

CLOVERLEAF LAND AND LIVESTOCK CO.

IBLA 77-229

Decided February 28, 1978

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., setting aside action by the Miles City, Montana, District Manager, Bureau of Land Management, respecting grazing permit MT-02-3011 in the Big Dry M-2 Grazing District.

Affirmed in part; reversed in part.

1. Grazing Permits and Licenses: Appeals

When a Federal grazing permittee signs a written trespass settlement and pays, without protest, the amount claimed by BLM in connection with such settlement, the issue of that trespass cannot later be reopened at a hearing before an administrative law judge.

2. Grazing Permits and Licenses: Trespass

Where the owner of base property ranchland formally leases out grazing privileges on his own lands and on appurtenant Federal lands, all stock subsequently grazed by the lessee under the terms of the lease will be attributed to the lessor for purposes of calculating trespass liability.

3. Grazing Permits and Licenses: Trespass

A BLM decision canceling base property qualifications for allegedly willful and repeated trespass is properly voided on appeal where such violations were not charged in the initial Order to Show Cause, and where such Order to Show Cause was not issued by the State Director as is required by 43 CFR 9239.3-2(e).

## 4. Grazing Permits and Licenses: Trespass

The retroactive issuance of a grazing permit for livestock foraging on Federal rangeland will moot a charge of trespass to the extent that such permit covers the same days, livestock, and rangelands which are the subject of the trespass charge.

APPEARANCES: Richard K. Aldrich, Esq., Office of the Solicitor, Billings, Montana, for the Government-Appellant; Robert Hurly, Esq., Glasgow, Montana, for the Appellee.

## OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The Miles City, Montana, District Manager, Bureau of Land Management (BLM), appeals from a February 9, 1977, decision of Administrative Law Judge John R. Rampton, Jr., voiding action by the District Manager with respect to the Federal range grazing privileges of Cloverleaf Land and Livestock Company. By decision of May 29, 1975, the District Manager held for cancellation Cloverleaf's base property qualifications in the Big Dry M-2 Grazing District to the extent of 3,772 AUM's which constituted all of Cloverleaf's privileges in that district. More specifically, the grazing right affected by this decision was the entitlement of the Miller-Cloverleaf Ranch to run 533 cows and their calves on the Gilbert Creek Allotment on a year-round basis

The Gilbert Creek Allotment is not broken down into separate licensed use areas, and Cloverleaf's private lands, consisting of some 8,300 acres, are intermingled with the Federal lands. Some of the lands involved, both private and Federal range, are within the Charles M. Russell National Game Range. The deeded Cloverleaf lands are sufficient to carry at least 213 head of livestock year round but, due to the extremely rugged nature of the terrain involved, none of the lands involved here are fenced, and livestock are free to browse back and forth across all the Federal and private lands in the Gilbert Creek area.

Robert W. Miller, who owns the majority of shares in Cloverleaf Land and Livestock Co., is treated interchangeably with Cloverleaf both herein and in the decision below. On January 29, 1974, Miller, acting for Cloverleaf, entered into an agreement with one Ned Hardy to lease to Hardy the Miller-Cloverleaf privileges in the Gilbert Creek Allotment to the extent of 500 head of cows per year for a term of 10 years. Under the terms of this lease, Miller-Cloverleaf retained rights to only 33 animal units. The events which followed the execution of this lease are described in the decision below as follows:

Mr. Donald E. Nelson, that his lease to Hardy was being questioned; that the BLM would need to know which base property he was retaining; and that Hardy should make an application for a license. Miller was given until April 21 to pay the trespass. Failure to pay would result in notification to the Federal Land Bank, which holds the mortgage on the Miller property. (Ex. F)

On April 15, Hardy telephoned the BLM and said that he had run 130 head over the authorized 500 head on the allotment during the 1974 season. He stated he wanted to pay the trespass to BLM and not to Miller. Hardy also told the BLM that Miller had nearly 100 horses plus some cattle on the allotment.

On April 23, the show cause notice was issued to Miller. His 1975 license was held for cancellation for the following reasons:

Grazing livestock upon the Federal range without an appropriate license.  
4112.3-1(a).

Grazing livestock upon the Federal range, in violation of the terms of a license, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated.  
4112.3-1(b).

No regular license shall be issued or renewed until payment for all fees due the United States have been made. Grazing privileges may be cancelled or reduced for failure to pay the required fees. Fees for regular licenses are due the United States upon issuance of a fee notice and are payable in full in advance before grazing use is authorized. 4115.2-1(k)(2).

Miller was given 15 days to respond. (Ex. G)

On May 9, Miller gave to the BLM a cashier's check in the amount of \$4,000. The BLM issued a Settlement of Trespass Obligation, and acknowledged an additional overpayment of \$876, which was to be processed for refund. The net payment by Miller was \$3,124, which was construed by BLM as settlement of alleged trespass. At the hearing, Miller testified he thought that a portion of this amount was for payment of grazing fees.

Apparently, a copy of the lease was not filed with the BLM and it is unclear whether the BLM knew of its existence. In any event, the BLM did not invoke the provisions of 43 CFR 4115.2-1(e)(8)(i), which provides that if a licensee loses ownership or control of base property, his permit terminates as to the lost base, which resulted from Miller's lease to Hardy. No demand was made to Hardy that he file documentary evidence of the transfer and apply for grazing privileges as required by 43 CFR 4115.2-2(a)(2).

On March 1, 1974, Miller's 1974 licensed year ended. He was at that time still delinquent on a major portion of his 1974 total license fee of \$3,939. In response to written demands he had paid \$1,000 on June 11, 1974, and \$939 on January 27, 1975. Although Miller did make final payment of \$2,000 on March 18, 1975, on his delinquent 1974 fees, at no time did he file a new application for his 1975 license.

On March 4, 1975, a notice of trespass was issued to Miller. (Ex. B) No count of trespassing cattle was specified in the notice. According to the testimony given by Mr. Lavin, the Area Resource Specialist for the BLM, an aerial count was made on this day of cattle within the Gilbert Creek Allotment. No brands were identified. Three hundred and fifty cows were counted in sections 29, 30, 31 and 32 and an additional 19 cows were scattered over the allotment, for a total of 369 head of cows and 78 horses. (Ex. C)

On April 1, 1975, Hardy appeared at the BLM office and signed the statement that the Hardy Company had grazed 505 cows since March 1, 1975, and prior in the Gilbert Creek Allotment. (Ex. E)

On April 3, 1975, the BLM sent a demand for trespass payment to Miller stating that no response to the March 4 notice had been received, and that because of his failure to cease the trespass or to make an offer of settlement for the forage consumed by the unauthorized livestock, he pay \$1,272 within 15 days for 505 head of cattle and \$392 for 78 horses for the period March 1, 1975, to April 1, 1975. (Ex. D)

Miller appeared at the BLM office on April 14, 1975, and stated that he had no money to pay the trespass. At that time, he was told by the Area Manager,

On May 9, a letter was written by the District Manager, Kannon C. Richards, notifying Miller that he had 10 days to present a bona fide lease and make application for Federal range privileges. He was also informed that if this were not done, his or the new operator's privileges would be reduced. (Ex. K)

On May 21, when Miller came into the BLM office he was told that Hardy was going to file a separate application for a license, but wanted the lease changed to deduct the payments to BLM and not as per the original lease agreement. (Ex. L)

The District Manager then sent a certified letter, dated May 29, to Miller notifying him that pursuant to the provisions of 43 CFR 4115.2-1(d) that by reason of his failure to sufficiently show cause why the action should not be taken as set forth in the "notice to show cause" served upon him on the 24th day of April, 1975, that his base property qualifications be cancelled in their entirety.

The appeal followed and on June 17, 1975, Hardy filed a long-form application for license based upon the January 1, 1974, lease agreement with Cloverleaf Land and Livestock. A temporary, nonrenewable license was issued to Hardy for 490 cattle and 6 horses for the period May 9, 1975, to February 29, 1976. (Ex. P)

The issues presented by this chronology were the subject of a full day of testimony at the November 4, 1975, hearing before Judge Rampton. Both Miller and the Government were represented by counsel, and, on February 8, 1977, Judge Rampton issued an opinion in the case, voiding the action of the District Manager, ordering the District Manager to reinstate Miller's base property qualifications, and directing the refund of the \$3,124 which Miller had paid in settlement of trespass. This decision went on to say that grazing privileges should issue to either Miller or Hardy (depending upon which one of them is found to presently have legal control of the base lands) upon payment of the applicable grazing fees.

From this decision, the district manager appealed, contending:

1. The order of the Administrative Law Judge to refund \$3,124 in trespass settlement payment by Robert Miller is unsupported by either the facts, the record, or the law.

2. The refusal of the Administrative Law Judge to discipline Robert Miller either by cancellation of base property qualification or other disciplinary action by a reduction of qualification for a term of years is also unsupported by the facts, the record, or the law.

3. Evidence relating to ranch value was erroneously admitted over objection of the Bureau of Land Management and relied upon by the Administrative Law Judge in his decision.

[1] Before considering the merits of the decision below, we feel constrained to examine the jurisdiction which Judge Rampton chose to assert over certain of the issues dealt with in the present dispute. Specifically, the Judge's rulings upon the issues surrounding the monetary trespass settlement which Miller reached with BLM appear to be without jurisdictional basis in that Miller, by making full settlement without protest, failed to preserve any right of appeal in the matter. We note, furthermore, that nearly 2 months elapsed between the time that BLM served Miller with notice of the trespass and the time at which Miller filed his initial appeal to the Administrative Law Judge. The applicable regulation, 43 CFR 4.470, states that:

(a) Any applicant whose interest is adversely affected by a final decision of the district manager may appeal to an administrative law judge by filing his appeal in the office of the district manager within 30 days after receipt of the decision.

(b) Any applicant for a grazing license or permit or any other person who, after proper notification, fails to protest or appeal a decision of the district manager within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in such final decision.

We find that the notice of trespass which BLM served upon Miller on March 4, 1975, was a final decision, appealable under Part 4 of 43 CFR. Thus, it was error for Judge Rampton to later reopen the question of Miller's liability under this trespass charge, the 30-day appeal period having long since elapsed before Miller filed his appeal.

[2] With regard to the merits of the case before us, we turn first to an examination of the trespasses alleged by BLM as "willful" infractions. Obviously, a key determination in assessing the nature of and responsibility for these trespasses will be the question of whether Hardy's cows were attributable to Miller at the time of the

alleged violations. While we take considered notice of the fact that Miller and Hardy were experiencing disagreement in regard to their lease contract, we are compelled to hold that, inasmuch as the Hardy cows were turned onto Federal range under the terms of this lease, they were attributable to Miller for purposes of this action. We are not unmindful of Miller's uncontroverted assertion that, "he was doing his best to get the Hardy lease cancelled" but the record before us contains no documentation or testimony concerning any formal attempt by Miller at severing privity with Hardy. The commencement of an action in ejectment or a formal decree of rescission from the appropriate Montana State Court might serve to negate such privity between the parties but no such evidence appears in the record before us and we hold that Miller could legitimately be deemed responsible for the subject Hardy cows up to the lease agreement number of 500. The fact that Miller, in 1975, had no grazing privileges to lease out does not relieve him of any responsibility for the trespass. Hardy's cattle, whether present on Miller's base lands or straying onto the public domain, were there at Miller's behest and by virtue of an arrangement in which valuable legal considerations flowed to Miller from Hardy. At no point in the record is there any indication that Miller sought to disclaim the benefits of his assignment to Hardy of Federal grazing privileges. On the contrary, the record below (Tr. 161) shows that Miller sought to collect additional money from Hardy for all the cows that Hardy was running on this mixed private/Federal rangeland, even those in excess of the original lease agreement.

Any result other than the above would create a dangerous precedent in that any landowner who leased out base property along with appurtenant Taylor grazing rights might keep an excessive number of his own stock on the range in addition to the lessee's stock, and evade a clearly legitimate trespass action by mere allegations of disagreement with the lessee. In this connection, we would suggest that even the commencement of a bona fide civil action against the lessee might fall short of the sort of action required before a lessor might disclaim responsibility for stock which he has previously agreed to allow on his leased Federal grazing range. A mere action on the contract to compel payment of past due rental would not, for instance, affect the lessor's responsibility for the lessee's continued presence on the leasehold tracts.

[3] As the decision below points out, there exists a substantial discrepancy between the violations charged in the BLM Show Cause Notice of April 23, 1975, and the violations enumerated as cause for cancellation of the base property qualifications in the decision of May 29, 1975. The show cause notice that was served upon Miller informed him that his lease was being held for cancellation for three reasons:

1. Grazing livestock upon the Federal range without an appropriate license. 4112.3-1(a).

2. Grazing livestock upon the Federal range, in violation of the terms of a license, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated. 4112.3-1(b).

3. Failure to make payment for all fees due the United States. Grazing privileges may be cancelled or reduced for failure to pay the required fees. Fees for regular licenses are due the United States upon issuance of a fee notice and are payable in full in advance before grazing use is authorized. 4115.2-1(k)(2).

The decision of May 29, 1975, however, stated that Miller's lease was being canceled for clearly willful and repeated trespass pursuant to 43 CFR 9239.3-2(b), as well as for failure to pay the grazing fees due the United States, 43 CFR, supra. The May 29 decision makes reference to two communications which are characterized as "continuation of the Show Cause Notice," i.e., a May 9, 1975, certified letter from BLM to Miller, and an oral notice of the same date. This "oral notice" must be disregarded since the regulations (43 CFR 9239.3-2(e)(1)) provide that notice of disciplinary action for willful and repeated trespass must be made by the State Director in written form, and the May 9, 1975, certified letter (Ex. K) makes no mention of repeated or willful trespass.

While particularity of notice and pleading are often of minor importance in agency proceedings, a party who may be adversely affected by administrative action has a right to be "reasonably apprised of the issues in controversy." Cella v. United States, 208 F.2d, 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016, 74 S. Ct. 864, 98 L. Ed. 1138. Especially in the context of an agency demand to show cause why adverse action should not be taken, the responding party should know what, exactly, he must disprove. Miller, having never been properly apprised of BLM charges of willful or repeated trespass could not possibly have explained or disproven the allegations and, indeed, the regulations do not even vest the District Manager with authority to issue a decision in cases of repeated trespass. As Judge Rampton stated:

Disciplinary action for this offense is governed by the provisions of 43 CFR 9239.3-2(e)(1) and (2), which requires the show cause notice to be issued by the State Director. The notice must set forth the acts complained of, specifically refer to the terms of the license, and include an estimate of damages. The notice must cite the licensee to appear before an administrative law judge who will, if the violation is

established, make a decision assessing the amount of damages and direct the District Manager to suspend, reduce, or revoke the license or base property qualifications.

The fact that departmental regulations require notice and a hearing before an Administrative Law Judge is no mere accident of draftsmanship. Federal courts have held repeatedly that fundamental concepts of due process require adjudicatory procedures where a proposed agency ruling is individual in impact and condemnatory in purpose. Cf. American Airlines v. CAB, 359 F.2d 624 (D.C. Cir. 1966). We, therefore, find that the May 29, 1975, cancellation decision was properly voided in the decision below to the extent that the former holding was based upon charges of willful and repeated trespass.

[4] Insofar as the April 23, 1975, Show Cause Notice properly charges Miller with failure to pay required grazing fees before commencing grazing use, it might properly be argued that Miller and Hardy Stock were in trespass upon Federal lands at the time of the BLM onsite livestock count in the Gilbert Creek Allotment, May 5, 13, 14, 15, 23 and 24, 1975. We find, however, that these alleged trespasses, if they were such, were cured in part by BLM's action in issuing to Miller's lessee, on June 17, 1975, a grazing permit for 490 cattle and six horses, retroactive to May 9, 1975, the date on which Miller made monetary settlement for his prior trespasses. We note, furthermore, that Miller, at all times relevant to the case, retained certain limited grazing rights in connection with his ownership of private fee lands in the Gilbert Creek Allotment. We find that these factors, combined with Miller's apparent good faith in making full payment for the prior trespasses, render further disciplinary action unnecessary.

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 to the extent that it voids the cancellation of appellee Miller's base property qualifications and

reversed to the extent that it directs BLM to return any of the May 9, 1975, trespass settlement monies to Miller.

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Douglas E. Henriques  
Administrative Judge

We concur.

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Frederick Fishman  
Administrative Judge

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Martin Ritvo  
Administrative Judge

