

THE CORPORATION OF THE GREAT SOUTHWEST

IBLA 81-226

Decided December 28, 1982

Appeal from decision Idaho 6-80-1 of Administrative Law Judge Michael L. Morehouse affirming a decision of the Area Manager, Cottonwood Resource Area, partially rejecting a grazing lease application and granting a conflicting applicant's grazing lease application to the extent of the conflict between the two applications.

Affirmed.

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

Where two conflicting applicants for a grazing lease are preference right applicants, and neither is the holder of an expiring lease, a decision awarding a grazing lease to one applicant and rejecting a conflicting application, rendered in accordance with the governing regulatory standard (43 CFR 4110.5), will not be overturned in the absence of convincing reasons that the award is not warranted.

APPEARANCES: Thomas W. Callery, Esq., Lewiston, Idaho, for appellant; Robert S. Burr, Esq., Office of the Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Corporation of the Great Southwest appeals from a decision of Administrative Law Judge Michael L. Morehouse, dated December 2, 1980, affirming an October 16, 1979, decision of the Area Manager, Bureau of Land Management (BLM), Cottonwood Resource Area, rejecting its grazing lease application as to certain lands and granting a grazing lease application of the same lands to conflicting applicant Harold N. Heitstuman. 1/

1/ Harold and Wayne Heitstuman both filed a grazing application and the Area Manager awarded the lease to the land in question to both Harold and Wayne Heitstuman. However, only Harold Heitstuman was a party (intervenor) in the proceeding before the Administrative Law Judge.

The lands in controversy totaling 120 acres are described as the SW 1/4 NE 1/4, W 1/2 SE 1/4, sec. 5, T. 31 N., R. 4 W., B.M., and are located in the Craig Mountain region of Nez Perce County, Idaho. Heitstuman controls land to the north and east of this parcel and appellant owns land to the south and west of the parcel.

Appellant filed an application for a grazing lease and an amendment to this application with BLM on November 6, 1978, and November 21, 1978, respectively. On November 21, 1978, and February 16, 1979, Harold and Wayne Heitstuman filed an application which conflicted in part with appellant's application. In his decision dated October 16, 1979, the Area Manager rejected appellant's application as to certain lands in conflict with the Heitstumans' application and awarded the lease of these lands to the Heitstumans. The Area Manager gave the following reasons for his decision:

In accordance with 43 CFR 4110.5 when more than one qualified applicant applies for livestock grazing use of the same public land and/or where 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.
- (b) Proper range management and use of water for livestock.
- (c) General needs of the applicant's 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.

Rationale for the decision is as follows:

1. The topography of Corral Creek is very steep and rugged. The steep slopes and rock outcrops restricts grazing in this area. The majority of the public lands in this area are used by livestock from the top along ridges or from the bottom.

2. The SW 1/4 NE 1/4 and W 1/2 SE 1/4 located in Section 5, T. 31 N., R. 4 W., B.M. have historically been used by livestock from the top along with private lands controlled by the Heitstuman's. A drift fence located near the south boundary of this parcel includes these public lands in a pasture controlled by the Heitstuman's. This portion of public land receives only light livestock use along the east side adjacent to the Heitstuman's private lands because of the excessively steep topography on the west side. Past use of this area indicates that livestock do not drift up the steep slopes, and therefore the Corporation of the Great Southwest could not utilize this public land.

* * * * *

4. It is estimated that approximately 80% of the public lands applied for are unsuitable for livestock grazing. Slopes in excess of 70% are common, rock outcrops, dense timber and brush stringers restrict livestock use and act as barriers. Because of the above stated facts forage allocation for livestock use will be minimal and no forage will be allocated on unsuitable range.

The two points of the Corporation of the Great Southwest appeal have been rejected. If the public lands in conflict were leased to the Corporation it would not help with their access problems, they would still have to cross the Heitstumans' private lands to a public road.

The fence located in Sections 4 and 5 of T. 31 N., R. 4 W., B.M. is located on the Heitstumans' private lands. The drift fence located near the south boundary of Section 5, of T. 31 N., R. 4 W., B.M. which connects into the above fence prevents the Heitstumans' cattle from trespassing on adjacent private lands. The steep topography of T. 31 N., R. 4 W., B.M. Section 5, W 1/2 SE 1/4 and SW 1/4 NE 1/4 prevents cattle from significantly drifting down slope to adjacent public or private lands. The construction of short drift fences will prevent this if unauthorized use occurs in the future. The only portion of public land within this 120 acres which is suitable for grazing is located adjacent [to] the Heitstumans' private land near the top of the ridge. If this portion of public land were leased to the Corporation of the Great Southwest it would encourage unauthorized use of cattle on the Heitstumans' private lands unless additional pasture fences were constructed.

* * * * *

Appellant requested a hearing which was held before Judge Morehouse on June 16, 1980, in Moscow, Idaho. Harold Heitstuman appeared as intervenor. On December 2, 1980, Judge Morehouse issued his decision affirming the Area Manager's decision to lease the parcel to the Heitstumans. In his decision the Judge summarized the pertinent facts of the case and gave the reasons for his decision as follows:

The area is generally known as the Craig Mountain Area. There is a high plateau of approximately 5,000 feet to the east which is controlled by Mr. Heitstuman which drops off sharply into steep canyonlands to the west into the lands controlled by the Corporation. Only eight to ten acres of the parcel in question can be used for cattle forage (see area marked "Big Pine" on Ex. G-1) since the west side of the parcel has slopes that approach 75 to 80 degrees. Heitstuman controls land directly to the east and north of the parcel and he and his predecessors in interest have made minimal use since 1968 of the small portion previously mentioned for horse and cattle forage. The remaining area of the parcel is suitable only for sheep. There is water at ZaZa Springs approximately one-half mile northeast of the parcel on Heitstuman land.

The land owned by the Corporation is basically winter range; summer range being in the plateau area. The Corporation's only summer range consists of approximately 300 acres directly to the south of the parcel in question which is inadequate for summer requirements and it is necessary to transport cattle approximately 150 miles to another ranch for summer grazing. Appellant estimates that if the 120-acre parcel were leased to the Corporation that the 19 AUMs which they presently graze on the 300-acre deeded parcel to the south would be increased by 6 AUMs plus one bull. The Corporation also has deeded land directly to the west of the parcel in question but they concede that there is no access to the disputed parcel from the west because of the steep slopes. Appellant also contends that historical use prior to 1968 has not been properly established by BLM and that there is a possibility of Heitstuman cattle being in trespass on its land if they drift to the south.

The only evidence in this record concerning historical use is that the parcel in question has been leased since at least 1968 by Heitstuman and his predecessors in interest. There is no evidence that the parcel has ever been leased by appellant or its predecessors in interest. The Corporation estimates that lease of this parcel would increase its summer range AUMs by 6. However, the evidence shows that the area of the parcel in question and the Corporation's 300-acre deeded land to the south is interspersed by deep east-west breaks and it is at least Heitstuman's opinion that the two areas could only be properly grazed in conjunction with each other if the Corporation ran sheep. In the past, the Corporation has had as many as 500 head of cattle and it is obvious that the leasehold acquisition of this parcel would not begin to solve range requirements.

The grazing regulations in 43 CFR Subchapter D give the authorized officer, in this case the Area Manager, broad authority to regulate grazing within his district. It is also well settled that a decision involving the exercise of administrative discretion is valid unless it can be shown that under the particular circumstances it is arbitrary and capricious. United States v. Maher, 5 IBLA 209 (1972). The burden is on the appellant to show by a preponderance of the evidence that under the circumstances the decision complained of is arbitrary and unreasonable. This appellant has failed to do.

On appeal appellant contends that Judge Morehouse's decision should be reversed because (1) intervenor has not demonstrated a need for the public land in dispute and thus is not a preference right applicant as to that land and appellant as the only preference right applicant is automatically entitled to the award of the grazing lease and (2) intervenor's month-to-month tenancy constitutes insufficient control of his base land for him to be considered a preference right applicant in light of the purpose of the Taylor Grazing Act.

