

CUB RIVER STOCKMEN'S ASSOCIATION

IBLA 78-446

Decided July 26, 1979

Appeal from decision of Idaho Falls District Office, Idaho Falls, Idaho, Bureau of Land Management, rejecting grazing lease application in part.

Affirmed.

1. Grazing Leases: Generally -- Grazing Leases: Apportionment of Land

In view of 43 U.S.C. § 1752(c) (1976), which dictates that in certain circumstances the holder of the expiring grazing lease shall be given first priority for receipt of the new lease, a district manager's decision apportioning lands between conflicting lease applicants will not be disturbed where holders of the expiring lease receive the land except for a portion and do not appeal the award of the portion to a conflicting applicant, thus waiving their preference right to said portion.

APPEARANCES: Cub River Stockmen's Association, Preston, Idaho, pro se; John Warburton and Elias Jepsen, Preston, Idaho, pro sese.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Cub River Stockmen's Association appeals from a decision of the Idaho Falls, Idaho, District Office, Bureau of Land Management (BLM), dated March 8, 1978, rejecting in substantial part its grazing lease application filed pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1976), and awarding a lease of these lands to conflicting applicants John Warburton and Elias Jepsen for the reasons stated in the regulation at 43 CFR 4121.2-1(d)(2)(i) through (iv), 43 CFR 4121.1-1, and section 402(c) of the Federal Land Policy and Management Act, 43 U.S.C. § 1752(c) (1976).

On January 18, 1978, appellant filed a lease application for 480 acres described as:

Township 14 South, Range 41 East,
Boise Meridian, Idaho
Section 19: W 1/2, S 1/2 NE 1/4,
W 1/2 SE 1/4

This land included all the lands leased to Elias Jepsen and John Warburton, whose lease was due to expire February 28, 1978. On January 23, 1978, Jepsen and Warburton filed a grazing preference statement and application.

The relevant facts, as set forth in the decision below, are:

. . . Mr. Elias Jepsen has had an interest in a grazing lease on the conflict area since at least 1963. Mr. H. W. Jepsen, a co-lessee with Mr. Elias Jepsen on the lease area, assigned his interest in the lease to Mr. John Warburton on April 30, 1976. A grazing lease was issued to Elias Jepsen and John Warburton on May 10, 1976. They have leased the area ever since.

The records also show Cub River Stockmen's Association had a lease on the E 1/2 SE 1/4 of Section 19 from July 6, 1966 to May 5, 1974. On April 29, 1974, Mr. Lamont B. Larson assigned the N 1/2 NE 1/4 over to the association. A grazing lease was issued to the association on May 6, 1976 for the subject 160 acres of public land. They have leased these two eighty-acre tracts ever since.

Examination of the area was not possible due to deep snow and lack of access. The area was observed from a distance to obtain a perspective as to topography and major vegetative types.

The terrain is a moderate-steep west facing slope located adjacent to the west side of the Cache National Forest. The area is also located at the head of Bear Creek. The conflict area is fenced on the north, south, and east sides as shown on the attached map. The SE 1/4 NE 1/4 is presently leased to Mr. Jepsen and Mr. Warburton. However, it is fenced in with Cub River Stockmen's Association lease area and is grazed by them.

Discussions have taken place between both parties involved regarding this tract leased to Jepsen and Warburton but actually fenced in with, and used by, Cub River Stockmen's Association. Mr. Jepsen and Warburton would like to exchange this forty-acre tract to the association in return for the NW 1/4 NE 1/4. They stated they would be willing to make the necessary fence changes to allow this exchange.

Mr. Jepsen and Warburton stated cattle have a tendency to get trapped under present fence locations in the NW 1/4 NE 1/4 of Section 19 where the fence runs 1/4 mile west and then 1/4 mile north. However, Mr. Alvin Beckstead, range rider for the Cub River Stockmen's Association, when asked if cattle got trapped by present fence locations stated, "not too much."

Mr. Beckstead also stated the fence is not located exactly on the quarter-section line and that the forage is better on the forty-acre tract they would be giving up than it is on the tract they would be getting.

Condition of the existing fence along the east side of the conflict area appears to be in question. One party stated the fence was in fairly good repair while the other party said it was in poor repair, needing all new wire and new posts.

There was [sic] also conflicts between the two parties testimony concerning the amount of livestock drift between the present lease areas. However, the amount of livestock drift appears to be dependent upon the condition of the above-mentioned fence.

The topography of the area does not offer a practical division without a large amount of new fence construction. The rather steep sidehill running approximately north and south through the conflict area does offer a partial deterrent to livestock. However, considerable fencing would be required to prevent cattle movement along this slope.

Mr. Jepsen owns contiguous preference land bordering, the west side of the lease area for a distance of one mile. No fence exists between the public land and the preference land. Mr. John Warburton owns contiguous preference land for a distance of one-half mile on the north side of the area. A fence in poor condition exists between this preference land and the public land.

Mr. Lamont Larson, a member of Cub River Stockmen's Association, offered his private land consisting of the E 1/2 of section 18 as preference land for the association on which to base their application. This tract of offered preference land barely qualifies as it only corners on the area in question. This offered preference land is fenced from the public land applied for.

The conflicting lease application was mainly filed on the premise that Mr. Jepsen and Mr. Warburton were not in the livestock business and that Cub River Stockmen's Association had a greater need for the forage.

Investigation of this requirement has revealed that Mr. Jepsen is in fact in the livestock business. Twenty head of steers were observed in the corral with Mr. Jepsen's brand on the right hip.

Mr. Jepsen stated the area was used by him with twenty head of steers for approximately one month last spring. He then had to remove them due to the drought. He stated he grazed the area with steers to get better utilization of the area. He also stated he used the area with 40 head of steers in 1976 and 31 head of steers in 1975. He stated he definitely has a need for the forage and has used the lease area according to regulations set forth on the grazing lease.

Mr. Warburton stated he did not use the area in 1976 because of recently acquiring Mr. H. W. Jepsen's interest in the area and financial limitations. He also stated he did not use the area in 1977 because of the drought, but would use the area this year if they are awarded the lease.

Both Mr. Jepsen and Mr. Warburton stated they would be very willing to use the area in accordance with a prescribed grazing system.

The Cub River Stockmen's Association is definitely in the livestock business and has a need for the forage. Their association consists of approximately 50 members and grazes over 1000 head of cattle. The association grazes on the adjacent Cache National Forest under a three-pasture rest rotation grazing system. They stated, if awarded the area, they would construct and/or repair the fences on the north and west sides of the area in question and incorporate it in with the allotment and grazing system on the adjoining National Forest.

An examination of both parties private preference lands was not possible due to snow cover.

Two water locations are present on the area in question. Either party could utilize the range equally well if awarded the lease.

BLM awarded the lands in issue as follows: SE 1/4 NE 1/4 of sec. 19, T. 14 S., R. 41 E., (40 acres) to Cub River Stockmen's

Association, and the remainder of the lease (T. 14 S., R. 41 E., Boise meridian, Idaho, sec. 19, W 1/2, W 1/2 SE 1/4, SW 1/4 NE 1/4, consisting of about 440 acres) to John Warburton and Elias Jepsen.

On appeal, Cub River Stockmen's Association contends:

(1) Fences bordering the leased property, specifically along the east side, should be properly repaired, maintained, and located.

(2) Need of Warburton and Jepsen for the lands for grazing is questioned, citing that Warburton did not use the leased area in 1976 or 1977; that Jepsen said he used the lands with 31 head of cattle in 1975, 40 head in 1976, and 20 head for a month in 1977; with drought blamed for nonuse in 1977; that the Forest Service letter to Association showed little or no use of the Forest by Jepsen.

(3) The Association needs more forage because it is losing use of certain lands in the Cache National Forest due to the present and future development of a Boy Scout camp.

[1] The District Manager awarded the land sought, except for the SE 1/4 NE 1/4 of sec. 19, T. 14 S., R. 41 E., to Warburton and Jepsen in accordance with 43 CFR 4121.2-1(d)(2)(i), (ii), (iii), (iv), 43 CFR 4121.1-1, and section 402(c) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1752(c) (1976). He awarded the remaining tract to Cub River on the basis of "past use, sound range management practices, and present fence locations, in accordance with 43 CFR 4121.2-2(d)(2)(i)(ii)(v)."

Section 402(c) of FLPMA, supra, states:

. . . 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 202 of this Act or section 5 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 477; 16 U.S.C. 1601), (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.

The legislative history, set forth in Harvey Sheehan, 39 IBLA 56 (1979), at 59, thus explains:

Subsection (c) specifies that upon expiration of a least [sic] or permit existing users would have a right of first refusal for any new lease or permit, provided that grazing will be continued by the Secretary concerned and they are in good standing and accept the terms and conditions of the new lease or permit. H.R. Rep. No. 94-1163.

The applicable grazing regulations issued since FLPMA, supra, are as follows:

43 CFR 4110.5 provides:

§ 4110.5 Conflicting applications.

When more than one qualified applicant applies for livestock grazing use of the same public land and/or where additional forage or additional land acreage becomes available, the authorized officer may allocate grazing use of such land or forage consistent with the land use plans on the basis of any of the following factors:

- (a) Historical use of the public land (see § 4130.2(d));
- (b) Proper range management and use of water for livestock;
- (c) General needs of the applicants' livestock operations;
- (d) Public ingress and egress across privately owned or controlled land to public lands;
- (e) Topography;
- (f) Other land use requirements unique to the situation.

43 CFR 4130.2(e) provides:

(e) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:

- (1) The lands remain available for livestock grazing in accordance with land use plans (see subpart 4120);

(2) The permittee or lessee is in compliance with the regulations contained in this part and the terms and conditions of his grazing permit or lease; and

(3) The permittee, or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer. [Emphasis supplied.]

While these two regulations appear inconsistent, the Board has ruled that 43 CFR 4110.5 must be read in pari materia with 43 CFR 4130.2(e) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria. Harvey Sheehan, supra.

The record shows that Warburton and Jepsen hold an expiring lease on the land sought and that they meet the conditions set forth above in 43 CFR 4130.2(e)(1), (2), and (3), and of FLPMA, supra. Accordingly, we find that under section 402(c) of FLPMA, supra, the legislative history, and the grazing regulations issued pursuant to FLPMA, supra, the District Manager properly awarded the land to Warburton and Jepsen. Harvey Sheehan, supra. As to the award of the SE 1/4 NE 1/4 of sec. 19, T. 14 S., R. 41 E., to Cub River, we feel it is clear this award violated section 402(c) of FLPMA, supra, and the above-cited regulations because Cub River was not the holder of the expiring lease on this land. Rather it was Warburton and Jepsen. The latter should have had first refusal of this land. However, appellees Warburton and Jepsen did not appeal the District Manager's decision as to this land, but on the contrary requested we affirm the holding. In these circumstances, we conclude that in accord with 43 CFR 4130.2(e) and section 402(c) of FLPMA, supra, appellees have waived their preference right to the SE 1/4 NE 1/4 of section 19.

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:

Joseph W. Goss
Administrative Judge

James L. Burski
Administrative Judge

