INTERIOR BOARD OF LAND APPEALS

Silvino Ortiz
v.
Bureau of Land Management

126 IBLA 8 (April 1, 1993)

Title page added by:
ibiadecisions.com

SILVINO ORTIZ
v.
BUREAU OF LAND MANAGEMENT

IBLA 92-497 Decided April 1, 1993

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., setting aside a decision of the Acting Manager, Las Cruces District, New Mexico, Bureau of Land Management, that rejected grazing application NM 030-91-002.

Reversed.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Base Property (Water)

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazier who had control of water base property offered in support thereof, which water was available and accessible for stock watering purposes and was used under a color of right, absent a determination under state law that the grazier did not have valid water rights.

APPEARANCES: Gayle E. Manges, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management; Herman E. Ortiz, Esq., Las Cruces, New Mexico, for Silvino Ortiz.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge John R. Rampton, Jr., dated April 30, 1992, setting aside an April 9, 1991, final decision of the Acting District Manager, Las Cruces District, New Mexico, BLM, that rejected the application of Silvino Ortiz for authorized grazing use (NM 030-91-002).

On January 17, 1990, Ortiz filed an application with BLM seeking authorization to graze 19 cattle on Yeso Arroyo Allotment No. 6003 from March 1, 1990, to February 28, 1991, amounting to 228 animal unit months (AUM's) of authorized grazing use. The allotment, which is situated in sec. 18, T. 18 S., R. 4 W., and secs. 13-15 and 22-24, T. 18 S., R. 5 W.,

New Mexico Principal Meridian, Sierra and Dona Ana Counties, New Mexico, is bordered by private lands owned and leased by Ortiz. He offered as base property State water rights held by him in two wells drilled on that land.

In his April 1991 decision, the Acting District Manager rejected the Ortiz application because he concluded that all of the authorized grazing use in the allotment had already been "properly allocated" to the Yeso Arroyo Ranch Partnership composed of Tommy Apodaca, Raymond Apodaca, Jr., and B.C. Apodaca (Partnership) (Final Decision at 3). The Acting District Manager concluded that the Partnership properly held the entire grazing preference in the allotment and was entitled to all grazing privileges since they "control[led]" water base property from the Rio Grande River by virtue of an "easement" which had retained the right of access from the public lands in the allotment to that water. He concluded that this was so although the Partnership did not hold a State water permit, because whether a permit was required under State law was of "concern to the State Engineer and junior water users."

According to BLM, the Partnership's grazing preference dates from the early 1930's when it was first issued to Nicanor S. Apodaca, who then owned fee lands along the banks of the Rio Grande River. See Statement of Reasons for Appeal (SOR) at 2. These lands were subsequently obtained by the United States pursuant to an October 21, 1941, warranty deed that reserved to Apodaca the right to drive stock across the lands conveyed for the purpose of watering them in the river. See id. at 3; "Exhibit A" attached to Exh. R-4. Prior to the conveyance, the Grazing Service (BLM's predecessor) had rendered an opinion that, following reservation of the access right, Apodaca would continue to have grazing privileges on adjacent public land:

> So long as the base water remains available, accessible, and adequate as set forth in the Federal Range Code. In other words, you can see that the mere right of Mr. Apodaca to drive his livestock across [the conveyed lands] would not qualify him for grazing privileges. He must also have the water available in an adequate amount accessible to his livestock in such a manner that they could consume the water and graze upon the Federal Range.

(Exh. R-4 at 12). The right of access to the river was subsequently conveyed by warranty deed dated January 21, 1946, to Raymundo Apodaca. See Exh. R-9. It was then inherited by Dolores Goedke, who conveyed it to Tommy Apodaca by warranty deed dated June 7, 1986. See Exhs. R-6 and R-12. Meanwhile, the preference passed to Raymundo Apodaca and then to Raymond Apodaca, Jr. See SOR at 4; Exh. R-6. Well before Ortiz applied for grazing use, Raymond Apodaca, Jr., requested BLM on December 17, 1985, to transfer the preference to the Partnership. See Exh. R-5 at 3. In support thereof, Tommy Apodaca offered as base property the water of the river. Id. at 2. On February 3, 1988, BLM approved the transfer of the preference to the Partnership. See SOR at 4; Exh. R-5 at 3. A 10-year

permit subsequently issued to the Partnership. BLM states that at all times since the 1930's the base property supporting the preference has been the water of the river. See SOR at 4.

Ortiz appealed from the Acting District Manager's April 1991 final decision, contending that the Partnership was not qualified, under 43 CFR 4110.1, to hold a grazing preference in the subject allotment since it does not own or control water base property. The regulation provides in pertinent part that "[in order] to qualify for grazing use on the public lands an applicant * * * must own or control land or water base property."

