

WILLIAM J. THOMAN
v.
BUREAU OF LAND MANAGEMENT
GZ LIVESTOCK, ET AL. (Intervenors)
(ON RECONSIDERATION)

IBLA 90-411R

Decided July 27, 2001

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., affirming decisions by the Area Manager, Green River Resource Area, Bureau of Land Management, suspending grazing permits and preferences, assessing fees for grazing trespass, and denying a grazing permit application. WY-04-88-1 and WY-04-89-2.

Petition for reconsideration denied.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Contracts: Construction and Operation: Generally

When the provisions of an agreement are unambiguous, parol evidence that an obligation is a condition precedent to the other party's obligations is inadmissible.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, and William F. Schroeder, Esq., Vale Oregon, for petitioner; Jennifer E. Rigg, Esq., Office of the Solicitor, U. S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Counsel for William J. Thoman has filed a timely Petition for Reconsideration of our decision in William J. Thoman v. Bureau of Land Management, 152 IBLA 97 (2000). See 43 CFR 4.403. At our request, the Bureau of Land Management (BLM) filed an Answer, and Thoman has filed a Reply. On September 29, 2000, we stayed implementation of a suspension of AUM's, proposed by BLM to be effective March 1, 2001, pending our decision on the petition.

A principal focus of our decision was a November 1968 agreement that Thoman and BLM entered into to settle Thoman's appeal of a BLM decision. We stated in our decision:

The 1968 Agreement is a contract and the normal rules of contract construction govern the interpretation of such agreements. Anthony v. United States, 987 F.2d 670, 673 (10th Cir. 1993); Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d 781, 784 (8th Cir. 1984). The primary function of contract interpretation is to ascertain the intent of the contracting parties as revealed by the language they chose to use. Sayers v. Rochester Telephone Corp. Supplemental Management Pension Plan, 7 F.3d 1091, 1094 (2d Cir. 1993), Seiden Assocs. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992). If the contract language is clear and unambiguous, the terms of the agreement are given plain meaning and the intent of the parties and the interpretation of the agreement will be determined from the four corners of the document alone. Anthony v. United States, 987 F.2d at 673; Georgia-Pacific Corp. v. Lieberam, 959 F.2d 901, 905 (11th Cir. 1992); Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d at 784. Contractual language will be deemed ambiguous only when it is reasonably susceptible to different constructions. WH Smith Hotel Services v. Wendy's Int'l, Inc., 25 F.3d 422, 427 (7th Cir. 1994). However, a contract is not ambiguous merely because the parties disagree on the correct interpretation. Pollock v. Federal Deposit Insurance Corp., 17 F.3d 798, 803 (5th Cir. 1994); Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc., 917 F.2d 1239, 1247 (10th Cir. 1990).

[1] Thoman and BLM entered into the 1968 Agreement to settle Thoman's appeal of the October 3, 1968, decision to establish and assign grazing allotments. Thoman interprets the 1968 Agreement as granting the right to use the Lombard Allotment and BLM-managed land along the Big Sandy River outside the Lombard Allotment for spring lambing operations until sufficient water is developed in the Lombard Allotment to permit spring lambing operations entirely within the Lombard Allotment. Thoman points specifically to Item 7 of the 1968 Agreement, which is set out in full in footnote 7 above, as the contract provision granting that right. Item 7 in the 1968 Agreement does contemplate BLM's installation of facilities "to facilitate the proper livestock distribution and utilization of the forage," and expresses a general need for additional watering facilities within the Lombard Allotment. However, we find no language expressing the intent urged by Thoman in Item 7 or anywhere else in the 1968 Agreement. Indeed, there is no reference to spring lambing or to any use outside the Lombard Allotment during the period that water is being developed or otherwise. We will not read language into the 1968 Agreement where no such language appears, especially when that language contravenes the language of Item 2 [sic] of the agreement. See James E. Briggs v. BLM, John F. Gross, Jr., 99 IBLA 137, 146 (1987); BLM, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4, 10 (1987). Judge Rampton did not find Thoman's testimony that his interpretation of the 1968

Agreement represented the intent of the parties credible and, after our review of the record, we are not persuaded that his conclusion is incorrect. See United States v. Deirdre Higgins, 134 IBLA 307, 316 (1996).

152 IBLA at 104-105. Footnote 7 of our decision, referred to above, reads:

7/ The 1968 Agreement contained eight provisions and five conditions. The provisions were: (1) Thoman agreed to withdraw his appeal; (2) BLM agreed to amend the Lombard Allotment, giving Thoman additional acreage to compensate for grazing privileges acquired from Arthur C. Robinson and trail use of the Lombard Allotment; (3) BLM would furnish fencing material and erect boundary fences on the north, east, and west side of the Lombard Allotment; (4) BLM would furnish the materials and BLM and Thoman would construct additional fences at points identified on an attached exhibit; (5) a portion of the Lombard unit would be administered in conjunction with the adjoining wildlife refuge until the refuge lands are fenced or disposed of; (6) the part of the Lombard Allotment lying southwest of the Green River would be administered in common with the Slate Creek Unit Allotment; (7) "The parties agree that adequate watering facilities including, ponds, reservoirs, wells and troughs, will be installed by the Bureau of Land Management to facilitate proper livestock distribution and utilization of the forage. a. Facilities for livestock and forage management installed, constructed or developed on public lands by the allottee will be authorized by appropriate documentation (Range Improvement Permit - Section 4 of the Taylor Grazing Act);]" and (8) a described livestock trail would be allocated north of the road to the east exterior boundary of the Lombard Allotment, with designated watering places. (Exh. G-47.)

The five conditions of the agreement were: (1) all obligations of the Government were made expressly contingent upon Congress making the necessary appropriations for expenditures, and if the appropriations are not made, the Government is released from any liability; (2) the agreement was subject to any rights which might exist of persons not parties to the agreement; (3) the agreement was specifically made subject to all laws and regulations of the United States, and if any of the terms are found to be in conflict with a law or regulation the law or regulation was to prevail; (4) Thoman warranted that no person or agency had been employed to secure the agreement for a commission or contingent fee; and (5) no member of Congress or Resident commissioner could gain a share of the agreement or the benefits derived from the agreement. Id.

152 IBLA at 101-102.

Thoman's petition quotes Williston On Contracts, § 33.14 (4th ed. 1999):

The parol evidence rule applies only when the parties integrate their agreement, that is, when they mutually consent to a certain writing or writings as the final statement of the agreement or contract between them. Only when an integrated contract exists and its meaning differs from extrinsic evidence offered by one of the parties, does the parol evidence rule come into play. Its application and effect are unitary – the exclusion of all inconsistent extrinsic evidence as defined under the rule. * * * Since the application of the parol evidence rule depends on the existence of a valid integrated contract, the rule does not preclude evidence which contradicts the very existence or validity of an alleged contractual obligation. Thus, the rule permits the admission of facts . . . that demonstrate the existence of a condition precedent to the contract or its obligations.

Petition at 9. "[Williston] added that the parol evidence is only admissible 'to the extent that the additional terms do not contradict the written terms of the agreement.' Id., § 33.20." Petition at 10.

The November 1968 agreement did not contain a merger clause that would create a presumption that the agreement made was fully integrated into the writing, Thoman observes. Id. at 10-11. ^{1/} Thoman argues that "[t]he evidence specifically showed the existence of a condition precedent to Thoman's obligation to move and the dismissal of an appeal from a decision requiring him to do so. That condition was BLM developing the necessary water facilities within the Lombard Allotment. The fact that these were reciprocal obligations was and is, under the circumstances, firmly established." Id. at 11. The existence of this condition is apparent from pages 98-105 of our decision, Thoman argues. Id.

We observed in our decision that the November 1968 agreement did not make any reference to spring lambing or to any use outside the Lombard Allotment during the period that water is being developed. 152 IBLA at 105. "[T]his is immaterial," Thoman argues, "because the writing did not purport to integrate all of the terms of the agreement":

Thoman had been historically authorized to lamb along the Big Bend and he was unwilling to forego that historical use without adequate watering facilities within the Lombard Allotment to accommodate this use, but he was willing to confine his grazing use to the Lombard Allotment conditioned upon BLM constructing 'adequate watering facilities . . . to facilitate proper livestock distribution and utilization of the forage' subject to

^{1/} A merger clause is a recitation that the written contract is integrated and contains all conditions, promises, and representations between the parties and that the parties are not to be bound except by the writing. Williston, § 33.21.

'necessary (monetary) appropriations' [quoting paragraph 7 and condition 1 of the November 1968 agreement]. This condition precedent was consistent with the writing. Ex. BB. See 152 IBLA at 105. That this was to be a condition to [Thoman's] vacating is obvious from the nature of the situation as it existed at and before the time BLM and Thoman executed the written commitment of BLM in 1968. Thoman historically used and relied upon the use within the Big Bend area to permit his lambing, and Thoman was unable to give up that use and otherwise confine his use to the Lombard Allotment unless or until BLM developed necessary water facilities within the Lombard Allotment to accommodate or replace that use.

Id. at 12-13. Although we acknowledged this history, Thoman states, we ignored its consequence and made "a clear error of law in [our] application of a concept of construction to only one of the relevant writings which constituted only one part of the agreement which was made," referring to pages 104-105 of our decision (set forth above). Id. at 14.

"A proper review would have demonstrated the record, that the 1968 writing was only a part of the contract and that parol evidence proved the reciprocal relationship between the dismissal of Thoman's appeal and the construction by BLM of adequate watering facilities; that Thoman's promise to vacate was 'not to be effective . . . unless some future specified event transpires,' i.e. the construction of adequate watering facilities. North American Uranium [v. Johnston], 316 P.2d [325] at 333 [Wyo. 1957]. The application of an erroneous legal theory . . . resulted in the Board not only ignoring the condition precedent to the 1968 writing, but in reaching an erroneous and manifestly unjust conclusion that Thoman committed unauthorized use." Id. at 14-15. Because BLM did not conform to the condition, Thoman argues, our decision finding he committed trespass should be set aside.

BLM states that Thoman's petition for reconsideration should be denied because it improperly attempts to contradict the express terms of the written agreement with parol evidence and because it is based on testimony by Thoman that was found not credible by Administrative Law Judge Rampton. Answer at 5. Thoman replies that BLM's argument that the condition precedent contradicts the 1968 Agreement is based on comparing the condition precedent and BLM's October 1968 decision, not the November 1968 agreement, and that Judge Rampton did not find Thoman's testimony lacked credibility, he only found that no document in evidence supported Thoman's position. Reply at 3, 5.

The context of Thoman's quote from Williston, § 33.20, on page 10 of his petition that parol evidence is only admissible to the extent that the additional terms do not contradict the written terms is:

"The principle that parol evidence may add terms to an incomplete agreement applies logically where the written agreement constitutes only a 'partial integration' of the parties' whole agreement -- that is, where an incomplete

writing is adopted by the parties as the expression of that portion of their larger oral agreement to which it relates. But if a contract is even partially reduced to writing, the written portion is no more subject to contradiction by oral than the entire contract would be had it been wholly reduced to writing. Thus, if a contract is not fully integrated, oral evidence of additional contract terms may be admitted to complete the agreement, but only to the extent that the additional terms do not contradict the written terms of the agreement."

Williston, § 33.20, pages 658-59. Thus, Thoman's argument is that the November 1968 agreement was partially integrated, i.e., did not fully reflect the understanding between Thoman and BLM, and that oral evidence that BLM's provision of adequate watering facilities was a condition precedent to Thoman's moving his sheep is admissible because it is consistent with the terms of the written agreement.

[1] In our view, even if the November 1968 agreement is only a partial integration of the agreement between Thoman and BLM in settlement of Thoman's appeal, that written agreement deals directly with BLM's provision of adequate watering facilities and therefore oral evidence that BLM's performance was a condition precedent to Thoman's removing his sheep contradicts the terms of the agreement and is not admissible. Item 7 on page 2 of the November 1968 Stipulation and Agreement states that "[t]he parties agree that adequate watering facilities will be installed by the Bureau of Land Management" and Condition 1 on the same page states that "[a]ll obligations of the Government under this agreement are expressly contingent with Congress making the necessary appropriations for expenditures and in case such appropriations as may be necessary to carry out any of such obligations is not made the Government is released from any liability therefore." These provisions are not ambiguous; they make clear that the parties agreed in writing that BLM would install adequate watering facilities unless Congress did not make the necessary appropriations. ^{2/} That is, BLM's installation of adequate water facilities was conditional on Congress making the necessary appropriations. Under these circumstances, oral evidence that the parties intended that BLM's installation of adequate watering facilities was a condition precedent to Thoman's removing his sheep is inconsistent and inadmissible. Williston, § 33.20; Restatement (2d) of Contracts, § 213; Seitz v. Brewers' Refrigerating Machine Company, 141 U.S. 510, 517 (1891).

^{2/} Thus, the settlement agreement clearly contemplated that BLM would actively seek the appropriations to develop the water necessary to conduct lambing operations on the Lombard Allotment. If it could be shown that BLM failed to exercise reasonable diligence in seeking these funds, an action could lie for breach of the agreement. However, if BLM breached the agreement, Thoman's relief was to seek damages for breach of contract. The breach, whether perceived or real, did not justify trespass.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR § 4.1, Thoman's petition for reconsideration is denied and our September 29, 2000, order staying implementation of BLM's proposed suspension of AUM's is lifted.

Will A. Irwin
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

