

MARK X. TRASK

IBLA 77-412

Decided November 9, 1977

Appeal from decision of South Dakota Area Manager, Bureau of Land Management, by which a division of land was made between two applicants for grazing leases of the same land (MT 020771).

Vacated and remanded.

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

In order to qualify as a preference right applicant for a grazing lease on public land under sec. 15 of the Taylor Grazing Act, the applicant must own or control contiguous or cornering private land, the proper use of which requires issuance of a grazing lease. The fact that an applicant once owned contiguous land and had a lease for the public land is irrelevant in determining his present preference status.

2. Federal Land Policy and Management Act of 1976: Generally--Grazing Leases: Generally--Grazing Leases: Renewal

Under sec. 402(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (West Supp. 1977), the holder of an expiring lease shall be given first priority for receipt of the new lease as long as the lessee is in compliance with the rules and regulations issued and the terms and conditions in the lease. Therefore, if the holder of an expiring lease loses control of the private property contiguous to public land which gave him a preference right to a lease under 43 CFR 4121.2-1(c), he is not entitled to first priority for receipt of a new lease.

3. Administrative Practice--Grazing Leases: Generally--Grazing Leases: Apportionment of Land--Grazing Leases: Preference Right Applicants

Where an area manager's decision divides the sec. 15 grazing use of a tract of public land between two applicants on the assumption that both are qualified preference right claimants, and it is determined on appeal that one claimant is not qualified, the decision will be set aside and the case remanded to the Bureau of Land Management for determination of the rights of the other applicant.

APPEARANCES: Mark X. Trask, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Mark X. Trask appeals from a decision of the Area Manager, Bureau of Land Management (BLM), dated April 29, 1977, by which a division of land was made between two applicants for a grazing lease of the same land within the South Dakota Resource Area (MT 020771) pursuant to the Taylor Grazing Act, as amended, 43 U.S.C. § 315 et seq. (1970). The land in issue, located in Meade County, South Dakota, contains 601.52 acres and is described as follows: Lot 4, SW 1/4 NW 1/4, Sec. 2, SE 1/4 NE 1/4, SE 1/4, Sec. 3, E 1/2, Sec. 10, T. 2 N., R. 14 E., B.H.M. Herbert B. Burmeister, who was issued the original grazing lease (Pierre 028499, December 23, 1946) for this land, applied to renew his lease. Appellant purchased portions of the Burmeister property adjacent to the public land and applied for the same grazing lease.

In his decision, the Area Manager divided the land between the two applicants as follows:

Mr. Burmeister was awarded the SW 1/4, Sec. 3 and the E 1/2, Sec. 10 for a total of 480 acres.

Mr. Trask was given the land in section 2 and the remainder of the land in section 3, and area comprising 121.52 acres.

The Area Manager based his decision on the following criteria:

1. Both applicants own parts of the original preference lands.
2. Mr. Burmeister appears to have the greater need.
3. The allotment has not been misused by Mr. Burmeister.
4. The allotment is fenced as it was split by this decision.

In his statement of reasons, appellant explains that in 1972 or 1973 after purchasing the property contiguous to the public land from Herman Burmeister (brother of Herbert Burmeister), he had discussed the application for a grazing lease with the Area Manager. Appellant was informed that the lease could not be transferred at that time because the lease was in the name of Herbert Burmeister and would not terminate for about 4 years. The Area Manager indicated that there would be no problem transferring the lease when Burmeister's lease expired.

Appellant notes that there is no water on the federal land and that he has allowed Burmeister to use the water on his (Trask's) land which is contiguous to federal land.

Appellant determines that his application meets the criteria regarding base property qualifications set forth in the proposed regulations published in the Federal Register on July 28, 1976 (41 FR 31504-31515). That is, appellant asserts that he has land or water used in conjunction with a livestock operation which is entitled to a preference under section 3 of the Act, supra, and he also has contiguous land entitled to a preference under section 15 of the Act, supra. Appellant contends that Burmeister's application meets neither criterion. He points out that Burmeister's property is approximately three-fourth mile from the public land in question.

Appellant claims he has a preference right under the proposed regulations to lease the whole tract under the regulations because he owns base property contiguous to public land (outside a grazing district) where such public land consists of an isolated or disconnected tract embracing 760 acres or less.

Finally, he contends that the land cannot be properly managed for grazing according to well-known principles of range management without a source of water on the property and that the terrain property does not lend itself to water development in the form of a Stockwater dam.

At the outset we note that the grazing regulations are in the process of being revised. The regulations to which appellant refers are proposed regulations. The regulations presently in force governing grazing administration outside grazing districts and exclusive of Alaska are found in 43 CFR Subpart 4120.

[1] Under section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1970), an applicant is required to own or control land contiguous to the federal public land for preference to receive a lease.

43 CFR 4121.2-1(c), the regulation concerning allocation of lands between conflicting section 15 grazing applicants provides:

(c) Applicants. 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 private lands to the extent necessary to permit proper use of such 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.

(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.

The first consideration then, to be made in deciding which of two conflicting applicants may be awarded a grazing lease is whether the applicants own or control private property contiguous or adjacent to the lands embraced in the lease application. This establishes the plane of preference under the Taylor Grazing Act and the regulations. The Area Manager stated that both applicants own parts of the original preference lands. Burmeister however, has sold that portion of his private land which is contiguous to the public land in question. The fact that he once owned land that was part of the original preference land, or that he now owns only a noncontiguous portion of that land, is of no consequence in determining his present preference status. Ralph O. Lorenz, 24 IBLA 1 (1976). See also, Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973); Harry Grabbert, 11 IBLA 313 (1973).

The Area Manager apparently based his decision on the criteria enumerated in 43 CFR 4121.2-1(d)(2) which states:

(2) The Authorized Officer will allocate the use of the public land on the basis of any or all of 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), and (vii) other land use requirements. [Footnote omitted.]

However, under the Taylor Grazing Act, supra, and 43 CFR 4121.2-1(c) the rights of the contiguous applicant are to be determined before any consideration is given to the noncontiguous applicant. Robert D. Liudahl, 17 IBLA 135, 137 (1974); Winchester Land & Cattle Company, 65 I.D. 148, 156 (1958). Only when conflicting applicants have equal preference rights has the Board considered the factors in 43 CFR 4121.2-1(d)(2) in determining which of two applicants should be awarded a grazing lease. See Allen R. Prouse, 32 IBLA 311 (1977); Wesley Leininger, 28 IBLA 93 (1976); Doyr Cornelison, 24 IBLA 155 (1976).

[2] Section 402(c) of the Federal Land Policy and Management Act, 43 U.S.C.A. § 1752(c) (West Supp. 1977) provides in part that the holder of an expiring lease shall be given first priority for receipt of the new lease as long as the lessee is in compliance with the rules and regulations issued and the terms and conditions in the lease. The fact remains, however, that under 43 CFR 4121.2-1(c) contiguous applicants have a preference right. Since appellant's property is contiguous to the public land and Burmeister's is not, appellant's superior preference right must be recognized.

Appellant is entitled to a preference right grazing lease to the extent that a lease of the tract applied for is required to permit proper use of the contiguous private lands. Taylor Grazing Act, Section 15, supra; Ralph O. Lorenz, supra at 4; Robert D. Liudahl, supra at 136, 137. 1/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

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1/ The record does not establish whether the subject 601.52 acres is actually an isolated or disconnected tract, as alleged by appellant. If so, however, the preference-right applicant, if otherwise qualified, is entitled to a lease of the whole tract. 43 CFR 4121.2-1(c), supra.

decision appealed from is vacated and the case remanded for further action consistent with this decision.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Martin Ritvo  
Administrative Judge

