

JOHN T. MURTHA

IBLA 75-36

Decided March 4, 1975

Appeal from decision by District Manager, Prineville, Oregon, District, Bureau of Land Management, rejecting in part application for renewal of a grazing lease (OR 05-74-1).

Appeal dismissed.

1. Grazing Leases: Cancellation or Reduction

Where a reduction in the authorized use of lands subject to a section 15 grazing lease is required to conform to the grazing capacity of such lands as determined by a District Manager, the full amount of the downward adjustment must be imposed immediately.

2. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Grazing Leases: Generally -- Rules of Practice: Appeals: Burden of Proof

A determination by a District Manager of the grazing capacity of lands offered for a section 15 grazing lease will not be overturned in the absence of a clear showing of error. The burden of proof is upon the party challenging such determination to show that the decision is erroneous or that he has not been dealt with fairly.

3. Grazing Leases: Generally -- Grazing Leases: Cancellation or Reduction -- Rules of Practice: Appeals: Dismissal

An appeal from a District Manager's decision reducing the authorized use of lands offered under a section 15 grazing lease

will be dismissed where the grazing season covered by the term of the proposed lease has expired and the appellant must meet a precondition before any future lease issues. The dismissal, however, will be without prejudice to the appellant's submitting evidence to the District Manager to disprove the determination of the carrying capacity of the range, if he otherwise meets the precondition for a lease.

APPEARANCES: Stephen D. Dixon, Esq., of Bodie, Minturn, Van Voorhees & Larson, Prineville, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

John T. Murtha appeals from a decision by the Manager of the Prineville, Oregon, District Office, Bureau of Land Management, dated May 17, 1974, which offered renewal of appellant's grazing lease No. 36056913, issued on March 1, 1969, pursuant to section 15 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315(m) (1970), but reduced the authorized annual grazing use of approximately 5,144 acres of national resource lands subject to the lease and situated in Gilliam County, Oregon, from 621 to 183 animal unit months (AUM's). The term of the renewed lease was to be from June 15, 1974, to February 28, 1975.

The District Manager based his finding on a range survey of the Gilliam County lands conducted approximately seven years prior to his decision, and on a recent inspection of portions of the entire area under lease, which includes lands in Sherman as well as in Gilliam County. 1/ According to the District Manager, the inspection had revealed that the lands had been overgrazed, with the result that:

\* \* \* The density and percent of composition of [the] primary grasses are below the requirements for classifying the leased lands as range in good condition, and there are numerous indicators of continuing range deterioration.

In areas accessible to livestock, plant litter is almost non-existent and the primary grasses exhibit close grazing, low vigor, receding [sic] crown dimen-

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1/ The decision left unchanged the authorized grazing use of 232 AUM's on approximately 2,287 acres of national resource lands in Sherman County subject to the lease, pending completion of a range survey thereof.

sions, and a nearly complete absence of seed stalks. There are an unacceptable number of dead and dying primary grass plants, and little evidence of reproduction by the primary grasses. Sandbergs Bluegrass, Cheatgrass, and various forbs are increasing and filling voids left by the declining cover of primary grasses.

The decision also pointed out that a major segment of the leased lands consists of rough terrain unsuitable for grazing lying along the course of the John Day River, a stream which with its "related adjacent land area" has been designated a Scenic Waterway by the State of Oregon and has been proposed by the Secretaries of the Interior and of Agriculture for potential addition to the National Wild and Scenic Rivers System, pursuant to section 4(a) of the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1275(a) (1970).

In the initial notice to appellant of the proposed reduction, issued by the Prineville District's Area Manager, it had been suggested that if appellant should feel that immediate application of the full amount of the reduction would cause undue hardship, the decrease in authorized grazing use graduated over a two-to-three-year period might be considered. The District Manager, while conceding that "[i]t is apparent that a sudden reduction will create a hardship for you," nevertheless held that a stepped-down reduction of grazing use of lands administered under section 15 of the Taylor Grazing Act is precluded by 43 CFR 4125.1-1(i)(1), which provides:

A grazing lease will authorize grazing use not in excess of the grazing capacity available for use by livestock as determined by the Authorized Officer in accordance with § 4121.2-1(b).

The decision conditioned any further renewals upon the development by appellant of a grazing system to be approved by the District Office. <sup>2/</sup> Appellant's season of use under the renewed lease was to extend from June 15 to October 31, 1974.

In his appeal appellant contends that the "reduction in authorized grazing use is unwarranted and without factual basis for support \* \* \*," and complains that "[t]he drastic reduction in the level of grazing capacity which has been proposed, reducing the AUM level

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<sup>2/</sup> 43 CFR 4122.1-3(b) provides for the development of grazing system requirements, in the absence of an allotment management plan, as a condition precedent to the award of a long-term lease, and authorizes the issuance of a short-term lease until such time as it is determined "that the grazing system requirements are adequate to assure proper multiple use management of the public land."

on the subject lands to less than one-third of its present authorized capacity, would work a severe economic hardship on Appellant. \* \* \* If the proposed reduction should be found justified, appellant requests that it be applied gradually; otherwise, he fears he may be forced to discontinue his livestock operations.

To support his contention that the reduction is unwarranted, appellant cites a report which he states was prepared by an expert range management consultant whom he had retained to make a thorough inspection of the Gilliam County lands involved in the appeal. In the words of his brief, this report "confirms Appellant's belief that the land in question at present has a grazing capacity not only equal to but in fact greater than the AUM level established in March, 1969 in the lease." Appellant has not submitted a copy of the report, which apparently was completed after the District Manager's decision had been rendered.

According to appellant, the report's findings indicate a present grazing capacity of 685 AUM's, an increase of 64 AUM's over the 621 authorized under the 1969 lease, with a projected further increase of 162 AUM's, to a total of 847, through the implementation of range improvements which appellant intends to make.

[1] The District Manager was correct in holding that the applicable regulations prohibit the reduction of use authorized on a graduated basis to conform to the rated grazing capacity of lands subject to grazing lease. On lands within grazing districts administered under section 3 of the Act, however, a stepped-down reduction in authorized use is permitted where it has been determined "that the imposition of the full amount of downward adjustment in authorized active use necessary to reach the proper stocking rate of a Federal range area would impose a serious hardship on the range users \* \* \*." In such instances the reduction, provided that it is at least 15 percent of the authorized active use, may be phased over a three-year period. 43 CFR 4111.4-3(d). Another section of the regulations provides:

No license or permit will confer grazing privileges in excess of the grazing capacity of the Federal range to be used, as determined by the District Manager, except as may be allowed under § 4114.4-[3](c) and (d). (Emphasis supplied.)

43 CFR 4115.2-1(e)(3).

The absence of a similar exception in the regulations governing grazing leases manifests the intent of the Secretary to confine his exercise of discretion to allow the gradual reduction of grazing privileges to cases involving section 3 permits and licenses.

[2] A determination by a District Manager of the grazing capacity available for use by livestock on public land offered for lease will not be overturned in the absence of a clear showing of error. Douglas F. Peterson, 13 IBLA 351, 353 (1973); Western Farm Management Co., A-30594 (December 14, 1966); Bill Cleverly, A-30530 (June 15, 1966). The burden of proof is upon the party challenging such determination to show that the decision is erroneous or that he has not been dealt with fairly. Claudio Ramirez, 14 IBLA 125, 127 (1973); see E. L. McCord, 64 I.D. 232, 240 (1957); Thomas W. Dixon, 1 IBLA 199 (1970). In the instant case appellant has alleged the existence of facts which, if proved, would demonstrate error in the District Manager's determination and entitle appellant to the relief sought. Appellant has, however, failed to make available the evidence upon which he relies to substantiate his conclusions. We cannot, therefore, on the basis of the present record, agree that appellant's contention is correct. We will not overturn the District Manager's determination on appellant's mere assertion of error.

[3] At present the case is in a peculiar posture. The 1974 season of use of the lands permitted by the annual lease has now expired. The issue of the carrying capacity of the range raised by appellant then is only relevant if a future award of the lease is made to appellant. The District Manager's decision required as a precondition to the issuance of a new lease that appellant submit a proposed grazing system to be approved by the Manager. If appellant does not submit a grazing plan, the precondition would not be met, and this would moot any further consideration of his contentions regarding the carrying capacity of the range. If appellant submits a plan, the District Manager would rule on its acceptability. Undoubtedly, the acceptability of any proposed grazing plan is intertwined with the issue of the carrying capacity of the range as the amount of use which can be authorized will be dependent upon that issue. In view of appellant's assertions, we believe the best resolution of the problem is to require appellant to submit whatever evidence he has to support his estimate of the carrying capacity of the range to the District Manager to consider along with his proposed grazing plan, assuming one is filed. The Manager will then rule on the matter. If the ruling remains adverse to appellant, the Manager's decision should indicate the factual reasons therefor and the record should have the reports and other substantiation for the decision made therein.

Because the issue of the carrying capacity of the range has become moot for the grazing term proposed by the District Manager, this case will be dismissed. This dismissal, however, is without prejudice to appellant's making the showing suggested above if he desires a future lease and meets the preconditions described by the District Manager. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal from the decision of the District Manager is dismissed.

Joan B. Thompson  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Martin Ritvo  
Administrative Judge

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3/ In cases involving annual licenses issued under section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1970), the Department has decided questions arising in appeals from denials of grazing privileges which have become moot upon expiration of the season of use of the range, where resolution of the issues would bear upon future awards. The majority of these cases have been concerned with the extent of base property qualifications established during a priority period, a problem peculiar to section 3 permits and licenses. E.g., W. Dalton La Rue Sr., A-30391 (March 16, 1966); Summit Lake Indians, I.G.D. 560 (1952); C. T. Lingenfelter, I.G.D. 492 (1947); F. Ray Clements, 56 I.D. 360 (1938). Other issues justifying consideration of an appeal after the expiration of a grazing season have been: the effect of unpaid damages for grazing trespass upon future awards of grazing privileges (Eldon L. Smith, 5 IBLA 330, 79 I.D. 149 (1972); the propriety of a classification of the range for winter use only (Ira Hatch, I.G.D. 575 (1952); and selection of the particular allotment to

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(Fn. 3 Cont.)

be assigned to an applicant for grazing privileges (Chester H. Trumbull, I.G.D. 27 (1937)). As we have indicated, the issue in the instant case is moot as to the past season of use and will be moot if appellant fails to submit a grazing plan. If he does, however, the issue will bear on the extent grazing privileges may be granted hereafter. For these reasons, we are postponing a final resolution of the actual issue of the carrying capacity of the range in order to assure that the facts regarding that issue may be more adequately presented and made of record.

