

RAY PERSHALL  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 83-574

Decided April 13, 1984

Appeal from decision of Administrative Law Judge Michael L. Morehouse setting aside decision of the Manager, Boise District, Idaho, Bureau of Land Management, which rejected grazing preference application. ID-1-82-2.

Set aside and remanded.

1. Appeals--Grazing Leases: Applications--Grazing Leases: Preference Right Applicants--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Rules of Practice: Appeals: Generally

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

APPEARANCES: Ray Pershall, pro se; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management; Gerald L. Weston, Esq., Caldwell, Idaho, for intervenors Blackstock Livestock and Chipmunk Grazing Association.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management has appealed from a decision of Administrative Law Judge Michael L. Morehouse, dated March 10, 1983, setting aside a decision of the Manager, Boise District, Idaho, Bureau of Land Management (BLM), dated December 23, 1981, which rejected the grazing preference application of Ray Pershall.

On December 16, 1981, Pershall filed a grazing application with BLM for 92 active animal unit months (AUM's) in the Elephant Butte allotment (No. 0513), offering as base property 88 acres situated in the N 1/2 SW 1/4 and the SW 1/4 SW 1/4 sec. 9, T. 2 N., R. 4 W., Boise meridian, Owyhee County,

Idaho. In his December 1981 decision, the District Manager, BLM, rejected Pershall's application because the land in the Elephant Butte allotment would not support additional AUM's. <sup>1/</sup> The District Manager noted that Pershall had been granted an individual allotment in the Hardtrigger subunit of the Wilson unit (including the Elephant Butte allotment) in 1946 but that he had "lost" any grazing privileges by failing to apply for them. Moreover, in December 1965, the Advisory Board had recommended the allocation of 292 AUM's in area No. 1 of the Hardtrigger subunit (Elephant Butte allotment) with no allocation to Pershall. <sup>2/</sup> However, by decision dated December 21, 1965, the District Manager had granted 92 AUM's in the Hardtrigger subunit to Pershall as "[n]onrenewable for 1966 grazing season only." The District Manager stated that from the 1966 to the 1981 grazing season, BLM has continued to issue temporary, nonrenewable "licenses" to Pershall. Finally, the District Manager stated that Pershall's license for the 1982 grazing season would not be renewed due to the "lack of supplemental forage." The District Manager noted that the current allocation in the Elephant Butte allotment is 324 AUM's, with "present production" at 304 AUM's. In addition, BLM's current range inventory had indicated that the Elephant Butte allotment was in a "poor condition," requiring remedial action in the form of a rotation grazing system, which would further reduce grazing use.

On August 5, 1982, a hearing was held before Administrative Law Judge Morehouse, in Boise, Idaho. In his March 1983 decision, Judge Morehouse set aside the December 1981 decision of the District Manager, BLM, concluding that, although the decision might be technically correct, because of the "special equities" involved it would be an "injustice" to deprive Pershall of grazing rights "that he has used over a continuous period of almost 60 years," with the knowledge and encouragement of BLM. Judge Morehouse stated that Pershall's grazing application should be granted.

In its statement of reasons for appeal, BLM contends that although Pershall had been granted temporary nonrenewable licenses pursuant to Departmental regulations for many years, the issuance of those licenses "cannot ripen into a grazing preference." Further, BLM argues that Pershall has been unable to provide evidence of his qualifications for a grazing preference in accordance with 43 CFR 4110.2 and suggests that it is "too late" for Pershall to pursue the question of his qualifications "as the decision was made many years ago that he had no right to a regular grazing permit." <sup>3/</sup>

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<sup>1/</sup> The December 1981 decision was styled a notice of proposed decision which would constitute a "final decision" in the absence of a protest. See 43 CFR 4160.3(a). The record indicates that Pershall did not file a protest, but instead appealed from the final BLM decision for the purpose of a hearing before an Administrative Law Judge, pursuant to 43 CFR 4.470.

<sup>2/</sup> The 292 AUM's were allocated as follows: T. Blackstock-185 AUM's, Jump Creek Sheep Company-62 AUM's, Panzeri Livestock Company-7 AUM's, Spring Valley Livestock Company-38 AUM's. In addition, the Advisory Board recommended that Pershall be granted grazing rights on a temporary basis.

<sup>3/</sup> On Apr. 11, 1983, Blackstock Livestock and Chipmunk Grazing Association, which association had acquired the grazing rights of Jump Creek Sheep Company and Panzeri Livestock Company in the Elephant Butte allotment, filed what amounts to a request to intervene in the present appeal. Because of the

The relevant portions of the evidence developed at the August 1982 hearing are summarized in the March 1983 decision of Judge Morehouse. Judge Morehouse stated first that Pershall was granted a temporary nonrenewable license for the 1982 grazing season, despite the December 1981 BLM decision not to grant a license, "due to the fact that there was sufficient forage after all" (Decision at 2). The fact Pershall failed to apply for grazing rights prior to the grant of the temporary license was confirmed by two documents. In a letter to Pershall dated November 14, 1961 (Exh. G-3), the Acting District Manager stated that "since 1943, no application has been made and no license has been issued for any use other than an individual allotment in the South Mountain unit." The minutes of the Advisory Board, held February 26 and 27, 1962 (Exh. G-6), also report that since 1946 Pershall "hasn't applied for use" within his individual allotment in the Wilson unit. The testimony of Pershall is summarized in the decision at pages 2-3:

Mr. Pershall testified that he bought his base property (indicated on overlay on Ex. G-1) in 1924. He has been grazing the allotment at issue continually since that time. Following enactment of the Taylor Grazing Act in 1934, he was advised by the grazer, one Wilfred Quinn, that the allotment was part of the Owyhee Irrigation Project and, therefore, was held out of the land to be managed under the Taylor Grazing Act. He stated further that even after the Owyhee Project was completed, Mr. Quinn still took the position that the area in question was not subject to the provisions of the grazing act and he did not have to make application for his use. In 1947, he was granted a Section 4 permit to build a fence in the allotment and did so (see green line on overlay to Ex. G-1). He continued to graze the area annually and in approximately 1972 or 1973 built another fence south of the 1947 fence (see brown line on overlay to Ex. G-1) because of some mixing between his and Blackstock's cattle. Sometime subsequent to this, a BLM employee inspected the fence and told him it was not up to specifications and he, therefore, rebuilt the fence to proper specifications in 1977. The reason that he applied for a permanent preference in 1981 is because he was advised by the man who handles his grazing permits that there might be some question concerning his rights to graze this area and he thought the matter should be cleared up. He testified that he is the only person that has grazed this area since 1924, except for the Spring Valley Livestock Co. who trails across the allotment every spring. The only other individual who has any rights in the immediate area is Blackstock to the south who has advised him that he does not want rights in the area in question because it would not fit in with his operation. Mr. Pershall stated that he has built the range up, provided fire protection,

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fn. 3 (continued)

obvious interest of the parties in the matter under appeal, the request is granted. Intervenors argue simply that granting 92 AUM's to Pershall in accordance with the March 1983 decision of Judge Morehouse would result in a reduction of approximately "one-third" of the present grazing rights in the Elephant Butte allotment, which would amount to an inverse condemnation of those rights.

built fences and used the area since 1924 exclusively, except for the spring trailing of the Spring Valley Livestock Co.

[1] At the time Pershall filed his grazing preference application in December 1981, the only apparent grazing rights he held in the Elephant Butte allotment were temporary nonrenewable licenses granted for every growing season since 1966. Issuance of these licenses is a matter of Departmental regulation. Brooks v. Dewar, 313 U.S. 354 (1941). Pershall's licenses were originally issued pursuant to 43 CFR 4115.2-1(i) (1965). That regulation provided that nonrenewable licenses might be issued to "nonpreference applicants only for the period specified by the District Manager and for the number of livestock for which range is temporarily available and which can be properly grazed without detriment to the operations on the range of applicants owning or controlling base properties \* \* \*." 43 CFR 4115.2-1(i) (1965). "Nonpreference applicants" were those applicants who did not have the preference right accorded by section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(b) (1976). See 43 CFR 4111.3-1(c) (1965). That statutory provision states that:

Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them \* \* \*.

43 U.S.C. § 315b (1976). We must conclude that the December 21, 1965, decision of the District Manager first granting the temporary nonrenewable license implicitly determined that Pershall was not a preference applicant for grazing use within the Elephant Butte allotment. Pershall never appealed from that decision. This is not to suggest that Pershall did not have preference rights at that time. However, failure to assert any rights was tantamount to having no rights.

The question presented by the instant appeal, however, is whether Pershall is not entitled to a grazing preference. <sup>4/</sup> We must conclude that Pershall may be so entitled. The issuance of nonrenewable licenses (now called permits or leases) is currently governed by 43 CFR 4130.4-2, which was originally promulgated effective August 4, 1978. See 43 FR 29072 (July 5, 1978). That regulation provides that nonrenewable permits or leases may be

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<sup>4/</sup> We express no opinion on whether Pershall was accorded an individual allotment in the Wilson unit in the 1940's or whether such an allotment was "lost" through failure to apply for grazing use because there is insufficient evidence in the record to consider these questions and, more importantly, they are irrelevant to the question of whether Pershall is now entitled to a grazing preference. Moreover, we hold that the December 1965 determination that Pershall was not qualified does not foreclose the question of whether he is now qualified, as BLM suggests on appeal. Pershall's current qualifications were not at issue in that prior "adjudication." See Ervin J. Crowder, 20 IBLA 305 (1975). In addition, there is some question as to whether Pershall was notified of the December 1965 determination so that it become final against him. See Tr. 39-40; 43 CFR 4.470(b).

issued "on an annual basis to qualified applicants" where forage is temporarily available and consistent with multiple-use objectives and existing livestock operations. 43 CFR 4130.4-2. The regulation no longer distinguishes between preference and nonpreference applicants; however, in order to be entitled to a nonrenewable permit or lease, an applicant must be "qualified." An applicant is considered "qualified," except with respect to freeuse grazing permits and crossing permits, where he is engaged in the livestock business, owns or controls land or water base property, and, in the case of individuals, is a citizen of the United States. 43 CFR 4110.1. Accordingly, by virtue of granting temporary nonrenewable licenses to Pershall in the Elephant Butte allotment since 1978, the District Manager has implicitly determined that Pershall is entitled to a grazing preference. Moreover, there is no statement in the December 23, 1981, decision of the District Manager that Pershall is not so qualified. Indeed, Pershall identified specific base property in his grazing preference application. <sup>5/</sup> Rather, the District Manager's decision appears to focus on the fact that Pershall was not accorded a grazing preference in the December 1965 recommendation of the Advisory Board and has since been issued only temporary nonrenewable licenses. The District Manager stated that Pershall's grazing use has been "established as temporary nonrenewable use." We expressly repudiate the notion that grazing rights may become fixed and that, by virtue of having accepted temporary nonrenewable licenses, Pershall is somehow foreclosed from applying for more permanent grazing rights.

Nevertheless, there remains the question of what rights Pershall may acquire, especially in view of existing grazing preferences. The December 1981 decision of the District Manager indicates the Elephant Butte allotment is allocated a total of 324 AUM's. The 92 AUM's accorded to Pershall is apparently made on the basis of additional forage temporarily available. The applicable regulation for the allocation of such forage is 43 CFR 4110.3-1(a) which specifies that the allocation "may be \* \* \* on a nonrenewable basis." The regulation, thus, leaves open the possibility that forage temporarily available may also be allocated on a renewable basis, with the term anywhere from 1 to 10 years. 43 CFR 4110.3-1 also provides for the allocation of forage which is "permanently available." 43 CFR 4110.3-1(b) and (c). Such forage "shall" be allocated first in satisfaction of the grazing preferences of authorized permittees or lessees. 43 CFR 4110.3-1(b). Additional forage "may be allocated in the following priority to: (1) Permittee(s) or lessee(s) in proportion to their contribution or efforts which resulted in increased forage production; or (2) Permittee(s) or lessee(s) in proportion to their preference; or (3) Other qualified applicants under § 4110.5 of this title." 43 CFR 4110.3-1(c). 43 CFR 4110.5 provides that additional forage may be allocated "on the basis of § 4110.3-1 of this title" or on the basis of any of certain enumerated factors, including "[h]istorical use of the public lands." In the present case, Pershall was issued a temporary nonrenewable license for every grazing season from 1966 to 1981, i.e., for 15 years, and has apparently been issued a license for the 1982 season. We, therefore, must question whether this 92 AUM's of additional forage is not available on a permanent basis. Moreover, the record indicates that Pershall has had almost exclusive use of the northern half of the Elephant Butte allotment,

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<sup>5/</sup> "Grazing preference" is defined at 43 CFR 4100.0-5 as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee."

which was partially separated from the southern half by a fence built in 1978. See Tr. 21-23. This virtually exclusive use was apparently with the concurrence of Blackstock, who uses the southern half of the allotment. See Tr. 55. However, the record also indicates that the range in the Elephant Butte allotment is in poor condition and that at some time BLM will implement a rotation grazing system using the two halves of the Elephant Butte allotment and the adjoining Alkali Wildcat allotment. See Tr. 57-58. However, in his testimony, the District Manager does not specify when, if ever, this system will be put into effect.

Since BLM issued Pershall a license for the 1982 growing season and in view of the uncertainty over the availability of forage in the Elephant Butte allotment, we conclude that this case must be remanded to BLM for a determination whether the 92 AUM's allocated to Pershall constitute additional forage available on a temporary or a permanent basis and whether a regular grazing permit should be issued to Pershall covering those AUM's in accordance with 43 CFR 4110.3-1 and 4110.5. See Ervin J. Crowder, supra; Elmer M. Johnson, 20 IBLA 111 (1975). When considering the latter question, BLM should give particular attention to Pershall's historical use of the northern part of the Elephant Butte allotment, with due consideration to the objectives of proper range management. <sup>6/</sup> See James M. Stoops, 57 IBLA 394 (1981); John Rattray, 36 IBLA 282 (1978); Douglas V. Livingston, 8 IBLA 61 (1972). It is simply not sufficient to say that Pershall is not qualified for a grazing preference or that his grazing rights have been predetermined. Moreover, we hereby set aside the March 1983 decision of Judge Morehouse because we conclude that this case is properly governed by the applicable regulations and not the "equities" inherent in Pershall's longstanding grazing use of the Elephant Butte allotment.

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 set aside and the case is remanded to BLM for further action consistent herewith.

Franklin D. Arness  
Administrative Judge

We concur:

Will A. Irwin  
Administrative Judge

Gail M. Frazier  
Administrative Judge

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<sup>6/</sup> To the extent that Pershall's grazing rights have been under a temporary nonrenewable license, and may be, under a grazing preference, based on additional forage, in excess of that already allocated, we fail to see how granting a preference to Pershall would proportionately reduce the existing preferences, as intervenors maintain. We do not view this as a situation where BLM has already allocated the entire grazing capacity of the allotment. See Gregersen v. Bureau of Land Management, 61 IBLA 381 (1982). In any case, intervenors' grazing preferences do not amount to property rights whose reduction constitutes a condemnation. United States v. Cox, 190 F.2d 293 (10th Cir.); cert. denied, 342 U.S. 867 (1951).