A hearing was held on February 6 and 7, 1992, in Las Cruces, New Mexico, before Administrative Law Judge Ramon M. Child. Following the conclusion of the hearing, the case was transferred to Judge Rampton and the record, including the hearing transcript and exhibits submitted at the hearing, was reviewed by him.

In his April 1992 decision, Judge Rampton concluded that the Partnership did not, as required by 43 CFR 4110.1, control necessary water base property. He found that the Partnership was not responsible to provide care and management of the base property and thus did not "control" the property within the meaning of 43 CFR 4100.0-5. He concluded that the Partnership had "permissive" use of water from the river since it had not been permitted under State law the right to use any water from the river and that such use was insufficient to meet the qualifications demanded of applicants by 43 CFR 4110.1. He also concluded that access or an easement permitting access to the river (assuming one was held by the Partnership) would not qualify an applicant under the regulation. Accordingly, he held that the Ortiz grazing use application was not properly rejected because of the Acting District Manager's erroneous conclusion that the Partnership controlled water base property needed to support a grazing preference. Judge Rampton therefore set aside the Acting District Manager's April 1991 decision. He did not hold that BLM could not reject the Ortiz application for other reasons. Nor did he hold that the Partnership's preference should be cancelled. Instead he suggested (but did not order) that the District Manager, upon return of the case, should:

> First, afford the Partnership a reasonable opportunity of approximately 90 days to obtain ownership or control of suitable base property to support its preference in the Yeso Arroyo Allotment. Second, permit the Partnership to continue grazing the Yeso Arroyo Allotment under terms identical to the terms of its present permit during the period in which it is afforded such opportunity. Third, if the Partnership is able to obtain suitable base property within such period, approve the transfer of its preference to such base property. Fourth, if the Partnership is unable to obtain suitable base property within such period, declare available the forage associated with the grazing use in question and

> follow normal procedures for notifying the public of the availability of the forage, accepting applications for such grazing use, and awarding the grazing use to the most qualified applicant.

(Decision at 7). BLM has appealed from this decision.

BLM contends that Judge Rampton improperly set aside the April 1991 decision rejecting the Ortiz application because the Acting District Manager had incorrectly concluded that the Partnership controlled water base property. BLM argues that the Partnership has control of such property by virtue of the fact that an adequate amount of water is available under the reserved easement to the Partnership, in the absence of a contrary determination by a State agency or court. BLM disputes Judge Rampton's conclusion that in order to establish control of water base property the Partnership must have a State permit for stockwatering purposes.

In holding that the Partnership did not control water base property to support a grazing preference, Judge Rampton found their use of water from the river was not only without the benefit of a State water permit, but was also "unlawful under State law" (Decision at 5). BLM takes exception to that holding, arguing that it goes beyond the authority of this Department. We agree that the Department does not have authority to decide whether use of public waters within a State is in violation of State law, since that is a question for the State courts. Cf. Lee J. Esplin, 56 I.D. 325, 334 (1938) (conflict regarding ownership of water rights under State law). Accordingly, we will not resolve the question of the legality of the Partnership's water use and we must disapprove the attempt by Judge Rampton to do so.

Correction of this error does not, however, dispose of this appeal, because whether the Partnership's use was proper was not the foundation for the ultimate holding by the Judge that the Partnership lacked control of water base property. The case turns on whether the Partnership controlled water base property under Departmental regulations (even without a State water permit), and not whether their use of the water without a permit was contrary to State law. The issue before us concerns whether BLM should allocate the authorized grazing use of the Yeso Arroyo Allotment (228 AUM's) to the current holder of the grazing preference (the Partnership) or negate that preference and award such use to a subsequent applicant therefor (probably Ortiz) since the evidence is undisputed that the allotment is not able to support any more than the current allocation of 228 AUM's (Tr. 245).

In order to be entitled to grazing privileges, an applicant therefor "must own or control land or water base property." 43 CFR 4110.1. That requirement has persisted since shortly after passage of the Taylor Grazing Act. See 43 CFR 501.6(b) (1938). Such ownership or control must continue during the term of the grazing permit, and it is not sufficient that privileges may have been longstanding, if they are not properly supported. Sidney W. Nicholes, A-27918 (Aug. 7, 1959), at 9. The term "[c]ontrol" is defined as "being responsible for and providing care and management of base property." 43 CFR 4100.0-5. "Base property" is defined, in the case

of water, as "water that is suitable for consumption by livestock and is available and accessible to the authorized livestock when the public lands are used for livestock grazing." Id. If there is loss of control of water base property, the grazing permit terminates immediately without further notice. 43 CFR 4110.2-1(d). If a permit terminates because of loss of control, "the grazing preference shall remain with the base property and be available through application and transfer procedures at 43 CFR 4110.2-3 to the new owner or person in control of that base property." 43 CFR 4110.2-1(d).

Ortiz is not claiming that the Partnership has lost control of claimed water base property from the river, but that they and their predecessors-in-interest never had control of such property. If this is the case, then the provisions of 43 CFR 4110.2-1(d) would not apply. Nevertheless, if it is true that the Partnership preference was not supported by appropriate base property, it would have been error for BLM to have issued a grazing permit to the Partnership. Having been issued, the permit would be subject to cancellation. See Briggs v. BLM, 99 IBLA 137, 153 (1987). The grazing preference so issued would not be void. Rather, BLM could transfer it to the owner or person in control of new base property (possibly Ortiz), though BLM could favor the Partnership (based on the longstanding use by their predecessors-in-interest). Id. at 153-54. So even if Ortiz were to prevail by demonstrating that the preference should not be held by the Partnership, he would not necessarily acquire the preference.

It is BLM's position that the reserved right of access to the river for stockwatering purposes coupled with actual use of water from the river for purposes not prohibited by the State operated to give the Partnership control of water base property and to support its existing grazing preference. Ortiz challenges the chain of title by which the Partnership acquired the reserved right of access to the river. See Brief in Chief of Appellant Silvino Ortiz at 10-11. We must therefore consider the adequacy of the chain of title for the limited purpose of determining whether the Partnership had control of water base property at the time it obtained the grazing preference and thereafter.

[1] Judge Rampton did not determine the adequacy of the chain of title (Decision at 6 n.2). Nonetheless, we conclude that Ortiz has failed to demonstrate any break in the chain. Ortiz may of course institute an action in State court to finally determine the matter. The access right was first conveyed by a January 21, 1946, warranty deed from Nicanor Apodaca to Raymundo Apodaca. See Exh. R-9. It was then willed to Dolores Goedke by Raymundo Apodaca upon his death in August 1985. See Exh. R-6. The will was probated and there is no evidence that the terms of the will were not fulfilled. See Exh. R-8; Tr. 204, 276, 278. Goedke then conveyed the access right to Tommy Apodaca by warranty deed dated June 7, 1986. See Exh. R-12. Tommy Apodaca entered into the Partnership on December 17, 1985. See Exh. R-11. On that same date, he (on behalf of the Partnership) offered the water in the river (including the right of access) as base property in support of the application by Raymond Apodaca, Jr. (also on behalf of the Partnership), for the transfer of the grazing preference. See Exh. R-5 at 2. BLM approved

the transfer, accepting the offered base property (including the right of access) on behalf of the Partnership.

From the time the grazing preference was transfered to the Partnership until hearing, water from the Rio Grande River was suitable and available for consumption by the Partnership's livestock grazing on the subject allotment (Tr. 73, 80-81, 93-94, 135, 168, 245). Also, by virtue of the reserved access right, there was no doubt the water was accessible to Partnership livestock for base property purposes. Compare Charles M. Creasy, IGD 72, 74 (1938), with Eduardo Boney, IGD 306, 307 (1942). Ortiz has presented no evidence to the contrary. Therefore, water from the river qualifies as water base property under 43 CFR 4100.0-5. See Cecile R. Paulk, IGD 178, 179 (1940).

It is unnecessary for purposes of establishing control of water base property that an applicant for transfer of a grazing preference show it has acquired a State water permit. There is no such requirement in the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1988), or implementing regulations (43 CFR Part 4100). Section 3 of the Act, as amended, 43 U.S.C. § 315b (1988), speaks of preference to owners of "water or water rights." (Emphasis added.) Water base property is also defined by regulation to mean simply "water." 43 CFR 4100.0-5. There is nothing in the definition of "[c]ontrol" in 43 CFR 4100.0-5 to require acquisition of a water permit. Indeed, an applicant can be "responsible for * * * [the] care and management" of free-flowing water even where it is not subject to a State water permit. Id. Such responsibility can derive from lawful use since such use inherently carries with it such responsibility.

The case of Briggs v. BLM, 75 IBLA 301 (1983), defines the word "control." While the case involved land and not water base property, it does stand for the proposition that the purpose of the Taylor Grazing Act to promote orderly use of the public range land and stability in the livestock industry (see 43 CFR 4100.0-2) would be frustrated by holding that a grazing preference is properly extended to "'occupants [of land] who are without tenure * * *, whose privileges can be terminated at any time without notice.'" Briggs v. BLM, 75 IBLA at 303 (quoting from Harry Grabbert, 12 IBLA 255, 261, 80 I.D. 531, 534 (1973)). Occupancy must be under "color of title or valid claim." A. L. Murry, IGD 120, 123 (1938). The same is true where control of land is based on use. See Frank Halls, 62 I.D. 344, 355-56 (1955). We think these principles are equally applicable in the case of water base property. It is true that water, unlike land, is not subject to occupancy but is only amenable to use. Consequently, where use of water is subject to some degree of tenure and cannot be terminated at any time without notice (or, put another way, under color of title or valid claim), we conclude that the user has established control within the meaning of 43 CFR 4100.0-5. That is the case here.

The Partnership have demonstrated that they and their predecessors-in-interest have long used water from the Rio Grande River (Tr. 273, 309-10). The record establishes that the Partnership's water was under control

of the holder of the grazing preference when it was transfered to the Partnership. Ortiz does not dispute this fact. We do not know when the Partnership's original predecessor-in-interest began using water from the river. Such use may have predated the State Water Code, in which case the user acquired water rights (protected by the State Constitution) that may have since devolved to the Partnership. See May v. Torres, 519 P.2d 298, 299 (N.M. 1974) (holding that diversion of water to beneficial use prior to enactment of the State Water Code vested user rights). Until a final determination can be made by a State court, we cannot say that the Partnership does not have water rights that predate the code and do not require a State permit. It is also possible that, even if such use was made following enactment of the Water Code, no permit need be obtained absent a diversion of water to a beneficial use since the statutory permit system codified prior law regarding appropriation that required a diversion (see State v. Miranda, 493 P.2d 409, 410-11 (N.M. 1972)) and applies only in the case of a diversion of water. See Lindsey v. McClure, 136 F.2d 65, 69 (10th Cir. 1943). There is no evidence that there has been any diversion in the present case (Tr. 33). There is also no evidence that the State requires the Partnership's use to be subject to a State water permit. As BLM points out, there has never been any action by the State or other water users to curtail Partnership use for stockwatering without a permit. Rather, the record shows that the Partnership (as well as its predecessors-in-interest) were not prohibited from obtaining water from the river for stockwatering purposes and did so using the right of access, without a State permit. Ortiz does not dispute this fact. This suggests that no permit is required. See also Tr. 87. We may not determine whether one is required since this would require an interpretation of State law that is beyond the authority of this Department. What is clear, however, is that the Partnership's use is more than merely permissive. It would require legal action to terminate it or, at the very least, notice. Such use can be said to be under color of title or valid claim. Therefore, we hold that this use is sufficient to demonstrate control. Compare with Eldon L. Smith, 6 IBLA 166, 169, 170 (1972).

In Van Ragsdale, IGD 61, 67 (1938) (also a case arising in New Mexico), the Assistant Secretary found that, as an alternative to an appropriation of water under State law, the assertion of an apparent right to water would be sufficient to establish ownership of water for purposes of showing entitlement to grazing privileges. Likewise here, even absent a clear appropriation of water from the river under State law, the Partnership's asserted right to that water is sufficient to establish at least control of the water in the absence of any State action to foreclose it. Unlike the situation in Van Ragsdale, the Partnership already holds grazing privileges. As a consequence, BLM is not in a position to suspend consideration of a grazing use application pending establishment of water rights by a court of competent jurisdiction (as the Assistant Secretary did in Van Ragsdale) even if there were serious doubts regarding those rights. Rather, the better approach now is to let the privileges stand until the water rights are finally resolved by State court action.

We therefore hold that it is sufficient for the purpose of establishing control within the meaning of 43 CFR 4100.0-5 that the record shows the Partnership and their predecessors-in-interest have long used the river for stockwatering purposes in connection with livestock grazing on the subject allotment, obtaining access pursuant to the reserved easement, and that such use is under a color of right. This satisfies the regulatory requirement that the preference holder be responsible for the care and management of the water. The Department will not disturb the status quo regarding the allocation of the grazing privileges in the subject allotment pending a final resolution of the question of the Partnership's rights to the water. See A. J. Mullen, IGD 241, 245 (1941).

We also find that the Partnership had control of water base property at the time of the transfer of the grazing preference in February 1988 and thereafter and is therefore entitled to grazing privileges in the allotment. This finding is consistent with the August 1941 opinion of the Grazing Service, confirmed by subsequent BLM practice, that the Partnership's predecessor-in-interest Nicanor Apodaca would, under the reserved easement and so long as water remained available and accessible, continue to have grazing privileges. See Exh. R-4 at 12. This holding promotes, for the time being, the orderly use of the public range and the stability of the livestock industry consistent with the purpose of the Taylor Grazing Act and implementing regulations. See Briggs v. BLM, 99 IBLA at 154.

We therefore conclude that the Partnership was properly granted the grazing preference in the Yeso Arroyo Allotment in February 1988 and has continued to hold the preference in accordance with the Taylor Grazing Act and Departmental regulations, so far as control of water base property is concerned. As a result, there have been no AUM's remaining to be allocated to another applicant. We find that the Acting District Manager, in his April 1991 final decision, properly rejected the Ortiz grazing use application since the entire grazing capacity of the range had already been properly allocated to the Partnership's licensed grazing use. Because Judge Rampton set aside that final decision in his April 1992 decision, we reverse his decision.

Accordingly, 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 reversed.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge