

LYNN L. MOEDL

IBLA 72-49

Decided March 8, 1973

Appeal from a decision (no BLM serial number supplied) of the Idaho Falls' District Office awarding certain grazing leases between preference claimants, pursuant to section 15 of the Taylor Grazing Act.

Affirmed as modified.

Rules of Practice: Appeals: Burden of Proof

One who challenges a determination by a district manager of a grazing lease allotment has the burden to show that it is inequitable.

Grazing Leases: Apportionment of Land

When the district manager divides the available grazing land between two conflicting section 15 preference right applicants but fails to cite the reasons listed in 43 CFR 4121.2-1(d)(2), the division will be adopted by the Board where it appears from a review of all the factors involved that the decision was equitable under the criteria listed in the regulation.

Grazing Leases: Preference Right Applicants:

In determining the amount of federal range necessary to permit proper use of base lands, consideration must be given to the criteria in 43 CFR 4121.2-1(d)(2), and the comparative size of the adjacent base lands held by the conflicting preference right applicants is not the determinative factor.

APPEARANCES: Winston V. Beard, Esq., Idaho Falls, Idaho, for appellant.

OPINION BY MR. STUEBING

This is an appeal from a decision (no BLM serial number supplied) by the Idaho Falls District Office, dated May 17, 1971, awarding certain grazing leases pursuant to section 15 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1275, as amended,

43 U.S.C. § 315m (1970). The lands in conflicting applications are: Lots 6, 9, 12, and 13, sec. 21; and lots 11 and 12, sec. 22, T. 4 N., R. 40 E., B.M. Both claimants applied for other lands in this township, but those applications were not in conflict.

The lands to be leased were omitted lands and had never been leased prior to this time. Both appellant and a Mr. Barber claimed preference rights on the basis of prior use on the same tracts of land. A meeting was held with appellant and Barber to solve the conflict. It was explained to them that if they could divide the land between themselves, and if that division was acceptable to the BLM, then leases would be awarded on the basis of that agreement. When the parties failed to agree on a division, the Acting District Manager divided the land, awarding Moedl the lease of lots 9 and 12, sec. 21, T. 4 N., R. 40 E., B.M., and Barber the lease of lots 6 and 13, sec. 21 and lots 11 and 12, sec. 22, T. 4 N., R. 40 E., B.M. The District Office stated in its decision, and in a letter placed in the file, that the division was based primarily on the amount of contiguous property owned by each. Moedl owns 24 acres and Barber owns 80 acres.

The area covered by the conflicting applications is 118.29 acres. Of that area, appellant received 21.09 acres and Barber received 97.20 acres.

In his statement of reasons appellant alleges an inequitable division of the property, not in the terms of acres, but in terms of the number of cattle which may be run on the different leases granted. "The average difference in ability to support cattle between that land awarded Mr. Barber and that awarded the undersigned," the appellant charges, "would be as follows \* \* \* 10-12 acres per head of cattle on the land awarded to Moedl and 8 acres per head of cattle on the lands awarded to Barber." Also, appellant feels that the award was made:

\* \* \* on an arbitrary basis totally unrelated to the respective rights of the parties to claim such land and that over the past 25-30 years the undersigned, or his predecessors in interests have had an opportunity to graze an average of 20-30 head of cattle a year on such property involved in this dispute, and Mr. Barber and his predecessors have grazed an average of 50-60 per year on such property.

In addition, appellant states that such grazing has generally been jointly conducted across the entire tract. The division of the tract will, according to appellant, allow Barber to run approximately 26 head of cattle on his 210 acres while appellant's 60 acres will support approximately five head of cattle, thus allowing Barber to

graze five times as many cattle as the appellant, whereas in the past Barber had only grazed twice as many.

No evidence in support of his allegation has been offered by appellant.

Upon inquiry by this Board the District Manager advised that the grazing capacity of three of the four lots awarded to the appellant is estimated at one acre per animal unit month. No estimate has been made for the other lot. Of the lands awarded to Barber, the grazing capacity is also estimated to be one AUM per acre for three lots, a portion of another and most of the N 1/2 SW 1/4, section 22. No estimate was made for the remainder of the N 1/2 SW 1/4, most of lot 12, or for lot 11. However, the District Manager is of the opinion that the grazing capacity of the lands awarded to the appellant is similar, on an acre for acre basis, to that awarded to Barber. The District Manager further reports that there is disagreement between appellant and Barber as to the extent of past use of the lands in conflict. However, appellant's predecessor never held any lease, whereas Barber has held a section 15 lease on the N 1/2 SW 1/4 of section 22 since 1952, and since there is no fence between that tract and the omitted land, it must be assumed that Barber's cattle have used the omitted land. There is no proof as to the extent of use by either party.

