

ESTATE OF LEONARD BANEGAS  
v.  
BUREAU OF LAND MANAGEMENT,  
ELIAS SALAZAR, EMMA BANEGAS,  
AND EDWARD BANEGAS, INTERVENORS

IBLA 86-1534

Decided April 11, 1989

Appeal from a decision of Administrative Law Judge Robert W. Mesch affirming as modified a decision of the Area Manager, Kingman (Arizona) Resource Area, Bureau of Land Management, determining grazing preference. Arizona 020-86-01.

Affirmed.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Base Property (Land): Dependency by Use

The failure of a licensee of the Federal range to request grazing privileges or nonuse to the extent of earlier licenses supported by the same base property for 2 consecutive years reduces the qualifications of the base property to the extent that it has not been covered by the requests for 2 consecutive years, even though the qualifications of the base property have not been formally adjudicated.

APPEARANCES: Michael W. Murray, Esq., Tucson, Arizona, for the Estate of Leonard Banegas; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; John M. Favour, Esq., Prescott, Arizona, for Intervenors.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Estate of Leonard Banegas (Estate) has appealed a decision dated July 11, 1986, by Administrative Law Judge Robert W. Mesch, affirming, as modified, a grazing preference determination made by the Area Manager, Kingman (Arizona) Resource Area, Bureau of Land Management (BLM).

On September 18, 1985, the Area Manager issued a decision establishing the grazing preference of the Estate within the Greenwood Peak Community Allotment, southeast of Kingman, Arizona, at 249 animal unit months (AUM's). He arrived at this figure by using the "10 year average of licensed use

from 1963 to 1973" (Area Manager's Decision at 4). The 10-year period was applied to all livestock operators in the Kingman Resource Area because no determination of grazing preferences had been made, as it should have been, following the enactment of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. | 315 (1982). The Area Manager further determined that whatever preference the Estate may have been entitled to above 249 AUM's was lost prior to 1974 for failure to include in an application for a license or permit for 2 consecutive years the entire base property qualifications for active, nonuse, or combination of active and nonuse (Area Manager's Decision at 5).

The Estate appealed the Area Manager's decision and a hearing was held before Judge Mesch on March 6, 1986, in Phoenix, Arizona.

In his July 11, 1986, decision, Judge Mesch dismissed the appeal and affirmed the Area Manager's decision "insofar as it found that the appellant's grazing preference was limited to 249 AUM's as a result of the mandatory provisions of 43 CFR 4115.2-1(e)(9), which was in effect from 1962 to 1978." <sup>1/</sup> In reaching this conclusion, Judge Mesch found, however, that the Area Manager had erroneously applied the "10 year average of licensed use from 1963 to 1973." The Judge found that the Estate was entitled to a grazing preference based on its predecessor's (L.O. Banegas') use of the public lands within the allotment during the 5-year priority period immediately preceding June 28, 1934. <sup>2/</sup> According to a 1936 application, L.O. Banegas had a preference of 75 animal units year long at 50-percent public land use for a total of 450 AUM's (BLM Exhs. 2 and 4). Judge Mesch stated that BLM's recognition of the 450 AUM's "constitutes sufficient evidence to indicate that the change in the preference reference period was detrimental to the [Estate]" (Decision at 3).

The Estate challenges this finding based on the testimony of Frances Esquerra Dickson, daughter of L.O. and Nestor Banegas. Dickson testified that her parents were running at least 200 head of cattle between 1929 and 1935 on the Greenwood Peak Allotment (Tr. 83). On cross-examination she testified that in 1936 her parents probably had more than 50 or 60 head but she did not count them (Tr. 84). The Estate contends that the grazing preference established by L.O. and Nestor Banegas is 200 cattle year long, not 75, as indicated in Judge Mesch's decision.

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<sup>1/</sup> 43 CFR 4115.2-1(e)(9) (1977) provided:

"(9) Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:

"(i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse or combination of active and nonuse, except where the base property qualifications are included in an outstanding current term permit, or where the allowable use has been reduced under || 4111.4-3(a)(3) and (c), and 9239.3-2(e) of this chapter."

<sup>2/</sup> See McNeil v. Seaton, 281 F.2d 931, 935 (D.C. Cir. 1960); McNeil v. Udall, 340 F.2d 801 (D.C. Cir. 1964).

As BLM points out, the Estate ignores the fact that the 1936 application shows that Dick Banegas, deceased child of L.O. and Nestor Banegas, ran cattle in common with his parents at the time. BLM contends, and we agree, that the best evidence of the preference is the 1936 application in which the Estate's predecessors applied for 150 head. (See BLM Exh. 4.) In any event, the importance of the dispute over these figures is eclipsed by the controlling issue in Judge Mesch's decision.

[1] As indicated earlier, the Area Manager determined that the Estate had lost whatever preference it may have been entitled to above 249 AUM's for failure to apply for the entire base property qualifications for 2 consecutive years prior to 1974. Reviewing this issue, the Judge recited the Estate's license history:

The appellant and its predecessor's license history shows that for the 9 year period from 1946 through 1954, with the exception of 1948, nonuse was applied for and granted; that the non-use varied from 17 to 102 animal units per year or an average of 73.8 animal units per year; that for the same 9 year period, from 60 to 145 animal units per year or an average of 95 animal units per year was applied for and licensed on an actual use basis; that for the 18 year period from 1955 through 1972, no nonuse was applied for or granted; and that for the same 18 year period, from 10 to 54 animal units per year or an average of 31.7 animal units per year was applied for and licensed on an actual use basis.

In 1971, the appellant or its predecessor applied for and was granted a license for 22 animal units year long at 78% public land use for a total authorized use or grazing preference of 206 AUM's. In 1972, the appellant or its predecessor applied for and was granted a license for 10 animal units year long at 78% public land use for a total authorized use or grazing preference of 94 AUM's. [3/]

(Decision at 5). In affirming the Area Manager's determination, the Judge cited Anawalt Ranch & Cattle Co., 70 I.D. 6 (1963). The Estate argues, as did the appellant in Anawalt, that the 2-year period could not begin to run until BLM had determined what the base property qualifications were; with-out such a determination, the Estate could not properly apply for nonuse. This argument was answered as follows in Anawalt: "[T]he fact that base property qualifications may be changed upon a formal adjudication and thus affect the grazing privileges for which a license or permit may be issued does not mean that an applicant need not offer his base property to the fullest extent that he believes it to be qualified." 70 I.D. at 8. As in Anawalt, the Estate or its predecessors knew that more extensive grazing privileges had been granted in the past and had been protected in the past by applying for nonuse. Based on Anawalt, the mandatory language in the regulation, and the Estate's history, Judge Mesch found that the grazing

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3/ See BLM Exh. 2 (Summary of Historical Licensed Use).

preference was properly established at 249 AUM's. The Estate points to no error in Judge Mesch's rationale.

The Estate contends that BLM should be estopped from enforcing the regulation, and that "the question of base waters" is pertinent to the disposition of the appeal. In support of the estoppel argument, the Estate asserts that since no further nonuse applications were filed after 1955, BLM must have advised Leonard and Dick Banegas that further nonuse requests were not required. As Judge Mesch found, the record simply shows that, in correspondence in the mid-1960's, BLM advised that there was not a set carrying capacity on the allotment because of varying feed conditions, and that any increase in the number of livestock would depend on the feed conditions (Estate Exhs. B and F). The Judge found that BLM's reference to feed conditions could not be construed as relieving the Estate or its predecessors from the requirements of the regulation.

As to base water, the Estate contends that certain waters should be listed in addition to four water sources listed in the Area Manager's decision. The Judge stated: "No useful purpose would be served by considering the question of whether the Area Manager should have listed additional waters as base property in his decision. Any such waters would be in excess of that necessary to support the appellant's grazing preference of 249 AUM's" (Decision at 6).

The Estate has requested oral argument to respond to issues in the briefs filed by BLM and the Intervenor. It did not file a reply to those briefs, as suggested in our order of November 26, 1986, nor would the issues its request sets forth affect our decision on appeal. We therefore exercise our discretion to deny the request. See 43 CFR 4.25.

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.

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Will A. Irwin  
Administrative Judge

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Anita Vogt  
Administrative Judge  
Alternate Member