

GLENN GRENKE
v.
BUREAU OF LAND MANAGEMENT

IBLA 89-436

Decided January 23, 1992

Appeal from a decision of Administrative Law Judge Ramon M. Child dated April 11, 1989, approving the transfer of suspended animal unit months to be activated in a different grazing allotment. OR 030-87-01.

Set aside and remanded.

1. Appeals: Generally--Grazing Permits and Licenses: Appeals--
Rules of Practice: Appeals: Standing to
Appeal

In order to establish standing to appeal under 43 CFR 4.410, an individual or organization must show that he or she is a party to a case and that a legally cognizable interest has been adversely affected by the appealed decision.

2. Appeals: Generally--Grazing Permits and Licenses:
Adjudication--Rules of Practice: Appeals: Generally

Where, in the course of analysis and adjudication, a proposal is changed so much that those potentially adversely affected do not have fair notice of its contents, the decision of the Administrative Law Judge on the proposal will be set aside and the matter remanded so that BLM may issue a new proposed decision based on analysis of the redefined proposal.

APPEARANCES: Barry Marcus, Esq., Boise, Idaho, for appellant Glenn Grenke; Andy Kerr, Director of Conservation, Oregon Natural Resources Council; Evelyn Huntington, Secretary, Oregon Natural Desert Association; Richard A. Parrish, Esq., Portland, Oregon, for the Portland Audubon Society; Timothy Lequerica, Jeff Davis, Ellen Mendoza, and Donald L. Tryon, pro sese; Donald P. Lawton, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Ramon M. Child, dated April 11, 1989, in which he

approved the transfer of 1,006 animal unit months (AUM's) of active grazing preference and 155 suspended AUMs of suspended grazing preference to be reactivated in a different grazing allotment (OR 030-87-01). 1/ The Oregon Natural Resources Council (ONRC), 2/ Portland Audubon Society (PAS), Oregon Natural Desert Association (ONDA), Donald L. Tryon, and Ellen Mendoza and grazers Timothy Lequerica and Jeff Davis (hereinafter, petitioners) have also filed what they variously termed requests to intervene or appeals of the Judge's decision.

This dispute originated in 1956 when grazing users executed an agreement (1956 Agreement, Exh. A-4) which established preference rights of grazing users in the former Soldier Creek Unit and reduced the duration of their active use by 10 percent and reduced their grazing privileges by 4 percent of AUM's plus additional listed reductions in AUMs for 22 users. BLM personnel also signed the 1956 Agreement, which stated:

The United States also agrees that the percentage reductions referred to in the fore part of this paragraph will be restored to each licensee or his successor in interest in the same proportion as the reduction taken when range conditions are such that all or any part of the restoration can be made.

(Exh. A-4 at 2).

In 1960, the Soldier Creek Unit grazing users, including Glenn Grenke, executed another agreement. BLM absorbed a 16-percent additional deficiency between 1956 and 1960. Then, acknowledging that the Soldier Creek Unit was still being grazed 16 percent over capacity, they agreed to divide the Soldier Creek Unit into the Willow Creek (1004), Arock (1001), and Antelope (1002) Allotments (1960 Allotment Agreement, Exh. A-5). They agreed "to accept their range use within areas as outlined below as their full proportionate share of the Federal range in the Soldier Creek Unit." In a handwritten addendum, they added that any increase in capacity above that required to make up the additional 16 percent would be distributed according to the 1956 Agreement "except that no transfer of use between allotments would be considered" (Exh. A-5). Although present during negotiation discussions, the BLM representative did not sign this agreement.

Over time, grazing capacity in other allotments that comprised the Soldier Creek Unit increased, but the Willow Creek allotment did not rebound well. BLM allowed new temporary grazing within the boundaries of the old Soldier Creek Unit, and some of this temporary allocation was made permanent. Other users were shifted out of Willow Creek after a fire there, and not shifted back. In 1984, signatories to the 1956 Agreement protested

1/ A related appeal, separately docketed as IBLA 89-437 addresses attorneys' fees for Glenn Grenke.

2/ By order dated Sept. 13, 1989, this Board granted a joint motion filed by the National Wildlife Federation (NWF) and ONRC to allow NWF to withdraw as an intervenor-appellant and to allow ONRC to adopt the statement of reasons NWF filed.

BLM's allocation of excess forage to others while the 1956 suspensions were still in effect (Tr. 28).

Meanwhile, wilderness study area (WSA) designations made pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1988), encompassed portions of the disputed allotments. This statute allows existing uses, such as grazing, to continue in the same manner and degree as on October 21, 1976, when the statute was passed. 43 U.S.C. § 1782 (1988).

On October 14, 1982, users of the Willow Creek allotment of the BLM Vale Grazing District requested to shift the Rhoades AUMs--both active and suspended--from the Willow Creek allotment to the West Cow Creek allotment. The Willow Creek allottees anticipated that such a shift would allow restoration of suspended AUM's for the remaining Willow Creek allottees and also allow appellant's predecessor-in-interest, to graze his stock closer to his ranch in an allotment where he had already "participat[ed] in water development." 3/

On December 28, 1983, Rhoades, appellant's predecessor-in-interest, requested to shift the disputed grazing preference from the Willow Creek allotment to the West Cow Creek allotment. The Vale District Manager denied the request on May 18, 1984. Rhoades appealed, but the matter was remanded to BLM for reconsideration in light of a newly issued Oregon Policy for Allocation of Additional Forage Permanently Available for Livestock Grazing Use, Instruction Memorandum (IM) OR-85-554. While the matter was pending, Rhoades applied to transfer to Glenn N. Grenke the Willow Creek grazing preference of 1,006 and 155 suspended AUM's of forage. The transfer was approved on April 24, 1985.

On July 16, 1987, the Southern Malheur Resource Area Manager denied Rhoades' application to shift the disputed preference, stating that he was no longer recognized as a grazing permittee after transferring his interests to Grenke. 4/ This July 16, 1987, final decision acknowledged and responded to a protest from Grenke, rejecting Grenke's position as successor-in-interest to the transfer application. BLM also said that a review of available forage, conducted pursuant to IM OR-85-554, indicated that no excess forage was available in West Cow Creek allotment and only 581 AUM's were available in the Arock allotment, which was insufficient to

3/ On Jan. 25, 1984, a group of Willow Creek allottees requested a moratorium on allocation of any excess AUM's prior to the restoration of their suspended AUM's.

4/ A proposed decision issued May 27, 1987; the final decision issued July 16, 1987. On Apr. 20, 1988, the Hearings Division, Office of Hearings and Appeals of the Department of the Interior, denied a motion to dismiss the appeal as to Rhoades. Grenke proceeded with the appeal, despite an incomplete application to transfer grazing preference back to Rhoades. Davis and Lequerica were served with both the proposed and final Area Manager decisions. The other intervenor/appellants now before the Board were not.

satisfy the grazing preference and inadvisable under Oregon State Office policy. Grenke appealed. 5/

Judge Child held a hearing on November 16 and 17, 1988. According to Judge Child, notice of the hearing was sent to the permittees using the Willow Creek, Arock, and West Cow Creek allotments, but no one appeared at the hearing to protest the application (Tr. 446-47).

Michael Holbert, the Supervisory Range Conservationist in the Jordan Resource Area of the Vale District from 1984 until the hearing, testified that it would be standard procedure for BLM to notify any current livestock permittees of an impending shift into their allotment (Tr. 173). This may not always have happened, as in another's shift from West Cow Creek allotment to Arock (Tr. 76, 174). It would also be standard procedure for BLM to consult with interested members of the public, including conservation or wilderness groups, when making management decisions based on its range policies (Tr. 183-84). Counsel for BLM acknowledged that a BLM decision to transfer grazing rights would impact other individuals who were likely to appeal (Tr. 439). At the close of the hearing, he was reluctant to stipulate to make any Administrative Law Judge's decision binding on appellants while others affected might appeal, although he did agree that either Rhoades or Grenke would stand in the same position (Tr. 446). Counsel for appellants stated at the beginning of the hearing that there was no opposition to the Grenke application (Tr. 29-30). Judge Child then observed that "neither party has called anyone who protested this action. No one has appeared in opposition to the applicant or in support of the denial thereof" (Tr. 446). He then stated that all permittees within the Willow Creek, Arock, and West Cow Creek allotments had notice of the hearing and did not appear, so that he would be in a position to make a final ruling (Tr. 447).

The BLM Supervisory Range Conservationist testified that he had analyzed the proposed shift in preparation for the hearing (Tr. 198; Exh. R-20), and recommended against the proposal. He based this recommendation primarily on what he considered an undesirable lack of consolidation of the grazer's overall operation, on compatibility with other users' operations (e.g., whether cow/calf or yearling operation (Tr. 282)), on the presence of WSA land in some pastures in grouped rest-rotation cycles (Tr. 246, 261, 310-12), and on any inconveniences to the applicants (Tr. 373-90). Neither the applicants nor the permittees in the target allotments were consulted in the course of this in-house BLM analysis (Tr. 384, 387). He assumed that no additional water or range improvements would be added (Tr. 232). He opined that the Willow Creek allotment still had potential to reactivate the suspended use (Tr. 374, also Exh. R-26). BLM would not approve the transfer due primarily to conflicts with WSA's (Tr. 226-81; Exh. R-20).

Rhoades testified that he or Grenke would be willing to water the transferred stock off private property and fence off a WSA component of a pasture, as in the Navaro V field of the West Cow Creek allotment

5/ BLM moved to dismiss the appeal the following year, but Administrative Law Judge Sweitzer denied the motion as untimely.

(Tr. 418). Both Rhoades and Grenke were conceded to be satisfactory range operators (Tr. 444-45).

On April 11, 1989, Judge Child reversed the July 16, 1987, BLM decision, and granted the "Rhoades-Grenke application to shift 1,006 active AUM's and 155 suspended AUM's from the Willow Creek Allotment into the West Cow Creek Allotment or in the alternative into the Arock Allotment," with the proviso that BLM may exercise its discretion to require the applicant to provide additional water or fencing (Decision at 17). Judge Child also declared that "[n]o excess forage within the Soldier Creek Unit shall be allocated to permittees other than those who (personally or by their predecessors in interest) appear as signatories to the 1956 Reduction Agreement and/or 1960 Allotment Agreement until such time as AUM's suspended by the terms of the 1956 Reduction Agreement have all been restored to the users." Id.

Judge Child concluded that before BLM could allocate any excess forage within the old Soldier Creek Unit to anyone outside the unit, BLM must restore the Willow Creek Allotment grazing preference suspended under the 1956 reduction agreement. Id. at 16. He concluded also that the application to shift grazing preferences to Arock or West Cow Creek was a reasonable way to restore the grazing preference and granted the application by order. Id. at 17.

On appeal to this Board, BLM incorporated by reference its briefs before the Judge. BLM argued that except for a limited area in the Arock Allotment, the "other areas of use requested would have required extensive monitoring of potential impacts on Wilderness Study Areas which the BLM concluded it did not have the resources to undertake."

BLM alleged that the Judge's decision erred in directing a transfer of AUMs from Willow Creek to Arock or West Cow Creek because such a transfer would prevent BLM from complying with statutory, regulatory, and internal requirements including environmental, WSA impact and grazing, and forage analyses. BLM maintained that the 1956 and 1960 Agreements did not require BLM to restore suspended grazing preferences before allocating excess forage in the remainder of the old Soldier Creek Unit to other users who were not parties to the agreements. BLM claimed that it was reasonable to deny the request for a transfer of AUM's due to a lack of manpower and financial resources. BLM also argued that by the added term of the 1960 Agreement the livestock grazers limited themselves to distributions of suspended nonuse within a given allotment only. If each allotment is considered independently, and the users have agreed that there will be no transfers of use between allotments to restore suspended use, then BLM need not restore suspended nonuse in Willow Creek before allocating surplus forage in Arock and Antelope to users outside the former Soldier Creek Unit.

[1] As a preliminary matter, this Board must evaluate contentions that some of these parties lacked standing to appeal. Regulation 43 CFR 4.410(a) governs standing to bring an appeal before this Board. Any party to a case who is adversely affected by a decision of a BLM officer may appeal to this Board, with certain exceptions that are irrelevant to the matter before us. To have standing before the Board, it is essential that

an individual or organization appealing a decision must show that he or she is a party to a case and has a legally cognizable interest adversely affected by the appealed decision. Colorado Open Space Council, 109 IBLA 274 (1989). Petitioners reasonably alleged that they were adversely affected by the decision either because they are current grazing users of the allotment to which the disputed AUM's would be switched (Davis, Lequerica) or because they use the affected area for recreational activities which could be adversely affected by the grazing of additional cattle (ONRC, PAS, ONDA, Mendoza, Tryon). We find that petitioners adequately alleged adverse effects of the decision for the purpose of establishing standing to appeal.

As to showing they are parties to the case, petitioners claim that they should be made parties to this appeal because they should have been made parties below. They acknowledge that they did not participate at the hearing, but contend that they would have done so if they had been given the opportunity. ONRC, PAS, ONDA, Mendoza, and Tryon claim BLM erred in not informing them adequately of the proceedings so that they could become involved. Petitioners Davis and Lequerica acknowledge that they knew of the impending hearing, but they did not present evidence because, they allege, BLM actively discouraged them from appearing at the hearing; BLM denies the charge. 6/ The record before us does not show that any of the petitioners were parties to this case at an earlier stage. They did not either participate below or file a timely protest to BLM's action pursuant to 43 CFR 4.450-2.

The case file shows that Davis and Lequerica were served with notice of the Area Manager's proposed and final decisions denying the request to transfer. This determination was not adverse, but favorable to them. The case file does not indicate whether Davis, Lequerica, or any other West Cow Creek or Arock allottees were served with notice of the Grenke appeal. Judge Child stated that they were notified, but the case file does not contain evidence of such notice.

In Bureau of Land Management v. Maez, 67 IBLA 89, 93-94 (1982), a BLM officer issued a decision determining the grazing privileges of two conflicting applicants. One applicant did not appeal the BLM decision because he did not consider the BLM decision adverse to his interest. The decision was adverse to the other applicant who appealed to an Administrative Law Judge with favorable results. The failure of the applicant dissatisfied with the Administrative Law Judge's decision to participate in the proceedings before the Administrative Law Judge did not foreclose him from appealing the adverse Administrative Law Judge decision to the Board of Land Appeals, as he was a party to the case adversely affected by a decision of an Administrative Law Judge within the meaning of 43 CFR 4.410. Although he did not participate in the proceedings before the Administrative Law Judge because he did not consider the BLM decision adverse to him, the Board held his failure to participate under the circumstances could not deprive him of his status as a party for purposes of establishing standing to appeal to the Board. Maez, supra at 93-94. Like the applicant who did not participate

6/ For this reason, Davis and Lequerica requested a new hearing.

before the Administrative Law Judge in Maez, other allottees were entitled to participated in these proceedings. Here, not all of the petitioners participated at a previous stage of the case. However, some claimed that they were entitled to participate and were prevented or discouraged from doing so. The record in this case is insufficient to prove or refute these assertions. However, in view of this Board's disposition of the case, all petitioners will have the opportunity to participate before BLM in the future. See, infra.

[2] The 1956 Agreement, which BLM signed, specified that those who had voluntarily reduced their use would be entitled to increase it again to the pre-agreement levels before any increase in forage was allocated to others (Exh. A-4). The 1960 Agreement, which BLM did not sign, added that no transfers between allotments should occur (Exh. A-5). The Southern Malheur Rangeland Program Summary, issued in January 1984, called for consultation with affected range users and other interested parties when developing allotment agreements (Exh. A-6 at 10) and quantified total suspended use for different allotments in its Appendix 1 (Tr. 45, 48; Exh. A-6). By 1985, BLM policy allowed shifts between allotments in some circumstances (Exh. R-16).

Among the causes prolonging this dispute is the changing nature of the proposal itself. The identity of the applicant and the desired destination of the cattle have changed. Rhoades filed the initial application, transferred it to Grenke, then applied to transfer it back to him (Tr. 445; Exh. A-1;). The initial transfer target was West Cow Creek allotment (Exh. A-1), then either West Cow Creek or Arock, then primarily the Arock allotment (see e.g. Grazing Advisory Board Minutes (Nov. 11, 1985) Exh. R-17 at 4). Then at the hearing Grenke and Rhoades indicated a preference for the Arock field of West Cow Creek allotment or to whatever combined destination the Judge would contemplate (Tr. 440-42). At the hearing it also became apparent that, unlike appellants, BLM did not anticipate reactivating suspended AUM's along with a shift in the location of active use (Tr. 388). In this context, the confusion, disagreements and frustration of the parties, the potential parties, and the Judge's were understandable.

The proposal was modified yet again at the hearing itself and in the Administrative Law Judge's decision. He approved a new modification of the proposal which would allow BLM to require Grenke or Rhoades to fence off the WSA components of affected pastures and water stock off private adjacent property. By this time, the proposal had changed so far from the original that it cannot be said that the other allottees in the target allotments had fair notice of it. Whether or not Davis and Lequerica were actively discouraged from testifying at the hearing, they should have had notice of the exact proposal which would manifestly affect them.

Where, in the course of analysis and adjudication, a proposal is changed so much that those potentially adversely affected do not have fair notice of its contents, the decision of the Administrative Law Judge on the proposal will be set aside and the matter remanded so that BLM may issue a new proposed decision based on analysis of the redefined proposal. Therefore, this case is remanded to BLM to issue a decision on the exact

proposal and serve notice of it on the allottees in affected allotments, on petitioners, and on those who may be adversely affected. Such a decision will carry the right to request a new hearing before an Administrative Law Judge. All the factors BLM alleged needed examination could then be incorporated into one analysis, augmenting and updating what was prepared for the hearing. Such an analysis should be prepared before a proposed decision is made.

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 Administrative Law Judge Ramon M. Child dated April 11, 1989, is set aside and the case is remanded to BLM for further proceedings in accordance with this opinion.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge