

RUSKIN LINES, JR.
v.
BUREAU OF LAND MANAGEMENT

IBLA 82-558

Decided August 10, 1982

Appeal from decision of Administrative Law Judge Michael L. Morehouse dismissing appeal from decision of Acting District Manager, Safford District, Bureau of Land Management, reducing authorized grazing in the Turtle Mountain Allotment. AZ-040-81-5.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Appeals--Rules of Practice: Appeals: Burden of Proof--Taylor Grazing Act: Generally

An appeal relating to grazing administration is properly dismissed by an Administrative Law Judge where the only issues in dispute are clearly defined in the regulations in 43 CFR Subpart 4100, which were correctly followed and applied by the Bureau of Land Management. Implementation of the Taylor Grazing Act of 1934 is committed to the discretion of the Secretary of the Interior. A decision reached in the exercise of administrative discretion relating to the adjudication of grazing privileges may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, or where it is shown that it does not represent substantial compliance with the grazing regulations. The burden is upon the appellant to show by substantial evidence that a decision is improper or unreasonable.

APPEARANCES: Ruskin Lines, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ruskin Lines, Jr., appeals from the decision of Administrative Law Judge Michael L. Morehouse dismissing his appeal from the decision of the Acting District Manager, Arizona State Office, Bureau of Land Management (BLM), Safford District, reducing his grazing preference in the Turtle Mountain Allotment No. 4618 from 3,199 Animal Unit Months (AUM's) to 2,066 AUM's.

On September 2, 1980, appellant received a proposed decision stating that his grazing use as of March 1, 1981, on the Turtle Mountain Allotment No. 4618 would be as follows:

<u>Animal Units Number--Kind</u>	<u>Period(s) of Use From -- To</u>	<u>Percent of Public Use</u>	<u>Public AUM's</u>
205 cattle/horses	03/01 -- 02/28	82	2,018

BLM determined that a reduction from the current grazing preference of 3,199 AUM's was appropriate because it exceeded the livestock grazing capacity on the Turtle Mountain Allotment. On September 11, 1980, appellant timely filed a protest of the proposed decision.

On March 30, 1981, BLM rendered a final decision which reduced the grazing use on the Turtle Mountain Allotment No. 4618 to 2,066 AUM's effective March 1, 1986. The scheduled reduction will occur over a 5-year period with effective dates of adjustments as follows:

<u>Effective Date</u>	<u>Animal Units/Kind</u>		<u>Percent Federal Range</u>	<u>Public Land AUM's</u>	<u>Suspended Total AUM's</u>	<u>Preference AUM's</u>
03-01-82	265 cattle/horses	88	2,798	3,180	401	
03-01-84	235 cattle/horses	86	2,425	2,820	774	
03-01-86	205 cattle/horses	84	2,066	2,460	1,133	

On April 23, 1981, Ruskin Lines filed an appeal with BLM comprised of five counts. On June 1, 1981, State Director, BLM, recommended the case for a hearing. On June 15, 1981, appellant filed with BLM an amended notice of appeal which deleted the last three of the five original counts. In count one, appellant seeks damages alleging that BLM issued overlapping patents for land. ^{1/} The second count states that BLM's practice of fixing grazing fees for a cow and calf unit for year-long grazing at the same rate as for yearlings that weigh half as much as the cow and calf unit and consume approximately one-half as much forage as the cow and calf unit is contrary to law.

The hearing was held on December 17, 1981. On February 10, 1982, Judge Morehouse issued a decision granting the Government's motion to dismiss

^{1/} Appellant alleges that the overlapping patents cover the land within the SW 1/4 of the SE 1/4 of sec. 27, T. 4 S., R. 28 E., Gila and Salt River meridian, Arizona. He maintains that the first patent was for a 5-acre millsite and that the second patent which includes the millsite was incorrectly issued to his predecessor in interest, George Hill, creating a defect in his title to the land in question.

the appeal, concluding that the issues raised by appellant were outside the scope of the BLM decision and not properly before him. With regard to the title issue raised by appellant, Judge Morehouse found that it was not raised within the BLM decision, and he was without jurisdiction to consider it. Concerning the fee issue, Judge Morehouse found the fees are charged pursuant to the regulation, and he is bound by them. We agree.

On appeal to the Board, appellant reasserts the same issues considered by Judge Morehouse at the hearing, that "the action of BLM in fixing the grazing fees "and" the regulation regarding the fixing of fees for the grazing of weaners, and or yearlings is arbitrary, capricious, and contrary to law."

[1] The applicable regulation 43 CFR 4130.5-1(d) states:

(d) The full fee shall be charged for each paying animal unit, which is defined as each animal six (6) months of age or over at the time of entering public lands, for all weaned animals regardless of age, and for such animals as will become twelve (12) months of age during the authorized period of use. No charge will be made for animals under six (6) months of age at the time of entering public lands, that are the natural progeny of animals upon which fees are paid, provided they will not become twelve (12) months of age during the authorized period of use, or for progeny born during that period.

In Bert N. Smith v. Bureau of Land Management, 48 IBLA 385 (1980), we stated:

Implementation of the Taylor Grazing Act of June 24, 1934, as amended, 43 U.S.C. § 315-315f, 315h-315m, and 315n (1976), is committed to the discretion of the Secretary of the Interior. Section 2 of the Act specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *" (43 U.S.C. § 315a). * * *

* * * * *

fn. 1 (continued)

Judge Morehouse determined that even if the issue of overlapping patents had been addressed in the BLM decision, he was without jurisdiction to consider it. He quoted the Court of Appeals which held in Pan American Petroleum Corp. v. Pierson, 284 F.2d 649, 655 (10th Cir. 1960), that "the courts have repeatedly held that [the Secretary] is without power to annul a patent once it was issued." The Board has consistently held that "the effect of the issuance of a legal patent is to transfer legal title from the United States and to remove the land from the jurisdiction of the Department of the Interior." Jimmy Lorn Gibson, 59 IBLA 170 (1981); Dorothy L. Standridge, 55 IBLA 131 (1981).

