

FANCHER BROTHERS

IBLA 77-482

Decided January 5, 1978

Appeal from decision of the Folsom, California, District Office, Bureau of Land Management, rejecting in part grazing lease application GL 4153/Oneto, C-046.1.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits -- Grazing Leases: Generally -- Grazing Leases: Applications -- Grazing Leases: Renewal

A decision renewing a grazing lease and rejecting a conflicting application which is rendered in accordance with the governing statutory standard set out in sec. 402(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (Supp. 197), will not be overturned in the absence of convincing reasons that the award is not warranted.

2. Grazing Leases: Applications -- Grazing Leases: Renewal

Past use of public land for grazing in trespass does not constitute cognizable historical use for the purpose of resolving conflicting applications for a grazing lease.

3. Grazing Leases: Applications

An applicant to purchase land under R.S. 2455 gains no rights in the land therefrom as against the United States and is not entitled to preferential treatment on an application for a grazing lease of the same land.

4. Administrative Procedure: Generally -- Appeals -- Rules of Practice:
Appeals: Standing to Appeal

Under 43 CFR 4.410, any party to a case who is adversely affected by a decision of the Bureau of Land Management has a right of appeal to the Board of Land Appeals, even where the decision concerns legislation which has been repealed.

APPEARANCES: Glenn Fancher, Ione, California, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On February 2, 1977, Fancher Brothers (Appellant) filed a grazing lease application, pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970), with the Folsom, California, District Office of the Bureau of Land Management (BLM). Insofar as this application concerned lots 13, 15, and 16, sec. 14, T. 7 N., R. 10 E., Mount Diablo meridian, California, it conflicted with the grazing preference statement and application for renewal of grazing lease of Edwin L. Oneto, filed with BLM on January 7, 1977.

On May 4, 1977, BLM issued a decision rejecting Appellant's application for lots 13, 15, and 16, and simultaneously offering Oneto a new 1-year grazing lease on these lots. Citing 43 CFR 4121.2-1(d), BLM held that, since Oneto had leased these lots since June 1, 1974, and had practiced good range management during that period, he was entitled to receive a lease on the lots in preference to Appellant, from which decision Fancher Brothers has appealed.

[1] Section 402(c) of the Federal Land Policy and Management Act, 43 U.S.C.A. § 1752(c) (West Supp. 1977), enacted on October 21, 1976, provides the following:

So long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 1712 of this title or section 1604 of Title 16, (2) the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned, and (3) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease. [Emphasis supplied.]

Accordingly, Oneto has first priority under the statute if the criteria are met. Allen R. Prouse, 32 IBLA 311 (1977). The record indicates that Oneto has a history of use and satisfactory range management of the land under a section 15 grazing lease since February 1974.

Appellant has failed to show and the record does not otherwise indicate either that Oneto did not have this preference right or that he in any way mismanaged the range while using it. A decision renewing a grazing lease and rejecting a conflicting application, rendered in accordance with the governing statutory standard, will not be overturned. See Wesley Leininger, 28 IBLA 93 (1976); Doyr Cornelison, 24 IBLA 155 (1976); George T. McDonald, 18 IBLA 159 (1974); Frederick Gorwill, 17 IBLA 13 (1974); Bernard Friend, 15 IBLA 119 (1974); and Dick Reckmann, 8 IBLA 227 (1972).

[2] Appellant asserts that it has been using this land for grazing since 1949, with BLM's knowledge. Appellant has presented no documentation of a lease authorizing this use. The record indicates to the contrary that Appellant has used this land in the past in trespass. Past use of public land in trespass does not establish a cognizable historical use, since no rights whatever may be established in public lands by mere occupancy, Sparks v. Pierce, 115 U.S. 408, 413 (1885), and since occupant must show that he occupies under some proceeding or law that at least gives him the right of possession. Southern Pacific Trans. Co., 23 IBLA 232, 244; 83 I.D. 1, 5 (1976).

[3] Appellant also suggests that its application for a grazing lease is entitled to special consideration because it had applied to purchase the land on March 19, 1970, under the provisions of R.S. 2455, 43 U.S.C. § 1171 (repealed 1976). This suggestion is without merit. An applicant under this section has no rights against the United States in the land applied for unless and until patent to the land is issued. 43 CFR 2711.7.

[4] On June 27, 1977, the California State Office of BLM issued a letter decision rejecting Appellant's application to purchase this land, since R.S. 2455, supra, was repealed on October 21, 1976, by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. (Supp. 197), and since the new sales provision of FLPMA, section 203, 43 U.S.C. § 1713 (Supp. 197) does not provide for the filing of such applications.

Appellant has not filed a timely notice of appeal of this decision, and we are therefore without jurisdiction to consider its merits. We note, however, that the decision erroneously advised Appellant that "[s]ince the new law specifically repealed R.S. 2455, no right of appeal can be provided to you." The decision in question relates to the disposition of public lands of the United States. Under 43 CFR 4.1, this Board has the exclusive power to decide

finally for the Department appeals from such decisions. Under 43 CFR 4.410, any party to a case who is adversely affected by a decision of BLM shall have a right of appeal to this Board. This regulation is mandatory and applies to all decisions by BLM, even those which concern legislation which has been repealed.

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 affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Frederick Fishman
Administrative Judge

