

RALPH AND BEVERLY EASON
v.
BUREAU OF LAND MANAGEMENT

IBLA 89-216

Decided September 28, 1993

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, dismissing an appeal taken from a decision of the Vale, Oregon, District Manager, Bureau of Land Management, fixing maintenance responsibility in the Jackies Butte summer allotment. OR-030-84-7.

Reversed and remanded.

1. Administrative Procedure: Administrative Procedure Act--Grazing Permits and Licenses: Hearings--Hearings

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

APPEARANCES: Eric Twelker, Esq., Denver, Colorado, for appellants; Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Ralph and Beverly Eason have appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated December 30, 1988, dismissing the Easons' appeal from a decision of the Vale, Oregon, District Manager, Bureau of Land Management (BLM). The District Manager's decision, dated May 30, 1984, fixed the Easons' maintenance responsibility for range improvements within the Jackies Butte summer allotment (1101). This May 30, 1984, decision addressed objections by the Easons to a proposed decision issued by the District Manager on November 8, 1983.

The proposed decision of November 8, 1983, allocated maintenance responsibility according to each grazing operator's licensed "active preference." Thus, an operator holding 10 percent of the allotment's active preference was assigned 10 percent of maintenance costs. The Easons do not object to the method used to allocate maintenance responsibility, but they do assert that the District Manager understated their active preference as 719 animal unit months (AUMs). Appellants also object to the District Manager's allocation of maintenance responsibility to them for improvements that BLM was to maintain under an agreement dated February 26, 1973. Much

of the testimony heard by Judge Sweitzer at a 2-day hearing held June 23-24, 1988, focused upon this agreement of February 26, 1973, and in particular upon the type of AUM that BLM granted to the Easons under this agreement.

The Easons own water rights within one watershed of the Jackies Butte allotment. The agreement settled a dispute between BLM and the Easons that arose prior to 1967 when BLM constructed reservoirs that interfered with the Easons' water rights. These reservoirs were constructed on public lands within the allotment. Approximately nine operators, including the Easons, graze cattle in common on this allotment. Range improvements, such as reservoirs, were key to full utilization of the Jackies Butte allotment, because the area lacked water commensurate with its forage.

The agreement recites that the Easons agree to permit BLM "to construct and maintain, at its own expense, as many water structures and developments as may be necessary for proper management of the Jackies Butte Unit on which [the Easons] control the water right." (Emphasis added.) In consideration of the Easons' consent to the above "construction and development," BLM agreed to grant appellants "200 AU's for 7 months (1400 AUM'S) in addition to their present 434 Class I AUM's within the Jackies Butte Unit." These additional 1,400 AUMs were to be permanent so long as BLM required water for domestic livestock within the Jackies Butte Unit and were to be the last allowance cut or diminished in the event of a reduction. The agreement characterized the 1,400 AUMs as "a trade of use" and specified that no license fee would be charged the Easons for these 1,400 AUMs.

As mentioned above, the dispute occasioned by the District Manager's decision of May 30, 1984, focuses upon whether the 1,400 AUMs granted by BLM were Class I AUMs or, in today's parlance, preference AUMs. Although the effect of an increase in Class I or preference AUMs would be, in theory, to increase the Easons' maintenance responsibilities, the Easons maintain that by the agreement of February 26, 1973, BLM assumed all maintenance responsibility for water structures, including wells, in the Jackies Butte allotment. BLM, however, reads the agreement to require that it maintain only those water structures and developments within the watershed where the Easons own water rights.

Judge Sweitzer began his legal analysis by stating that the sole issue on appeal was whether the District Manager's decision of May 30, 1984, was arbitrary, capricious, or contrary to law. This analysis, although suggesting the standard of review applied by a Federal district court, was in accordance with the applicable regulation, 43 CFR 4.478. This rule provides that 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 43 CFR Part 4100.

Regulation 43 CFR 4.478 considerably narrows the scope of review to be given to the District Manager's decision by the Administrative Law Judge and by this Board. Although unusual, this scope of review is consistent with the highly discretionary nature of the Secretary's responsibility for Federal range lands. Chris Claridge v. Bureau of Land Management, 71 IBLA 46, 50 (1983).

Judge Sweitzer next focused upon the evidentiary standard, *i.e.*, the standard of proof, that appellants were required to meet in order to satisfy their burden of proof. After considerable discussion of case law, including Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984), and Washboard Permitee Group, 99 IBLA 10 (1987), Judge Sweitzer felt bound to follow Board precedent as enunciated in Webster v. Bureau of Land Management, 97 IBLA 1 (1987). Webster required an appellant to show by "substantial evidence" that a grazing decision was improper or unreasonable. ^{1/} "Substantial evidence," Judge Sweitzer found, was comparable to the "clear and convincing" standard of proof imposed in certain administrative settings.

Having defined this standard of proof, Judge Sweitzer required the Easons to show by substantial evidence that the District Manager's decision was arbitrary, capricious, or contrary to law. With respect to the type of AUM granted to appellants under the agreement of February 26, 1973, Judge Sweitzer found that the Easons had not shown by substantial evidence that the 1,400 AUMs were Class I. As to BLM's maintenance duties, Judge Sweitzer held that the Easons had not shown by substantial evidence that the District Manager erroneously limited such duties under the February 26, 1973, agreement to that watershed where appellants owned water rights.

Appellants assert that Judge Sweitzer erred in requiring them to demonstrate error in the District Manager's decision by a heightened standard of proof. This heightened standard of proof refers to the "substantial evidence" standard employed by Judge Sweitzer. We agree with appellants.

[1] Our analysis of the proper standard of proof begins with section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), which provides in part: "The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." (Emphasis added.) The hearings implicitly required by this statute apply "to matters that arise in the administration of grazing districts." LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir. 1963). Regulations governing Judge Sweitzer's hearing in the instant case, 43 CFR 4.470 through 4.478, are successors to the initial rules and regulations implementing section 9. See Circular No. 4, 55 I.D. 368 (1935), and 44 FR 41790 (July 18, 1979). We find, accordingly, that the hearing conducted by Judge Sweitzer in the instant case was a section 9 hearing.

In Bureau of Land Management v. David & Bonnie Ericsson, 98 IBLA 258, 263 (1987), this Board concluded that a section 9 hearing was an adjudication under 5 U.S.C. § 554(a) (1988), *i.e.*, an adjudication "required by statute to be determined on the record after opportunity for an agency hearing." Accord E. L. Cord, 64 I.D. 232, 239 (1957). A hearing under 5 U.S.C.

^{1/} The Webster decision is clearly distinguishable in that it involved conflicting preference claims voiced by competing ranchers and interpreted the provisions of 43 CFR 4.478(b).

§ 554(a) (1988) is an example of formal adjudication under the Administrative Procedure Act (APA), 5 U.S.C. § 551 (1988), and is subject to the terms of that Act.

One provision of the APA relevant here is section 7(c), 5 U.S.C. § 556(d) (1988), which states in pertinent part:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. [Emphasis added.]

In Steadman v. Securities & Exchange Commission, 450 U.S. 91, 102 (1981), the Supreme Court was called upon to construe section 7(c) in deciding the appropriate standard of proof for a hearing under 5 U.S.C. § 554(a) (1988). The Court held: "The language and legislative history of § 7(c) lead us to conclude * * * that § 7(c) was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of-the-evidence standard." 2/

The standard of proof adopted by Judge Sweitzer, substantial evidence, 3/ was regarded by the Judge as "comparable" to the clear and

2/ The similarity of language in section 7(c) of the APA and 43 CFR 4.478 lends support to our conclusion in Ericsson that a section 9 hearing was to be "on the record" within the meaning of 5 U.S.C. § 554(a) (1988). Regulation 43 CFR 4.478, which applies to section 9 grazing hearings, states in part:

"(a) **Record as basis of decision; definition of record.** No decision shall be rendered except on consideration of the whole record or such portions thereof as may be cited by any party or by the State Director and as supported by and in accordance with the reliable, probative and substantial evidence." (Emphasis added.) The passage underscored above appears verbatim in section 7(c) of the APA, 5 U.S.C. § 556(d) (1988), and first appeared in the grazing regulations shortly after enactment of section 7(c). See 43 CFR 161.9(n), 11 FR 14496 (Dec. 18, 1946).

3/ In Steadman v. Securities & Exchange Commission, supra, the Supreme Court carefully distinguished the APA's use of the phrase "substantial evidence" as it appears in section 7(c) and as it later appears in section 10(e). As noted above, the phrase refers to a standard of proof in section 7(c), and that standard is a preponderance of the evidence. In section 10(e), 5 U.S.C. § 706(2) (1988), the phrase is used to define the scope of review--not the standard of proof--of a Federal judge reviewing cases subject to 5 U.S.C. §§ 556 and 557 (1988), or otherwise reviewed on the record of any agency hearing required by statute. Section 10(e) provides:

convincing standard of proof (Decision at 5 n.5). As so viewed, the standard of proof required of the Easons was higher than that contemplated by the APA's preponderance of the evidence standard and placed appellants at a disadvantage. This error requires that we reverse Judge Sweitzer's decision insofar as it rests upon this incorrect standard of proof.

Because Judge Sweitzer presided at the hearing involved here and had the benefit of viewing the demeanor of the witnesses during their testimony, we remand this case to him for preparation of a new decision. In preparing this decision, Judge Sweitzer shall weigh the evidence under a preponderance of the evidence standard of proof. Thus, where the issue is one of fact, appellants will prevail if their evidence preponderates over that adduced by BLM. ^{4/} Judge Sweitzer's new decision shall be final in the absence of an appeal.

fn. 3 (continued)

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

(Emphasis added.)

In the context of section 10(e), "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966), quoting from Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229 (1938). Section 10(e) does not permit the reviewing court to weigh the evidence. Steadman v. Securities & Exchange Commission, 450 U.S. at 99.

^{4/} In determining the nature of the AUMs received by the Easons, the Administrative Law Judge may wish to consider whether the Easons' water rights qualified them as preference applicants under 43 CFR 4111.3-1(c) and (d) (1973). Water used in range livestock operations is recognized as "property" by 43 CFR 4110.0-5(i) (1973).

Therefore, 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 reversed and remanded for action consistent herewith.

James L. Byrnes
Chief Administrative Judge

I concur:

R. W. Mullen
Administrative Judge