* * * It is an oft-stated truism that the Secretary of the Interior has the right to rely on the conclusions of the Department's technical experts. See, e.g., Exxon Corp., U.S.A., 15 IBLA 345, 354 (1974). Where, as here, a decision is made within the field of expertise of the deciding official, the Board has consistently held that such a decision can be regarded as arbitrary and capricious only where it is not supportable on any rational basis. Colvin Cattle Co., 39 IBLA 176 (1979); Bert N. Smith, 36 IBLA 47, 50 (1978); United States v. Maher, 5 IBLA 209, 218, 79 I.D. 109, 113-14 (1972). See also Dunlop v. Bachowski, 421 U.S. 560, 573 (1975). The burden is upon the appellant to show by substantial evidence that a decision is improper or that he has not been dealt with fairly. Colvin Cattle Co., *supra*; Bert N. Smith, *supra*; John T. Murtha, 19 IBLA 97, 101 (1975); Claudio Ramirez, 14 IBLA 125, 127 (1973).

Moreover, as regards grazing, the applicable regulation, 43 CFR 4.478(b), expressly states that "[n]o 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 4100 of this title." * * * Appellants bear a heavy burden of showing that the proposed plan was unreasonable; this, they did not do.

48 IBLA at 389, 393; see Bureau of Land Management v. Wagon Wheel Ranch, 62 IBLA 55 (1982). Appellant has not shown any evidence why or how BLM's action in fixing the fees, or that the regulation is "arbitrary, capricious, and contrary to law." From the record, it is clear that BLM did comply with the regulation in fixing the grazing fees. The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law and are binding on the Department. Altex Oil Corp., 61 IBLA 270 (1982); Ben M. Powell III, 59 IBLA 146 (1981). Thus, we find appellant's allegations without merit, and that the appeal was properly dismissed.

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 affirmed.

Douglas E. Henriques
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

I am reluctantly constrained to concur with the affirmance of the dismissal by Judge Morehouse of the instant appeal. My reluctance is not occasioned by a feeling that the actions of either Judge Morehouse or the Board are erroneous. I, too, for reasons which I will set forth, believe we are bound to enforce the regulation involved herein, 43 CFR 4130.5-1(d). My problem with this case is that I think that appellant has shown that the regulation fixing the fee for weaners and yearlings has scant logical or legal support buttressing it.

First of all, everyone agrees that weaners and yearlings do not consume as much forage as would a mature animal. The District Manager testified that a weaner or a light yearling would consume approximately 60 percent of the forage consumed by a mature animal, whereas a heavy yearling would consume 80 percent of the forage (Tr. 14). Indeed, in recognition of this fact, BLM applies a conversion factor to allow full utilization of the land's grazing capacity. In other words, if a specific allotment has a capacity of 100 AUM's, a livestock operator could run either 100 head of mature cattle for one month or 166 head of light yearlings for one month. Both groups would be expected to consume the same amount of forage, but the group of yearlings would pay fees 66 percent higher than the mature cattle. These fees are thus based on the number of animals grazing rather than the forage consumed. This treatment of yearlings and weaners is inconsistent with the handling of sheep and goats.

Thus, because of the recognized fact that sheep and goats do not consume as much per animal as a cow or horse, not only is a conversion factor of 5 applied to AUM grazing capacity in determining how many head of sheep may be run, but the billing rate is also adjusted accordingly. In other words, if an allotment has a capacity of 100 AUM's, 500 sheep can be run for 1 month or 100 cattle. In this instance, the charge to the rancher, however, is the same. No compelling reason has been offered to justify the disparate treatment of sheep and yearlings.

If the difference in forage consumption between a yearling and a mature cow is sufficiently definite to permit use of a conversion factor in determining the number of animals that may be grazed in an allotment, it should also be sufficiently definite to permit billing to occur on the basis of the amount of forage which the animal consumed. The District Manager recognized that there was a logical anomaly in the treatment of yearlings and weaners and sought to justify it on the grounds that this was the way private land owners generally charge (Tr. 15-16). While I do not think that this factor is totally irrelevant, I also do not feel that it can be controlling here.

While the Government is normally required to charge fair market value for any use of the public lands by private parties, section 6(a) of the Public Rangelands Improvement Act, Act of October 25, 1978, 92 Stat. 1806, 43 U.S.C.A. § 1905 (West Supp. 1978), directs that any grazing fee charged between 1979 through 1985 shall represent "the economic value of the use of the land to the user." Thus, in grazing fee determinations, the fair market

value which private citizens charge does not necessarily represent the fee that the Government is mandated to assess. While normally the fact that fees were assessed by private parties would persuade me as to the correctness of a Government fee assessment for the same use, the imposition of grazing fees must follow the Congressional direction.

Viewed in this light, I am less than convinced that a fee structure which charges the same fee for a yearling as for a mature bull, despite the recognized difference in forage consumption, "represents the economic value of the use of the land to the user." This fee structure, however, has been established by regulation. While I believe that a regulation directly contrary to a statute is of no force or effect (see Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981)), I believe that where it is not free from all doubt that a regulation is contrary to a statute, this Board is required to resolve such doubts in favor of the regulation's validity. The authority of the Department to issue regulations must embrace the authority to issue foolish or unwise ones. Thus, I agree that we are bound by the instant regulation and I concur in the Board's affirmation of Judge Morehouse's decision.

James L. Burski
Administrative Judge

