

CHARLES R. ELLIOTT, SR.

IBLA 73-154

Decided July 19, 1973

Appeal from the decision of District Manager, Malta District Office, Montana, BLM, canceling grazing lease for lack of substantial use.

Set aside and remanded.

Grazing Leases: Cancellation

A grazing lease issued pursuant to section 15 of the Taylor Grazing Act will not be canceled for failure to make substantial use of the land where the lessee makes an adequate showing as to the justification for such past nonuse.

APPEARANCES: Charles R. Elliott, Sr., pro se.

OPINION BY MR. HENRIQUES

Charles R. Elliott, Sr., appeals from the decision of the Malta District Manager, Bureau of Land Management, dated September 12, 1972, canceling his grazing lease of 80 acres issued pursuant to sec. 15 of the Taylor Grazing Act, 43 U.S.C. §315m (1970), for failure to make substantial use of the leased lands. The land in issue consists of E 1/2 SE 1/4 sec. 33, T. 25 N., R. 8 E., P.M., Montana. Appellant was granted a lease on the land for a ten-year period from August 20, 1968. Appellant owns adjacent land consisting of, inter alia, W 1/2 SE 1/4, N 1/2 of sec. 33, and N 1/2 SW 1/4 sec. 34, T. 25 N., R. 8 E., P.M. Thus, appellant borders the leased land on approximately two and one-half sides.

Appellant was originally granted a ten-year sec. 15 lease in 1943 for the SW 1/4 SW 1/4 sec. 26, E 1/2 SE 1/4 sec. 33, E 1/2 NE 1/4, NE 1/4 SE 1/4 sec. 34, and NW 1/4 NW 1/4 sec. 35, T. 25 N., R. 8 E., P.M., containing 280 acres. In 1946 pursuant to a request by appellant to lease other lands in T. 25 N., R. 8 E., P.M., a consolidated lease was offered consisting of the lands leased in 1943 together with the E 1/2 E 1/2, SW 1/4 NE 1/4, NW 1/4, N 1/2 SW 1/4, and NW 1/4 SE 1/4 sec. 35. Appellant accepted the offer, the 1943

lease was canceled, and a new lease was issued for a duration of ten years. In 1957 another lease for the same land was executed, also for a ten-year period. By letter of October 26, 1965, the District Manager informed appellant that an examination of his leased lands showed no extended use of 680 acres of land and that there were indications that past grazing use on the other 80 acres had been and was still being made by one of his neighbors. The District Manager proposed to cancel the lease, effective January 1, 1966. Appellant objected and noted that he was considering assigning his lease to some of his sons. On November 16, 1965, the E 1/2 NE 1/4, NE 1/4 SE 1/4 sec. 35, T. 25 N., R. 8 E., P.M., was deleted from appellant's grazing lease as being outside of appellant's fenced area of use. Of the remaining 640 acres, appellant assigned 560 acres to his son, and retained the 80 acres at issue in this case.

When appellant's ten-year term expired, Jackson E. Shaw, who controls land adjacent to the land in issue, made application for a lease of it, in opposition to the appellant's request to continue leasing the 80 acres. By decision dated July 12, 1968, the District Manager awarded the 80 acres to the appellant noting that "[f]urther division of the tract would not be practical because of topography nor would it improve range condition or facilitate range management of the tract." The lease was issued to the appellant for a ten-year period effective August 20, 1968.

By letter of April 12, 1972, one Bernard E. Hardy inquired of the District Manager if it would be possible to obtain use of certain lands then under lease to the appellant and his son, Charles Elliott, Jr. He alleged in this letter that there had been no use of the subject lands for a number of years. It should be noted that Hardy did not have legal control of non-federal lands adjacent to or cornering upon the land leased by the appellant. Subsequent to examination of the leased land, the District Office by letter of July 26, 1972, directed the appellant to show cause why his lease should not be canceled for nonuse. Appellant in his answer, dated August 1, 1972, explained that a deep washout in one of the coulees had prevented his horses from crossing over, but that a new crossing had been constructed for them. By decision of September 12, 1972, the District Manager rejected the appellant's explanation and canceled his grazing lease as excess to his needs, pursuant to 43 CFR 4125.1-1(h). From this decision appellant appeals. For reasons elucidated infra, we reverse.

It is clear that nonuse is an adequate ground to cancel a grazing lease. Thus, 43 CFR 4125.1-1(i)(5) provides:

\* \* \* 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). \* \* \*

This regulation, however, is directory, not mandatory.

The lessee offered as explanation for his nonuse of the grazing lease that a gully had been washed so deeply that his horses could not cross over their accustomed route to reach the larger portion of the leased land. He indicated that he had now effected a new route for the animals and that his horses were now utilizing the leased land as source for winter forage. We find this showing to be an adequate response to the show cause order. Therefore, we set aside the District Manager's decision holding the lease for cancellation.

However, we admonish the lessee that unless his stock graze the leased lands substantially at their forage capacity, it will be proper for the District Manager to reopen this case to determine whether the lease should be canceled in accordance with the above-quoted regulation.

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 set aside and the case file is remanded for further action not inconsistent with this decision.

Douglas E. Henriques, Member

We concur:

Joan B. Thompson, Member

Edward W. Stuebing, Member

