

INTERIOR BOARD OF LAND APPEALS

Kenneth Young

v.

Bureau of Land Management

148 IBLA 221 (April 20, 1999)

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KENNETH YOUNG  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 95-221

Decided April 20, 1999

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer affirming three decisions of the Area Manager, Royal Gorge Resource Area, Canon City District, Bureau of Land Management, Colorado, on grazing privileges. CO-05-93-01, CO-05-94-01, and CO-05-94-02.

Affirmed.

1. Grazing Permits and Licenses: Adjudication

Denial of applications for grazing privileges is authorized by 43 C.F.R. § 4170.1-1(a) when the evidence supports a violation of the grazing regulations by the applicant.

2. Grazing and Grazing Lands—Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 C.F.R. Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

APPEARANCES: Kenneth Young, pro se; Martha F. Flynn and Warren R. Ross, interveners, pro sese; Lowell L. Madsen, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Kenneth Young has appealed a December 20, 1994, decision by Administrative Law Judge Harvey C. Sweitzer affirming three decisions of the Area

Manager, Royal Gorge Resource Area, Canon City (Colorado) District, Bureau of Land Management (BLM), adjudicating Young's applications for grazing privileges.

### Factual Background

The Mill Creek Common allotment is made up of the Flynn Ranch, BLM land, and State land. (Tr. 115; Ex. 1.) The Flynn Ranch consists of approximately 1,544 acres of private land. (Tr. 45; Ex. 4.) In a grazing application dated November 12, 1969, Daniel and Martha Flynn offered this land as base property for 63 animal unit months (AUM's) of grazing preference on adjacent Federal lands within the Mill Creek Common allotment. (Exs. 1, 2; Tr. 45-46.) That application was approved in May 1970. (Ex. 5.) From 1970 to late 1983, the Flynns conducted a grazing operation on the High Mountain Ranch, which consisted of the Flynn Ranch, the Federal lands upon which they grazed their 63 AUM's, and State lands (Section 16) within the Mill Creek Common allotment leased by the Flynns. (Tr. 46.)

On March 4, 1984, Daniel Flynn leased the High Mountain Ranch to Byk Banta (Banta) and appellant, Kenneth Young. (Ex. 6.) To comply with the State prohibition against subleasing, Flynn asked Banta and Young to put the State lease in their own names. (Tr. 49.) On June 1, 1984, Banta and Young applied for 64 AUM's of grazing preference in the Mill Creek Common allotment, offering the Flynn Ranch, not the State lands, as base property. (Ex. 7.)

After her husband's death, Martha Flynn continued to lease the High Mountain Ranch to Banta and Young, the last lease with a 3-year term ending May 1, 1993. (Exs. 20, F.)

In 1991, Young was convicted of attempted felony theft of livestock owned by Irvin Story. (Tr. 304, Ex. 18.) In its investigation of court records, BLM discovered that Young had removed Story's livestock from the public lands where they were authorized to graze. (Ex. 8.) Based on this investigation, the Area Manager, by decision of July 28, 1992, canceled Young's grazing permit and grazing preference for 64 AUM's in the Mill Creek Common allotment. (Ex. 8.) The Area Manager listed the page references for seven court documents, including the transcript of the jury trial, which he utilized to determine that "[Young] removed Mr. Story's cattle from public land." He then determined that Young was in violation of 43 C.F.R. § 4140.1(b)(5) and (7). Citing 43 C.F.R. § 4170.1-1(a), he canceled Young's grazing permit and grazing preference for 64 AUM's in the Mill Creek Common allotment. (Ex. 8.) <sup>1/</sup>

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<sup>1/</sup> 43 C.F.R. § 4140.1(b)(5) and (7) define as prohibited acts on public lands removing authorized livestock from public lands without the owner's consent and interfering with lawful uses or users of the public lands. Under 43 C.F.R. § 4170.1-1(a) the authorized officer may "withhold issuance of a grazing permit or lease, or suspend the grazing use authorized under a grazing permit or lease, in whole or in part, or cancel a grazing permit or lease and grazing preference \* \* \* for violation by a permittee or lessee of any of the provisions of this part."

Young appealed the July 28, 1992, decision, but the appeal was dismissed as untimely filed. (Ex. 9.)

