

**Editor's note: 86 I.D. 458; Reconsideration denied by order dated Feb. 4, 1980; Appealed -- aff'd, sub nom. Garcia v. Andrus, Civ.No. 80-383 (D.Ariz. March 23, 1978), rev'd, No. 81-5417 (9th Cir. Nov. 12, 1982); 692 F.2d 89**

EARL W. PLATT

IBLA 78-475

Decided September 18, 1979

Appeal from decision of the Phoenix District Office, Bureau of Land Management and recommended decision of Administrative Law Judge Michael L. Morehouse partially rejecting an application for a grazing lease and awarding a lease to a conflicting applicant. Ariz. 020-2758.

Reversed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits -- Grazing Leases: Preference Right Applicants -- Grazing Leases: Renewal

Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.

APPEARANCES: Mitchel D. Platt, Esq., Platt & Platt, St. Johns, Arizona, for appellant; Lawrence A. Ruzow, Esq., and Belinda Barrington, Esq., Vlassis, Rusow & Crowder, Phoenix, Arizona, for Barbara Garcia, appellee; Fritz L. Goreham, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This case involves a controversy between two applicants for grazing leases on the same public land. It arises from a decision dated May 13, 1977, by the District Manager of the Bureau of Land Management (BLM), Phoenix District Office, which rejected in part Earl Platt's application to the extent of one-third of the allowable use and awarded him a lease for two-thirds of the allowable use. It awarded the other one-third use to Barbara Garcia. Following Platt's appeal to this Board, the Area Manager of the Phoenix Resource Area of the Phoenix District Office returned Garcia's check for the grazing fees dated May 31, 1977, in effect ruling that Platt could continue with all of the privileges granted under his former lease until resolution of the appeal. See 43 CFR 4.21.

In his appeal, Platt alleged, inter alia, that Garcia was not qualified to hold a grazing lease because she was not in the livestock business, did not have sufficient control over preference

lands and, in any event, that the award to her was not based upon proper regulatory criteria. He also requested a hearing before an Administrative Law Judge. Garcia and BLM denied these allegations and contended that the award of privileges to her be upheld. Garcia also moved to have the Bureau decision of May 13, 1977, immediately implemented.

By Order dated August 24, 1977, we denied the motion to have the decision immediately implemented and ordered a hearing pursuant to 43 CFR 4.415. We delineated the issues as follows:

The issues to be determined are whether Garcia is qualified to hold a grazing lease under the controlling regulations and, if so, whether the award properly met regulatory criteria. There are also issues concerning whether and to what extent Mrs. Garcia has control over any preference lands, and whether Mr. Platt has lost control over any preference lands. These and other issues raised by the parties, including the degree of control necessary, and any additional matters relevant to the determination of entitlement to the grazing privileges in question may be entertained by the Judge.

Pursuant to this Order, a hearing was held before Administrative Law Judge Michael L. Morehouse in Phoenix, Arizona, on January 10, 1978. Following receipt of post-hearing briefs from the parties, Judge Morehouse issued a Recommended Decision dated June 1, 1978. Copies thereof were sent to the parties, and they have filed briefs and comments to this Board. In his recommended decision, Judge Morehouse basically recommended affirming the decision of the

District Manager, thus upholding the rejection of Platt's application to the one-third percentage of grazing privileges, and awarding that one-third to Garcia.

Before discussing the issues raised in the briefs, we set forth Judge Morehouse's statement of the factual background of his recommended decision as follows:

The evidence established that the Garcia Ranch, which is the subject of the controversy, consists of approximately 35 sections of patented lands, 18 sections of Federal lands, and 6 sections of State lands (see Ex. A-3). The ranch was homesteaded in the later 1800s by Jose Garcia, grandfather of Barbara Garcia's late husband, Conception. Following Jose's death, the ranch was owned and operated by his three grandsons, Emilio, Joe and Conception, from approximately 1925 to 1955. Barbara Doran married Conception Garcia in 1932. Thereafter, she resided on the ranch with her husband, Conception, who with his two brothers were in the cattle business. In 1955, Conception Garcia died, leaving his wife, Barbara, a life estate of one-third undivided interest in the ranch with their six children as remaindermen. From 1955 to 1958, Emilio, Joe and Barbara ran the ranch. In 1958, Joe sold his undivided one-third interest to Emilio and the same year Emilio and Conception's Estate leased the whole ranch to one Everett Hinkson for four years. In 1959, Earl Platt acquired Emilio Garcia's interest in the ranch. The Estate of Conception Garcia was closed in 1961, and in 1962, Earl Platt leased Barbara Garcia's one-third interest (Ex. R-3). The lease terminated on October 1, 1975. Throughout this period of time Earl Platt had been the attorney for the Garcia brothers. Following Conception's death he represented the Estate and was also the attorney for Barbara Garcia. [1/] In 1958, when Emilio acquired Joe's one-third interest, he borrowed the purchased money from Earl Platt.

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1/ In commenting on this decision, Platt vigorously denies that he was Garcia's attorney thereafter because he had no retainer agreement and she paid him no fees. Garcia testified she considered him as her attorney, however. For the purpose of this decision, their past relationship does not matter.

The lease between Earl Platt and Barbara Garcia initially ran for a period of five years. It was renewed for three years commencing October 1, 1967, terminating September 30, 1970, and renewed again for a period of five years commencing October 1, 1970, and terminating October 1, 1975. At that time, evidently the parties were unable to reach an agreement concerning the terms of a new lease. It appears, in any case, that there may have been some kind of falling out between Mr. Platt and Mrs. Garcia, since she retained another attorney to negotiate new lease terms, which negotiations proved unfruitful (see letter dated September 30, 1975, attached to appellant's reply brief). Subsequently, a partition suit was filed in State Court, which is still pending.

Mrs. Garcia testified that before 1975 and the expiration of the lease, she made the decision to go back into the livestock business. In January, 1977, prior to filing her grazing lease application (Ex. A-2), she bought a mother cow, a bull and two horses. On January 12, 1977, she acquired a new brand certificate (Ex. A-4) from the State of Arizona and on December 17, 1977, she purchased an additional 20 head of cattle (Ex. R-5). These cattle are now on land belonging to a relative which has only limited forage. She stated that she considers herself presently in the livestock business, she intends to remain in the livestock business, and she needs her one-third share of the BLM grazing privileges that attach to the Garcia ranch.

(Dec. 3-5)

At the time our Order of August 24, 1977, no party had raised, nor had the majority of this Board considered, the effect of section 402(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1976), on the questions presented by this appeal. That section provides, in relevant part, as follows:

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 1712 of this title or section 1604 of title 16, (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.

Upon reflection, this Board is now of the view that the applicability of sec. 402(c) of FLPMA is determinative of the appeal. Platt argues that this section requires reissuance of the lease to him regardless of any other matter raised in this case. Garcia contends that this section does not require reissuance of a lease to a prior holder who no longer has the original qualifications upon which the lease was premised. BLM asserts that this section does not apply to situations where a common owner is seeking to reassert her rights and her co-owner no longer has the control over her interest in the land which had been used as the reference for the grazing privilege. This issue was not raised before Judge Morehouse, nor was it addressed by him.

[1] This Board has ruled that where conflicting grazing lease applicants have equal preference rights for the land, the statutory provision requires that the holder of the expiring lease be given first priority (in effect, a right of first refusal) for a new lease for the land embraced by his former lease if the statutory requirements are met. Harvey Sheehan, 39 IBLA 56, 86 I.D. 51 (1979); see also George T. McDonald, 35 IBLA 75 (1978); Fancher Brothers, 33 IBLA 262 (1978); Mark X. Trask, 32 IBLA 395 (1977); Allen R. Prouse, 32 IBLA 311, 84 I.D. 874 (1977). In Trask, supra, we held

that if the holder of an expiring lease lost control of the private property contiguous to the public land which gave him a preference right to a lease under 43 CFR 4121.2-1(d) (1977), he would not be entitled to first priority under FLPMA for receipt of a new lease.

The decision in Trask was premised on the recognition that upon the loss of contiguous or cornering land an individual loses the preference right afforded by section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976). Thus the Board held that since Trask no longer held a preference right to lease the land, the right of first refusal could not be exercised so long as another applicant with contiguous or cornering land sought to lease the Federal range.

The issue presented by this appeal, however, is substantially different. While we are cognizant of the fact that a partition suit is presently pending in the state courts, the fact remains that as of now Platt has a two-thirds undivided interest in the base lands while Garcia has a one-third undivided interest in the same lands. Even assuming that Garcia has a preference right to lease the adjacent Federal range, we are of the opinion that until such time as partition actually occurs Platt, under the provisions of section 402(c) of FLPMA, has the right of first refusal to the entire Federal range contiguous or cornering thereto.

It is clear that if we assume that Garcia's one-third undivided interest is sufficient to vest her with a preference right, we must

assume that Platt, with a two-thirds undivided interest, is similarly vested with a preference right. Thus, unlike the situation in Trask where the prior lease holder no longer had a preference right, in the instant case both would have a preference right. Under such a situation we can no longer find, as we did in Trask, that the prior Federal lessee is not in compliance with the rules and regulations issued by the Secretary. See 43 U.S.C. § 1752(c)(2).

The instant situation is clearly analogous to a situation in which there have always been two preference right holders, but where only one has ever actually exercised the preference. Under the statutes and regulations in effect prior to the enactment of FLPMA, the historic use of the individual who had been grazing on the Federal range would be a factor to consider in the adjudication of conflicting applications, but it would not have been conclusive. Since the passage of FLPMA, however, it is our view that the prior holder has an absolute right of first refusal so long as he maintains his preference right and is otherwise in compliance with the applicable regulations.

Thus, we conclude that, until such time as partition occurs, Platt has a priority right to lease the Federal range involved herein. We are not unmindful that the provisions of section 402(c) may, at times, work an injustice upon certain individuals. But it seems clear that Congress has determined that stabilization of the

existing livestock industry should receive the highest consideration. We feel that this Board has no option but to follow that policy decision. Upon partition, of course, BLM should re-examine the rights of the parties in accordance with the views expressed in Trask and the instant case.

Inasmuch as our resolution of the above question renders moot the other issues presented by this appeal, we will not address those questions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed are reversed and the case files are remanded for further action consistent with the views expressed herein.

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James L. Burski  
Administrative Judge

We concur:

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Newton Frishberg  
Chief Administrative Judge

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Frederick Fishman  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

I must disagree with the conclusion in the majority opinion that section 402(c) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1752(c) (1976), mandates renewal of a lease for the entire grazing privileges in these circumstances where a common owner is seeking to reassert her rights and her coowner no longer has the control over her interest in the land which had been used as the preference for the grazing privilege.

This precise issue has not been addressed before by this Board or in any other ruling of which I am aware. Thus, as this is a case of first impression, we must view the statutory provision to determine statutory intent not only from the specific language but from the entire legislative and administrative milieu from which it arose. There is no guidance in the legislative history to the type of situation presented here. See the discussion in Allen R. Prouse, 32 IBLA 311, 315, 84 I.D. 874, 876 (1977), showing the Congressional concern that existing grazing operations continue so long as the authorized user remains qualified under the law and regulations. Nor is there any evidence on the specific question here in the current regulations. The implementing regulation echoes the statutory language, providing:

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.

43 CFR 4130.2(e), published July 5, 1978, 43 FR 29072.

In commenting on the final rulemaking wherein the grazing regulations were revised last year, the Assistant Secretary stated in the preamble to the regulations:

Serious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands administered by the Bureau of Land Management. Livestock operators with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. There [sic] adjudicated grazing use, their base properties, and their areas of use (allotments) will be recognized under these grazing regulations.

43 FR 29058 (July 5, 1978). While this comment reflects the statutory priority for renewal, it relates that "preference" to the past determinations concerning the grazing user's base properties, among other matters.

Thus, to determine what preference existed, we turn to the basic statutory provision which established the base property preference. For lands outside grazing districts, grazing privileges are awarded under the authority granted by section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976), which gives preference to:

. . . owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of land contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary. [Emphasis added.]

This preference, of course, was further delineated by section 402(c) of FLPMA by affording a priority to the holder of an expiring lease. What is evident in the entire statutory and regulatory framework, however, is a recognition of rights established by virtue of ownership or control of base property. For section 15 leases, the base property is the contiguous land. Although a purpose of the Taylor Grazing Act and section 402(c) of FLPMA is to stabilize existing grazing operations, the underlying assumption in both Acts as to preference and priority for a lease is that the original conditions which afforded the preference right remain the same, i.e., that the applicant retain his ownership or control of the base property. Thus, the priority under FLPMA for renewal depends upon the continued ownership or control of the

base property, as was recognized in Mark X. Trask, 32 IBLA 395 (1977), where it was held that if the holder of an expiring lease loses control of the private property contiguous to public land which gave him a preference right to a lease under 43 CFR 4121.2-1(d) (1977), he would not be entitled to first priority under FLPMA for receipt of a new lease. It follows that loss of a percentage of the ownership or control over the base property causes a loss of the priority to lease to that same extent.

We would apply the law to harmonize with the entire statutory and regulatory scheme of leasing based upon preference land ownership or control. Thus, we would rule that section 402(c) of FLPMA gives a priority to lease to expiring lessees only to the extent that the lessee retains ownership or control of the preference lands upon which the lease was formerly granted. If the lessee loses a percentage interest in a tenancy in common on such preference lands, he would only have a priority to lease based upon the percentage of ownership or control he retains.

The majority opinion interprets section 402(c) of FLPMA to a logical absurdity. This may be demonstrated by considering the perimeters of the logic flowing from the majority's conclusion. Under Trask if a grazing lease applicant no longer owns or controls land contiguous to the public land to be leased, he or she would not have the statutory preference to that land under section 15 of the Taylor

Grazing Act. However, so long as a lessee owns or controls any percentage interest in the contiguous land he would prevail under the majority's theory. Thus, where a lessee, whose lease is expiring, had 100 percent ownership or control of the contiguous land upon which the preference was based when the prior lease issued and loses control over 99 percent interest in the contiguous lands, but retains a 1 percent interest in a tenancy in common, the thrust of Platt's argument and the majority's conclusion in this case would compel a ruling that section 402(c) of FLPMA requires that the lease be renewed. Any other tenant in common of the preference lands would be prevented from ever acquiring a Federal grazing lease so long as the tenant in common who held the prior lease owns any percentage interest in those lands. This is completely contrary to the entire statutory scheme relating the stabilization of the livestock industry to the ownership or control of contiguous lands for grazing leases. The majority's conclusion will compel tenants in common to partition lands in order to attain a grazing lease. However, this may not even afford them a basis for relief unless upon partition the cotenant with the lease no longer owns lands contiguous to the Federal lands.

To be in compliance with the rules and regulations so as to be entitled to priority for renewal, the former lessee must meet the essential qualification to "own or control land or water base property". 43 CFR 4110.1-2. Furthermore, there must have been compliance with the terms and conditions of the lessee's lease. The grazing

lease which Platt desires to renew incorporated the regulations then in effect when the lease issued. At the times Platt's Federal lease issued and expired, 1/ a regulation expressly provided that a 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." (Emphasis added.) 43 CFR 4125.1-1(i)(4) (1970-1977). Platt's lease from Garcia was used by him to support his prior preference right to a lease. When that lease terminated, without renewal, Platt lost control to the extent of the one-third undivided interest in the base property owned jointly by Platt and Garcia. Since one of the lease terms was termination of the lease in whole or in part because of loss of control of the base lands, it cannot be said that the lease was in good standing at the time of its termination as to the one-third interest which had been lost by Platt. As against Garcia, Platt is therefore not entitled to assert the priority otherwise accorded under FLPMA to those in compliance with the terms and conditions of the expiring Federal lease.