The statute provides, in part, "That preference shall be given to owners \* \* \* or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands \* \* \*." 43 U.S.C. § 315m (1970).

43 CFR 4121.2-1(d)(2) states that:

The Authorized Officer will allocate the use of the public lands on the basis of any or all the following factors: (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands under application (where access is not presently available), (vii) other land use requirements.

It is well established that where two or more grazing lease applications are filed for the same lands by applicants having equal preference rights, the lands will be leased upon the basis of the land use pattern, the equities of the applicants, the comparative ability of the applicants to effectively utilize the

range under proper range management practices, the amount of federal range that is necessary to permit the proper use of applicant's base lands, and any other factors which are pertinent to the purposes of the Taylor Grazing Act. Camp Creek Cattlemen's Association, A-30418 (October 28, 1975).

The District Manager erred in making the award of the leases "primarily" on the basis of the amount of contiguous property owned by each of the applicants without specific reference to the criteria enumerated in the regulation, supra.

However, our review of the record indicates that the distribution made by the District Manager comports well with the topography, the need for location of boundary fences and the acreage of the lots under application. A map of the areas shows that several of the parcels applied for are isolated from the others by watercourses of the Snake River. For instance, lot 6 in sec. 21 is contiguous to lot 11 in sec. 22, and these two lots are isolated from the others by the river. To divide this relatively small parcel between the two applicants would reduce its utility and value as pasture and would require the erection of a fence. That is to say that one lessee could utilize the land to better advantage than could two.

A study of the plat area shows that because of the natural divisions of the several parcels, the only other possible apportionment would be to award the appellant lot 13 of section 21, a 27-acre tract, more than doubling his award of the disputed land. We again note that appellant's statement of reasons was not directed to the area of land in terms of acres leased to the respective parties, but instead complained of the alleged inferiority of the forage available on the lands leased to him as compared to the carrying capacity of the lands leased to Barber. This contention is refuted by the subsequent report furnished this Board which shows that forage availability is about equal on both leases on an acre for acre basis.

One who challenges a determination of grazing lease allotments by the Bureau of Land Management has the burden to show its inequitable nature. Porter Estate Company, A-30817 (December 2, 1968). And, where the District Manager divides the available grazing land between conflicting preference right applicants, the decision will not be disturbed where it appears from a review of the factors involved that the decision was equitable. Maynard and Mattie Newcombe, K. R. Rhiley, A-27199 (November 9, 1955); Camp Creek Cattlemen's Association, supra. In addition, the fact that one of the applicants will probably be economically disadvantaged by the division does not, per se, amount to a failure of equity. James M. Stoos, A-27040 (March 23, 1955).

In this case the appellant has failed to show how the division by the District Office is unjust or how it could possibly have been more equitably performed. In light of all these facts we agree with the District Office's determination. There is no practical reason for remand.

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 adopted by the Board and affirmed as modified.

Edward W. Stuebing, Member

I concur:

Joseph W. Goss, Member.

I dissent:

Martin Ritvo, Member

## DISSENTING OPINION OF MR. RITVO

I agree with the majority opinion that the District Manager based his awards on a criterion not open to him. The pertinent regulation provides that the District Manager will base his allocation on any or all of the seven factors listed in it. Proportionate ownership of preference right land is not one of those factors. Whether it should be is beside the point; it simply is not a consideration the District Manager is authorized to use in making an allocation. He is bound by the regulation so long as it is in effect 1/ and must make his determination only by applying the factors the regulation states he must use.

The majority opinion states that the District Manager erred in making his award "without specific reference to the criteria enumerated in the regulation." Emphasis added. The District Manager did more than simply fail to make reference to one of the criteria available to him. He twice stated, once in his decision and again in a letter to the Board, that he based his determination on the amount of preference land each applicant owned. There is an appreciable difference between a decision that may neglect to spell out exactly the grounds on which it relies and one that admits it rested upon an improper ground.

Relying upon this gloss, the majority apparently applies the same standard to a review of the District Manager's decision that it would if it had been based upon acceptable criteria.

I find this step unwarranted. An applicant who shows that an allocation was made in disregard of the plain language of the regulation is entitled to one adjudication properly made. There undoubtedly is more than one equitable adjudication possible. The majority by using the limited scope of review applicable to these allocations has deprived the applicant of the possibility that another equally equitable adjudication would have been reached upon application of a proper criterion. Since the District Manager erred as he did, the Board can either consider the case de novo, which it has not done, or remand it for reconsideration under the regulation.

However, rather than attempting to make an allocation ourselves on the basis of the record before us, I would remand the case to the District Manager with instructions to reconsider the applications and make the awards in light of the criteria set out in the regulation.

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1/ Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950); Bonita v. Wirtz, 369 F.2d 208, 212 (D.C. Cir. (1966)); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. (1955)).

