

JOHN RATTRAY
ELMER L. WILSON

IBLA 78-95

Decided August 21, 1978

Appeals from decision of Prineville District Office, Bureau of Land Management, Oregon, apportioning lands pursuant to conflicting grazing lease applications. OR-050-77-04.

Affirmed.

1. Grazing Leases: Applications -- Grazing Leases: Apportionment of Land -- Grazing Leases: Preference Right Applicants

Priority of filing is not one of criteria listed in 43 CFR 4121.2-1(d)(2) for adjudicating conflicting grazing lease applications. Therefore, one appellant's filing for lease before other appellant gives former no rights superior to latter's.

2. Grazing Leases: Generally -- Grazing Leases: Apportionment of Land -- Grazing Leases: Preference Right Applicants

Where record indicates no dispute that there was grazing use of public lands in issue from 1951 to 1975 by current grazing lease applicant's predecessors in interest, followed by 1-year hiatus in valid grazing use prior to current applicant's filing for lease, since length of hiatus was reasonable under circumstances, and since general intention of historical use criterion in 43 CFR 4121.2-1(d)(2) was not contradicted during break in valid grazing use, BLM was not arbitrary in applying historical use criterion in favor of one applicant in a case involving conflicting grazing lease applications. Here, hiatus was approximately one grazing season

and was occasioned by purchase at foreclosure sale of preference lands by first mortgagee, who conveyed those lands 1 year later to current applicant, a grazing operator.

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

Considering record as a whole, Board concludes that neither of appellants has shown that District Office decision apportioning, on basis of historical use in favor of one appellant and topography in favor of other appellant, grazing lands between two lease applicants was arbitrary or capricious, or without rational basis, or inequitable.

APPEARANCES: John Rattray, Condon, Oregon, pro se; James M. Habberstad, Esq., Dick and Dick, The Dalles, Oregon, for appellant Wilson.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This case involves conflicting grazing lease applications for public lands in Oregon. See 43 U.S.C. § 315m (1970); 43 CFR Part 4120. Both John Rattray and Elmer L. Wilson, the conflicting applicants, have appealed from an October 14, 1977, final decision of the Prineville District Office, Bureau of Land Management (BLM), Oregon, apportioning between Rattray and Wilson the disputed lands for grazing leases. 1/ The lands in conflict are in T. 5 S., R. 19 E., Willamette meridian. 2/

Both appellants own or control private lands contiguous to the public lands in issue and thus are of equal status in respect of the preference right granted in 43 U.S.C. § 315m (1970). See also 43 CFR 4121.2-1(c)(1). An understanding of the geography of this area is important. The public lands in issue are situated between

1/ The final decision incorporated by reference a proposed decision of September 21, 1977. The final decision was amended in part by a November 18, 1977, issuance of the District Office.

2/ Wilson's application for lease of certain lands in T. 6 S., R. 18 E., and T. 5 S., R. 18 E., Willamette meridian is not in issue in this appeal. The District Office rejected Rattray's application for the NW 1/4 of sec. 5, T. 5 S., R. 19 E., Willamette meridian because those are not public lands, and Rattray has not appealed on this issue.

the preference lands of Rattray and Wilson, with Rattray's holdings to the east of the public lands and Wilson's to the west of the public lands. Two distinctive topographical features exist in this area. The John Day River is located along the eastern boundary of the public lands tract in issue, and to the west of this river, and located on the public lands, is a natural rim. This rim generally parallels the river, and the parties do not dispute the fact that there is a steep, though apparently passable, slope between the rim and the river.

The District Office granted Wilson that portion of the public lands to the north and west of the natural rim, with that part to the south and east of the rim going to Rattray. This meant that the grant of certain lands to one applicant required denial of the request of the other for those same lands.

The District Office denied the material part of Rattray's application for the reasons:

1. That historical use has been with the previous owners of the other applicants preference lands. These lands have been leased by them since 1951.
2. That in considering other factors between both applicants on these lands we could find no other single issue or combined issues that favored either party enough to change our proposed decision.

The District Office declared with respect to its partial rejection of the lands applied for by Wilson:

1. Topography: These lands lie below the natural rim along the river and do not have easy access to and from other lands owned or under application.
2. Proper use of preference lands: Because of No. 1 above, if the applicants cattle did drift down off the higher country (preference lands and other public lands) to the river it is logical to expect that they would not of their own accord go back up the hill to the preference land.
3. Proper range management: Same as 1 & 2 above plus the fact, if the applicants cattle did drift down to these areas they would tend to stay and overgraze these areas unless they were moved off the areas.
4. Other land use requirements - We considered the need for future fence locations on the boundary between the two applicants in this case. We feel that this proposed division of the conflict area makes it

possible to build the proposed fence in the best location considering factors mentioned above and to keep fencing close to the John Day River to a minimum.

Before deciding this case, BLM officials held a meeting and conducted a field tour of the disputed lands with Rattray and Wilson in August 1977 in an attempt to settle the conflict by agreement of the parties. No settlement was reached, and in early September both applicants filed briefs in support of their positions. On September 21, 1977, a proposed decision was rendered by the District Office setting out in detail the manner in which the BLM anticipated resolving the conflict. The applicants were given an opportunity to protest the proposed decision, and both parties did so, Wilson by document and Rattray by personal appearance. After considering the objections raised, the District Office issued its final decision on October 14, incorporating the earlier proposed decision.

Adjudication of conflicting applications for grazing leases is governed by 43 CFR 4121.2-1(d). Subsection (2) of that regulation states the criteria for determining the apportionment of lands between conflicting applicants. That subsection says:

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.]

Wilson argues that he and his business associates 3/ should have this entire tract of public lands, including those granted to Rattray. On historical use, Wilson contends that the disputed area has been under lease to his predecessors in title to the preference lands since at least 1951. With respect to topography, Wilson urges that

3/ The grazing lease application was filed in the name of Wilson only. However, the copy of the deed to the preference lands upon which the lease request is based shows that that property was conveyed to Wilson, Daniel C. Petroff, Jr., and Robert E. Williams. On appeal, counsel states that the three intend to form the Pine Creek Grazing Association. Our references to Wilson are intended to include his associates, although we imply no judgment herein on their qualifications to be grazing lessees.

the John Day River -- the eastern boundary of the disputed public land tract -- is "the natural dividing line from Mr. Rattray." ^{4/}

Rattray maintains in effect that Wilson may not benefit from the historical use criterion because the predecessors upon whom Wilson relies to establish such use have not had continual control of the preference lands since 1971, because at the time Rattray filed his application "there was no existing legal lease on the lands [he] filed for," and because "Wilson did not have control of the preference lands until April 15, 1977." ^{5/} In respect of topography, Rattray opposes Wilson's contention that the John Day River is the natural dividing line between the lands in dispute and Rattray's property, maintaining that the river is not large enough except during spring runoff to keep stock from crossing back and forth. Finally, Rattray contends his proposal for fencing to separate his grazing lease lands from Wilson's would be less costly than the BLM's proposal.

We begin our analysis of these arguments with a statement of the scope of our review of BLM decisions adjudicating grazing leases. Because of the variable nature of range conditions and livestock operations, it is not feasible to write statutes or regulations for application in literal and dispositive fashion to resolve grazing lease application conflicts. Intelligent decision-making requires that the grazing official knowledgeable about local conditions exercise broad discretion in the adjudicatory process. In Doyr Cornelison, 24 IBLA 155, 157 (1976), we said:

A decision renewing a grazing lease and rejecting a conflicting application, rendered in accordance with the governing regulatory standard, will not be overturned in the absence of convincing reasons that the award is not warranted. *
* * No such reasons have been shown that would warrant the substitution of our judgment for that of the District Manager.

See Wesley Leininger, 28 IBLA 93 (1976). An appellant must show that the official's decision was arbitrary or capricious, or without a rational basis, or inequitable. See Carl and Lyle Christensen,

^{4/} If this argument of itself were dispositive, Rattray would be awarded no lands, since all of the public lands in issue are to the west of the John Day River.

^{5/} Rattray submitted his lease application on January 27, 1977. The deed for the conveyance of the preference lands from the Lomas and Nettleton Company to Wilson and his associates is dated April 15, 1977. Wilson filed his lease application on July 15, 1977. The applicable history of the predecessor grazing leases and the preference lands is set out in the text below.

16 IBLA 207 (1974); Claudio Ramirez, 14 IBLA 125 (1973); Dick Reckmann, 8 IBLA 227 (1972). Where, however, the record manifests no rational basis for the grazing official's actions or does not indicate a consideration of all of the criteria listed above, the Board will reverse the BLM decision or remand it for proper consideration. E.g., Elmer M. Johnson, 20 IBLA 111 (1975); Vern A. Venable, 9 IBLA 294 (1973); Victor Powers and Florence Sellers, 5 IBLA 197 (1972).

1. Historical use

Ratray has not been authorized grazing use of the disputed Federal lands in the past. The issue is whether or not the historical use criterion is to be weighed in Wilson's favor. We shall lay out the recent history of both the leasing of the public lands and the ownership of the preference lands upon which Wilson bases his lease request.

We will first consider the history of the BLM-issued grazing leases on the public lands in issue. There is no dispute over the fact that Wilson's preference lands were owned by Luther Davis at the beginning of 1971. In the record, there is a photocopy of an agreement signed by Davis, his wife, and Charles Bothwell and dated March 15, 1971. It states:

This agreement authorizes Charles E. Bothwell the use of all lands in Sherman and Wasco Counties owned by Luther W. Davis and Helen E. Davis for pasture in the proper seasons for the period extending from this date to December 31, 1978.

This agreement authorizes Charles Bothwell to:

- 1- The use of straw left from the grain harvest
- 2- The use of land set aside in compliance with government programs if it does not interfere with the program of development plans of the owner.
- 3- The use of all facilities on the property such as corrals etc.
- 4- The use of existing water and the right to develop water holes.

Mr. Bothwell agrees to pay an amount per head of stock cows up to but not exceeding \$24.00 per year excluding calves to one year of age and stock horses.

[6/]

6/ In his statement of reasons Ratray argues: "Charles Bothwell did not have lease or proof of control of deeded lands to exercise preference right. He had only a farming agreement on the wheat lands and it had expired long before Feb. 28, 1977, at which time

On the basis of this control of the Davis preference lands, on August 8, 1972, the Prineville District Office issued to Charles Bothwell a grazing lease on the public lands in issue, as well as others, effective that day and running to February 29, 1976.

On December 18, 1975, Bothwell applied to the BLM for a renewal lease, and a billing summary in the record indicates that a lease was granted for the 1976 grazing season. A year later, on January 27, 1977, Rattray applied for the lands in issue, and Bothwell 1 day later filed a renewal application for his lease. Thus, it initially appeared that the conflict existed between Bothwell and Rattray, but after an April 15, 1977, conveyance, discussed below, of the preference lands initially owned by Davis came to its attention, the BLM sent a letter on June 7, 1977, to Bothwell requiring that he show proof of control of those preference lands. Bothwell did not respond, and on July 7, 1977, his grazing lease application was rejected. On July 15, 1977, pursuant to his having purchased the preference lands formerly owned by Davis, as discussed below, Elmer Wilson filed his grazing lease application for the public lands in issue.

Wilson on April 15, 1977, had acquired the preference lands previously owned by Davis from the Lomas and Nettleton Company, which had bought the lands on March 15, 1976, at a foreclosure sale held by the sheriff of Sherman County, Oregon. 7/

The private March 15, 1971, lease agreement, quoted above, between Bothwell and Davis was no longer effective after execution of the December 31, 1975, state court decree ordering foreclosure on the Davis property, since that decree -- in an action in which Bothwell was a defendant -- ordered that "the defendants, each and every one of them, and all persons claiming by, through or under them, or any of them, be and they are hereby forever barred and foreclosed of all right, title, interest, lien or equity in and to the property * * *." 8/

fn. 6 (continued)

I filed my application." We disagree with Rattray on this point. The 1971 agreement between the Davises and Bothwell by its plain language contemplates Bothwell's using the Davis' private lands for grazing. The question of Bothwell's control of the preference lands as of January 1977 is considered in the text below.

7/ The copy of the sheriff's certificate of sale appearing in the record lists the Lomas and Nettleton Company as plaintiff in the court proceeding leading to the foreclosure sale, and lists Luther Davis, Helen Davis, Charles Bothwell, Skyline Enterprises, Inc., Cascade Aviation, Inc., John Day Recreational Development, Inc., and other parties as defendants.

8/ High, et al. v. Davis, et al., Lomas and Nettleton Company v. Skyline Enterprises, Inc., et al., Nos. 3636 and 3630, p. 11 (Cir. Ct. Ore., Sherman County, December 31, 1975). In this consolidated

This order was based on the court's finding that Lomas and Nettleton's mortgages were superior to all other interests held in the Davis property by the other parties to the court action.

After acquiring the Davis preference lands, Lomas and Nettleton Company initially indicated that it planned to lease the lands to Charles Bothwell. The record includes a memorandum and several letters dated April 1976 relating to discussions between Marvin R. Bagley, Area Manager in the Prineville District, and Theodore B. Jensen, attorney for Lomas and Nettleton, in respect of these lands. Bagley wrote Jensen transmitting forms for assignment of the outstanding grazing lease from Bothwell to Lomas and Nettleton and for application for a grazing lease by the company. Bagley also noted that the company should send the BLM a copy of a lease from Lomas and Nettleton to Bothwell if the latter was to continue leasing the preference lands.

No such completed documents were ever filed with the BLM, and the record is devoid of explanation of what arrangements, if any, were made between Bothwell and Lomas and Nettleton allowing the former to maintain control of the preference lands. In a memorandum captioned "Appeal Analysis and Brief" contained in the record, the BLM relates that on the basis of the correspondence with Jensen, the lease to Bothwell for the 1976 grazing season was not canceled. 9/

fn. 8 (continued)

proceeding, Bothwell was a defendant in the latter action, No. 3630, in which Lomas and Nettleton was plaintiff. No appeal was taken from the circuit court's decision in No. 3630, but plaintiffs in No. 3636, in which Lomas and Nettleton was a defendant but Bothwell was not a party, have an appeal pending in the Supreme Court of Oregon, styled High, et al. v. Davis, et al., No. P-2486, filed January 24, 1976. The record in the administrative case before this Board does not indicate the nature of the appeal in No. 3636, but since the sheriff has executed the circuit court's judgment and our record does show a statutory special warranty deed conveying the original Davis preference lands to Wilson and his associates, at present we consider the ownership or control of those preference lands, as demanded under 43 CFR 4121.2-1(c)(1), to be in Wilson and his associates. Should the interests in those preference lands be altered as a result of the decision in the above-cited Oregon Supreme Court case, the BLM then can take such action under the grazing regulations as may be appropriate.

9/ There is no indication that appellants were served with copies of the "Appeal Analysis and Brief," so this Board, in accordance with concepts of due process, attributes no probative weight to the arguments and allegations of fact in this document in reviewing the decision of the Prineville District Manager under the scope of review standard discussed above. The record is sufficient without this document for deciding the case, however.

In evaluating the evidence on historical use, we note that the BLM issued grazing leases to Bothwell from 1972 through 1976 on the basis of his control of the preference lands originally owned by Luther Davis. 10/ The District Office in its decision stated that since 1951 the public lands in issue had been leased to previous owners of the preference lands now deeded to Wilson. Rattray does not dispute this historical use from 1951 through 1971, and his only objection to Bothwell's use of the lands from 1972 to 1975 is not persuasive. 11/ Rattray does, however, allege that in February 1977 the BLM was not able to show him proof that Bothwell controlled the preference lands after the foreclosure sale on March 15, 1976. We agree with Rattray's implication on this latter point. Since neither Lomas and Nettleton nor Bothwell ever filed proof that Bothwell continued to control the preference lands after the sheriff's sale, as demanded in the exchange of letters between Jensen and Bagley, supra, and since Wilson alleges no facts in respect of control of the preference lands or actual grazing use of the public lands by Bothwell during the 1976 season, and in view of Bothwell's failure to respond to the June 7, 1977, BLM letter demanding that he furnish proof of control of the preference lands, we conclude that when Bothwell applied for a lease renewal in January 1977, he no longer had a preference right to that lease, and that he may not be deemed to have made valid grazing use of the public lands in 1976. 12, 13/

10/ Rattray has alleged that prior to the 1976 foreclosure sale Davis deeded away the material preference lands to Skyline Enterprises, Inc. in August 1971 and that Skyline subsequently conveyed the lands to Cascade Aviation. There is no indication in the record, however, and Rattray does not argue, that either of these transactions affected the preference lands lease entered into by Davis and Bothwell on March 15, 1971. Since the BLM on August 8, 1972, granted Bothwell a 4-season grazing lease on the public lands in issue, the presumption is that the agreement between Davis and Bothwell remained in effect as a property interest superior, at least for the term of the private lease, to the estates allegedly conveyed later. Of course, Bothwell's lease was foreclosed along with other interests inferior to Lomas and Nettleton's by the state court decree, supra.

11/ See note 6, supra.

12/ In 43 CFR 4125.1-1(i)(4) it is provided that:

"The grazing lease will be terminated in whole or in part because of loss of control by the lessee of non-Federal lands that have been recognized as the basis for a grazing lease."

This language is mandatory in effect.

13/ In Donald E. and Nancy P. Janson, 16 IBLA 66 (1974), we held in effect that where the record is silent as to the actual extent of historical use of an area, the party asserting grazing rights based on historical use has not proved its case. In Janson, a dispute existed over whether the appellant in point had historically made use of the contested area, and the Phoenix District Office did not find that

[1] Thus, based on the showing in the record, we agree that at the time Rattray filed his application, "there was no existing legal lease on the lands [he] filed for." Bothwell had lost his preference right and Wilson had not yet submitted his lease application. Priority of filing, of course, is not one of the criteria for resolution of grazing application conflicts given in 43 CFR 4121.2-1(d)(2), so Rattray's filing before Wilson gives the former no right superior to the latter's.

[2] The question thus becomes whether or not, where the record indicates no dispute that there was grazing use of the public lands in issue from 1951 to 1975 by a current grazing lease applicant's predecessors in interest, followed by a 1-year hiatus from valid grazing use prior to the current applicant's filing for a grazing lease, the District Office acted properly in applying the historical use criterion of 43 CFR 4121.2-1(d)(2) in favor of the current applicant, Wilson. The answer depends on the length of time and the circumstances of the hiatus, for the term "historical use" is general in its meaning and requires interpretation on a case-by-case basis. In view of the nature of grazing operations and land transactions associated with them, we do not think it reasonable that "historical use" be interpreted by strict chain of title or renewal of lease approaches.

Here, the hiatus in valid use by Wilson's predecessors in interest in his preference lands was approximately one grazing season, possibly less. The record indicates that the hiatus was occasioned not by any intention to terminate the long-standing use of the preference lands for grazing purposes, but by the purchase at a foreclosure

fn. 13 (continued)

the appellant had made such use. Here, as its rationale for granting Wilson a lease on part of the public lands, the Prineville District Office found that historical use had been in Wilson's predecessors in interest, and Rattray did not persuasively challenge this finding with respect to the years 1951 through 1975, as we have discussed in the text, supra.

In Hays v. Williams, A-24594 (March 1, 1948), the Solicitor rejected Hays's argument that Williams had lost control of certain preference lands. The Solicitor's rationale was that "[n]o action * * * was taken to cancel [Williams's] lease and, in the absence of such cancellation, this Department must treat her lease as having been effective * * * [to the time of the Director's decision on her application]" -- i.e., the private parties among themselves had not acted to cancel the private lease agreement under which Williams controlled the preference lands. In the instant case, at the issuance of the Oregon state court decree, the 1971 lease agreement between Davis and Bothwell was clearly terminated in favor of the prior lien held by Lomas and Nettleton. No substantiated allegation has been made that Lomas and Nettleton ever leased to Bothwell.

sale of the preference lands by the first mortgagee, who conveyed those lands 1 year later to Wilson, a grazing operator. The record does not indicate any action by Lomas and Nettleton during the hiatus in derogation of use of the preference lands in conjunction with the public lands for grazing purposes. We conclude that the length of the hiatus was reasonable under the circumstances, and that the general intention expressed in the historical use criterion in 43 CFR 4121.2-1(d)(2) was not contradicted during the break in valid grazing use. Accordingly, we hold that the District Office was not arbitrary in applying this criterion in favor of Wilson.

2. Topography

As we have noted above, the District Office granted Rattray a lease on that part of the public lands in issue situated to the south and east of the natural rim located on the public lands. In its decision, quoted supra, the District Office stated the probable behavior of livestock confronted by the steep slope between the John Day River and this rim as its rationale for deeming this rim the natural dividing line between the leases to Rattray and Wilson. Potential overgrazing was noted. On its face, the BLM holding re topography has a rational basis. Wilson argues in respect of this issue only that the John Day River is the natural dividing line, and gives no further explication of this view. Rattray contends that the river, except during a short period during spring runoff, is not so large as to keep stock from crossing it.

In light of the facts of this case and the reasons stated by the BLM, Wilson's sole assertion that the river is the natural boundary is insufficient to show that the BLM improperly applied the topography criterion of 43 CFR 4121.2-1(d)(2).

3. Fencing

Rattray contends that:

1. It is unreasonable to build 5-1/2 miles of fence on rough range to enclose such a small area when there is an existing fence which would only have to be repaired to enclose the same lands, as my proposal indicated.
2. It would take 5-1/2 miles of brand new fence at approximately \$2000.00 per mile to follow the B.L.M. decision.
3. My proposal would take approximately 2 miles of new fence plus the rebuilding of 2 miles of present fence.
4. The B.L.M. fence would have to be packed in, mostly by horseback, while my proposal could mostly be reached by vehicle.

The final criterion listed in 43 CFR 4121.2-1(d)(2) is "other land use requirements," which would include considerations such as fencing.

Both the BLM and Rattray have enclosed maps for the file indicating the location of the fencing proposed for separating Rattray's grazing grant from Wilson's. Under Rattray's proposal, he would obtain use of a substantial portion of the grazing rights historically used by Wilson's predecessors in interest in secs. 7, 17, and 20, T. 5 S., R. 19 E. Further, Rattray's proposal would isolate from access a small area of private land owned by Wilson in sec. 7. Rattray has not stated his estimate of the cost of his proposal for "2 miles of new fence plus the rebuilding of 2 miles of present fence," although he has offered \$2,000 per mile as a figure for the BLM-suggested fence.

One of the two BLM maps in the case file has, with the caption "boundary to be fenced where needed," an indication of the proposed route for the BLM fence. By our calculations based on the scale of this map, this fence would be approximately 4 miles long, not 5-1/2 as alleged by Rattray, and the 4-mile figure assumes that the entire line will be fenced, which may in fact not be necessary because of the intermittent impassibility of the rough terrain involved.

The experience of the Department's grazing program is that after a grazing lease is issued, the operator uses the involved public lands for a long term. ^{14/} The deed of sale of the preference lands from Lomas and Nettleton to Wilson and his associates states the true consideration to be \$369,547.90, an amount of money indicating a serious business intent. The record shows that Rattray himself is a long-established grazing operator with thousands of acres of private holdings and BLM-issued grazing leases near the area involved in this appeal. Thus, the Department's apportionment of the lands between Wilson and Rattray is properly viewed as long-term in character. Considering this factor and the historical use of the lands by Wilson's predecessors in interest, we conclude, even assuming arguendo the validity of Rattray's contentions on fencing, that his evidence on higher cost of the BLM's proposed fence compared to that suggested by Rattray is of limited evidentiary consequence, and is insufficient

^{14/} E.g., see Frederick and Nida Gorwill, 17 IBLA 13 (1974); Doyr Cornelison, *supra*; R. A. Malesich, 13 IBLA 199 (1973). As we said in Gorwill at page 14:

"There is no indication in the record of poor range management, abuse of the range, or other reasons of this type dictating a need for a change in the range user. Where proper range management will be served by awarding the lease to either of the two conflicting applicants, it has been held that there should not be a change from the long-time user to a new applicant unless there are convincing reasons to support the change."

in itself or in tandem with Rattray's other arguments to show that the District Office decision was arbitrary or capricious, or without a rational basis, or inequitable, in apportioning the grazing lands as it did.

4. Other considerations

The appellants have raised other points of fact and law. For example, both sides have insisted that for various reasons they will properly manage the range, but such contentions are speculative and of little value for resolving the conflict here. The same reasoning applies to Wilson's allegation in respect of the "general needs of the applicants" criterion of 43 CFR 4121.2-1(d)(2) that if he does not gain use of the lands granted to Rattray, "it is possible that the Farm[ers] Home Administration may not be able to advance moneys for the formation of the grazing association." Further, although Wilson and his associates assert they will "be cut off from some of their deeded land," they have not demonstrated the validity of their assertion.

Rattray offers objections concerning the scenic impact of a fence along the natural rim paralleling the river, as well as the need for difficult-to-maintain water gaps in that fence to provide cattle with access to the John Day River. Even assuming these allegations to be well founded, they seem to us to be minor points capable of being managed by the BLM on an ongoing basis, and they are not of such force as to suggest the impropriety of the District Office allocation of the land between Wilson and Rattray.

Finally, even if we take at face value Rattray's assertion that Wilson turned out cattle "on preference and B.L.M. lands" in May 1977, given the intermingled nature of the private lands owned by Wilson with the public grazing lands, we do not find these assertions to be sufficient evidence of violation of the proper range management criterion of 43 CFR 4121.2-1(d)(2) as to show abuse of discretion in the adjudication by the District Office, considering the compelling nature of the historical use and topography showings discussed above. We do not imply any limitation on the BLM's authority to institute a grazing trespass action should it deem such a course appropriate.

[3] Considering the record as a whole, and for the reasons expressed above, we conclude that neither of the appellants has shown that the District Office decision apportioning the grazing lands between the two lease applicants in this case was arbitrary or capricious, or without a rational basis, or inequitable. Thus, we affirm the decision below. See Carl and Lyle Christensen, Claudio Ramirez, and Dick Reckmann, all supra.

The dissent raises several objections which we should address. First, it notes that "[w]hile BLM mentions a natural rim above the river, the record is unclear as to the extent of this rim and the effect of this upon the movement of cattle in the area and their proper range management." However, an analysis of the record will show that neither appellant has disputed on appeal the BLM findings with respect to this rim, although the BLM decision specifically discussed the rim, the effect it would have on cattle movement, and the resulting overgrazing expectancy. Thus, it would seem to us to be a useless gesture to send this case to a hearing before an Administrative Law Judge to find facts on this issue.

The dissent remarks that "[b]oth appellants contend that the river is a natural boundary and should be used as such." However, in his statement of reasons, as we have pointed out, appellant Rattray states that the John Day River is not a natural boundary, contending that it "is not a large enough river to keep stock from crossing. They cross back and forth constantly except for about 1 month of spring runoff from May until June in ordinary years. The past 2 years, this didn't even occur." If the natural effect of the rim is as the BLM states in its decision, without dispute from the appellants, then because of the geographical situation of the rim vis-a-vis the river, which has been discussed, supra, whether the river is an effective natural boundary becomes an irrelevant question.

The dissent mentions Rattray's objections on the fence which may be needed to divide the grants to Wilson and Rattray. Since we have considered this issue in detail above, we need not reiterate why Rattray's objections are not persuasive. But we should note that the result of accepting Rattray's assertions on the fencing issue would have the effect of granting him more lands to the west of the natural rim, and depriving appellant Wilson of those identical lands. The dissent states that "[t]here is a long record of historical use of the subject land by appellant Wilson's predecessors in interest. To disturb this long continuity of use based upon preference lands now owned by Wilson, there should be good justification in the record." This statement makes our point on the fencing question. Rattray's allegations on fencing are not of such probative effect, as we have discussed above, that they constitute "good justification in the record" for disturbing Wilson's continued use of the lands between the natural rim on the east and the fence proposed by Rattray further to the west -- lands which have historically been used by Wilson's predecessors in interest.

As for the dissent's view that, aside from the "Appeal Analysis and Brief" referred to in footnote 9, supra, "there is no other information in the record to support the decision on the topography, proper range management, and other criteria, apart from historical use," we must state our opinion that the dissent's view is simply not correct. We have not relied on the Appeal Analysis and Brief, and we do not

find it necessary for reaching a decision in this matter. We have noted above there is no dispute over the BLM's finding that there is a natural rim along the river. Such a fact is properly considered under the topography criterion of 43 CFR 4121.2-1(d). The relationships between the natural rim to the west of the river and the proper use of preference lands and proper range management criteria of 43 CFR 4121.2-1(d) are explicitly noted in the BLM decision, and neither appellant has argued BLM error on these points. Aside from historical use and the three criteria mentioned immediately above, the only other criteria stated in 43 CFR 4121.2-1(d) are proper water use for livestock, the general needs of the applicants, public ingress and egress across preference lands to public lands under application, and other land use requirements.

While the latter four criteria are not specifically referred to in the BLM decision, such omissions should not render the BLM decision an abuse of discretion where the appellants do not raise allegations on appeal which would show that the BLM neglected to consider probative evidence which falls within the scope of the criteria. On proper range management and water use for livestock, as well as the general needs of the applicants, the evidence submitted by the appellants is irrelevant or plainly immaterial. For instance, we noted above the entirely speculative nature of Wilson's assertion that the Farmers' Home Administration might not lend him money if he loses what is certainly no more than a small portion of his claimed grazing rights to Rattray. As for range management, Wilson makes the gratuitous statement that he "will be using proper range management techniques and will observe grazing seasons," but such an offering is of no probative value for the apportionment of the lands in issue. Rattray makes essentially the same promise in his September 6, 1972, filing with the BLM.

On the point of proper water use, Rattray has offered partly incompatible allegations. In his September 6 filing, he states that the "water does not conflict as there are springs to utilize the range for either party," but in his statement of reasons he maintains that "[t]here is no water problem that fencing, as I propose, would create." We note that from a comparison of the maps attached by the District Office to its proposed decision and by Rattray to his statement of reasons that the fence Rattray has proposed is at its maximum distance only approximately two-thirds of a mile to the west of the proposed BLM fence. Thus, we are not persuaded that Rattray's proposal for a different fence location -- the only statement he offers which might be deemed an objection to the BLM's consideration of the proper water use criterion -- can be of substantial probative value on the question of water use by the livestock.

Wilson alleges with respect to water use only that his "range study and management plan incorporates the John Day River as a source of stock water. An award of the disputed land to Mr. Rattray would

cut off a significant portion of this water source." Wilson further notes that he has begun developing springs on his preference lands in the area. Although Wilson objects to the loss of water from the John Day River, he does not indicate in any manner how leasing those lands to the east of the rim along the river to Rattray would result in improper water use for livestock. No issue has been joined with respect to this criterion, and the BLM decision has not been shown by either appellant to be in error on this point.

Aside from Wilson's unfounded charge, considered above, that he would be cut off from some of his deeded land, no facts with respect to the ingress and egress criterion of 43 CFR 4121.2-1(d) have been alleged.

In summary, the evidence as to historical use, topography, proper use of preference lands, and proper range management upon which the BLM decision is founded is of substantial probative force, and constitutes a rational basis for the decision. The other evidence adduced on these criteria and the other criteria listed in 43 CFR 4121.2-1(d) is not of such weight that by comparison with the evidence on which the BLM has based its decision, it calls the propriety of the BLM decision into doubt.

Wilson has requested "that this matter be set for hearing in front of a representative of the Board of Land Appeals." This request for argument is denied, since we do not see that a hearing would serve a useful purpose. See Charles A. Mitchell, Jr., 30 IBLA 1, 6 (1977).

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.

Frederick Fishman
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

This Board has the authority to order a fact-finding hearing before an administrative law judge pursuant to 43 CFR 4.415, where the regulations do not otherwise provide for the right to such a hearing. I would order such a hearing in this case to obtain a more informative record upon which to base our decision on the allocation of the grazing privileges in dispute, even though the regulations in effect when the decision being appealed issued did not afford a right to such a hearing for grazing lease applicants. 1/ See Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973).

There is a long record of historical use of the subject land by appellant Wilson's predecessors in interest. To disturb this long continuity of use based upon preference lands now owned by Wilson, there should be good justification in the record. Historical use is not always the determinative criterion in allocating grazing privileges between conflicting grazing lease applicants under 43 CFR 4121.2-1(d)(2), but it is a very important one. 2/

Both parties on appeal have made assertions concerning the allocation of the subject land between them that raise questions on the advisability of the action taken by BLM in this case. Among other matters, it is not clear that the proposed fencing requirement is one that can be authorized at this time or that it is a sound proposal, in any event. Appellant Rattray contends that it will be expensive and difficult to build, and impossible to maintain because of its location along the river, and also, that it would be visible from the river. Both appellants contend that the river is a natural boundary and should be used as such. While BLM mentions a natural

1/ Now rules affecting the administration of grazing privileges would establish similar appeal procedures for applicants for grazing leases and for grazing licenses or permits, including an appeal from a final decision of the authorized officer of the Bureau of Land Management to an administrative law judge. Rule 43 CFR 4160.4, 43 FR 29075 (July 5, 1978). The new rules are effective August 4, 1978. 43 FR 29058.

2/ For example, Congress has now expressly given first priority for a new lease to an applicant to renew a grazing lease if he is in compliance with the rules, regulations, terms, and conditions of the lease and he accepts terms and conditions to be imposed. Section 402(c), Federal Land Policy and Management Act of 1976, 90 Stat. 2774, 43 U.S.C.A. § 1752(c) (West. Supp. 1977). Conflicting applications must be rejected where such priority is recognized. Mark Y. Trask, 32 IBLA 395 (1977); Allen R. Prouse, 32 IBLA 311, 84 I.D. 874 (1977). Wilson was not an applicant for a renewal lease and in no position to take advantage of that provision, although he may otherwise have the benefit of his predecessors' historical use.

rim above the river, the record is unclear as to the extent of this rim and the effect of this upon the movement of cattle in the area and their proper management.

Although footnote 9 of Judge Fishman's decision indicates no probative weight is given to the "Appeal Analysis and Brief" prepared in the BLM District Office in deciding this case, there is no other information in the record to support the decision on the topography, proper range management, and other criteria, apart from that of historical use. Accordingly, as indicated, I would order a hearing on all the issues bearing upon the proper allocation of the subject land. Also, until a final decision issued, I would authorize Mr. Wilson as the successor to those having historical use of the land, to lease all the conflicting land on the condition that the lease will be canceled or amended if a final decision awards any or all of the land to Mr. Rattray.

Joan B. Thompson
Administrative Judge