I would agree with the majority to the extent it finds that an interest in a tenancy in common gives ownership or control to such land. This is in accord with the general common law principles governing tenants in common where each coowner may use and enjoy property

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1/ Platt's Federal lease was effective February 14, 1974, and it expired February 13, 1977. His lease from Garcia terminated October 1, 1975.

owned in the form of tenancy in common as if he were the sole owner provided his actions do not prejudice the use and enjoyment of the property by the other coowner. E.g., Jackson v. Low Cost Auto Parts, Inc., 25 Ariz. App. 515, 544 P. 1116, 1117 (1976). Nevertheless, under the rule in Jackson a tenant in common cannot exclude other coowners from enjoying their equal privileges, since to do so would be an "ouster." The majority's conclusion, however, fails to give recognition to any rights in the cotenant to share in the usage of the common tenancy base property and helps Platt, in effect, to oust Garcia from her rights appurtenant to the base property. To avoid this Department being a participant to such a result, we should apply the regulation to recognize the ownership interests which the cotenants have in the undivided whole interest in the property by recognizing their proportionate shares.

Platt contends, however, that Garcia has no control over base property because under the rule in Grabbert v. Schultz, 12 IBLA 255, 80 I.D. 531 (1973), full control must be recognized in the majority interest. In Grabbert the base land had originally been patented to a corporation and when it was dissolved many small undivided interests in the land were distributed to the shareholders in proportion to their holdings. One of the conflicting applicants attempted to obtain from the small percentage holders leases which were merely permissive in nature. On its facts, Grabbert is distinguishable from the situation here. However, to the extent language in that case may be

read to require over 50 percent interest in a tenancy in common before any rights may be recognized in the cotenant, I would overrule it to that extent. Such a rule is not consonant with the principles of law pertaining to tenancies in common.

The concept of a cotenant's basic qualification of ownership or control in base lands should not be confused with the concepts applicable to proper allocation of the Federal lands. Although we would hold that Platt's ownership and control of the base property for the purpose of his basic qualification and his priority for renewal of his grazing lease should be in proportion to his percentage of interest in the tenancy in common, this does not mean necessarily that he is entitled to a lease simply for two-thirds of the Federal lands. Since Garcia was not the holder of an expiring Federal grazing lease, she has no priority for a new lease under FLPMA. However, assuming she is otherwise qualified, as the owner of a percentage interest in contiguous lands she is an owner of base property and would have a preference under section 15 of the Taylor Grazing Act to lease contiguous lands except to the extent she is precluded by Platt's FLPMA priority for a lease based on his two-third's interest in the base property.

To the one-third interest to which Platt does not have the priority to lease under FLPMA, we thus have conflicting preference applicants. Generally, in such circumstances the grazing privileges for

that interest should be allocated in a manner consistent with the criteria set forth in 43 CFR 4110.5, which applies when more than one qualified applicant applies for livestock grazing use of the same public land. The authorized officer may allocate grazing use consistent with land use plans on the basis of any of the following factors:

- (a) Historical use of the public land (see section 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; and
- (f) Other land use requirements unique to the situation.

Platt contends that if there is to be any allocation of the privileges it should have been done by the range manager applying similar criteria. We agree with Platt that generally this is true and should have been done in this case. However, there is now an additional factual circumstance which may be given consideration under criterion (f) above, that is, the pendency of the partition suit. Extensive

land use planning and evaluation of all these criteria may be postponed where it appears that a probable change in land ownership is imminent. Thus, temporary leases for less than 10 years are justified under section 402(b) of FLPMA in the best interest of sound land management where such a change in land ownership by partition is imminent. However, we believe all of these considerations should have been weighed before an allocation was made here, and would modify the decisions below and remand the case to the Authorized Officer to make a further determination of proper allocation and the reasons therefor.

The foregoing discussion is predicated upon an assumption that Garcia is qualified for a lease because she is in the livestock business. The issue of her qualifications was one of the primary reasons for our ordering a hearing in this case. Being in the livestock business continues to be a mandatory qualification under current regulations. 43 CFR 4110.1. Platt correctly contends the fact that Garcia had engaged in the business prior to 1961 bears no relevance to the adjudication of her application under appeal because Garcia's lease of her interest and other evidence indicates that she was not engaged in the grazing business from that time at least until her refusal to renew Platt's lease. See Laurence A. Andren, 7 IBLA 14 (1972); Orin L. Patterson, 56 I.D. 380 (1938). Platt points to several Departmental decisions in support of his argument. The Department has held that the ownership of a few livestock may not be sufficient to establish a person as being engaged in the livestock business. See

Ralph E. Holan, 18 IBLA 432 (1975); Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973). We have held that entry into the livestock business cannot be contingent upon the award of a Federal lease. See Ralph E. Holan, *supra*; George T. McDonald, 18 IBLA 159 (1974).

The cited cases may be distinguished from the instant case, among other reasons, in that the appellants therein never established that they had entered the livestock business before final Departmental action on their applications. Final action on Garcia's application has been stayed pending this appeal, see 43 CFR 4.21, and her application remains pending before the Department. Nothing precludes consideration of all the applicant's circumstances while an application is pending, and Judge Morehouse's findings support the conclusion that Garcia met this qualification at the time of the hearing. It is clear that her entry into the livestock business was not contingent upon the award of a Federal lease. Ralph E. Holan, *supra*; George T. McDonald, *supra*. This tends to show that Garcia had, at least, started a livestock business, albeit a small beginning, when she filed her application. We would find that she is qualified.

Platt further contended that Garcia should not be awarded any grazing privileges without first requiring her to make any compensation to Platt for his improvements on the Federal range prior to the award of the lease. Judge Morehouse ruled that this could await the outcome of the partition action. Platt contends this was erroneous.

The statutory basis for such compensation is provided in section 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1976), which provides in part:

No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. [Emphasis added.]

While this provision pertains to lands inside grazing districts, it has been provided that section 15 grazing leases (which are outside grazing districts) are to be administered under the provisions of the Taylor Grazing Act, see 43 U.S.C. § 315m-2 (1976), and hence, the provision should be applicable to leases as well. Present grazing regulations require payment for improvements by a transferee prior to approval of the transfer of grazing use, regardless of whether the use arises under a lease or permit. See 43 CFR 4120.6-5.

The difficulty here is that if the privileges are awarded for joint use as they were below on a percentage basis use of all the Federal range in conflict, there would be no "prior occupant" as contemplated by the Act. Although Garcia's livestock might have some use of the improvements, so would Platt's. Thus, Platt would certainly not be entitled to reimbursement for all the reasonable value of improvements which he is using or may use in the future. If, however, an allocation of the range would preclude his usage of the improvements

from a given area, we would agree that provision for some compensation for such improvements should be a prerequisite before a permanent lease should issue to another.

To conclude, we would rule here that Garcia is qualified to hold a lease, that Platt has a priority to lease only to the extent of two-thirds of the base property he owns in common with Garcia, that there should be an allocation of the other one-third privileges between Platt and Garcia in accord with 43 CFR 4110.5, and that consideration of compensation for improvement should be made if warranted upon a reallocation of the privileges, in accord with the discussion above, and that further issues raised by Platt but not answered by the decision below or this decision should be entertained by the District Manager upon a remand of the case to accord with these views.

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Joan B. Thompson  
Administrative Judge

We concur:

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Joseph W. Goss  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

