

JONES AND SANDY LIVESTOCK, INC.

IBLA 82-294

Decided August 5, 1983

Appeal from decision of Administrative Law Judge Morehouse holding that crossing permits should not have been issued. ID 5-81-1.

Vacated.

1. Administrative Procedure: Administrative Law  
Judges--Administrative Procedure: Hearings--Appeals--Contests and  
Protests: Generally--Grazing Permits and Licenses: Appeals--Grazing  
Permits and Licenses: Hearings

Where the Bureau of Land Management refers a complaint about the issuance of a crossing permit under 43 CFR 4130.4-3 directly to an Administrative Law Judge for hearing, without taking any action, the decision of the Administrative Law Judge must be vacated.

APPEARANCES: Leon E. Smith, Esq., Twin Falls, Idaho, for Jones and Sandy Livestock, Inc.; William F. Ringert, Esq., Boise, Idaho, for John Faulkner, intervenor.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On April 28 and 30, 1980, John Faulkner filed applications in the Shoshone District Office, Bureau of Land Management, for crossing Federal range (across the Clover Creek allotment along Hill City Road between Hill City, Idaho, and the Bliss Road) with several hundred sheep on May 9 and 10. 1/ Permits with stipulations were issued on April 30. 2/ On October 23

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1/ Exhs. G-2, G-3; Tr. 12-13. The applicant was Faulkner Lands and Livestock of Gooding, Idaho. The authority for such applications is 43 CFR 4130.4-3, which provides:

"Crossing permits. Any applicant showing the necessity for crossing the public land or other land under Bureau of Land Management control, or both, with livestock for proper and lawful purposes may be issued a crossing permit upon such terms and conditions deemed necessary by the authorized officer to achieve the objectives of this part."

The objectives of 43 CFR 4100 are set out in 43 CFR 4100.0-2.

2/ The stipulations were: "You may enter Clover Creek Allotment in the evening, then the following day the sheep must be driven up Hill City road

and 24 Faulkner applied for two more permits to bring two bands of more than 2,000 sheep back south along the same road between October 24 through October 30. These were approved on October 24. 3/ BLM did not provide written notice to Jones and Sandy Livestock, Inc., of the application for or issuance of these permits. Meanwhile, on October 10, 1980, the Shoshone District Manager of BLM sent both to Faulkner and to Jones and Sandy Livestock, Inc., notices of proposed decisions to reduce the animal unit months in and change the boundary of the Clover Creek allotment. 4/ The notices of these proposed decisions provided their recipients an opportunity to file a protest within 15 days of receipt in accordance with 43 CFR 4160.2 or, alternatively, to allow the decisions to become final and then appeal for a hearing in accordance with 43 CFR 4.470. 5/ Jones and Sandy Livestock, Inc., received the notice on October 14 and filed a document, in part entitled "notice of appeal," on October 29. 6/ The Shoshone District Office treated

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fn. 2 (continued)

and out of the Allotment in one day; stay within 1/8 mile of road. Your alternative is to use your Indian Allotment for trailing." (Emphasis in original.) The Clover Creek allotment of Jones and Sandy Livestock, Inc., is contiguous on the east with Faulkner's Indian allotment. See Exh. G-1.

3/ Exhs. G-4, G-5; Tr. 14-15. Actually, only one application is signed, and the testimony of the BLM Area Manager is unclear whether he approved both, but this ambiguity is not important. These permits and subsequent spring permits issued to Faulkner did not limit the time and width of passage in the manner of the April 1980 permits.

4/ The proposed decisions reduced Clover Creek's active animal unit months (AUM's) from 1,315 to 459 over a 3-year period, a change explained as "necessary to balance grazing use by livestock with the available livestock grazing capacity for the public rangelands in the Clover Creek Allotment." The decisions also reduced the Clover Creek allotment by 2,020 acres, stating that this area would be managed as part of Faulkner's Indian allotment to compensate for the reduction of Faulkner's AUM's in the Clover Creek allotment.

5/ The proposed decisions read in part:

"If you wish to protest this decision, as provided by 43 CFR 4160.2, you are allowed 15 days from receipt of this notice within which to file such protest with the District Manager. \* \* \* In the absence of a protest within the time allowed, the above proposed decision shall constitute my final decision \* \* \*. Should this notice become the final decision and you wish to appeal this decision for the purpose of a hearing before an Administrative Law Judge, in accordance with 43 CFR 4.470, you are allowed 30 days from receipt of this notice within which to file such an appeal with the District Manager."