In its response to the statement of reasons, BLM pointed out that historical use of Federal land by livestock operations is one of the major elements in issuing a lease under the Taylor Grazing Act, and that of the two

competing applicants for the grazing use, only the intervenor can claim historical use of these 120 acres. As for appellant's need for this parcel, BLM contends that 120 acres of Federal range, together with the private land the corporation has on the plateau and to the east of this public land, would not solve appellant's summer range requirements. BLM contends that the use of this land in the past by the intervenor and his predecessors-in-interest and its integration into the grazing operation confirm the need for this land by the intervenor. BLM asserts that the intervenor's lease does give him sufficient control of his base land for him to be considered a preference applicant.

[1] We begin our analysis of these arguments with a statement of the scope of our review of BLM decisions adjudicating grazing leases. Because of the variable nature of range conditions and livestock operations, it is not feasible for statutes or regulations to be written for application in literal and dispositive fashion to resolve grazing lease application conflicts. Intelligent decisionmaking requires that the grazing official knowledgeable about local conditions exercise broad discretion in the adjudicatory process.

A decision awarding a grazing lease to one applicant and rejecting a conflicting application, rendered in accordance with the governing regulatory standard, will not be overturned in the absence of convincing reasons that the award is not warranted. See John Rattray, 36 IBLA 282 (1978). No such reasons have been shown that would warrant the substitution of our judgment for that of the Area Manager and the Administrative Law Judge. John Rattray, *supra*; Doyr Cornelison, 24 IBLA 155 (1976). An appellant must show that the official's decision was arbitrary or capricious, or without a rational basis, or inequitable. John Rattray, *supra*; see also Carl and Lyle Christensen, 16 IBLA 207 (1974); Claudio Ramirez, 14 IBLA 125 (1973).

Section 15 of the Taylor Grazing Act, 43 U.S.C. § 315(m) (1976), which establishes base property preference for lands outside grazing districts, 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." In order to qualify for grazing use on the public lands, 43 CFR 4110.1 requires, inter alia, that an applicant be engaged in the livestock business, and own or control land or water base property. Regarding base property, 43 CFR 4110.2-1(a)(1) provides in part that the authorized officer shall find land owned or controlled by the applicant to be base property if it is contiguous land, used in conjunction with a livestock operation which utilizes public lands outside a grazing district.

Appellant contends that the intervenor is not a qualified preference right applicant for two reasons. First, appellant refers to the Taylor Grazing Act, 43 U.S.C. § 315m (1976), which grants preference to lawful occupants of contiguous lands to the "extent necessary to permit proper use of such contiguous lands." (Emphasis added.) Appellant contends that intervenor does not qualify as a preference right applicant under 43 U.S.C. § 315m (1976), because he has not demonstrated a need for the land in dispute. Appellant points out that it needs the land in dispute as summer range to complement its base property which consists of basically winter range (Tr. 94-95, 108) and therefore qualifies as a preference right applicant under the statute. We agree that appellant is a preference right applicant.

We find, however, that intervenor is also a preference right applicant. Intervenor has shown a need for the lands based on the fact that these lands have been used in the past by the intervenor and his predecessors in interest in connection with the grazing operations on the property now controlled by the intervenor. Next, appellant asserts that the intervenor is not a preference right applicant because he leases the base property on a month-to-month basis pending litigation and does not have sufficient control over the property. ^{2/} Neither the Taylor Grazing Act, *supra*, nor the regulations issued pursuant to it, specify any requirements relating to the duration of the lease. ^{3/} For a section 15 lease, the base property is contiguous land, and the intervenor has control of land contiguous to this parcel. Intervenor testified that he has a letter of intent that when the litigation is disposed of, he will be granted a 5-year lease (Tr. 120). As long as intervenor retains control of the base property, he is a preference right applicant. Cf. Mark X. Trask, 32 IBLA 395 (1977).

Since both the appellant and intervenor are preference right applicants, and neither is the holder of an expiring lease, 43 CFR 4110.5, the regulation dealing with the adjudication of conflicting applicants for a grazing lease, is applicable. Bureau of Land Management v. Maez, 67 IBLA 89 (1982). ^{4/} That regulation, as previously cited in the Area Manager's decision, sets forth the criteria for determining the apportionment of lands between conflicting applicants and reads in pertinent part:

§ 4110.5 Conflicting applications. When more than one qualified applicant applies for livestock grazing use of the same public land * * *, the authorized officer may allocate grazing

^{2/} Also, appellant asserts that intervenor testified at the hearing that the base property which he leases is involved in litigation between the owner of the property and a previous lessee (Tr. 120). Appellant points out that the Taylor Grazing Act provides in its preamble that among its purposes are orderly use of the public grazing land and the stabilization of the livestock industry. Appellant asserts that granting preference right status to one who holds his base property on a 30-day tenancy subject to court litigation thwarts the purpose of the Taylor Grazing Act. Since the record before us does not indicate that the ownership of the property has changed, we consider the ownership to be in the Howard and Walters estate and leased to intervenor. Should the interests in the preference lands be altered as a result of litigation, BLM can then take such action under the regulations as may be appropriate. See John Rattray, *supra* at 288 n.8.

^{3/} At the hearing, Richard Harms, Area Manager, Cottonwood Resource Area, testified that duration of the lease of the base property is not an important factor for consideration in awarding a grazing lease (Tr. 91).

^{4/} 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.

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.^[5/]

In his decision, the area manager properly considered several of these factors. He stated that this parcel has historically been used by livestock from the top along with the private land now controlled by the intervenor. Testimony at the hearing shows that BLM leased this 120-acre parcel to C & N Livestock Company from 1968 to 1972. In 1972 C & N Livestock Company assigned the remainder of their lease term to Ray Smith, who received a lease from BLM for this parcel in 1975 for 3 years (Tr. 42). In 1978, intervenor acquired Ray Smith's preference lands (Tr. 18). There is no evidence that appellant or the previous owners of appellant's base property have ever leased the lands in issue from BLM (Tr. 41-42). Therefore, BLM properly weighed the historical use criterion in the intervenor's favor. See John Rattray, supra. 6/

In light of the testimony presented at the hearing, the Area Manager's decision that the lease of the parcel should be awarded to the intervenor based on the topography factor is correct. Earl Rinkes, Range Conservationist for the Cottonwood Resource Area, testified that the only area on this 120 acres which would be suitable for grazing would be approximately 8 to 10 acres at Big Pine (Tr. 46). The map (Exh. G) shows that the Big Pine area borders intervenor's base property. Rinkes said the slope on Big Pine ranges from 30 to 50 percent. According to Rinkes, the area on the edge of the plateau mildly slopes 30 to 50 percent, and then the remainder of the 120 acres slopes 75 to 80 percent and above 80 percent there are timber stringers (dense shrub and understory) which prevents lateral movement of the cattle (Tr. 46). Craig Johnson, a former Range Conservationist for Cottonwood, agreed that the top (north) section of the parcel can best be used for grazing because the moderate slopes are near the top (Tr. 75).

The Area Manager also found that the parcel was best utilized by the intervenor. At the hearing, the intervenor testified that he used the land as a holding pasture for extra saddle horses and for grazing cattle on a very narrow strip which "hooks on to our plateau" (Tr. 128, 130). Other factors such as access and trespass were considered by the Area Manager.

^{5/} Amendments to 43 CFR 4110.5 are found at 46 FR 5789 (Jan. 19, 1981), and 47 FR 41710 (Sept. 21, 1982).

^{6/} Although the Rattray case was decided under a former regulation concerning conflicting applications, 43 CFR 4121.2-1(d), historical use was also a factor for consideration in that regulation.

The record in this case clearly shows that both applicants were preference right applicants and that the Area Manager considered the factors mandated by 43 CFR 4110.5 for evaluating conflicting grazing lease applications. Cf. Elmer M. Johnson, 20 IBLA 111 (1975).

The evidence as to topography and other factors considered, upon which the Area Manager's decision is founded, is of substantial probative force, and constitutes a rational basis for the decision. The evidence presented by appellant at the hearing is not sufficient to overturn the Area Manager's decision.

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 affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Edward W. Stuebing
Administrative Judge