

LUTHER WALLACE KLUMP  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 91-355

Decided February 5, 1993

Appeals from two orders by Administrative Law Judge Raymond M. Child affirming findings of unlawful grazing in willful trespass, assessing damages, and cancelling the grazing permit. AZ-040-91-01, AZ-040-91-02, AZ-040-91-03.

Affirmed.

1. Grazing Permits and Licenses: Cancellation or Reduction

A grazing permit does not create any right, title, interest, or estate in or to lands. The privileges granted by a permit are entitled to procedural protections, but continued ownership of the permit is dependent upon compliance with its terms and conditions.

APPEARANCES: Luther W. Klump, pro se; Fritz L. Goreham, Esq., and Richard R. Greenfield, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Luther Wallace Klump has appealed two orders by Administrative Law Judge Raymond M. Child which affirmed three decisions of the Stafford District Office Manager, Bureau of Land Management (BLM), and dismissed appeals of those decisions. <sup>1/</sup> In the first order, dated May 29, 1991, Judge Child upheld BLM's October 12, 1990, decision (AZ-040-91-01) that appellant had violated 43 CFR 4140.1(a)(1) and 4140.1(b)(1)(iii) by

<sup>1/</sup> Consistent with rulings made at the hearing, the orders under appeal are styled dismissals of the proceedings (Tr. 16, 362). They state, however, both that the appeals are dismissed and that BLM's decisions are affirmed. "As a matter of general definition, a dismissal is an order for the termination of a case without a trial of any of its issues." 24 Am. Jur. 2d, "Dismissal" § 1 (1983); compare 43 CFR 4.474(b) with F.R.C.P. 12(c), 41(b). Because a hearing was held concerning violations at the HX Dam Protection Area and the orders address substantive matters related to the violations, the orders are reviewed as decisions on the merits rather than as dismissals of the appeals.

allowing cattle to graze in the Ryan Seeding Pasture of the Badger Den Allotment (No. 51100) contrary to the terms and conditions of his grazing permit. BLM assessed \$408.90 as damages for willful trespass. Judge Child's second order, dated May 31, 1991, affirmed BLM's decision (AZ-040-91-02) of July 17, 1990, requiring removal of livestock from the HX Dam Protection Area and placing the decision in full force and effect pursuant to 43 CFR 4160.3(c). The second order also affirmed BLM's decision (AZ-040-91-03) of January 16, 1991, to impose trespass damages of \$1,193.20 for grazing in the HX Dam Protection Area. Most significantly, the order affirmed BLM's decision to cancel appellant's grazing permit for the Badger Den Allotment.

Judge Child's orders were issued after a hearing held in Stafford, Arizona, on May 20 and 21, 1991. Appellant timely filed a combined notice of appeal and statement of reasons and BLM answered. Subsequently, appellant has filed a document titled "Appellant's Defense" (hereinafter, "Brief") in which he more fully sets forth his reasons for appeal. BLM has not sought permission to respond. At BLM's request, expedited consideration of the appeal was granted by order of July 1, 1992. On September 28, 1992, appellant filed additional arguments, to which BLM responded on October 6, 1992.

Although considerable testimony and evidence was presented at the hearing, there is no genuine issue on appeal as to whether the grazing violations occurred. Appellant did not challenge BLM's finding that his cattle had grazed on the Ryan Seeding Pasture during times prohibited by his grazing permit and Judge Child dismissed his appeal (Tr. 16). Appellant did present evidence that cattle had been able to enter the HX Dam Protection Area by jumping the fence BLM had constructed and that a bull had been able to enter the area through the trigger gate (Tr. 162-63, 176, 180; Exh. A-22, A-23). However, the instances of trespass cited in BLM's January 16, 1991, decision occurred after the fence had been brought to standard by adding an additional strand of barbed wire and at a time when BLM employees observed an open trigger gate allowing cattle access to the area (Tr. 132, 260, 303, 306-08; Exhs. G-3, G-6 through G-9). Appellant admitted that he set the gate open (Tr. 131-32, 141, 262, 286, 312-13). Consequently, we need not address BLM's or the Judge's factual findings that appellant's cattle grazed in the Ryan Seeding Pasture and HX Dam Protection Area in violation of the terms and conditions of his permit, and need only address appellant's arguments which might mitigate the violations or require reversal of the BLM decision to cancel his permit.

[1] Appellant first argues that he holds grazing rights which date back to 1690 when cattle were introduced to the area (Brief at 3-4). Assuming he is correct as to the date, and that he is a proper successor in interest, he is mistaken in contending that use of the land for grazing established rights which, preclude BLM from controlling or limiting grazing on the land. As recognized by the Supreme Court in Buford v. Houtz, 133 U.S. 320, 326 (1890), those who grazed livestock on the open public range acquired an implied license. Graziers held rights which a court could protect against interference by others, but use of the public range

did not give them vested rights against the government, because the government is not a third party but the land owner. Omaechevarria v. Idaho, 246 U.S. 343, 352 (1918); Light v. United States, 220 U.S. 523, 535-36 (1911); see Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 313-14 (D.C. Cir 1938). With enactment of the Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934), codified as amended at 43 U.S.C. §§ 315-315o-1 (1988), Congress replaced implied permission to graze with a system of permits and leases. Contrary to appellant's claim, issuance of a grazing permit does "not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b (1988). The privileges granted by a permit are entitled to procedural protections, but continued ownership of a permit is dependent upon compliance with its terms and conditions. It is clear that appellant violated the limitations on grazing included in his permit.

Throughout the proceedings appellant has asserted that he has purchased and holds water rights, grazing rights, and property rights which are not subject to interference by BLM (Brief at 3-4, 9-10; Additional Arguments at 2-3; Tr. 23, 216-17, 251). The record shows that appellant and his wife entered into a lease and purchase-option agreement to acquire the Foote Ranch, including associated water rights and leases (Exh. A-30). Other than this agreement there is no evidence that appellant holds any property interest in lands or resources within the Badger Den Allotment. 2/ While appellant is correct that the patented lands within the allotment are not under BLM jurisdiction, the same is not true of the land which is Federally owned. To the extent appellant contends BLM is depriving him of grazing pasture he has paid for, we observe that the owner of the Foote Ranch does not own all of the land within the allotment and could not lease or otherwise convey to appellant the right to use it. Appellant's authority to graze on Federal land derives entirely from his permit, which expressly excludes grazing on the HX Dam Protection Area (Exh. G-1).

The water rights to which appellant refers are held by Gerald Foote apparently as executor of the Foote estate (Exh. A-14; Brief, Attachment A). Appellant's interest arises by virtue of his lease-purchase agreement. The documents show that, strictly speaking, Foote does not hold a water right on the HX Dam Protection Area, but has filed a claim to use water for a stockpond as part of the adjudication of the Upper Gila River before the Superior Court of Maricopa County (Tr. 219-20, 333-35; Exh. A-14). See Ariz. Rev. Stat. Ann. §§ 45-252, 45-254, 45-272 to 45-276 (1987). Departmental proceedings on appellant's grazing permit should not affect the validity of Foote's claims to water within the allotment. See 43 U.S.C. § 315b (1988). The proceedings affect appellant's use of water only as a consequence of affecting his ability to graze cattle on Federal land as a direct result of his violations of the terms of his permit, in particular opening the trigger gate to the HX Dam Protection Area in which

2/ Appellant also claims ownership of the land based on a document he has recorded with the Graham County recorder (Tr. 361-62). There is no basis in the record for believing the document has any substantive legal significance.

grazing was not authorized. In this respect his situation is unlike that of the plaintiff in Fallini v. Hodel, 725 F. Supp. 1113 (D. Nev. 1989), aff'd, 963 F.2d 275 (9th Cir. 1992). Appellant claims additional water rights leased to him by his brother (Exh. A-13). From the land descriptions in the documents he has provided, it does not appear that they pertain to land within the Badger Den Allotment but to land in Cochise County south of the allotment.

Appellant also contends that he signed the permit under protest and attempted to preserve his rights by a "mutual agreement" he attached to the permit when he returned it to BLM (Brief at 2, 4-5, 7; Tr. 12-14, 22-23, 27, 251-52, 256; Exh. A-37). This argument overlooks the fact BLM's proposed decision to issue the permit informed appellant of his right to protest (Exh. A-5). Although appellant claims that he felt he had no choice but to sign the permit as offered because the proposed decision stated that otherwise his application to have the allotment transferred to him would be rejected, he had successfully objected to terms in the permit previously offered him (Tr. 52-56, 64-66; Exh. A-7). While we cannot say what the outcome might have been had he formally protested the proposed decision, the claim that BLM did not allow him to protest rings hollow. Moreover, whatever his reservations about or disagreements with the terms and conditions imposed by BLM, appellant was not justified in failing to comply with the agreement he signed. "If there is dissatisfaction with the action of the officials in the granting of permits, or as to other decisions, the live-stock owner's remedy is by appeal as provided for in the [Taylor Grazing] Act and the Code \* \* \*." Chournos v. United States, 193 F.2d 321, 323 (10th Cir. 1951), cert. denied, 343 U.S. 977 (1952).

The "mutual agreement" appellant attached to the permit when he returned it stated: "We mutually agree to treat each other fair and humane, as set forth in the spirit of America in 1776. and/or fair and humane, as set forth in Christian teachings, and/or fair and humane as set forth in the Civil Rights Act." (Exh. A-6; emphasis in original.) It appears that appellant intended the provision to operate as an addendum to a contract, modifying the terms of the permit (Tr. 101). Although BLM did not sign the attachment or otherwise agree to it, even regarded as part of the permit, the wording is far too general to alter the specific terms which prohibit grazing in the HX Dam Protection Area and limit grazing in the Ryan Seeding Pasture. Moreover, even if we were to hold that it was proffered to BLM as a modification of the permit, the conclusion most favorable to appellant would be that the permit was not properly issued. The result would be effectively the same as the decision to cancel appellant's permit--he would no longer be authorized to graze cattle on the Badger Den Allotment.

Appellant further argues that BLM erred in placing its July 17, 1990, decision in full force and effect because an emergency did not exist and the prior trespass notice on which it was based was later rescinded (Brief at 8; Tr. 24-25, 200-07, 252). See 43 CFR 4160.3(c). The argument has merit but no consequence. BLM vacated a notice of trespass and a proposed decision because the fence it had constructed around the HX Protection Area did not meet specifications and cattle may have entered the area by jumping the fence (Tr. 115-17; Exh. A-39). BLM, however, did not vacate its full

force and effect order which had been predicated on the violation. While logically it may be that the order also should have been vacated at that time, the effect of the order was to direct appellant to remove and exclude his cattle from the HX Dam Protection Area and to maintain the fence. He was already obliged to do this under the terms of his permit (Exh. A-6). The order imposed no additional burden on him. Consequently, BLM's reliance on violations of the full force and effect order in later actions was without prejudice to appellant.

Similarly, the question whether an emergency supported issuance of the full force and effect order is without practical significance to the appeal. BLM's stated reason justifying the full force and effect order was to preserve grass within the area for erosion control (Tr. 274-77, 343-44). While excluding cattle would clearly assist in this purpose, the record is less than clear that resource deterioration had occurred so as to constitute an emergency. See Thoman v. Bureau of Land Management, 120 IBLA 302 (1991). Rather, it appears that the full force and effect order was intended to direct appellant to cease setting the trigger gate in an open position, something he had frequently done (Tr. 131-33, 141, 204-06, 277, 344). Although appellant may have been correct that an emergency did not exist, the lack of an emergency did not justify his continued practice of setting the trigger gate open to allow his cattle access to the area. This practice led to BLM's January 16, 1991, decision finding cattle to be in trespass on numerous occasions in November and December of 1990, and the decision to cancel the allotment.

Finally, appellant argues that the restrictions in his permit limiting grazing within the HX Dam Protection Area, Ryan Seeding Pasture, and other areas were in violation of the multiple-use act (Brief at 6-7). Although the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1988), cited by appellant, applies to National Forest lands rather than lands managed by BLM, the principle of multiple use does apply. See 43 U.S.C. § 1732(a) (1988). It does not, however, require that every parcel of land be available for every use. Consequently, multiple use did not require BLM to allow appellant to graze cattle in the HX Dam Protection Area or the Ryan Seeding Pasture.

The other arguments raised by appellant have been considered and are hereby rejected. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the orders appealed from are affirmed.

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James L. Byrnes  
Chief Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge