

MARCUS RUDNICK
v.
BUREAU OF LAND MANAGEMENT

Decided July 22, 1986

IBLA 85-603

Appeal from a decision of Administrative Law Judge E. Kendall Clarke allocating grazing privileges. CA-01-83-02.

Affirmed.

1. 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, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(4) (1983), he had no priority right to renewal of the lease.

2. Grazing Permits and Licenses: Adjudication

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

APPEARANCES: Marcus Rudnick, pro se; Robert L. Sullivan, Jr., Esq., Fresno, California, for El Tejon Cattle Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Marcus Rudnick appeals from a decision of Administrative Law Judge E. Kendall Clarke, dated April 12, 1985. The decision affirmed a Bureau of Land Management (BLM) allocation of certain grazing privileges in San Luis

Obispo County, California. Judge Clarke also determined BLM should have allowed a 15-day protest period before its allocation decision became effective, but BLM's failure to do so was, in this case, a harmless error.

Both appellant and John Bidart of the El Tejon Cattle Company had applied for a grazing lease on public land then subject to a grazing lease held by appellant. ^{1/} On February 24, 1983, BLM sent a letter to appellant which said,

You and Mr. Bidart have properly filed in conflict for a grazing lease on part of the public land that you now lease. The Bureau of Land Management will give you 30 days from receipt of this letter to settle the conflict by yourselves.

After 30 days, if an agreement is not reached, the Bureau of Land Management will make a decision for the grazing rights on this public land.

(Gov't Exh. 4).

On April 1, 1983, the BLM District Manager, Bakersfield District, California, issued an allocation decision. BLM characterized this allocation decision as a "Notice of District Manager's Final Decision Effective Upon Receipt."

The allocation decision quoted 43 CFR 4130.2(e)(4) (1983) and stated:

The Taylor Grazing Act of June 28, 1934 Sec. 15 states in part, ". . . That preference shall be given to owners, homesteads, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands,"

Based on the fact that Mr. Bidart of El Tejon Cattle Company owns contiguous land and Mr. Rudnick does not own or control any contiguous land, the lease for the public lands described above will be granted to El Tejon Cattle Company.

In order to insure orderly administration of the range and to protect the rights of the private land owner, this decision will be placed into full force and effect in accordance with 43 Code of Federal Regulations (CFR) subpart 4160.3(e) [sic].

^{1/} The public land is located as follows:

In T. 31 S., R. 21 E., Mount Diablo Meridian

Sec. 23, S 1/2 S 1/2, South of boundary fence.

Sec. 25, W 1/2, SE 1/4, South and west of boundary fence. Sec. 26, All except a small parcel parcel of public land north of boundary fence.

Sec. 27, E 1/2, East of boundary fence.

Sec. 35, N 1/2

Total approximately 1,480 acres

Mr. Rudnick will have 15 days from the receipt of this notice to remove his cattle from the above described public lands.

(Allocation Decision at 1-2). Rudnick appealed this decision on April 22, 1983, noting the failure to provide a 15-day protest period. Following appeal, the matter was assigned to the Hearings Division, Office of Hearings and Appeals, pursuant to 43 U.S.C. § 315h (1982) and 43 CFR 4.470.

In a letter to BLM, dated July 8, 1983, Rudnick also stated that on March 1, 1983, he began negotiating with owners of contiguous unleased parcels. He stated these negotiations were suspended when he received the allocation decision and filed his initial appeal. He complained that BLM's procedural error foreclosed his opportunity to resolve the issue. In a letter to Judge Clarke, dated June 19, 1984, appellant claimed that violation of 43 CFR 4160.1-1 rendered the BLM decision voidable.

A hearing before Judge Clarke was held on July 10, 1984, and Rudnick, El Tejon, and BLM submitted posthearing briefs. A decision was rendered by Judge Clarke on April 12, 1985. In his decision Judge Clarke stated:

No proposed decision was issued by the district manager. The reason for the lack of a proposed decision was discussed by the BLM's Area Manager Carpenter in his reasons for issuing the final decision in the matter (Tr. 13 & 24). The reason he did not issue a proposed decision was the need to determine with some certainty the actual user of the allotment in order to secure proper utilization of the forage on the property during the growing season which at the time of the issuance of the final decision was imminent. An additional reason for issuing a final decision and placing it in full force and effect was to prevent trespass during any appeal period.

The map (Ex. 1) shows that the owner of Section 36 is a natural user of the contiguous allotment, the allotment which is the subject of this proceeding. This is because of water development and existing fence locations.

DISCUSSION

Mr. Rudnick, the appellant herein, has taken the position in his appeal that the Bureau of Land Management erred in issuing a final decision in this matter without providing him with a notice of proposed decision and allowing a 15-day period in which to file a written protest. It is the position of the Bureau of Land Management that as of April 1, 1983, when the district manager issued a final decision the appellant Mr. Rudnick could not have prevailed. Both the Taylor Grazing Act and the Department's regulations which were in effect at the time the decision from which this appeal is taken, require that the lease be given to the owner of the contiguous real property. 43 CFR 4130.2(e)(4). The evidence which was adduced at the hearing shows that

Mr. Rudnick entered into two leases of separate parcels of property which are contiguous to the area in question but after the date of the final decision. The first lease was entered into on July 19, 1983 with James M. Meiklejohn and covered 80 acres in the E-1/2 of the SW 1/4 of Section 27, Township 31 South, Range 21 East MDBM (Ex. B). This property is contiguous to the area in question on the west but outside of the fence which confines the area in question and the base lands owned by El Tejon. The second lease which was entered into with Katherine Hampton and her sister on December 15, 1983 (Ex. C) covers 80 acres in the N-1/2 N-1/2 of Section 34, Township 31 South, Range 21 East, MDBM.

It was Mr. Rudnick's position that had he been given 15 days notice he could have and would have obtained these leases and thereby provided the necessary base to substantiate the requirement for leasing the public land.

The evidence, however, did show that until Mr. Rudnick obtained the Meiklejohn lease he had not controlled any contiguous base lands since El Tejon purchased the NE-1/4 of Section 35, from Oppenheimer interests in 1980 (Tr. 66-67).

DISCUSSION AND DETERMINATION

At the time the district manager's decision was issued on April 1, 1983, the facts which were determinative of the question were in place. El Tejon owned and controlled contiguous base property; Rudnick did not and had not since 1980. Subsequent events show that Rudnick was able to eventually obtain control over contiguous base property and conceivably had he been given an additional 15 days could have obtained control over some contiguous base property within that period of time. That however would not have changed the facts as they appeared on April 1, 1983, when the decision was rendered giving the lease to the owner of contiguous real property (43 CFR 4130.2(e)(4)).

I do not find that the district manager committed a reversible error in failing to provide a 15-day period of protest. Additional facts would not have changed the situation as it existed on April 1, 1983. The Interior Board of Land Appeals has held that they will not remand a case where the remand serves no purpose. Phil J. Hillberry, 24 IBLA 283 (1976).

I find that the district manager should have permitted a period of protest of 15 days, however, since no facts would have been available to the district manager of which he was not already appraised, [sic] failure to provide the period of protest was a harmless error and does not provide the basis for a reversal of his decision. The district manager's decision of April 1, 1983, awarding the grazing lease on the public land here in question to El Tejon Cattle Company is hereby upheld.

(ALJ Decision at 1-4).

Appellant then filed an appeal from Judge Clarke's decision. In his statement of reasons for appeal appellant presents the following arguments. He argues 43 CFR 4160.1-1 requires a 15-day protest period in order to afford an adversely affected party an opportunity to submit further information or change his position, and BLM's failure to do so precluded him from submitting additional facts. Appellant contends the denial of the 15-day protest period was harmful error because it denied a mandatory period of time within which he planned to complete his negotiations for a private lease of lands contiguous to the disputed land. Appellant claims he would have completed lease negotiations within the 15 days if the time had been allowed. He also contests the Judge's justification for the hastily imposed decision. Appellant also contends El Tejon's need was not urgent, and in fact few cattle grazed on the allotment during the growing season following the decision. Appellant emphasizes he now has a lease of contiguous land, and as the holder of the expired lease, he should have priority. Appellant objects to testimony by the Area Manager indicating the BLM decision was designed to prevent appellant's cattle from trespassing on private lands in sec. 36 owned by El Tejon. Appellant maintains that any alleged trespass was not BLM's concern because sec. 36 is private land not subject to an exchange of use agreement.

El Tejon responded to the statement of reasons stating Judge Clarke correctly found El Tejon owned and controlled contiguous property and appellant did not. El Tejon advances support of Judge Clarke's conclusion that the facts as they existed on the date of the allocation decision would not have warranted a different decision by the District Manager, and thus the lack of an explicit 15-day protest period was harmless error.

[1] Both appellant and El Tejon sought status as preference right applicants; appellant held the previous expiring lease and El Tejon owned contiguous lands. Their competing applications were filed pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982). The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1752(c) (1982), further provides that in certain circumstances the holder of an expiring lease shall have priority for a new lease, provided the applicant meets the applicable regulatory requirements. See 43 CFR 4110.5 (1983); 2/ Sheehan & Mudon, 39 IBLA 56, 86 I.D. 51 (1979). The applicable law, 43 U.S.C. § 1752(c) (1982), provides:

(c) First priority for renewal of expiring permit or lease

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

2/ 43 CFR 4110.5 (1983), and 43 CFR 4160.3(e) (1983) were removed. (49 FR 6451, 6455 (Feb. 21, 1984))

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 or lease.

BLM found appellant did not have priority against El Tejon because appellant did not own or control contiguous land at the time his lease expired, citing the provisions of 43 CFR 4130.2(e)(4) as the basis for its decision. 3/ BLM properly concluded appellant did not have priority for the new lease, even though he held the expiring lease.

[2] Appellant raises the legal issue whether failure to allow a 15-day protest period was a harmless or fatal error. Appellant asserts he would have been able to comply with the regulatory requirement of control of contiguous lands but for BLM's failure to abide by 43 CFR 4160.1-1. This regulation stated:

§ 4160.1-1 Proposed decisions on permits or leases.

The authorized officer shall serve a proposed decision on any applicant, permittee or lessee, or the agent of record, or both, who is affected by the proposed action on applications for permits (including range improvement permits) or leases, or by the proposed action relating to terms and conditions of permits (including range improvement permits) or leases, by certified mail or personal delivery. The authorized officer shall also send copies to those who have indicated in writing that their interests may be affected by the proposed decision. The proposed decision shall state reasons for the action, including reference to pertinent terms, conditions and/or provisions of these regulations, and shall provide for a period of 15 days after receipt for the filing of a protest. [Emphasis added.]

The record discloses BLM sent two communications to appellant. First, a letter dated February 24, 1983, mailed to both appellant and El Tejon, allowed 30 days to arrange a solution to their conflicting grazing lease applications. Subsequently, on April 1, 1983, BLM issued its allotment decision which was given immediate full force and effect and did not provide a 15-day protest period. Testimony at the hearing indicated BLM thought the hiatus between these two communications was sufficient to allow for a 15-day protest period, even though a 15-day period was not explicitly stated. We

3/ 43 CFR 4130.2(e) (1983) states:

"(e) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:

* * * * *

"(4) The base property offered by a grazing lessee is contiguous to the public lands to be grazed or, if noncontiguous, there are no conflicting applications submitted by those offering qualified base property which would be contiguous to the public lands to be grazed."

cannot agree. The first letter merely advised the parties of a conflict and cannot be considered a proposed decision, as contemplated by 43 CFR 4160.1-1. For this reason we must examine the effect of this failure to issue a proposed decision on the rights of appellant.

Had a 15-day period been provided, appellant would have been able to file a protest to the proposed determination. Had a protest been filed, the basis for the protest would have been considered, and, after considering the protest, a final decision could have been issued. Until issuance of the final decision, jurisdiction over the matter remains with the official responsible for issuance of the decision. Under the regulations, the final decision is suspended for a period of 30 days to allow for appeal, and if an appeal is filed, the decision is suspended until a final determination is made. 43 CFR 4160.3(c). However, this regulation, as in effect at the time of the BLM allocation decision, provided that "if the authorized officer places the final decision in full force and effect, it shall take effect on the date specified, regardless of appeal." 43 CFR 4160.3(c) (1983). ^{4/} See also 43 CFR 4.477. Thus, even if the 15-day period was necessary, under the regulations in effect at the time of the decision, the final decision could have been given full force and effect at the time of issuance.

The record of the hearing before Judge Clarke discloses that at the time of BLM's allocation decision, the boundary between BLM lands and the private lands of El Tejon was unfenced and the only water available to livestock on the lease lands was located on the El Tejon lands. Thus we find there was sufficient basis in the record for giving a final decision full force and effect pending appeal, pursuant to 43 CFR 4160.3(c) (1983).

A determination by BLM must logically be based upon the facts as they existed on the date of determination. If proper procedure is used, the date for determination is the date of the issuance of the proposed decision. In the case before us, the determination should have been based upon the facts as they existed on the date of the issuance of a proposed decision, or April 1, 1983. Instead, a final decision was issued on that date without the intermediary proposed decision. Normally, if during the 15-day protest period a party presents reasons for modifying or overturning the proposed decision, the authorized officer must consider the proposed decision in light of the reasons presented. If, after consideration, the authorized officer properly determines that the reasons advanced by a protestant do not affect the proposed decision, he may make the proposed decision final. Thus a decision will be modified only if the reasons for modification advanced by a party are relevant to the decision. However, any change in the status of the lands subsequent to the date of the proposed decision has no bearing on the correctness of that decision.

In the case before us appellant advances the argument that the BLM determination should be reversed because, at the time of issuance, he was seeking to acquire the necessary base lands. There is no question that at

^{4/} On Feb. 21, 1984, section 4160.3 was amended limiting the authority to place a decision in full force and effect. It can now be utilized "only in emergency situations to stop resource deterioration." 49 FR 6440, 6448 (Feb. 21, 1984).

the time of the BLM decision (and for a period of months thereafter) appellant had no base lands. No reason for overturning or modifying the decision was advanced, and Judge Clarke found the decision to be factually proper. Appellant has advanced nothing which would have changed the priorities as they existed on April 1, 1983. Appellant correctly stated that BLM's decision was voidable. However, unless some reason can be advanced to void a voidable decision, it will be upheld.

"No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4100 of this title." 43 CFR 4.478(b). See Rachel Ballow, 28 IBLA 264 (1976). Given the circumstances leading up to the BLM allocation decision, the decision itself clearly was reasonable. El Tejon controlled contiguous lands and appellant did not. BLM was of the opinion that the 30 days allowed for negotiation between the two conflicting applicants constituted substantial compliance with the requirements of Part 4100. 43 CFR 4160.1-1 served to put an applicant on notice of an impending adverse decision and to allow 15 days to act on that notice. On appeal to the Administrative Law Judge and again on appeal to this Board, appellant was afforded an opportunity to demonstrate why the BLM decision was in error. If he had done so, we would not hesitate to reverse the BLM decision. However appellant offered no proof he owned or controlled base lands at the time BLM issued its decision. Judge Clarke determined the lack of an additional 15 days before the decision became final would not have made any difference in this case because appellant did not obtain an adjacent private lease until over 2 months after the BLM allocation decision. On this basis he found the error was not prejudicial. We agree. The situation is now the same it was on the date of BLM's decision. Of the two competing applicants, only El Tejon controlled contiguous land. Judge Clarke correctly observed that a remand would serve no purpose. See Phil J. Hillberry, *supra*. The BLM allocation determination was proper, given the requirements of 43 CFR 4130.2(e) (1983), even though the decision should not have been considered final until 15 days after it issued. The key determinative issue was that appellant had no priority under 43 U.S.C. § 1752(c) (1982), on April 1, 1983, the date of the decision. Because he had no priority, the allocation of grazing privileges was proper. Whether the decision was proposed or final makes no material difference in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

