INTERIOR BOARD OF LAND APPEALS

Jerry Kelly
v.
Bureau of Land Management
Sheldon W. Lamb, Intervenor

155 IBLA 58 (May 9, 2001)

Title page added by:
ibiadecisions.com

JERRY KELLY,
Appellant

v.

BUREAU OF LAND MANAGEMENT,
Respondent
SHELDON W. LAMB,
Intervenor

IBLA 99-332 Decided May 9, 2001

Appeal from a decision of Administrative Law Judge James H. Heffernan, reversing and remanding that part of a final decision of the Lahontan (Nevada) Resource Area Manager, Bureau of Land Management, which found that the former holder of a grazing preference had been compensated for range improvements placed on the grazing allotment after 1986. NV-030-95-04.

Affirmed.

1. Grazing Permits and Licenses: Generally

An Administrative Law Judge's decision reversing and remanding a BLM decision to the extent BLM found that the former grazing preference holder had been compensated for range improvements placed on the allotment after 1986 will be affirmed where the record establishes that BLM issued permits for the range improvements after 1986 and the current grazing preference holder has not shown error in the Administrative Law Judge's decision to remand the matter to BLM for determinations of use, ownership, and valuation or removal of those improvements.

APPEARANCES: Jerry Kelly, Lovelock, Nevada, pro se; W. Allen Schroeder, Esq., Boise, Idaho, for intervener Sheldon W. Lamb; John Singlaub, Manager, Carson City Field Office, Bureau of Land Management, Carson City, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Jerry Kelly, the holder of the grazing preference on the Boyer Ranch allotment, has appealed that part of the March 26, 1999, decision issued by Administrative Law Judge James H. Heffernan, reversing the determination in a May 8, 1995, final decision of the Lahontan (Nevada) Resource Area

Manager, Bureau of Land Management (BLM), that Sheldon W. Lamb, the former grazing preference holder on the allotment, had been compensated for all range improvements on the allotment when he sold all his grazing permits to the U.S. Navy (Navy) on December 17, 1986, and remanding the matter to BLM for initial adjudication of use, ownership, and valuation of the range improvements constructed on the allotment after 1986.

This appeal is the latest chapter in a saga originating on August 10, 1987, when the Lahontan Resource Area Manager issued a final decision denying Kelly's protest of BLM's decision to award Lamb the grazing preference on the Boyer Ranch Allotment. Since that time, the controversy has been the subject of two previous hearings, a stipulation for settlement approved by an administrative law judge, a decision by a different administrative law judge, and a Board decision. See Jerry Kelly v. BLM, 131 IBLA 146, 147-50 (1994). The present dispute arose from BLM's implementation of the Board's directive in Jerry Kelly v. BLM, 131 IBLA at 165, that, upon remand, BLM should award Kelly the grazing preference on the Boyer Ranch allotment.

On March 24, 1995, BLM issued a proposed decision awarding the grazing preference to Kelly. Lamb protested the proposed decision, objecting to the transfer to Kelly and asserting, among other things, that BLM should not have issued a grazing permit to Kelly until Kelly had paid the reasonable value of the improvements Lamb had constructed on the allotment.

In its May 8, 1995, final decision, BLM modified the proposed decision to address the range improvements, concluding that Lamb had been compensated for all range improvements on the allotment through the December 17, 1986, sale of all his grazing permits to the Navy. Accordingly, BLM awarded Kelly the grazing preference for the Boyer Ranch allotment.

Lamb appealed BLM's decision pursuant to 43 C.F.R. §§ 4.470 and 4160.4, seeking a hearing before an administrative law judge. Lamb argued, inter alia, that BLM had erred in awarding Kelly the grazing preference without first determining whether Kelly was a qualified applicant who owned or controlled requisite base property and that BLM had wrongly granted Kelly the grazing preference without requiring Kelly to pay Lamb the reasonable value of the range improvements Lamb had constructed on the allotment. The case was assigned to Administrative Law Judge James H. Heffernan who, by order dated February 23, 1998, granted Kelly's motion to intervene in the appeal.

Lamb, Kelly, and BLM each filed motions or cross motions for summary judgment and supporting and opposing briefs. In an order dated June 12, 1998, Judge Heffernan differentiated between the two main issues before him. He concluded that the issue of whether BLM had erred in awarding Kelly the grazing preference without first determining whether Kelly was a qualified applicant was appropriate for summary judgment since there were no disputed issues of material fact, but that a public hearing was necessary to resolve the disputed issues of material fact underlying the issue of compensation for certain range improvements. Judge Heffernan reserved

his decision on summary judgment as to the first issue pending the outcome of the hearing on the range improvement compensation issue.

Judge Heffernan held the evidentiary hearing in Reno, Nevada, on September 28 and 29, 1998. Lamb called two witnesses, James Michael Gianola, a BLM employee, and Isabel H. Lamb, Lamb's wife, and introduced eight exhibits. 1/ Kelly recalled Gianola as his sole witness and introduced three exhibits. BLM called no witnesses and offered no exhibits. All the parties filed post-hearing briefs and reply briefs.

In his March 26, 1999, decision, Judge Heffernan first affirmed BLM's award of the Boyer Ranch allotment grazing preference to Kelly, finding that the Board's decision in Jerry Kelly v. BLM, supra, had unequivocally held that Kelly should be granted the preference, thus foreclosing any additional BLM adjudication on this issue. He therefore denied Lamb's motion for summary judgment and granted Kelly's and BLM's summary judgment motions. Judge Heffernan further concluded that Lamb had been compensated for the range improvements constructed on the allotment before the December 17, 1986, sale of his grazing permits to the Navy, construing Lamb's contract with the Navy as extinguishing all of Lamb's interests in the public range improvements existing at that time. Judge Heffernan determined that neither BLM nor Kelly owed Lamb any compensation for those improvements and affirmed BLM's decision as to those improvements.

Judge Heffernan concluded, however, that the three range improvements permitted after 1986, i.e., Boyer Cow Camp #1, Boyer Cow Camp #2, and the Cottonwood Drift Fence, were not covered by the Navy contract. He noted BLM's concession that Kelly should have compensated Lamb for Lamb's interest in the Cottonwood Drift Fence and consequent request that its decision in this regard be reversed and remanded for negotiation over the necessary payment and granted that request. As to the two cow camps, Judge Heffernan concluded that Lamb had the statutory right under section 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1994), to have BLM determine whether he was entitled to some degree of compensation for the camps and, if so, the value of his interests. Accordingly, Judge Heffernan also reversed BLM's decision with respect to the two cow camps and remanded the matter to BLM for valuation of the Cottonwood Drift fence and for "determinations of who enjoys the beneficial use of [the two cow camps], of who owns said camps, and for a determination of either valuation or removal of said camps." (Decision at 22.)

On appeal, Kelly 2/ contends that the identified post-1986 range improvements were not constructed after 1986 and/or have no value. While

---

1/ Although Lamb testified on direct via affidavit and appeared in person for cross examination by Kelly, he was physically unable to return for cross examination by BLM and his entire testimony was voluntarily withdrawn. See Tr. 117.
2/ Kelly was represented by counsel in this proceeding through the hearing, but he now represents himself.

apparently conceding that permits for the fence and the two cow camps were issued after 1986, he claims that the fence is useless, that Boyer Cow Camp #1 was actually built long before 1986 and was included in the Navy's 1985 pre-purchase appraisal, and that Boyer Cow Camp #2 is a worthless salvage area for junk. Kelly further denies that he has any obligation to compensate Lamb for the range improvements because there was no transfer of those improvements from Lamb to Kelly and because BLM assigned him only the obligation to maintain the range improvements, not their ownership. 3/ Kelly also objects to Judge Heffernan's remand of the case to the Carson City Field Office, BLM, for valuation, suggesting that the Carson City Field Office is biased against him because it has never issued a decision favorable to him. 4/

[1] Section 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1994), allows permittees to construct range "improvements necessary to the care and management of permitted livestock * * * on the public lands * * * under permit issued by the authority of the Secretary." Section 4 also addresses the disposition of such improvements when grazing rights change hands, providing that

> [n]o permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under the rules and regulations of the Secretary of the Interior.

43 U.S.C. § 315c (1994); see Watts v. United States, 148 IBLA 213, 217 (1999). Since the statute requires all new holders of grazing rights, not just transferees from previous holders (see 43 C.F.R. § 4120.3-5), to compensate the former occupant for range improvements constructed and owned by that former occupant prior to receiving authorization to use existing range improvements, we reject Kelly's argument that he has no obligation to compensate Lamb for the post-1986 range improvements because he did not receive his grazing preference via a transfer from Lamb.

Although Kelly asserts that Boyer Cow Camp #1 is not a post-1986 range improvement, the evidence in the record directly contradicts his assertion. The range improvement permits issued by BLM, copies of which were admitted into evidence as Hearing Ex. A-6, indicate that Lamb applied for a permit to construct Boyer Cow Camp #1 on March 13, 1989, and that

---

3/ The record before us reveals that, as of Mar. 4, 1998, BLM had assigned Kelly the use and necessary maintenance of the Cottonwood Drift fence, but not the two cow camps both of which it had classified as "Range Improvements In Unsatisfactory Condition." See Hearing Ex. Q, Mar. 4, 1998, BLM letter to Kelly, Enclosure #1 at unnumbered p.1-2.
4/ Although Kelly raises various other issues in his appeal submissions, none of them is relevant to this appeal and we reject them.

BLM approved the permit application on December 5, 1989. 5/ Although Kelly admits that BLM issued the permit after 1986, he nevertheless maintains that the cow camp, which he characterizes as a corral, existed long before that date and was included in the Navy's 1985 appraisal, pointing to an indecipherable photograph which he alleges depicts the cow camp. Kelly's claims do not suffice to establish that Boyer Cow Camp #1 was erroneously classified as a post-1986 range improvement. Kelly did not object to the inclusion of this camp as a post-1986 improvement during the hearing, nor did he offer any sworn testimony or documentary evidence challenging the inclusion of the cow camp at that time; instead, he first raised the issue in his pro se post-hearing submissions. The indistinct photograph fails to establish that the cow camp was included in Lamb's December 1986 sale to the Navy, especially given that the camp was not permitted until 1989. Accordingly, we find that Kelly has failed to establish that Judge Heffernan erred in including Boyer Cow Camp #1 as a post-1986 range improvement.

As to Kelly's contention that the post-1986 range improvements have no value, the valuation of those improvements was not adjudicated at the public hearing. See Decision at 19. Rather, the valuation question was remanded to BLM for adjudication in the first instance. Since Judge Heffernan's decision did not address the value of the improvements, that issue does not fall within the scope of this appeal and is not properly before us at this time.

Kelly's challenge to the remand to BLM of the issues of the valuation of the Cottonwood Drift Fence and of the use, ownership, valuation, or removal of Boyer Cow Camps #1 and #2 must be rejected. Kelly's counsel did not object when, in an order dated September 3, 1998, Judge Heffernan excluded range valuation issues from the hearing, specifically stating that those issues would be remanded to BLM for determination following the public hearing. In fact, Kelly's counsel considered that procedure to be appropriate. See Kelly's Opposition to Lamb's Motion to Clarify the ALJ Sept. 3, 1998, Order, at 2. Although Kelly now intimates that the Carson City Field Office, BLM, is biased against him, this issue was not raised at the hearing and we need not consider it. See Gregersen v. BLM, 61 IBLA 381, 386 (1982). In any event, the fact that BLM has ruled against him in the past does not suffice to establish disqualifying bias, absent any proof in the record that BLM's actions were improperly motivated. See Auge v. BLM, 76 IBLA 83, 87 (1983). We therefore affirm Judge Heffernan's remand of these issues to BLM for adjudication in the first instance. 6/ Should

---

5/ BLM approved the permit authorizing construction of Boyer Cow Camp #2 on Dec. 15, 1989, as well. The permit for the Cottonwood Drift Fence was issued in Sept. 1991. See Hearing Ex. A-6.

6/ While this appeal was pending, BLM attempted to implement Judge Heffernan's remand order by issuing proposed and final decisions adjudicating the valuation and related issues. By order dated Aug. 12, 1999, the Board held that BLM lacked jurisdiction to issue the proposed and final decisions because Kelly's filing of an appeal of the Administrative Law Judge's decision "vested jurisdiction of this case in this Board and

BLM's decision on remand be adverse to Kelly, he will have the opportunity first to protest any proposed decision and, if necessary, to appeal BLM's final decision for the purpose of a hearing before an administrative law judge. See 43 C.F.R. §§ 4160.2, 4160.4, and 4.470.

To the extent not specifically addressed herein, Kelly's other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of Administrative Law Judge Heffernan is affirmed.

James P. Terry
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 6 (continued)
precluded BLM from implementing the decision of the Administrative Law Judge pending review by this Board." (Order at 3.) Therefore, those decisions are nullities and, upon remand, BLM shall adjudicate the valuation, use, and ownership questions anew, giving due regard to the issues raised by Kelly.