i.e., the ACEC's – were established by decision of the Secretary, or a proper delegate exercising his authority, or that the Ong and Nash classification petitions have been reviewed by

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<sup>4/</sup> As noted above, the MTP shows that only a portion of lands Ong applied for are classified as unsuitable for desert land entry.

the State Director following the procedures in 43 C.F.R. Part 2450. The ROD was approved by the Idaho State Director. See 43 C.F.R. §§ 1610.5-1, 1610.5-2(b). We have consistently recognized that approval of an RMP is not subject to appeal to this Board, and we will not review management policy and planning decisions when considering an appeal addressing the implementation of an RMP. See Petroleum Association of Wyoming, 133 IBLA 337, 341-42 (1995); Max Wilson, supra at 308-09. However, a decision rejecting a desert land entry application is made under the laws and regulations governing desert land entries, and, if rejection is based upon an RMP, that decision is a decision implementing that document. See 43 C.F.R. § 1601.0-5(k). An implementing decision is appealable and must be supported by a proper record. 43 C.F.R. §§ 4.1, 4.410(a); Petroleum Association of Wyoming, supra at 342.

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 May 1, 1996, decisions of the Cascade Area Manager, Boise Field Office, are set aside and remanded for further action consistent with this opinion.

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R.W. Mullen  
Administrative Judge

I concur.

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Will A. Irwin  
Administrative Judge