

HARRY & MARJORY GRABBERT

IBLA 73-174

Decided June 29, 1973

Appeal from a decision of the BLM District Manager, Worland, Wyoming, W1-73-2(15), apportioning the federal range.

Affirmed.

Grazing Leases: Applications -- Grazing Leases: Preference Right Applicants

Where only one of two conflicting applicants for a section 15 grazing lease has a statutory preference right to the lease, historical use of the land is not relevant to the apportionment of the federal range; demonstration of past grazing use is only relevant in the apportionment of grazing lands between two applicants of equal standing.

APPEARANCES: Marvin L. Bishop, Esq., of Bishop & Bishop, Casper, Wyoming, for the appellant.

OPINION BY MR. HENRIQUES

Harry and Marjory Grabbert appeal from the decision of the Bureau of Land Management District Manager, Worland, Wyoming, dated October 6, 1972, apportioning various grazing areas in T. 49 N., R. 102 W., and T. 50 N., R. 102 W., 6th P.M., Wyoming. The areas involved in the appeal consist of lot 9 sec. 9, T. 49 N., R. 102 W., and lot 17, SE 1/4 SW 1/4 sec. 30, S 1/2 NE 1/4 sec. 33, SE 1/4 NW 1/4, SW 1/4 NE 1/4, NE 1/4 SW 1/4 sec 34, T. 50 N., R. 102 W. These lands had, for a number of years, been leased to the Thomas Ranch. In 1972 when the then existing lease expired both the appellants and the Thomas Ranch made application for them. Appellants claimed that their historical use of the lands showed that they were entitled to them.

The District Manager in his decision rejected this contention as to lands in T. 50 N., R. 102 W., for two reasons. First, he held that the use of the land that appellants enjoyed was not creditable historical use, since they had utilized the lands pursuant to an oral exchange-of-use agreement with the Thomas Ranch on a quid pro

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quo basis, i.e., they had permitted the Thomas Ranch to use some Grabbert lands for grazing in exchange for the use of the lands in question, and, in any event, the agreement between the Grabberts and the Thomas Ranch has been dissolved with the Thomas Ranch resuming its control of its lands contiguous to the lands in question. Secondly, the District Manager noted that the alleged historical use was irrelevant to all the lands in T. 50 N., R. 102 W., because only fee lands of the Thomas Ranch adjoin these lands and the Grabberts do not have a statutory preference right to lease such lands. This second ground of decision is determinative as to those lands. The relevant regulations clearly indicate that the importance of historical use lies in determining preference between equal applicants. Thus, 43 CFR 4121.2-1(c) declares:

Grazing leases may be issued to qualified applicants to the extent that public land is available in the following order and amounts:

(1) To applicants who are the owners, lessees, or other lawful occupants of contiguous lands. When the public land consists of an isolated or disconnected tract embracing 760 acres or less, owners, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, upon terms and conditions prescribed by the Secretary: Provided, That the preference right must be asserted during a period of 90 days after such tract is offered for lease. (Emphasis added)

(2) To applicants owning, leasing or lawfully occupying noncontiguous lands to the extent necessary to permit the proper use of such noncontiguous lands.

(3) To other applicants.

We find that Thomas Ranch, through its ownership of contiguous land, is vested with a statutory and regulatory preference right to a sec. 15 grazing lease on the subject lands in T. 50 N., R. 102 W. 43 U.S.C. § 315m (1970). Its application for the Sec. 15 grazing lease therefore has priority over the conflicting application from Grabbert, a non-preferential applicant. Where a conflict exists between applicants for a Sec. 15 grazing lease on an isolated unleased tract of public land containing less than 760 acres and

only one applicant is vested with a statutory preference right through ownership or legal occupancy of contiguous or cornering patented lands, the grazing lease for the entire tract must be awarded to the preference right applicant. Historical use and the other criteria set forth in 43 CFR 4121.2-1(d) are to be considered only in allocating Sec. 15 grazing leases between applicants enjoying equal preference rights and qualifications.

Appellants contend that the failure of the Thomas Ranch to make actual use of the leased lands has led to a forfeiture for nonuse of its right to the same. The relevant regulation is found at 43 CFR 4125.1-1(i)(5):

\* \* \* When it is determined by the Authorized Officer that the leased land is excessive to the lessee's need or that the lessee is not making substantial use of the leased land, the Authorized Officer may cancel the lease, reduce the acreage of the grazing lease, or reduce the grazing use allowed in accordance with the provisions of § 4125.1-1(h). (Emphasis added.)

It is obvious that the Authorized Officer (the District Manager) has discretion whether or not to cancel a grazing lease for nonuse. In this case, however, the District Manager rejected the argument that the Thomas Ranch should not have a renewal grazing lease because it has failed to use these lands in the recent past, for the reason that the exchange of use agreement between the Thomas Ranch and the Grabberts, under which the Grabberts had used these lands for several years, was not terminated. The Manager determined that equity dictated renewal of the grazing lease to the Thomas Ranch, it having recovered the use of its own lands contiguous to the federal range lands in T. 50 N., R. 102 W. We find this decision has a rational basis.

We find further that the Thomas Ranch and the Grabberts each enjoy a statutory preference right to lease lot 9 sec. 9, T. 49 N., R. 102 W. The determination of the District Manager to divide this tract between the conflicting applicants, utilizing an existing fence line through the tract, appears to be proper land use management and is a reasonable resolution to the conflict.

Accordingly, 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 affirmed.

Douglas E. Henriques, Member

We concur:

Joan B. Thompson, Member

Joseph W. Goss, Member

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