

COLVIN CATTLE CO., INC.

IBLA 78-431

Decided January 30, 1979

Appeal from decision by District Manager, Las Vegas, Nevada, District Office, Bureau of Land Management, denying grazing lease application (N-056) for certain lands and rejecting grazing lease application for 2,796 AUM's active use.

Affirmed.

1. Administrative Procedure: Burden of Proof–Evidence: Burden of Proof–Grazing Leases: Generally–Grazing Leases: Cancellation or Reduction–Rules of Practice: Appeals: Burden of Proof–Taylor Grazing Act: Generally

A District Manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A District Manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

2. Administrative Authority: Generally–Constitutional Law: Generally–Grazing Leases: Generally–Public Lands: Generally–Secretary of the Interior–State Laws

Under the Supremacy Clause; U.S. CONST., art. VI, cl. 2, Federal laws, including

Federal grazing regulations, override conflicting State laws with respect to public lands.

APPEARANCES: Peter L. Knight, Esq., Knight and Demetras, Tonopah, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Colvin Cattle Co., Inc., appeals from a decision by the District Manager, Las Vegas, Nevada District Office, Bureau of Land Management (BLM), dated March 14, 1978, rejecting appellant's grazing lease application (N-056) filed January 25, 1978, as to certain lands generally located between U.S. Highway 95 and the Nellis Air Force Bombing Range until such time as a fence is constructed along the west boundary of the bombing range to prevent livestock trespass onto the Nevada Test Site and the Nellis Air Force Bombing and Gunnery Range. The District Manager stated that this action means that appellant's application for the Montezuma/springdale Allotment is approved for 675 cattle for the season March 1, 1978, to February 28, 1979, 8,100 AUM's active use, and is rejected for 233 cattle, March 1, 1978, to February 28, 1979, 2,796 AUM's active use.

The District Manager considered the following in making the decision:

1. The reissuance of the lease for lands adjacent to the Nellis Air Force Range would encourage continued livestock trespass on the Bombing Range and would be inconsistent with previous action taken by the U.S. Government. In 1964 the U.S. Government purchased all water rights, improvements and grazing privileges on the Nellis Air Force Range. Also, a permanent injunction was issued by the U.S. District Court (Civil No. 518) in 1964 restraining individuals from either directly or indirectly using or grazing livestock on the Nellis Air Force Range.

2. The existing U.S. Highway 95 right-of-way fence offers protection to the Bombing Range from livestock trespass. The use of this fence is the most economical manner in which the BLM can obtain this control and assure compliance with the Court Order.

For his decision he relied on 43 CFR 4125.1-1(i)(1), (6), and (11) (1977) which state in part:

"[A] grazing lease will authorize grazing use not in excess of the grazing capacity available for livestock . . .", "the Authorized Officer may establish the size and boundaries of a grazing lease area to facilitate the proper and effective

management of the resources . . ." and, "the Authorized Officer may require the lessee, as a condition to granting and continued effectiveness of grazing leases, to fence . . . the allotted areas and maintenance of such fences."

In its statement of reasons appellant contends that the fencing requirement is discriminatory because BLM has "seen to" the fencing of northern and eastern boundaries of the Nellis Air Force Bombing Range and Nevada Test Site, thereby sparing permittees to the north and east the expense of fencing. Appellant explains that nearly one-half of its operation would be eliminated because many sections omitted from the leasing area contain more water and vegetation than the other sections. Appellant points out that discontinuance of part of the lease will not affect the test site, as the trespass of wild and free-roaming horses and burros will persist.

Appellant also contends that denial of the area deprives appellant of the use of improvements he installed; completely divides his two grazing areas, which is detrimental to his operation; and militates against the multiple use concept. Appellant states that the Air Force activities have not bothered its cattle and it fails to see how its cattle would interfere with the Air Force activities. Appellant says it is willing to assume the risk of any trespass which may occur and is willing to take every reasonable measure to restrain the cattle from trespassing on the test range. Furthermore appellant is willing to waive his rights in the event that its cattle are damaged by Air Force activities. Since Nevada is an "open range state," appellant alleges that the Air Force, like any private citizen, should be required to construct a fence to keep the neighbor's cattle out, rather than order appellant to fence its cattle in.

Section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1976), provides in part as follows:

The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to sections 315-315g, 315h-315m, 315n, 315o and 315o-1 of this title, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe * * *. [Emphasis supplied.]

The Secretary's authority expressed in the underscored language above is also stated in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(a) (1976), quoted below:

Except as provided in subsection (b) of this section, permits and leases for domestic livestock grazing on

public lands issued by the Secretary under the Act of June 28, 1934 (48 Stat. 1269, as amended; 43 U.S.C. 315 et seq.) or the Act of August 28, 1937 (50 Stat. 874, as amended; 43 U.S.C. 1181a-1181j), or by the Secretary of Agriculture, with respect to lands within National Forests in the eleven contiguous Western States, shall be for a term of ten years subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease. [Emphasis supplied.]

The regulations on which the District Manager relied in rendering his decision are codified at 43 CFR 4125.1-1 (1977) and read as follows:

(i) * * *.

(1) 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).

* * * * *

(6) The Authorized Officer may establish the size and boundaries of a grazing lease area to facilitate the proper and effective management of the resources. In so doing, he will give consideration to seasons of use, topography, and establishment of systems of grazing and any other pertinent factors.

* * * * *

(11) The Authorized Officer may require the lessee, as a condition to the granting and continued effectiveness of grazing leases, to fence or to contribute an equitable share to the cost of fencing the allotted areas and the maintenance of such fences.

[1] Pursuant to these regulations the District Manager decided that a portion of the area requested in appellant's application should not be leased until it was fenced. He made this decision because the land in issue is adjacent to a bombing range and reissuance of a grazing lease thereon would be inconsistent with that use and would

encourage trespass. Having reduced the grazing area, the District Manager correspondingly rejected appellant's application for 233 cattle from March 1, 1978, to February 28, 1979, 2,796 AUM's active use. We find that the District Manager's decision rests on a reasonable basis. A decision reached in the exercise of administrative discretion may be regarded as arbitrary or capricious only where it is not supportable on any rational basis. Bert N. Smith, 36 IBLA 47, 50 (1978); United States v. Maher, 5 IBLA 209, 218, 79 I.D. 109, 113, 114 (1972); see also Dunlop v. Bachowski, 421 U.S. 560, 573 (1975). The burden is upon appellant to show by substantial evidence that a decision is improper or that he has not been dealt with fairly. Bert N. Smith, *supra*; John T. Murtha, 19 IBLA 97, 101 (1975); Claudio Ramirez, 14 IBLA 125, 127 (1973). Appellant has not met this burden. It contends that BLM has provided the fencing for other lessees whose grazing areas border on the bombing range and therefore has discriminated against appellant by requiring the area to be fenced. Appellant has offered no proof of this.

Nor has appellant shown error in the District Manager's decision that the land should not be leased until it was fenced because of its proximity to the bombing range. BLM is not requiring appellant to fence the land but is denying the lease until it is fenced because it has determined that grazing thereon could result in trespass on the bombing range, inconsistent with the use of the bombing range area. In other words, the area is not available for leasing until it is fenced. 43 CFR 4125.1-1(i)11 is cited to show that it is not the Government's responsibility to fence the area.

[2] Appellant makes reference to the fact that Nevada is an "open range state" and that the Air Force, as in the case of any private citizen, should be required to construct a fence to keep the neighbor's cattle out of the bombing range. The United States Constitution provides the answer to this contention. Under the Supremacy Clause of the United States Constitution, Federal law necessarily overrides conflicting State laws with respect to Federal public lands. U.S. CONST., art. VI, cl. 2; Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). "A different rule would place the public domain of the United States completely at the mercy of state legislation." Camfield v. United States, 167 U.S. 518, 526 (1897); Bureau of Land Management v. Babcock, 32 IBLA 174, 189, 84 I.D. 475, 482-483 (1977); see also, Utah Power & Light Co. v. United States, 243 U.S. 389, 404-405 (1917). Accordingly, Federal laws and regulations must prevail in this case.

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.

Anne Poindexter Lewis
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

