

BUREAU OF LAND MANAGEMENT

v.

ALFREDO R. MAEZ

IBLA 82-595

Decided September 13, 1982

Appeal from decision of Administrative Law Judge Michael L. Morehouse allocating grazing privileges. NM 10-80-2.

Affirmed.

1. Appeals -- Rules of Practice: Appeals: Standing to Appeal -- Grazing Permits and Licenses: Appeals

Where the Bureau of Land Management authorized officer issues a decision determining the grazing privileges of two conflicting applicants which is adverse to one of the applicants, and that applicant appeals to an Administrative Law Judge and receives a favorable decision, the failure of the other applicant to participate in the proceedings before the Administrative Law Judge does not foreclose that applicant from appealing that decision to the Board of Land Appeals, as that applicant is a party to a case adversely affected by a decision of an Administrative Law Judge within the meaning of 43 CFR 4.410.

2. 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 the Federal Land Policy and Management Act,

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. However, where 43 U.S.C. § 1752(c) (1976) is not applicable, allocation of grazing privileges pursuant to 43 CFR 4110.5 is proper.

APPEARANCES: John S. Thal, Esq., Albuquerque, New Mexico, for Tixier Properties, Inc.; Eugenio S. Mathis, Esq., Las Vegas, New Mexico, for Alfredo R. Maez.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Tixier Properties, Inc. (Tixier), appeals the decision of Administrative Law Judge Michael L. Morehouse styled Alfredo R. Maez v. Bureau of Land Management, dated February 3, 1982. The decision that was in issue in the proceeding before the Administrative Law Judge was the Bureau of Land Management (BLM), Albuquerque, New Mexico, District Manager's decision, dated October 17, 1979, which had divided grazing privileges in sec. 16, T. 13 N., R. 25 E., New Mexico principal meridian, between Maez and Tixier. Acting in accordance with 43 CFR 4110.5, the District Manager stated:

Alfredo R. Maez will be leased the acreage basically on top of the mesa that is directly adjacent to his private property. This is legally described:

T. 13 N., R. 25 E., NMPM

Sec. 16: E 1/2 NE 1/4 NE 1/4
 E 1/2 SE 1/4 NE 1/4
 E 1/2 NE 1/4 SE 1/4
 NW 1/4 SE 1/4 SE 1/4
 N 1/2 SE 1/4 SE 1/4
 SE 1/4 SE 1/4 SE 1/4

Containing 100 acres in San Miguel County, New Mexico. [1]

Mr. Maez will be responsible in controlling his cattle to the top of the mesa and east of the fence in the extreme SE corner.

Tixier Properties will be leased the remainder of the section and will be responsible for all existing fencing, and controlling their cattle within the fence and below the topographical boundary of the mesa.

1/ We note that the land description is ambiguous in that it describes the NW 1/4 SE 1/4 SE 1/4 and the N 1/2 SE 1/4 SE 1/4. The NW 1/4 SE 1/4 SE 1/4 is part of the N 1/2 SE 1/4 SE 1/4.

The above decision is in accordance with the following:

1. 43 CFR 4110.5 which provides for allocation of grazing use between conflicting applicants on the following factors.
 - a. Historical use.
 - b. Public ingress and egress.
 - c. Topography.

Maez filed a timely appeal of the District Manager's decision which precipitated the proceeding before the Administrative Law Judge. At the hearing held on January 15, 1981, Tixier did not make an appearance, although it was notified of the hearing.

Sec. 16 was originally a State school land selection and was managed by the State, although the section was not formally conveyed to the State until 1961. Maez or his father had a State grazing lease for 480 acres from 1949 through 1968 (Tr. 63-66). Sec. 16 was reconveyed to the United States by a relinquishment deed in 1965, subject to Maez's lease. In 1966, the section was withdrawn in connection with the Conchas Dam and Reservoir Project (Exh. G-2). Surface jurisdiction over sec. 16 accordingly was transferred to the U.S. Army Corps of Engineers (Corps). Appellant continued to use the land for grazing and in 1973 he filed a grazing application with BLM (Tr. 20). By letter dated November 19, 1973, BLM inquired of the Corps whether it had any objection to BLM issuing a grazing lease for the land (Tr. 20; Exh. G-3). The Corps responded that it had surface jurisdiction of the land and that grazing authorization would be made by the Corps (Exh. G-4). BLM informed Maez by letter dated December 17, 1973, that the Corps was responsible for surface management of the land, and that he should submit his application for a grazing lease to the Corps (Exh. G-5).

In 1975, Maez sought to lease the land from the Corps but his "bid" was rejected (Tr. 68). In 1977 Tixier applied to BLM for a grazing lease for sec. 16 (Exh. G-7). On June 27, 1977, BLM issued a lease to Tixier for sec. 16 effective July 1, 1977, to February 28, 1978 (Exh. G-12). No mention was made concerning surface management of the land by the Corps. Tixier again applied for the same land, and on March 1, 1978, was granted a lease from that date to February 28, 1979 (Exh. G-14). Both Maez and Tixier applied for a lease for grazing year 1979 which resulted in the October 17, 1979, decision of the BLM, District Manager (Tr. 6).

Following the hearing in January 1981, the Administrative Law Judge issued an "Order of Remand" on June 4, 1981, which provided:

In the posthearing briefs, both sides recognized that there was a serious unresolved question regarding Tixier's qualifications to hold a grazing lease, and felt that the case should be remanded to BLM to determine this question. I believe that this is an extremely important issue and therefore the request of the

parties is granted and the case is remanded to the Bureau for determination of this issue. Obviously, if Tixier did not meet the qualifications of a lessee at the time the lease was issued, then the decision of the District Manager was in error. In addition, there is the question as to whether or not BLM had authority to issue leases to Tixier in 1977 and 1978, at which time the Corps of Engineers had official authority to manage the land. I do not decide how this issue would affect the application of Section 1752(c) [of 43 U.S.C.] or any of the other issues raised in the posthearing briefs because of the decision to remand. However, the parties should keep me advised as to the status of this matter; and I will render a decision on all unresolved issues should it be necessary.

Following the receipt of evidence that Tixier was a qualified lessee, the Administrative Law Judge issued his February 3, 1982, decision. Therein, he concluded:

As stated above, the Corps had the responsibility of managing section 16 from approximately 1965 until 1978. A 1977 grazing license was issued to Tixier by BLM apparently without any authority and after Tixier applied for a 1978 license, BLM contacted the Corps and was given permission to issue permits. Accordingly, a permit was issued Tixier for 1978. It is my view that because BLM was without technical authority to issue a permit at the time Tixier applied in 1978, that it is not mandatory that Tixier be granted first priority pursuant to 43 U.S.C. 1752(c) when both Tixier and appellant applied for a 1979 license. That factor, together with all the other factors in this case, leads me to the conclusion that the allocation of grazing use as between appellant and Tixier should be governed by 43 CFR 4110.5. Taking those specific regulatory factors into consideration together with all the other evidence in this case, I conclude that a fair division of section 16 would be to grant appellant grazing privileges on that part of the section lying east of the north-south fence indicated on Ex. G-20 and Tixier that part of the section that lies to the west of the fence. The evidence shows that appellant runs a cow-calf operation and has grazed section 16 for many years prior to 1975, whereas Tixier never has grazed the section even when he had a license.

Tixier filed a notice of appeal from the Administrative Law Judge's decision on March 19, 1982.

The initial questions in this case are procedural. Both are raised by Maez in his response to Tixier's appeal. Maez claims that the appeal was untimely, and, in the alternative, that Tixier is not a proper appellant.

The first question is disposed of easily. Tixier established that its appeal was filed within 30 days of its receipt of a copy of the Administrative Law Judge's decision. See 43 CFR 4.411(a); see also Exh. A attached to appellant's Reply Brief. Tixier was not on the list for distribution of

the Administrative Law Judge's decision, but the decision was forwarded to Tixier by the Acting Taos Resource Area Manager and received by Tixier on February 22, 1982. The appeal was filed March 19, 1982.

[1] The second question raised by Maez, however, is more difficult. The District Manager determined the grazing privileges of Maez and Tixier. Tixier did not consider that decision adverse to its interest. Maez did and appealed. A copy of a certified mail return receipt card in the file shows that Tixier received notice of the hearing scheduled for January 15, 1981, on December 9, 1980.

Tixier did not participate in the proceedings before the Administrative Law Judge (Tr. 5-6). Tixier's explanation for not appearing is that it did not consider that its interests were adversely affected by the District Manager's decision. Tixier alleges, however, that it made "it clear to BLM that if the decision of the Administrative Law Judge was adverse to its interests, it would expect the opportunity to intervene" (Appellant's statement of reasons at 2).

Tixier argues that under 43 CFR 4.470(b) only an applicant who fails to appeal the final decision of the authorized officer within the period prescribed in the decision is barred from challenging the matters adjudicated in that decision. Tixier points out that because it never considered the final decision of the District Manager to be adverse to its interest it was not required to appeal.

There can be no dispute that Tixier was satisfied with the District Manager's decision and, therefore, was not required to appeal that decision. However, 43 CFR 4.470 relates to appeals to Administrative Law Judges from grazing determinations by BLM. That regulation refers to persons adversely affected by a BLM determination. Tixier was not adversely affected, consequently, 43 CFR 4.470 did not apply to its situation.

The regulation for consideration is 43 CFR 4.410 which governs appeals to this Board:

Except as otherwise provided in Group 2400 of Chapter II of this title, except to the extent that decisions of Bureau of Land Management officers must first be appealed to an administrative law judge under § 4.470 and Part 4100 of this title, and except where a decision has been approved by the Secretary, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge, shall have a right to appeal to the Board. [Emphasis added.]

The term "party" has various meanings depending on the context in which it is used and the nature of the subject matter. In this case Tixier was one of two applicants whose grazing privileges were adjudicated by the District Manager and the Administrative Law Judge. As such, it was entitled to participate in the proceedings below. Tixier had an interest in the proceedings

before the Administrative Law Judge, and there was the possibility that it would be adversely affected by the decision. The mere failure to participate in such a situation cannot deprive it of its status as a "party." We find that Tixier is a "party to a case" for purposes of 43 CFR 4.410.

Tixier also has been "adversely affected by a decision of an * * * administrative law judge" within the meaning of 43 CFR 4.410. Tixier was not adversely affected by the District Manager's decision, and although entitled, it was not obligated to participate in the proceeding before the Administrative Law Judge, even though it clearly would have been advantageous for Tixier to do so. The Administrative Law Judge's decision altered the District Manager's decision to the detriment of Tixier. Tixier is now seeking to have the first decision which has been adverse to its interest reviewed within the Department. We find that Tixier is a "party to a case who is adversely affected by a decision of an * * * administrative law judge," and conclude that Tixier is a proper appellant.

[2] Having determined that Tixier is a proper appellant, we will consider its arguments.

In its statement of reasons for appeal Tixier argues that 43 U.S.C. § 1752(c) (1976) 2/ mandates that Tixier be given a preference on sec. 16 in its entirety for the 1979 lease year and subsequent lease years; that Tixier has met all of the qualifications necessary to be given this preference; and that consistent with prior Board of Land Appeals decisions, as well as the legislative history of 43 U.S.C. § 1752(c) (1976), Tixier must be given this priority. Tixier cites Earl W. Platt, 43 IBLA 41, 48 (1979), wherein we stated:

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

2/ Section 402(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1752(c) (1976), 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."

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.

The statute, 43 U.S.C. § 1752(c) (1976), is not applicable in this case. Upon withdrawal of sec. 16 by Public Land Order No. 4088, September 23, 1966, surface management resided in the Corps, and this fact was recognized by BLM when it referred Maez to the Corps in 1973 to obtain a grazing lease. However, in 1977 and 1978 BLM issued grazing leases for sec. 16 to Tixier. The BLM area manager for the resource area where the land is located explained at the hearing:

Then the following year [1978] there was some concern on the part of our staff and we weren't really sure whether we wanted to go with conditions the way they were so we contacted the Corps of Engineers again and obtained from them and filed a permit from the Corps of Engineers that we could, in fact, issue permits on that land.

(Tr. 15).

The document referred to by the area manager was dated July 11, 1978. It authorized BLM to take over the surface grazing management of sec. 16 "beginning 15 July, 1978, and ending 14 July, 1983" (Exh. G-13).

Thus, until July 15, 1978, BLM was without authority to act independently to issue a grazing lease for sec. 16. BLM issued Tixier's grazing leases on June 22, 1977, and March 1, 1978. At that time the Corps apparently still retained the authority which BLM had recognized in 1973. We are not persuaded by Tixier's argument that only BLM is authorized to issue grazing leases to Tixier. At a minimum the record indicates confusion on the part of BLM concerning its authority to issue grazing leases for sec. 16. However, such confusion cannot inure to the benefit of Tixier. Regardless of whether BLM retained authority to issue grazing leases as argued by Tixier, the land was withdrawn for the use of the Corps. Therefore, BLM should have consulted with the Corps and secured the approval of the Corps for authorizing an activity which had the potential of interfering with use of the land by the Corps. In this case evidence of the securing of such approval is exhibit G-13, which indicates that approval postdates the 1978 lease.

Therefore, we cannot find that the leases to Tixier established any priority which triggers 43 U.S.C. § 1752(c) (1976). Since Tixier had no recognizable priority, the allocation of grazing privileges by the Administrative Law Judge pursuant to 43 CFR 4110.5 was proper.

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.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