On November 15, 1992, the owners of the Flynn Ranch, including Martha Flynn, canceled Young's lease of the High Mountain Ranch. (Tr. 57; Ex. 10.) Also in November, Young and Banta applied to lease the State lands (Section 16) which were part of the High Mountain Ranch, as the existing State lease was set to expire in January 1993. (Tr. 59.) The State agreed to lease the lands to Young and Banta for 10 years. (Tr. 59; Ex. 16.)

On February 4, 1993, the owners of the Flynn Ranch applied for 64 AUM's of grazing preference in the Mill Creek Common allotment, offering their fee interest in the Flynn Ranch as base property. (Ex. 11.) On February 10, 1993, Young applied for the same 64 AUM's of grazing preference. He offered his leasehold interest in the State lands as base property. (Ex. 12.)

Before BLM could act upon the application filed by the owners of the Flynn Ranch, they leased their ranch to Warren R. Ross and Donn Pease. (Tr. 202.) On April 5, 1993, Ross and Pease applied for the 64 AUM's of grazing preference, offering their leasehold interest in the Flynn Ranch as base property. (Ex. 13.)

#### The Area Manager's Decisions

In a July 1, 1993, decision, the Area Manager denied Young's application for 64 AUM's of grazing preference in the Mill Creek Common allotment and approved the Ross/Pease application for the same 64 AUM's. The Area Manager gave three reasons for his determination: (1) The Ross/Pease application had priority over the Young application because it offered the same private land as base property that served as base property for these 64 AUM's prior to the Area Manager's July 28, 1992, decision to cancel Young's permit; (2) the Ross/Pease application had priority over the Young application because it was in effect an amendment to the Flynn's February 4, 1993, application which was received before Young's application; and (3) approval of Young's application would be inconsistent with the Area Manager's July 28, 1992, decision to cancel Young's permit for violation of 43 C.F.R. § 4140.1(b)(5) and (7). (July 1, 1993, Notice of Final Decision at 3.) Young's appeal was docketed as CO-05-93-01.

On April 20, 1993, Young applied for an exchange-of-use grazing agreement for 84 AUM's in the Mill Creek Common allotment, offering his leasehold interest in the State lands in support of his application. (Ex. 16.)<sup>2/</sup> In his September 13, 1993, decision, the Area Manager denied

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<sup>2/</sup> An exchange-of-use grazing agreement may be issued to an applicant who owns or controls unfenced lands which are intermingled with public lands in the same allotment "when use under such an agreement will be in harmony with the management objectives for the allotment and will be compatible with the existing livestock operation." 43 C.F.R. § 4130.6-1(a).

the application because: (1) approval of the application would be inconsistent with the July 28, 1992, decision canceling Young's grazing permit in the Mill Creek Common allotment and denying Young additional use in the same allotment because Young committed illegal acts on public land in violation of 43 C.F.R. § 4140.1(b)(5) and (7); (2) Young's co-lessee, Byk Banta, was under a restraining order preventing him from contacting Warren R. Ross, the Ross/Pease authorized representative holding the BLM grazing permit. These circumstances would prevent the normal communication required for Ross and Banta to manage cattle on a common range; and (3) Young did not have legal access to get cattle to the State land. Access is either across private land controlled by Ross/Pease or across public land administered by BLM. According to the Area Manager, Ross stated that he would not give Young permission to cross private lands Ross controls. Young had not applied for a crossing permit and the Area Manager again found that it would be inconsistent with his decision of July 28, 1992, to grant Young a crossing permit. (September 13, 1993, Notice of Final Decision at 3.) Young's appeal was docketed as CO-05-94-01.

On February 4, 1994, Young again applied for an exchange-of-use grazing agreement in the Mill Creek Common allotment. He applied for 80 AUM's, offering his leasehold interest in State lands in support of his application. (Ex. 17.) In his May 31, 1994, decision, the Area Manager denied this application, stating that to approve it would contradict his July 28, 1992, and September 13, 1993, decisions. (May 31, 1994, Notice of Final Decision at 2.) The Area Manager noted again that Young lacked access to the State land because access was controlled by Ross/Pease who, according to the Area Manager, stated they would not give Young access, and by BLM, which would not grant him a crossing permit. Id. Young's appeal was docketed as CO-05-94-02.

Young's appeals from the three decisions were consolidated and a hearing was held on September 21 through 23, 1994, by Administrative Law Judge Sweitzer in Canon City, Colorado. At the hearing, Martha F. Flynn on behalf of the Flynn Ranch, Warren R. Ross on behalf of himself and Donn Pease, and Tom Estis on behalf of the Fremont County Cattlemen's Association were granted leave to intervene. Young, BLM, and the interveners filed briefs with Judge Sweitzer after the hearing.

#### The Administrative Law Judge's Decision

After noting that "a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100," Judge Sweitzer provided the following rationale for affirming the Area Manager's July 1, 1993, decision:

The Area Manager's July 1, 1993 decision is rationally and lawfully based upon the fact that Ross and Pease controlled the Flynn Ranch, the base property to which the grazing preference for the 64 AUM's was attached. Upon cancellation of the lease [on November 15, 1992] held by Young and Banta for the Flynn Ranch, the controlling interest in the base property for

the 64 AUM's reverted back to the Flynn Ranch owners. This interest was then transferred to Ross and Pease by way of a lease agreement. Generally, 43 CFR 4110.2-3 contemplates that the transferees of base property - Ross and Pease in this case - shall be entitled to a grazing permit to the extent of the grazing preference which is attached to the base property.

Moreover, the regulations clearly contemplate that Young, as the prior holder of the grazing permit, may be entitled to priority in the issuance of a new permit only if he was in compliance with the rules and regulations. 43 CFR 4130.4-4 [sic]. <sup>3/</sup> He was not in compliance, having violated 43 CFR 4140.1(b)(5) and (7), as found in the [Area Manager's] July 28, 1982 decision.

Because this decision is binding on Young, his efforts to refute the fact of these violations are unavailing. His violations of the grazing regulations certainly provide another rational and lawful basis for denying him priority for the new permit and for favoring Ross and Pease over Young.

(Decision at 4-5.)

Judge Sweitzer also found all three of the reasons set forth in the Area Manager's September 13, 1993, decision for rejecting Young's exchange-of-use application rationally based and in substantial compliance with grazing regulations. He observed that granting the application would largely nullify the penalty imposed on Young (the July 28, 1992, cancellation of his grazing permit for violation of the grazing regulations), that range management objectives for the allotment would be difficult to meet in view of the restraining order on Young's partner Banta, and that Young's cattle did not have legal access to the State lands offered in exchange of use, as admitted by Banta. (Tr. 256.) The Judge further ruled:

Under 43 CFR 4130.4-1(b) an exchange-of-use grazing agreement may be issued to authorize use of public lands to the extent of the livestock carrying capacity of the lands offered in exchange of use. Young presented no evidence of the present carrying capacity of the Mill Creek Common allotment. Instead, he relied upon the fact that a former permittee of the allotment, Jack Carr, once held 97 AUM's in grazing preference (Tr. 180-186). There is no indication whether this was active preference, whether and when Carr used the preference, or how range conditions have changed since Carr may have used this preference. Consequently, Young's evidence is of little value and fails to

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<sup>3/</sup> The 1994 edition of the grazing regulations contained no section "4130.4-4." Compliance with grazing regulations, as a factor to be considered by the authorized officer in adjudicating conflicting applications, is listed in 43 C.F.R. § 4130.1-2(a); see 43 C.F.R. § 4130.2(d)(2).

overcome the Area Manager's testimony that only 64 AUM's were available in the allotment (Tr. 187-188, 224).

(Decision at 5.)

Finally, Judge Sweitzer found the Area Manager's May 31, 1994, decision denying Young's second application for an exchange-of-use agreement was rational and in substantial compliance with the regulations on the same basis as he had affirmed the September 13, 1993, decision. Id. at 6.

#### Arguments on Appeal

In his statement of reasons for appeal (SOR), Young objects to Judge Sweitzer's reliance on Exhibit 8 (the Area Manager's July 28, 1992, decision) and 19 (a 1991 statement by Irvin and Helen Story about Young's attempted theft of their livestock) as the basis for finding that Young removed livestock from the public lands. (SOR at 1-2.) Young argues the Area Manager's July 31, 1993, decision does not substantially comply with the grazing regulations. "[T]here is no proprietary interest attached to the Flynn Ranch giving it sole priority in the issuance of a new permit," Young states. (SOR at 2-3.) Judge Sweitzer ignored the fact that the state lands in sec. 16 also qualify as base property and ignored the regulation applicable to conflicting applications, 43 C.F.R. § 4130.1-2, in light of testimony by Banta and Mrs. Flynn and Exhibits 1, 6, and 7, he argues. For the Area Manager to deny his application on the basis of the July 28, 1992, decision "violates the United States Constitutional provisions prohibiting double jeopardy, i.e. a person cannot b[e] convicted or sentenced twice for the same offence," Young argues. (SOR at 3.) For the same reason, the July 28, 1992, decision cannot serve as a basis for denying his exchange-of-use applications, Young argues. Id. Young argues that under Colorado law "free transit over the Public Domain may not be denied," and therefore as the lessee of unfenced state land he is entitled to a permit to cross public domain land under 43 C.F.R. § 4130.4-3 and therefore Judge Sweitzer erred in finding he did not have access to the state land. (SOR at 3-4.) Finally, Young argues that additional AUM's are not a prerequisite to granting an exchange-of-use application but in any event Exhibits 4 and B demonstrate that 33 additional inactive AUM's were available for allocation, and therefore Judge Sweitzer erred in concluding Young had not demonstrated their availability. Id.

In its Answer, BLM states that Young's applications "are nothing more than a thinly veiled attempt \* \* \* to negate the impact of the area manager's July 28, 1992, decision cancelling his grazing permit and grazing preference because of his unlawful activities." (Answer at 7.) BLM states that the private land owned by the Flynn family has always been the base property for the grazing permit and therefore has sole priority over the state section that Young leases insofar as the issuance of a new grazing permit is concerned. Ross and Pease applied with a preference because they controlled the existing base property, BLM notes, so Young's reference to the regulations governing conflicting applications is not correct. Id.

at 8. The Area Manager's concern about problems with access to the state lands was a legitimate management-related reason for rejecting Young's exchange-of-use applications. Id. at 9-10.

#### Discussion

[1] Although we agree we cannot review the events that led to the Area Manager's July 28, 1992, decision or the decision itself, because of the doctrine of administrative finality, see Turner Brothers Inc. v. OSM, 102 IBLA 111, 121 (1988); Gifford H. Allen et al., 131 IBLA 195, 202 (1994), we can determine there is ample basis in the record of the three decisions under review to support denial of Young's applications on the basis of a violation of the regulations in 43 C.F.R. §§ 4140.1(b)(5) and (7). See Ex. 18 and Tr. 304-07. Withholding issuance of an application for grazing privileges on the basis of a violation of the grazing regulations is clearly authorized by 43 C.F.R. § 4170.1-1(a). See Wayne D. Klump v. BLM, 130 IBLA 119, 141 (1994). In this context the concept of double jeopardy is inapposite.

[2] Although this is a sufficient basis for the denial of all three of Young's applications, BLM's other reasons were also proper. As Judge Sweitzer noted, an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. 43 C.F.R. § 4.478(b). When BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis. The burden is on the objecting party to demonstrate that a decision is improper. Jerry Kelly v. Bureau of Land Management, 131 IBLA 146, 151 (1994); Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176, 182 (1992); Glanville Farms, Inc. v. BLM, 122 IBLA 77, 87 (1992); Fasselin v. BLM, 102 IBLA 9, 14 (1988). Judge Sweitzer utilized these principles in affirming the decisions appealed from. Young has failed to show error and therefore presented no reason to disturb the Judge's decision. When Young lost the lease of the Flynn Ranch in November 1992, under 43 C.F.R. § 4110.2-1(d) the grazing preference remained with the base property and became available through application and transfer procedures at 43 C.F.R. § 4110.2-3 to the new owner or person in control of that base property, i.e., Ross and Pease. For that reason, the Ross/Pease application had priority over Young's application. Under 43 C.F.R. § 4410.2-1(a), the Area Manager had discretion to prefer the Flynn Ranch over sec. 16 state lands as base property based on considerations of easier access. Contrary to Young's view, issuance of a crossing permit is discretionary with BLM under 43 C.F.R. § 4130.4-3 (1993). BLM also has discretion to reject an exchange-of-use application based on these or other considerations. Harold J. Heath, 73 IBLA 147, 153 (1983); see Ball Brothers Sheep Co., 2 IBLA 166 (1971); Alton Morrell and Sons, 72 I.D. 100 (1965).

To the extent not discussed in this decision, Young's arguments have been considered and rejected.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Administrative Law Judge Sweitzer's December 20, 1994, decision is affirmed.

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Will A. Irwin  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge