

JAMES M. STOOS

IBLA 81-401

Decided September 10, 1981

Appeal from a decision of Administrative Law Judge Mesch dismissing appellant's appeal from the Judith area manager's decision rejecting appellant's grazing application. MT 060-80-1.

Affirmed.

1. Grazing Leases: Applications -- Grazing Leases: Preference Right Applicants

Where an applicant for a grazing lease has committed repeated, willful trespasses on the public lands resulting in the cancellation of the applicant's grazing preference, the area manager may properly reject an application to lease on the basis that it would not be in the best interest of proper range management to issue a lease to the applicant in preference over other qualified applicants for the same land.

APPEARANCES: James M. Stoos, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

James M. Stoos appeals from an order of Administrative Law Judge Robert W. Mesch, dated February 9, 1981, dismissing Stoos' appeal from a decision of the Judith area manager, Bureau of Land Management (BLM), Lewiston, Montana. By decision dated January 10, 1980, the Judith area manager had rejected appellant's application for grazing privileges finding that appellant was responsible for repeated, willful livestock trespasses:

1. The prior grazing permittee, in this case, yourself, is normally considered to have preference. However,

your grazing preference on these same public lands was cancelled because of your repeated willful livestock trespass violations. This is in accordance with 43 CFR 4170.1-1.

2. It is not in the best interest of proper range management for the public lands to issue a grazing lease to you because of your past violations of the terms and conditions of your previous grazing lease. This is in accordance with 43 CFR 4110.5(b).

A timely notice of appeal from this decision was filed on February 5, 1980. Pursuant to 43 CFR 4160.4, this appeal was heard by Administrative Law Judge Mesch. In his order of February 9, 1980, Judge Mesch provides information that is helpful to an understanding of the area manager's rather brief decision. On April 4, 1979, the Montana State Director issued a notice citing Stoos to appear before an Administrative Law Judge to show cause why his grazing preference 1/ should not be cancelled for repeated, willful grazing trespasses. A hearing was held on this matter, and a decision rendered on July 2, 1979, finding repeated, willful violations by appellant. Pursuant to 43 CFR 4170.1-1, the Administrative Law Judge cancelled appellant's grazing preference. 2/ At the time of this decision, July 2, 1979, appellant did not have a current grazing permit or lease. The decision notes that if appellant had held such a permit or lease, it would have been cancelled along with appellant's grazing preference. No appeal was taken from this July 2 decision.

Thereafter on November 19, 1979, appellant filed an application for grazing privileges, which application is at issue in the instant appeal. Two other applicants filed for the grazing privileges which appellant seeks. It does not appear from the record that any of the three applicants has superior preference rights to the lease. Appellant's lease of these lands ended in November 1978. The record does not reveal whether the lands at issue were leased at all during 1979.

As set forth above, appellant's application was rejected, because the area manager found that issuance of a lease to appellant would not be in the best interest of proper range management. The decision of the area manager cited 43 CFR 4110.5 in support. That regulation states:

When more than one qualified applicant applies for livestock grazing use of the same public land and/or where

1/ A grazing preference is the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee. 43 CFR 4100.0-5(o).

2/ The author of the July 2, 1979, decision is Administrative Law Judge Mesch. In this decision, Judge Mesch found four trespasses by appellant's livestock, the largest of which involved 90 cattle for an unspecified length of time during the period February through May 1977.

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. [Emphasis supplied.]

[1] On appeal, Stoos argues that the area manager incorrectly based his rejection of the subject application on the fact that Stoos had lost his grazing preference. While a grazing preference may grant one applicant certain rights over other qualified applicants, the failure to hold a grazing preference, appellant contends, is not in itself grounds for rejection of an otherwise qualified grazing application. With this contention of appellant, we agree. We feel, however, that appellant has misunderstood the area manager's decision.

In Mark X. Trask, 32 IBLA 395 (1977), we noted that only where conflicting applicants enjoy equal preference rights has the Board considered the factors set forth in 43 CFR 4110.5 as a basis for allocating grazing privileges. In stating that appellant's grazing preference was cancelled, the area manager was not offering this fact as an independent basis for rejection of appellant's application. Rather, the fact of cancellation was set forth to justify his use of the considerations appearing in 43 CFR 4110.5. Inasmuch as appellant's privately owned land is contiguous to the Federal lands at issue, appellant would normally enjoy a grazing preference. 43 CFR 4110.2-2. The fact of cancellation and the finding that leasing to appellant would not be in the best interest of proper range management were both necessary components of the area manager's decision.

In his statement of reasons, Stoos also charges that his application did not receive consideration by the area manager because of his prior record with BLM. It appears, however, from our reading of the record that appellant's application was considered by the area manager and simply rejected. Indeed, in the introductory paragraph of the area manager's decision of January 10, 1980, he writes, "I have considered your application dated November 19, 1979, for grazing privileges in Chouteau County * * *."

Finally, appellant argues that the area manager failed to indicate in what way the use of water for livestock entered into his decision to reject appellant's grazing application. As quoted above, the area manager could properly base a decision to allocate grazing privileges on "[p]roper range management and use of water for livestock." On the basis of the record before us, it does not appear that the use of water for livestock was a persuasive factor in the area manager's decision to reject appellant's application. Nor does it appear from appellant's statement of reasons that the award of grazing privileges to either of the two other applicants would be inconsistent with the proper use of water for livestock. We do not believe that the area manager's failure to discuss this consideration is sufficient to upset his decision.

Regulation 43 CFR 4170.1-1 provides that an authorized officer shall suspend the grazing use authorized under a grazing lease, in whole or in part, or shall cancel a grazing lease and grazing preference, in whole or in part, for repeated, willful violations by a lessee of section 4140.1(b)(1). This latter section prohibits a person from allowing livestock on lands without a permit or lease or in violation of the terms and conditions of a permit or lease, either by exceeding the number of livestock authorized, or by allowing livestock to be on these lands in an area or at a time different from that designated. Had appellant held a current lease at the time of the July 2, 1979, decision finding repeated, willful trespasses, these regulations would have provided ample authority for the cancellation of his lease. If repeated, willful trespasses will support cancellation of a lease, we find it logical that such trespasses will support a decision to reject an application to lease. On the basis of these trespasses, we believe the area manager could properly find that the issuance of a lease to appellant would not be in the best interest of proper range management where other qualified applicants were seeking grazing privileges on the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Mesch is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

