

JIMMIE AND LEONA FERRARA

IBLA 79-206

Decided May 21, 1980

Appeal from decision of Administrative Law Judge E. Kendall Clarke holding that notification to transfer grazing privileges was sufficient and remanding the case to the Bureau of Land Management to carry out requirements necessary to making the transfer. (N2-78-3).

Reversed.

1. Grazing Permits and Licenses: Base Property (Land): Ownership or Control -- Grazing permits and Licenses: Cancellation or Reduction

The loss of ownership or control of base property results in the loss of grazing privileges attached thereto and requires the cancellation of the license, in the absence of a timely application for transfer of grazing privileges to new base property.

2. Grazing Permits and Licenses: Base Property (Land): Transfers

A timely transfer of grazing license privileges to new base property may be made only while the original base property is within the ownership or control of the licensee, and transfer may not be made following sale of the original property.

3. Grazing Permits and Licenses: Cancellation or Reduction -- Mistakes -- Regulations: Waiver

Even if it be established that the Department had not applied in previous years regulation 43 CFR 4115.2-1(e)(8) (1975), which

requires termination of grazing privileges upon loss of ownership or control of base property, such failure to apply the regulation is not authority to further disregard the regulation.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, Department of the Interior, Sacramento, California, for the Bureau of Land Management; Lyman F. McConnell, Esq., Diehl, Recanzone & Evans, Fallon, Nevada, for appellees.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Bureau of Land Management (BLM) appeals from a decision of Administrative Law Judge E. Kendall Clarke dated January 25, 1979, holding that Jimmie and Leona Ferrara had notified BLM that they wanted to transfer their base property qualifications from secs. 26 and 27 to sec. 21, T. 30 N., R. 35 E., Mount Diablo base line and meridian, and remanding the case to BLM to carry out other requirements before the transfer is made.

Prior to December 1975 Jimmie and Leona Ferrara owned property in secs. 26 and 27, which qualified as base property for Jimmie Ferrara's grazing privileges of 960 AUM's. The Ferraras sold this property on December 1, 1975, and subsequently sought to transfer the grazing privileges to other property which they owned in sec. 21. Ferrara said he notified BLM of the sale and desire to transfer the privileges in January 1976 when he applied for his license. A notation to this effect was placed on the reverse side of the application. No formal application, however, was filed until 1978. On May 24, 1978, BLM rejected the application because the Ferraras no longer owned or controlled the base property to which the privileges were attached at the time of the sale. BLM stated that the license issued to him terminated on December 1, 1975, and that any license issued after that date had been issued in error. BLM based its decision on the following regulations.

43 CFR 4115.2-1(e)(8)(i) (1975) states: "[I]f a licensee or permittee loses ownership or control of 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." 43 CFR 4115.2-1(d) states in part: "Licenses or permits are subject to cancellation or reduction to the extent that they have been improperly issued * * *."

The Ferraras appealed BLM's decision and a hearing was held on November 14, 1978. The following information emerged as a result of that hearing.

In 1974, the Ferraras listed their property located in secs. 26 and 27 which formed the basis for grazing privileges of 960 AUM's.

Ralph Tucker, a neighboring attorney, was handling negotiations for the transfer of the grazing privileges to other property owned by the Ferraras in sec. 21. Tucker had apparently contacted BLM regarding the transfer as Ben F. Collins, Area Manager, had written a letter dated April 5, 1974 (Exh. B), in which he stated: "You do not need to transfer privileges. Rather, you need to decide what property produces 500 AUM's and write a letter describing the property. I will adjust the Dependent Property Record to show what you want as base." Robert D. Cordell, Acting Area Manager, wrote a letter to Mr. Tucker dated July 12, 1974 (Exh. C), in which he said: "Regarding your telephone conversation with me on July 10, 1974, I have enclosed the Transfer of Grazing Privileges forms that you requested. Should you have any further questions concerning this subject, feel free to contact me."

In November of 1975 Tucker died. On December 1, 1975, the Ferraras sold their property in secs. 26, 27, and 28 without the grazing privileges to Don and Ruth Knight who did not attempt to exercise any grazing privileges as they were hay farmers.

Jim Ferrara testified that each year after the sale he advised BLM that the grazing privileges were applicable to sec. 21. His application for a grazing license filed January 23, 1976 (Exh. 1), contains the following notation on the reverse side: "Sold Sec. 28, 27 and W 1/2, Sec. 26, T. 30 N., R. 35 E. Remaining base, Section 21." Chester E. Conard, Winnemucca District Manager, testified that he thought the writing was that of Vern Schultz, a BLM employee (Tr. 59). Ferrara said that there was never any question with respect to whether the privileges had been transferred and he was not notified until 1978 that the change had not been made (Tr. 19).

Ferrara testified that he leased sec. 21 to John Thacker in 1977 for a 1-year period and in 1978 for a 2-year period (Tr. 20). Brad Hines, range conservationist, testified that Thacker did not submit a copy of the lease in 1977 (Tr. 64). Nor did Hines find any application for transfer of the license from Ferrara to Thacker in 1977. Ferrara, rather than Thacker, signed the 1977 application (Exh. G). Grazing privileges were granted to Ferrara in 1976 and 1977 based on the applications filed (Tr. 2).

On March 17, 1978, a copy of the lease (Exh. E) between Ferrara and Thacker was filed with BLM and listed all of sec. 21 in the property description.

Conard testified that BLM first learned that secs. 26 and 27 had been sold when BLM checked the county records in the spring of 1978 (Tr. 51). He said that there was no application for transfer of privileges from secs. 26, 27, 28, and 34 to sec. 21 in the file (Tr. 48, 54). On November 9, 1978, Conard crossed out the reference to sec. 21 on Ferrara's 1976 application because "there was no record that showed

why this conclusion was reached" (Tr. 54). On April 26, 1978, Ferrara filed an application for transfer (Exh. D).

Judge Clarke issued his decision on January 25, 1979, in which he found that the notification given by Ferrara to BLM as indicated in the statement written by an employee on the reverse side of Exhibit 1 was sufficient notice of the sale and requested transfer. His decision was based on the following rationale:

The regulations which control a situation where licensee or permittee loses ownership or control of his base property are contained at 43 CFR 4115.2-1(e)(8)(i), (ii) (1975):

(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 that, if the licensee or permittee notifies the District Manager, in writing, of such loss within thirty days from the date thereof, such license or permit shall terminate to that extent at the end of the grazing season or grazing year as the District Manager shall determine; or

(ii) All or part of such other lands or grazing privileges as are necessary to his year-round operation, the license or permit will be subject to reduction in proportion to the loss of such necessary lands or grazing privileges unless the licensee or permittee notifies the District Manager within 30 days after such loss and thereafter within the time allowed by the District Manager acquires ownership or control of other lands or grazing privileges sufficient to assure a year-round operation.

Any form of request for transfer, including informal methods of notification are sufficient according to the BLM. Therefore, I find that the notification given by the appellant to an employee of the BLM and memorialized in the statement written by the employee on the back of Exhibit 1 was sufficient notice of the sale and requested transfer.

43 CFR 4115.2-2 (1975) permits a 90-day period for a transferee to apply for transfer of the grazing privileges. I find that is the standard established and should

be applied where the privileges are requested to be transferred to other base property.

It is my finding that the information furnished to the employee of the Bureau of Land Management as shown by Exhibit 1 was sufficient notification that a transfer of the privileges from the base of secs. 26 and 27 to sec. 21 was desired and that this was full notification within a reasonable period of time in accordance with the spirit of the regulations cited above. This matter is therefore remanded to the Bureau of Land Management, to carry out the other requirements necessary before a transfer of base is made, such as check of commencability, [sic] as though the application for transfer was currently pending.

In its statement of reasons for appeal, BLM contends: That 43 CFR 4115.2-1(e)(8)(i) (1975), cited by the Judge in his decision, specifies a 30-day period during which the District Manager must be notified, in writing, of the sale of property with base property qualifications attached; that oral notification to BLM in 1976 which was purportedly memorialized by a BLM employee on the application is not sufficient; that 43 CFR 4115.2-2(b) requires that "[a]n application for approval of transfer must be filed with the District Manager on a form approved by the Director for a land base or water base" (emphasis supplied); that there is no basis in the record for the Judge's conclusion that informal methods are satisfactory to transfer grazing privileges; and, that there was no written notification of the transfer of the underlying base secs. 26 and 27 by Ferrara as required by section 4115.2-1(e)(8).

In their answer, the Ferraras allege that they did notify BLM that sec. 21 was the proper base property, and that this is verified by Mr. Schultz's note on the 1976 application beside which was written "O.K." by a BLM official; that information relating to sec. 21 was crossed out prior to the hearing; that BLM's position is overly technical in concluding that Ferrara did not comply with the exact technicalities of the regulations; that they thought that everything was "okay" with the base property as the "permits" were issued regularly each year; and that the intent of the regulations is to inform BLM of changes and in this case BLM was informed. They state: "In conclusion, it is interesting to note the 43 CFR 1853.9(b), regarding grazing proceedings appeals, provides: 'No adjudication of grazing privileges will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4110 of this chapter.'" 1/

[1] Regulation 43 CFR 4115.2-1(e)(8)(i) (1975), cited by the Administrative Law Judge, provides if a licensee loses ownership of

1/ Apparently the Ferraras are referring to 43 CFR 4.478(b), which is identical except "title" is used instead of "chapter."

the base property, the license, to the extent it was based upon such lost property, shall terminate immediately. (The regulation provides an exception to this rule which is not applicable in this case.) Loss of ownership or control of base property results automatically in the loss of grazing privileges attached thereto, in the absence of a timely application for transfer of these privileges to other qualifying base property. Fillmore Ranches, 30 IBLA 282 (1977); Charles Stewart, 26 IBLA 160, 162 (1976); James G. Brown, 65 I.D. 394 (1958). As discussed below, a timely application for transfer of grazing privileges from original base property to new base property can only be made while the original base property is within the ownership or control of the licensee. There is no evidence in the record, other than can be implied in some way from a statement by Ferrara, that he signed some transfer application papers in 1974 or 1975 for Tucker. Nor is there evidence that such an application to transfer his grazing privileges to other base property was filed prior to December 1, 1975, the date of sale of the base property, when he lost ownership and control thereof. It is thus clear that Ferrara's grazing privileges terminated automatically as of the date of the transfer of the base property.

[2] 43 CFR 4115.2-1(e)(8)(i) (1975) must be read in concert with 43 CFR 4115.2-2(a)(2) (1975) and section 4115.2-2(b), the regulations relating to transfers, which state in pertinent part:

§ 4115.2-2(a)(2)

(2) A transferee shall, within 90 days from the date of transfer, file with the District Manager documentary evidence of the transfer and an application on a form approved by the Director for a license or permit, active or nonuse, for the grazing privileges based thereon. Failure to comply with these requirements may result in the loss of the qualifications of the base property transferred. Where, however, a transfer, or a different vesting in any manner, of a leasehold interest in land or water may result in interference with the stability of livestock operations or with proper range management, upon a finding to that effect by the District Manager, such land or water will lose its base property qualifications and grazing privileges based thereon will be denied.

§ 4115.2-2(b)

(b) Transfer of base property qualifications; limitations; consent of owner or encumbrancer; effect. (1) A licensee or permittee may request the transfer of the recognized qualifications of base property then owned or controlled by him to other property owned or controlled by him, or to property owned or controlled by another person or persons qualified in accordance with § 4111.1-1. An

application for approval of a transfer shall be filed with the District Manager on a form approved by the Director for land base or water base.

This case involves two different types of transfers: (1) the transfer of base property qualifications from secs. 26 and 27 to sec. 21; and (2) the transfer of grazing privileges from Ferrara to Thacker. The first transfer is governed by 43 CFR 4115.2-2(b) (1975). Under the terms of this section, a timely transfer of grazing privileges to other base property may be made only while the original base property is within the ownership or control of the licensee. Fillmore Ranches, supra; Charles Stewart, supra at 162. The Ferraras lost both ownership and control of their base property in December 1975 when they deeded this land to a third party. Therefore, the Ferraras may no longer transfer the grazing privileges to other base property. As the Ferraras had lost their grazing privileges under 43 CFR 4115.2-2(b), they had no privileges to transfer to Thacker under 43 CFR 4115.2-2(a)(2).

Also, 43 CFR 4115.2-2(b) (1975) clearly states that the application for transfer shall be on a form approved by the Director. Even if Ferrara had notified BLM prior to December 1, 1975, the date of the sale, oral notification to a BLM official and his notation on the 1976 grazing application would not be sufficient for compliance with the regulation.

[3] The Ferraras argue that they thought the transfer had been completed as grazing privileges were issued to Ferrara in 1976 and 1977. The Government is not estopped from denying the application to transfer because it erroneously issued grazing privileges to Ferrara in 1976 and 1977. Failure to apply the appropriate regulations in prior years is not authority to further disregard those regulations. Charles Stewart, supra.

The Ferraras urge that in accordance with "43 CFR 1853.9(b)" the decision below should not be set aside if it appears that it is reasonable and represents substantial compliance with the regulations. We find that the failure to file an application for transfer prior to the sale of their property does not represent substantial compliance with a regulation which requires that this be done.

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 reversed.

Anne Poindexter Lewis
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

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ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

It is most probable from the facts shown in this case that a proper application to transfer the base property qualifications was not timely filed with BLM in this case because of the death of the Ferraras' attorney in 1975. It is evident that the attorney was probably aware of the procedural requirements for applying for a transfer of the base property qualifications. Although the majority refers to Exhibit B, a letter to the attorney dated April 5, 1974, upon which the Ferraras greatly rely, to support their conclusion to this effect, I do not believe that exhibit supports the conclusion or the implications which the Ferraras would draw from it.

The statement quoted by the majority from that letter that privileges need not be transferred must be read in the entire context of the letter which states:

Here is the copy of the Dependent Property and Adjudication summary showing the base property production and the grazing privileges it supports. The privileges are attached to the entire 920 acres which produces 1009 AUMs. Only 500 AUMs of base property production is needed to support the 999 AUMs of Federal Range Qualifications. Also enclosed is a copy of the Dependent Property Record showing approximate areas of crop production used to calculate Mr. Ferrara's commensurability.

You do not need to transfer privileges. Rather, you need to decide what property produces 500 AUM's and write me a letter describing the property. I will adjust the Dependent Property Record to show what you want as base.

If you have any questions let me know.

The 920 acres referred to in the first paragraph were undoubtedly the W 1/2 of sec. 26 and sec. 27, which were the base lands, which with other lands were sold by the Ferraras in December 1975. The statement indicating there was no need to transfer privileges referred to the 920 acres. Exhibit B cannot be read as relating to sec. 21 or to any proposed transfer of privileges to that section. Furthermore, that letter was long prior to the Ferraras' conveyance of the property and reflects no knowledge that property would be conveyed.

It is important that in a subsequent letter from BLM personnel to the attorney, Exhibit C, a letter dated July 12, 1974, reference is made to a telephone conversation of July 10 and the letter states that requested "Transfer of Grazing Privileges" forms were enclosed. Thus, the record shows the attorney was sent the forms and also that

appellants may have signed such forms. The problem arises, however, because the transfer application forms were apparently never received by BLM.

These unfortunate circumstances cannot support the Administrative Law Judge's ruling in this case. His decision was based upon a ruling made by him from the bench. I cannot agree with his conclusions in fact or law. He found that there was adequate notice to BLM of a desire to transfer the privileges to sec. 21. The only support for this conclusion is the notation made on Exhibit 1 referring to the sale and that sec. 21 base remains. This notation does not support a finding that a request for a transfer was made. At most, it supports a finding that BLM then may have thought that sec. 21 was base property. However, as the record shows, it was not base property. There is too great a leap in logic to find that this manifested a request for a transfer or any decision by BLM to transfer the privileges. At least the Judge realized that a decision could not have been made by BLM on a request because of the need to decide whether sec. 21 had commensurability and his remand to BLM for such a determination. The need for such a determination, however, reflects the necessity for a timely application to transfer the privileges. Therefore, I agree with the interpretation and application of the regulations made by the majority, and concur with the reversal of the Judge's decision.

Joan B. Thompson
Administrative Judge