6/ The document reads:

"In the Matter of the Allowance )  
of the District Manager to grant )  
Faulkner Land & Livestock Inc., )  
a trail permit in the Clover )  
Creek Allotment )

NOTICE OF APPEAL

"COMES NOW JONES AND SANDY LIVESTOCK INC., Hagerman, Idaho, hereinafter referred as Jones and Sandy and do appeal the actions of the District Manager in the allowance of a trail permit to Faulkner Land & Livestock Inc., to trail two [five J.W.J. Jr.] bands of sheep in the Clover Creek Allotment, for the purpose of a hearing before an examiner as provided in the Taylor

this document as an appeal from the October 10 proposed decision and transmitted it to the Idaho State Director of BLM on December 5, who, in turn, forwarded it to the Office of Hearings and Appeals in Salt Lake City. 7/

At the May 21, 1981, hearing there was some confusion about whether the spring permits, fall permits, or proposed decisions were at issue, but at the end of the day it was clear that the parties wished a decision on the spring permits. 8/ The Administrative Law Judge issued a decision on November 12, 1981, that summarized the situation and concluded the spring permits should not have been issued. 9/ Faulkner filed a timely notice of appeal. 10/

[1] Although the parties raise many issues on appeal about the Administrative Law Judge's decision, it is apparent that BLM handled the Jones and Sandy Livestock complaint mistakenly from the outset and erred in referring

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fn. 6 (continued)

Grazing Act of 1934, as amended (43U.S.C. 315 (a)-315 (r) Section 4 of the Act of August, 1936 (43 U.S.C. 118 (d) and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq) 4240.2 of Rules and Regulations.

"At this hearing Jones and Sandy intends to urge that by allowing Faulkners Land and Livestock Inc. to trail sheep through the upper part of Clover Creek Allotment the District Manager has in fact made a decision on the allowance of trail AUM's to be moved from their historic use area. That the allowance of a trail permit has disrupted Jones and Sandy sheep use in the Clover Creek Allotment this spring. This is against 4110.2-3(2) of Rules and Regulations. At this hearing Jones and Sandy will urge that the Bliss Unit Allotment boundary decision should be upheld and sheep be allowed to trail in their individual allotment or on established trails.

"DATED this 3 [29 J.W.J. Jr.] day June [Oct J.W. Jr.] 1980" (Additions and initials in original.) The reference to the number of bands of sheep had been changed from "two" to "five" and initialed by the signatory for Jones and Sandy Livestock, and the date had been changed from the 3rd day of June 1980 to the 29th day of October and also initialed.

7/ The Jan. 9, 1981, letter from the Acting State Director to the Office of Hearings and Appeals lists the following enclosures as "documents pertaining to the appeal of Jones and Sandy Livestock, Inc.":

"5 Enclosures

1. Grazing Appeal Transmittal
2. Jones & Sandy Appeal, dtd 10/20/80
3. DM's Proposed Decision, dtd 10/10/80 to Jones & Sandy
4. DM's Proposed Decision to Mr. Faulkner, dtd 10/10/80
5. Crossing Permits issued to Faulkner Land & Livestock Inc."

Although they are presumably the same as exhibits G-1 through G-4, supra, notes 2 and 3, no documents referred to in item 5 are contained in the record, nor were they sent to the Administrative Law Judge (Tr. 3).

8/ See Tr. 7, 53, 279-80.

9/ Decision at 5. The decision concluded: "Should Faulkner make future application, the District Manager should consider all of the various factors involved and set forth his considerations in a decision in sufficient detail so that with proper notice all parties concerned may be heard in the event of any objection." Id. at 5-6.

10/ Faulkner had been permitted to intervene as a party (Tr. 4).

it to the Administrative Law Judge when it did. The notice of appeal requested a hearing about the issuance of Faulkner's crossing permits under 43 CFR 4240.2. That regulation concerns hearings involving grazing privileges in Alaska and was clearly inapplicable. BLM apparently interpreted that document as applying to its October 10 proposed decision, and this was not altogether unreasonable since that was the only written decision issued to Jones and Sandy Livestock, Inc. Since it was clear from the contents of the document itself that Jones and Sandy Livestock, Inc., was complaining about the issuance of crossing permits to Faulkner, BLM should have treated it as a protest and acted on it prior to referring it to an Administrative Law Judge. As it was, the Administrative Law Judge was put in the position of attempting to exercise appellate jurisdiction without the necessary previous participation of the affected parties or consideration of the issues by the local authorized officer of BLM. See California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). We agree with the Administrative Law Judge's decision as it relates to procedures governing future crossing permit applications. <sup>11/</sup> However, we must vacate that decision for lack of the necessary procedural prerequisites under the circumstances of this case. It was improper for BLM to refer the protest to the Administrative Law Judge without first considering its merits.

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

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Will A. Irwin  
Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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R. W. Mullen  
Administrative Judge

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<sup>11/</sup> Note 9 supra. Given the current structure of 43 CFR Part 4100, a crossing permit should be issued pursuant to the procedure outline for proposed decisions found at 43 CFR Subpart 4160. See LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir. 1963). (Cf. 43 CFR Part 4100 (1977) where a crossing permit under 4115.2-1(k)(vi) or 4125.1-1(m)(2) was not considered either an annual grazing use or a grazing lease covered by the protest and appeal procedures of 43 CFR 4115.2-1(a) through (d) or 4125.1-1(e), respectively).

