

ERWIN A. SWANSON, APPELLANT
JOHN D. WEBER, HERMAN C. WEBER
d/b/a WEBER BROTHERS, INTERVENORS

IBLA 72-301

Decided February 22, 1973

Appeal from decision (California 2-71-5) of Administrative Law Judge 1/ Rudolph M. Steiner affirming decision of District Manager which rejected in part appellant's application for grazing privileges.

Remanded.

Grazing Permits and Licenses: Advisory Boards

A District Advisory Board must meet together as a body in order to make recommendations to a district manager on an application to transfer grazing privileges; a mere telephone poll of the members in lieu of such a meeting constitutes reversible error.

Grazing Permits and Licenses: Hearings

In a hearing to determine an appeal from a decision of a district manager in which an appellant alleges that he has been deprived of grazing privileges, the burden is upon the appellant to show by substantial probative evidence that his rights have been impaired.

Grazing Permits and Licenses: Base Property (Land): Ownership or Control -- Grazing Permits and Licenses: B

A transfer of grazing privileges from one base property to another does not require the written consent of the owner of the base property from which the transfer is to be made where the transferee is a tenant at the time when the application for transfer is filed and the tenant's livestock operations established the dependency by use for such property.

1/ 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).

APPEARANCES: Guy Martin Young, Esq., Alturas, California, for the appellant; Paul B. Baker, Esq., Alturas, California, for the intervenors; Burton J. Stanley, Esq., Office of the Regional Solicitor, United States Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY MR. FISHMAN

Erwin A. Swanson has appealed from a decision of Administrative Law Judge Rudolph M. Steiner, dated February 2, 1972, affirming a decision of the District Manager of the Susanville, California, District Office, Bureau of Land Management, which rejected in part appellant's application for grazing privileges.

Appellant applied for a grazing license or permit on December 14, 1970, pursuant to section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. § 315b (1970). By decision dated March 16, 1971, the District Manager informed appellant that the Advisory Board of the Susanville Grazing District recommended that the grazing privileges requested by appellant be rejected. In his decision the District Manager stated that he was rejecting in part appellant's application for grazing privileges for the reason that the grazing privileges in issue had been transferred on December 10, 1970, from the base property of the appellant (the "Yankee Jim" property) to the base property of the intervenors, John D. Weber and Herman C. Weber (the "Cantrell - Richardson" property).

Appellant first argues that the transfer of grazing privileges from the Yankee Jim base property to the Cantrell-Richardson base property was erroneous because the intervenors did not establish their right to a transfer as present lessees and failed to obtain the written consent of the appellant as property owner.

The Yankee Jim property was leased to the Weber family since 1916 and their livestock operations established the dependency by use or priority of the Yankee Jim property. The appellant purchased the Yankee Jim property in October of 1970 apparently with the erroneous understanding that the grazing privileges in issue were appurtenances to the Yankee Jim property which would pass to appellant upon conveyance. As part of the closing transactions, appellant and his wife signed the following acknowledgement:

Undersigned are aware that the Weber brothers are for the calendar year 1970 tenants on the property in Modoc County commonly known as the "Yankee Jim Ranch" and we understand that even though we purchase this property, the Webers will have the right to remain in possession until December 31, 1970.

The applicable regulation, 43 CFR 4115.2-2(b)(3) provides in pertinent part:

* * * No transfer will be allowed without the written consent of the owner * * * of the base property from which the transfer is to be made, except that in an application for transfer of class 1 qualifications where the applicant for such transfer is a lessee of the base property without whose livestock operations the dependency by use or priority thereof would not have been established, such consent will not be required. [Emphasis added.]

It is undisputed that the Webers did not obtain the written consent of appellant for transfer of the grazing privileges in issue. Therefore, unless the intervenors fell within the exception of 43 CFR 4115.2-2(b)(3), the transfer was invalid.

The Judge found that the Webers controlled the Yankee Jim property at the time of the application for transfer and through December 31, 1970, by an oral lease. This finding is supported by the record. John D. Weber testified that the Webers held the Yankee Jim property under an oral lease since 1916. He further testified that the term of the lease was on a year-to-year basis from January 1 to December 31 of each year. Weber's testimony was uncontroverted.

As stated in Charles R. Kippen, 61 I.D. 452, 457 (1954):

In the absence of a specific provision to the contrary, ordinarily a tenant is not deprived of his leasehold estate by a sale of the premises (3 Thompson, Commentaries on the Modern Law of Real Property, sec. 1335).

Appellant acknowledged in writing that the Webers were tenants of the Yankee Jim property until December 31, 1970. In light of this evidence and the uncontroverted testimony of John D. Weber, we conclude that intervenors came within the exception of 43 CFR 4115.2-2(b)(3) and were not required to obtain the written consent of appellant to transfer the grazing privileges from the Yankee Jim property to the Cantrell-Richardson property.

Appellant also argues that the transfer of grazing privileges from the Yankee Jim base property to the Cantrell-Richardson base property was erroneous because the Cantrell-Richardson base property does not produce sufficient forage to support the transfer.

Based upon Bureau of Land Management records, the Judge found that the Yankee Jim property had a total commensurability rating

of 638 AUMs, 2/ 621 of which were class 1. The Judge also found that the Cantrell-Richardson property had a total commensurability rating of 1,081 AUMs, only 200 of which were class 1. Therefore, the commensurability of the Cantrell-Richardson property, as shown by the Bureau records, was more than sufficient to permit the transfer.

In a hearing to determine an appeal from a decision of a District Manager in which an appellant alleges that he has been deprived of grazing privileges, the burden is upon the appellant to show by substantial probative evidence that his rights have been impaired. Thomas Ormachea and Michael P. Casey, 73 I.D. 339 (1966). At the hearing in the case at bar, appellant offered no evidence to rebut the commensurability rating of the Cantrell-Richardson property as shown by the Bureau records. Accordingly, the finding of the Judge on this issue will not be disturbed.

Appellant next contends that the transfer of grazing privileges was contrary to 43 CFR 4115.2-2(b)(3) because the District Advisory Board failed to hold a meeting and consider collectively the application to transfer grazing privileges filed by intervenors.

The pertinent language of 43 CFR 4115.2-2(b)(3) provides:

* * * Upon approval of the application by the District Manager after reference to the advisory board, the transfer shall be effective * * *. [Emphasis added.]

At the hearing, Roger W. Burwell, an employee of the Bureau, testified that he made a telephone poll of the members of the Advisory Board at the direction of the District Manager (Tr. 29, Government's Exhibit 9, Tr. 46) and that seven of the nine members recommended that the intervenors' application for transfer be approved. He further testified that he was unable to contact the remaining two members.

While the regulation does not expressly provide that the Advisory Board must convene in order to consider an application for transfer, section 18 of the Taylor Grazing Act, 43 U.S.C. § 3150-1 (1970) and 43 CFR 4114.1-4 provide for meetings of District Advisory Boards, and 43 CFR 4114.1-5 provides that "District advisers shall advise or make recommendations on * * * [t]he transfer * * * of base property qualifications."

2/ The total commensurability of the Yankee Jim, according to the Bureau records admitted in evidence at the hearing, was actually 683 AUMs.

The recommendations of the Advisory Board are intended to advise the District Manager of pertinent facts and considerations which might otherwise not have come to his attention. The District Manager is authorized to follow or reject those recommendations. Harvey Brothers, A-24482 (March 28, 1947). In Richard McKay, Eureka Ranch Company, Intervenor, 2 IBLA 1, 5 (1971) a District Manager acted upon an application relating to grazing privileges, notwithstanding the fact that the local Advisory Board refused to make a recommendation on the application. On appeal to the Secretary of the Interior, it was argued that the Advisory Board's failure to make a recommendation deprived the District Manager of his authority to act upon McKay's application. In considering the argument the Department stated:

[The Advisory Board's] refusal to act cannot give it greater power than its expression of an opinion would. In either case the final determination rests with the district manager and he must proceed with the disposition of the application.

The present case is distinguishable from McKay in that in the case at bar the Advisory Board, as a body, was not afforded the opportunity to make a recommendation.

This view is buttressed by 43 CFR 4114.1-4 which envisages that the "District advisory boards shall meet * * *" and the "[m]eetings * * *" shall be open to the public; with the approval of the Bureau representative present, the Board may meet in executive session. Although 43 CFR 4114.1-5 perhaps could otherwise be construed to provide that District advisors individually shall advise or make recommendations on transfer of grazing privileges, 43 CFR 4115.2-2 specifies that in the case of a transfer of grazing privileges the District Manager may approve the application after reference to the Advisory Board.

The rule set forth in Webster v. Texas & Pacific Motor Transport Co., 140 Tex. 131, 166 S.W. 2d 75, 76-77 (1942) is deemed to be controlling:

* * * where the Legislature has committed a matter to a board, bureau, or commission, or other administrative agency, such board, bureau, or commission must act thereon as a body at a stated meeting, or one properly called, and of which all the members of such board have notice, or of which they are given an opportunity to attend. Consent or acquiescence of, or agreement by the individual members acting separately, and not as a body, or by a number of the members less than the whole

acting collectively at an unscheduled meeting without notice or opportunity of the other members to attend, is not sufficient.

The same court went on to state at p. 77 that the purpose of the rule:

* * * is to afford each member of the body an opportunity to be present and to impart to his associates the benefit of his experience, counsel, and judgment, and to bring to bear upon them the weight of his argument on the matter to be decided by the Board, in order that the decision, when finally promulgated, may be the composite judgment of the body as a whole.

While Webster is distinguishable from the present case in that in Webster the Railroad Commission's decisions were final actions, the reason for requiring a board to act as a body is equally applicable to advisory boards.

We recognize that the remanding of this case for a meeting of the District Advisory Board may have no effect on the ultimate outcome. The District Manager may disregard the recommendation of the Board so long as he does not act in an arbitrary or capricious manner. However, the intention of the Secretary in promulgating the regulations is clear. The Advisory Board must be afforded an opportunity to meet and fulfill its intended role. See Richard McKay, Eureka Ranch Company, 2 IBLA 1, 5 (1971).

Appellant should not be deprived of his right, as established by the regulations, to have the District Advisory Board meet and review the transfer application prior to the action of the District Manager. The Supreme Court has held that where a matter is committed by regulation to the discretion of a board, even though the authority to reverse the board is reserved, the regulation must be observed so long as the regulation remains operative. To paraphrase the language of Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954):

* * * In short, as long as the regulations remain operative the * * * [District Manager] * * * [is denied] the right to sidestep the Board or dictate its decision in any manner.

In the case at bar, the proposed transfer was never officially presented to the Board, nor did the Board hold any meeting thereon. Appellant has been denied this procedural protection, possibly to his prejudice. It is not necessary that he prove in advance that the Advisory Board would have made a recommendation, after consideration, favorable to him, or that the District Manager

would have denied the transfer. Accardi v. Shaughnessy, supra. Reversible error is that which reasonably might have prejudiced the party complaining. Cf. Condello v. United States, 297 F. 200, 201 (2d Cir. 1924).

The Board of Land Appeals will not countenance the disregarding of the Secretary's regulations by placing its imprimatur on precipitous action. The District Advisory Board, the District Manager and this Board are bound by the Secretary's mandate that the Advisory Board be given the opportunity to meet and consider prior to the District Manager acting upon the question. See McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).

Therefore, 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 set aside and the case remanded to permit the District Advisory Board to render its recommendation, as required by the regulations.

Frederick Fishman, Member

We concur:

Edward W. Stuebing, Member

Joseph W. Goss, Member.

