

RAYMOND C. AUGE  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 82-793

Decided September 21, 1983

Appeal from decision by Administrative Law Judge Michael L. Morehouse affirming decision of the Bureau of Land Management establishing authorized grazing use in NM 02-81-03.

Affirmed.

1. Grazing Permits and Licenses: Range Surveys

Absent proof of error, a Bureau of Land Management decision establishing range capacity will not be disturbed.

2. Grazing Permits and Licenses: Adjudication

An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of 43 CFR Part 4110.

APPEARANCES: Raymond C. Auge, pro se, Belen, New Mexico; John N. Harrington, Esq., Office of the Solicitor, Field Office, Southwest Region, Santa Fe, New Mexico, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On April 7, 1981, Administrative Law Judge Michael L. Morehouse issued a decision affirming a Bureau of Land Management (BLM) decision in an appeal arising under the provisions of the Taylor Grazing Act of 1934, as amended, Act of June 28, 1934, 43 U.S.C. § 315 (1976). On December 9, 1980, BLM issued a proposed decision establishing a 25 cattle year long (CYL) limit upon appellant's use of his grazing allotment in 1981. Following protest by appellant, a final decision issued on March 26, 1981, which modified the earlier proposed limitation by increasing the permitted grazing use to 26 CYL. Appeal was taken and a hearing into the matter was conducted on November 19, 1981, which established a record showing that appellant possesses a grazing preference on 2,358 acres within the Cerro Montoso allotment in New Mexico, of which 2,198 acres are federally owned. His grazing preference on the Federal lands amounts to 407 animal unit months (AUM's) or approximately 34 CYL's. This preference right was not affected by the March 26, 1981, decision and is not in issue on this appeal.

Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974) established requirements to include range surveys, which must be met by BLM before permits for grazing in the western lands administered by the Bureau can be issued. The decision which aggrieves appellant arises as a result of the survey requirements established by Natural Resources Defense Council, Inc. v. Morton, *supra*. On appeal before this Board, appellant complains, as he has throughout this proceeding, that the survey and resulting management of his allotment by BLM in conformity to Natural Resources Defense Council, Inc., has deprived him of the full use of his allotment. Further he claims he was denied equal protection of the laws under the United States Constitution by rulings of the Administrative Law Judge which prevented him from offering evidence to show unequal treatment of others having been issued dissimilar leases for tracts of land similar to his. He denies that the survey of his range was properly conducted by BLM employees, who he alleges are motivated to discriminate against him from motives of personal bias. He also complains that BLM has failed to provide necessary aid to him by reseeding and eradicating pests which should have made a reduction of his animal use capacity unnecessary.

The record on appeal establishes that a rangeland survey was conducted of appellant's allotment in 1976 or 1977 using the ocular reconnaissance method described at 4412 BLM Manual 11A. The survey indicated the existence of 147 AUM's of forage on the Federal land which comprises most of appellant's allotment. 1/ The survey results were discussed with appellant, who cooperated closely with BLM. 2/ Despite this negotiation, the parties failed to reach agreement concerning the proper number of animals the Cerro Montoso allotment should carry in 1981, and proposed and final decisions were issued by BLM as required by 43 CFR Subpart 4160. The BLM District Manager testified that the final decision by BLM took into consideration appellant's protest as well as the conservationists' report made of the range survey, and increased the number of allowable cattle to be grazed by one. 3/

The survey was regularly conducted according to BLM standards for such studies. 4/ It took into consideration the actual condition of the land and involved direct onsite study of the allotment. 5/ Historic usage of the land was also considered. 6/ The expert opinion of a conservationist was obtained prior to decision. 7/ The limitation established for 1981 is not a permanent limitation, but is subject to increase or decrease based upon actual changes in the condition of the forage on the allotment. 8/ \_\_\_\_\_

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1/ Tr. 57.

2/ Tr. 26, 27.

3/ Tr. 28, 29. The Board has also considered the decision in McKinley v. BLM, Hearings Division NM-02-81-1 (Mar. 22, 1982), an official record of the Department, extensively referred to at the hearing in this matter.

4/ Tr. 8, 9.

5/ Tr. 28.

6/ Tr. 17, 18, 19.

7/ Tr. 28.

8/ Tr. 38, 39.

