

BUREAU OF LAND MANAGEMENT

v.

WILLIAM J. THOMAN

IBLA 78-213

Decided June 11, 1979

Appeal from a decision of Administrative Law Judge Michael L. Morehouse setting aside two decisions of the District Manager, Rock Springs, Wyoming, Bureau of Land Management, cancelling grazing privileges for 1,182 AUM's in the Little Colorado Unit (Wyoming 4-76-4) and reducing by eleven AUM's grazing privileges in the Rock Springs Unit (Wyoming 4-76-5).

Set aside and remanded.

1. Grazing Permits and Licenses: Base Property (Land): Ownership or Control

Where a grazing permittee owned base property taken in condemnation proceedings by the United States, but a Federal district court has stayed the United States from taking exclusive possession of the property and granted joint possession to the condemnor agency and the permittee pending disposition of an appeal on a motion to re-vest the property in the permittee, implementation of a decision cancelling grazing privileges for loss of control of base property under 43 CFR 4110.1 (1975) will be stayed in accordance with the court order.

APPEARANCES: Lowell L. Madsen, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado, for appellant; Milton A. Oman, Esq., Salt Lake City, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The Bureau of Land Management (BLM), has appealed from a decision of Administrative Law Judge Michael L. Morehouse setting aside, in

part, two decisions of the District Manager, Rock Springs, Wyoming, BLM, cancelling grazing privileges for 1,182 AUM's in the Little Colorado Unit (Wyoming 4-76-4) and reducing by eleven the exchange-of-use AUM's available in the Rock Springs Unit (Wyoming 4-76-5). 1/

The District Manager's decisions were premised on the fact that the base property supporting the grazing privileges and owned and occupied by the appellee was "lost due to condemnation proceedings" initiated by the United States in the United States District Court for the District of Wyoming which resulted in an Order for Delivery of Possession of the property to the United States on January 28, 1974. The land was to be used for the benefit of the Seedskaadee National Wildlife Refuge. The pertinent regulation, 43 CFR 4115.2-1(e) (1975), 2/ provided in part:

(8) If a licensee or permittee loses ownership or control of:

(i) All or part of his base property, the license or permit, to the extent it was based upon such lost property, shall terminate immediately without further notice from the District Manager, * * *.

Except as set forth below, appellee does not contest the fact that legal title to the base property vested in the United States on January 28, 1974. As a part of the condemnation proceedings, however, "use" of the base property was reserved to the appellee for 1 year. Even after the expiration of this 1-year use reservation, appellee continued to occupy and use the property.

On July 17, 1975, the Regional Director, Fish and Wildlife Service, the condemnor agency, informed appellee that his continued occupancy and use of the base property would be subject to a rental fee from the date of expiration of the 1-year use reservation and that the United States intended to take possession of the property on October 15, 1975. The situation remained as before, with appellee continuing his occupancy and use of the property.

1/ Appellant does not appeal that part of the Administrative Law Judge's decision (Wyoming 4-76-4) relating to rejection of appellee's application for horse use for ten horses in the Little Colorado Unit and ten horses in the Rock Springs Unit.

2/ The present regulation, 43 CFR 4110.1, now states:

"§ 4110.1 Mandatory qualifications.

Except as provided under §§ 4130.3 and 4130.4-3, to qualify for grazing use on the public lands an applicant must be engaged in the livestock business, must own or control land or water base property, and * * *."

On April 19, 1976, the Regional Director, Fish and Wildlife Service, notified appellee:

On July 17, 1975, I wrote to you informing you that the United States intended to take complete possession of its 1036.05-acre tract on October 15, 1975, and that you should vacate the property by that date. Obviously, we have not exercised that intention. We have deferred that action in order to prevent undue hardship to you and your family. We do not plan to defer indefinitely.

Also in that letter, I informed you that your use and occupancy would be subject to a rental fee from the date of expiration of your use reservation. That use reservation expired January 28, 1975. The rental fee for the 11 months in 1975 is \$600 per month or \$6,600. The rental fee for 1976 is \$730 per month. All rental fees through April 1976 will be due upon receipt of this letter. Subsequent monthly rents are due in advance on the first day of each month. All rents due and unpaid as of July 1, 1976, will bear simple interest from that date at the rate of 6 percent cent per annum. After July 1, 1976, this interest rate will also apply to any unpaid monthly rents beginning 30 days after their due date. Rental payments should be made payable to the United States Fish and Wildlife Service and should be delivered to the Refuge Manager, Seedskadee NWR in Green River, Wyoming.

The situation remained as before. Appellee continued to occupy and use the property. On May 20, 1976, the Fish and Wildlife Service received \$600 as a "down payment" on appellee's rental fees.

After Thoman appealed the District Manager's cancellation of grazing privileges, the Administrative Law Judge concluded that appellee's "control" of the base property continued after its condemnation under either the 1-year use reservation or "under the somewhat confused relationship with the Fish and Wildlife Service." He held that appellee satisfied the requirements of 43 CFR 4115.2-1(e), and was entitled to retain his grazing privileges.

Appellee has moved to stay or to dismiss the BLM appeal, contending that a final determination has yet to be made regarding ownership of the base property because the matter is presently on appeal to the United States Court of Appeals, Tenth Circuit (Civil No. 78-163), on a motion to retest the property in appellee. As a part of these same proceedings, the United States District Court for the District of Wyoming on April 28, 1978, subsequent to the appeal herein, ordered 3/

3/ Civil action No. C 74-16K.

that Thoman "may continue his present state of utilization of the premises." The Order was entitled "Order Staying Exclusive Possession of the United States Property Condemned Pending Appeal." Joint possession was granted to appellee and Fish and Wildlife Service until 60 days after disposition of the appeal by the Court of Appeals, and Fish and Wildlife was "stayed from interfering with the joint possession of said premises by the defendant during the pendency of [the] appeal."

[1] Except for the 1978 court order, appellee would not be considered to have control over the base property by virtue of either his continued occupancy and use of the property or the Fish and Wildlife Service's claims for rent. As stated in Charles A. Mitchell, Jr., 30 IBLA 1, 5 (1977):

Appellant's assertion that he remains on the land irrespective of the Southern Pacific's termination [of his lease] only indicates that he may be in trespass or a tenant at sufferance. The fact that S.P. claims back rent for the continued occupancy in no way proves that he * * * controls the lands in question.

"Control" implies something more than that someone occupies and uses such property. A mere trespasser can be said to control property in the sense that he occupies it to the exclusion of all others and uses it as he pleases but the law will not invest him with any rights in the property. It is only such occupancy and use of property as is authorized that the law will recognize and that can be said to amount to "control." This is especially so in the case where issues of "control" arise under the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1976), as amended, which the regulation, 43 CFR 4115.2-1(e) (1975), implemented. The Act provides in its preamble that among its purposes are to provide for the orderly use of public grazing land and to stabilize the livestock industry. These objectives would be thwarted if unauthorized use of condemned land, which use is subject to termination at any time, were held to be a sufficient predicate for grazing privileges on other public lands. Cf. Charles A. Mitchell, Jr., 30 IBLA 1 (1977); W. Doyle Wood, 25 IBLA 261 (1976).

The condemnation action herein thus effectually caused loss of control of the condemned lands, the only issues generally being related to the amount of compensation. Therefore, the action by the District Manager was proper and that decision should be reinstated.

The 1978 court order, however, permitted the condemnee to utilize the land "up to and including 60 days after the entry of the mandate from the Court of Appeals." Therefore, implementation of the District Manager's decision shall be stayed in accordance with the court order.

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 set aside and the case remanded to the District Manager.

Joseph W. Goss
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge

