

WILLIAM H. CASEY  
G.N. AND M. SHARP,  
A PARTNERSHIP, INTERVENOR

IBLA 70-110

Decided January 26, 1973

Appeal by the intervenor from decision by the Bureau of Land Management remanding Casey's section 3 grazing permit case (Nevada 6-68-1) to the District Manager for consideration on its merits of an application filed by him to transfer a portion of the grazing privileges attached to his base land to other lands acquired by him.

Affirmed as modified.

Grazing Permits and Licenses: Base Property (Land): Generally--Grazing Permits and Licenses: Base Property (Land): Commensurability--Grazing Permits and Licenses: Base Property (Land): Transfers

Where a grazing permittee has been given two consecutive years in accordance with 43 CFR 4115.2-1(e)(9)(i) within which to increase the production of his base property or suffer the loss of all or part of his base property qualifications and, where after two growing seasons have passed but not two full years, he files an application to transfer some of the qualifications from his base property to other land acquired by him,

his base property qualifications are still in good standing at the time of filing the transfer application because the term "two consecutive years" specified in the regulation means two consecutive application years and not two growing seasons. Accordingly, the District Manager should have considered the transfer application on its merits.

Grazing Permits and Licenses: Base Property (Land): Generally—Grazing Permits and Licenses: Base Property (Land): Transfers

Where an application to transfer base property qualifications to other land owned by an applicant is approved, the transfer is effective as of the date the transfer application was filed. A sale at a later date by the proposed transferee would not affect the transfer, and the District Manager properly may consider the transfer application if the purchasers of the property have indicated an interest in obtaining any grazing privileges for which that land is base property.

Words and Phrases

The term "two consecutive years" in 43 CFR 4115.2-1(e)(9)(i) means two consecutive application years and not two growing seasons.

APPEARANCES: W. Howard Gray, Esq. of Reno, Nevada, Gray, Horton and Hill, for appellant; Charles E. Evans, Esq., of Elko, Nevada, for appellee.

OPINION BY MRS. LEWIS

This is an appeal to the Secretary of the Interior by G. N. and M. Sharp, a Partnership, the intervenor, from the decision of October 13, 1969, amended November 14, 1969, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed the Administrative Law Judge's <sup>1/</sup> decision of May 15, 1969, pertaining to the grazing privileges of William H. Casey under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), in the Nyala Unit of Nevada Grazing District No. 6. The Judge's decision affirmed a decision of the Bureau's Battle Mountain, Nevada, District Manager, dated January 22, 1968.

The Bureau decision held that the "two consecutive years" specified in the regulation at 43 CFR 4115.2-1(e)(9)(i) means two consecutive application years and not two growing seasons, and an application to transfer grazing privileges attached to the base

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<sup>1/</sup> The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

property to the newly acquired Goss Ranch lands, which application was filed before the expiration of the second application year, is timely filed, and the base property qualifications of licensee Casey are in good standing.

The Bureau further held that when its decision became final, the case would be returned to the District Manager, through the State Director, for consideration of the transfer application on its merits.

In the instant appeal, G. N. and M. Sharp contends that Casey has now sold the Goss Ranch land and that all holdings of the Bureau's decision are moot. Sharp further contends that Casey is in the same position as before he acquired the Goss Ranch property and that the Casey property, exclusive of the Goss Ranch land, will support no more than 4,844 AUMs. Sharp disagrees with the interpretation of the two-year rule but thinks it is moot.

Casey filed an answer alleging that the notice of appeal was never served on him; that neither the notice of appeal nor the statement of reasons was timely filed; and that, as he owned the Goss Ranch land on January 17, 1968, the date of his application to transfer the grazing privileges, the transfer would be effective as of January 17, 1968, and the privileges would attach to the Goss Ranch land as of that date, and the later sale of the land would

not affect the validity of such transfer. Casey requested that the appeal be dismissed. Sharp filed a reply to Casey's answer. For the reasons stated below, the request to dismiss the appeal is denied.

We find no merit in the procedural objections made by Casey. The signed return receipt shows that the notice of appeal was served on the attorney for Casey. As the decision was served on Sharp on November 10, 1969, he had 30 days thereafter plus a 10-day grace period if he mailed the notice of appeal during the 30 days. As the notice of appeal was filed on December 11, 1969, it was timely filed. Sharp then had 30 days dating from the time of filing the notice of appeal to file his statement of reasons. As he filed such statement of reasons on January 7, it also was timely filed.

With respect to the substantive questions, the record shows the following:

On October 27, 1967, Casey filed an application with the District Manager, Bureau of Land Management, Battle Mountain, Nevada, in which he requested a license for 399 animal unit months (AUMs) of forage on an active use basis and 5,339 AUMs on a nonuse basis, for a total of 5,738 AUMs. By decision of January 22, 1968, the District

Manager held that the forage production of Casey's base property was sufficient to issue a license for only 4,844 AUMs, or a reduction of 894 AUMs.

Casey appealed the decision, contending that the District Manager was in error as he failed to take any action on a pending application filed by Casey to transfer a portion of his base property qualifications to other property owned by him, called the Goss Ranch land, that would provide sufficient forage to justify the issuance of a license for all of the AUMs requested.

A hearing on the appeal was held by the Judge on December 11, 1968. Casey, the District Manager and G. N. and M. Sharp all appeared and were represented by counsel.

The Judge concluded that if the productivity of base property declines, grazing privileges are lost under 43 CFR 4115.2-1(e)(9)(i) only after the expiration of two consecutive application years and then only if nonuse has not been granted for those privileges that cannot be utilized due to the insufficient production of the base property. Accordingly, he held that as Casey was issued licenses during 1966 and 1967 granting nonuse for those privileges that could not properly be utilized due to the lack of productivity on his base property, and as two consecutive application years did

not intervene between the time of the District Manager's letter of April 15, 1966, and January 17, 1968, the date of filing the transfer application, Casey had not lost any grazing privileges under the regulation at the time the transfer application was filed. He, therefore, remanded the case for appropriate action on the transfer application.

The Bureau and G. N. and M. Sharp appealed to the Director, Bureau of Land Management. The Office of Appeals and Hearings affirmed the Judge and remanded the case to the District Manager for consideration of the transfer application on its merits.

In affirming, The Bureau decision noted:

In the case of Mrs. C. B. Stark, Nevada 6-62-2 (January 28, 1964), the Bureau stated, "It is hereby construed that the 'two consecutive years' referred to \* \* \* is interpreted to mean two consecutive application years and not two calendar years \* \* \*." In Jack G. Taylor, A-31014 (June 25, 1969), in discussing the regulation, 43 CFR 4115.2-1(e)(9), the Department held that the "intent of the regulation is to require an applicant to assert his demand timely so that it can be adjudicated and to bar one who does not do so within a period of 2 years from thereafter pressing his claim." The Department also stated in Anawalt Ranch & Cattle Co., et al., 70 I.D. 6 (1963), that "the decision establishing base qualifications at a limit commensurate with the extent to which it was covered by the appellant's applications for 2 years immediately preceding was correct \* \* \*" (Emphasis supplied by the Bureau).

As to the interpretation of "two consecutive years," we affirm and adopt the rationale and finding of the decision of The Bureau.

We agree with appellants that the sale by Casey of the Goss Ranch land reduces his base property commensurability.

With respect to the Goss Ranch land, which has now been sold by Casey, while there seems to be no precedent on this issue, we agree with Casey that the transfer application, if it were approved on its merits, would be effective as of January 17, 1968, the date his transfer application was filed, and while he owned the land. 43 CFR 4115.2-2(b)(3).<sup>2/</sup> Therefore, the grazing privileges requested to be transferred would then be attached to that land, and the sale of the land by him at a later date would not affect the transfer. Under the doctrine of "relation back" as stated above, it could possibly have an effect on the rights of the purchasers of the base property to the grazing privileges attached thereto under 43 CFR 4115.2-2. The grantees named in the deed are George A. Manley and

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<sup>2/</sup> This regulation provides in applicable part:

(3) \* \* \* Upon approval of the application by the District Manager after reference to the advisory board, the transfer shall be effective as of the date of filing of the application, and the base property from which the transfer is made will thereupon lose its qualifications to the extent indicated in the transfer. (Emphasis supplied).

Linda M. Manley. If the latter have expressed an interest in obtaining any grazing privileges to which the base land is entitled, the transfer application should be considered on its merits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1972), the decision below is affirmed as herein modified, and the case record is returned to the Bureau of Land Management for any action that may be deemed necessary or advisable in accordance with this decision.

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Anne Poindexter Lewis, Member

We concur.

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Frederick Fishman, Member

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Newton Frishberg, Chairman