Appellant's testimony establishes without contradiction that he acquired the allotment in 1977 and has used it sparingly since then, running only 4 cattle in 1978, 8 in 1979, and 16 in 1980. 9/ According to appellant, in conversations with one of the BLM range conservationists it was agreed that the limitation for 1981 was to be set at 26 CYL's. When a limit of 25 CYL's was initially proposed by the District Manager, appellant felt his trust had been abused by BLM. 10/ In order to manage his allotment effectively, he needs 34 CYL's, even though he has no present intention to put more than 26 animals onto the land. 11/ The intensive management of his property by BLM is unfair and unwarranted, according to Auge, because he has demonstrated that he is a conservationist who will use the land only in the manner fitting its current condition. 12/

The term "intensive management" is defined in Natural Resources Council, Inc., supra at 832, in this manner:

The Bureau's management of the public lands is carried out at three levels or stages of intensity. About 7 million acres are, and will continue to be, managed in a merely custodial fashion due primarily to their scattered and isolated locations. Approximately 108 million acres are administered in a fashion the BLM describes as "the best management attainable within the limits of manpower and funding." It is, however, the goal of the BLM to bring 133 of the 171 million acres of public lands under the third category of management -- intensive management -- by the year 2000. Currently, however, only 25 million acres (18 percent) are under intensive management.

The 52 BLM grazing districts are the agency's basic management component. The procedures which these districts follow for administering an area under intensive management are rather involved. Each district is divided into planning units and a unit resource analysis (URA) containing a detailed inventory of resources is prepared for each one. After public comment, a land use plan called a management framework plan (MFP) containing a set of "goals, objectives, constraints" is prepared for each planning unit. Once the MFP is completed, more specialized plans known as program activity plans are prepared for each type of resource-related activity, such as timbering, recreation and grazing, in the unit. An activity plan is designed to lay out in detail how the particular activity will comport with the objectives and constraints of the management plan for that particular unit. The program activity plan for grazing is called an allotment management plan (AMP). A planning unit may contain a number of grazing allotments.

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9/ Tr. 98.

10/ Tr. 36.

11/ Tr. 99.

12/ Tr. 101, 102, 103.

The court in Natural Resources Council, Inc., held the agency had not taken proper action to comply with the statutory mandate of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970), and required that there be a study of grazing lands to be licensed for grazing purposes which would enable a BLM decisionmaker to consider "all of the specific and particular consequences of his actions, or the alternatives available to him." Natural Resources Council, Inc., supra at 838. An actual survey of the affected lands was to be made which would "provide the local decision-maker with the data necessary to analyze the alternatives open to him and their consequences." Id. at 839.

Appellant's contention that his land is managed more closely by BLM than that of his neighbors similarly situated is not supported by the record, which indicates that in other allotments of nearby cattle-raisers the ratio of Federal to privately held land is much less than appellant's. 13/ The record is silent concerning the exact treatment accorded those other owners. While appellant was limited in his cross-examination of the BLM Assistant District Manager who he sought to cross-examine concerning the difference between grazing leases based upon acreage or total animal units, 14/ in the context of his inquiry, it appears that his question was answered: The answer given was that there was no difference in administration between the two types of leases inquired about. 15/ He was not permitted to question in greater detail concerning other leases, because the answer supplied ended

13/ See Map, Exh. R-3; Exh. 6-1.

14/ Tr. 80, 81.

15/ "MR. AUGE: I do not necessarily completely understand a Section 15 lease, even though I have it.

"I assume that a Section 15 lease originally was based on a per acre lease and it turns into a total unit lease for cow units after a period of time and that the management by the Bureau of Land Management is less intense on a Section 15 lease than it would be on a Section 3. I do have a Section 15 lease which is the same as my surrounding neighbors have.

"JUDGE MOREHOUSE: I have asked Mr. Harrington before and he says that the management of a Section 15 lease, in these circumstances, is the same as a Section 3 lease. Is that correct?

"THE WITNESS: That's right.

"MR. AUGE: Your Honor, may I ask a question there?

"JUDGE MOREHOUSE: Go ahead.

"MR. AUGE: You said in certain circumstances the Section 15 --

"JUDGE MOREHOUSE (interrupting): Or in a general sense is it the same? "THE WITNESS: Yes, sir. We have the same management for all of these on Section 15 that we have on Section 3.

"JUDGE MOREHOUSE: He has answered the question. Go on to something else." (Tr. 79, 80). It is noted, as dictum, that the references to the similarity of rights derived from sections 3 and 15 of the Taylor Grazing Act of 1934 are not correct as a legal matter. It is not clear whether the discussion reported was a discussion of law or of the actual treatment of the different provisions of the statute by local administrators in practice.

his inquiry and made further questioning on the point irrelevant. Appellant was not prevented from offering evidence of actual differences in treatment between himself and others similarly situated. His claim that he was singled out unfairly by BLM is, in this regard, without apparent merit.

Similarly, his substantive argument based upon the same subject matter must be rejected. There is simply no showing that ranchers having a similarly large ratio of Federal to private grazing lands were treated differently than appellant. In fact, the record demonstrates the opposite: Most ranchers in the vicinity do not have as large a share of Federal lands in relation to other land as does appellant. <sup>16/</sup> Appellant failed to show the existence of a single similar allotment which had been accorded different management treatment than the Cerro Montoso. His argument that there was a denial of equal treatment based on a showing that others having a different situation are treated in a dissimilar fashion is without basis in law or logic.

Similarly without merit is his claim that he was treated unfairly for personal reasons. While appellant has shown directly that he entertains suspicion of BLM, he fails to demonstrate the basis in fact for his distrust. Thus, he cites his own feelings about the regulation of his allotment and apprehension that public statements he has made which are critical of the agency are proof that there are similar feelings towards him on the part of the agency personnel. Such speculation does not amount to evidence of bias, no matter how strongly it is felt. There is no proof in the record of agency conduct contrary to the interests of appellant which is improperly motivated.

[1] Appellant attacks the survey of his rangeland because he distrusts the accuracy of the method used. Since he does not specify the particular defects in the methods employed which are the basis for his objection, it is apparent that this contention too is without basis in fact. Where the accuracy of a BLM survey is questioned, it has been the position of the Department that a determination of range capacity will not be disturbed in the absence of positive substantial evidence establishing error in the determination. See Rachel Ballow, 28 IBLA 264 (1976), and cases cited. Appellant offers no evidence to show that a different result is required, or even possible in this case. To the extent that appellant was given an increase in his limitation, it appears the agency has considered not only its own study but appellant's opinions as well in reaching the decision to limit his land to 26 CYL's, as required by 43 CFR 4110.3-2.

[2] Finally, appellant's contentions that his requests for seeding and pest control have not been heeded or properly acted upon by BLM are not persuasive to show agency bias or error. Appellant has failed to show that the desired Federal aid is practicable on his land, or that it would be effective to raise the productivity of the ground. The record establishes that appellant has been given the materials for a water distribution system for his Federal lands free of charge by BLM and that further aid depends upon the effect upon the forage of improved watering of the lands. <sup>17/</sup> It is

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<sup>16/</sup> Tr. 73-78; Exh. G-1.

<sup>17/</sup> Tr. 48-51.

apparent that appellant's complaints are at best premature, under the circumstances. In any event, they are merely complaints, and do not rise to the level of evidence. There is nothing in the record or in appellant's arguments concerning his treatment by BLM in connection with the Cerro Montoso allotment to indicate that the adjudication of his grazing privileges by BLM in this case was unreasonable or not in compliance with applicable Departmental regulation. Upon the record the Administrative Law Judge correctly found that the BLM District Manager's decision setting range capacity for the Cerro Montoso was reasonable and in substantial compliance with the provisions of 43 CFR Subpart 4110. See Rachel Ballow, supra at 268.

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.

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Franklin D. Arness  
Administrative Judge  
Alternate Member

I concur:

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Anne Poindexter Lewis  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in substantial agreement with both the result and rationale of the majority opinion, I feel that a comment is warranted on the adequacy of the present record in hopes of forestalling possible problems in the future.

At the beginning of the hearing in the instant appeal, Judge Morehouse noted that:

Yesterday during a recess in the hearing in the McKinley case, Mr. Auge and myself and Mr. Harrington had a conversation about certain possible stipulations. I think, it is my understanding, that Mr. Auge agreed that the general testimony concerning the, how the 1975/1977 rangeland survey was conducted and how the EIS was prepared, the EIS of 1979, the East Socorro grazing EIS, how that was prepared using as a part of it the rangeland inventory. All that evidence, which took some time to come in, could apply in this case, as well.

All parties concurred in this stipulation.

The problem, however, was that no one identified the relevant parts of the previous day's testimony in McKinley v. Bureau of Land Management, New Mexico 02-81-1, nor was any part of that record or the East Socorro EIS ever transmitted to the Board. This omission is doubly disconcerting since BLM's brief before Judge Morehouse cited the McKinley transcript and exhibits in 11 separate places. Moreover, Judge Morehouse's decision in McKinley was not appealed, so we have no independent access to that record.

I think the practice of incorporation by reference used in the instant case could be very beneficial. The problem is that there must also be a specific identification of what is being incorporated together with provision that the incorporated material be included in the case record. Obviously, in the instant case, as of the time of hearing, the parties could not delineate the relevant pages in the McKinley transcript as it had not yet been typed. However, provision should have been made for the parties to get together after the hearing when the transcript was available and specifically describe that part of the McKinley record applicable to the Auge hearing. Absent such identification, even had the record of the McKinley case been transmitted with the Auge file, the Board would have been required to read the entire transcript of that hearing in order to ascertain what was, in fact, within the scope of the stipulation, and even then there might be some doubt as to whether certain parts of the McKinley record were properly part of the record in the Auge case.

The total absence of the McKinley record does make the instant record somewhat less than complete. However, a review of appellant's assertions clearly shows that his disagreement with the results of the range survey are not supported by any competent evidence which could possibly justify this Board in concluding that the range survey "is in error." Midland Livestock Co., 10 IBLA 389 (1973). Thus, I concur in the result reached in the majority decision.

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James L. Burski  
Administrative Judge

