

RICHARD McKAY  
EUREKA RANCH COMPANY

IBLA 70-125

Decided February 26, 1971

Grazing Permits and Licenses: Advisory Boards

A determination by an advisory board not to act on an application regularly presented to it does not deprive the district manager of his authority to act upon the application.

Grazing Permits and Licenses: Appeals

Where a grazing user fails to appeal from a decision awarding him grazing privileges within an individual allotment with a grazing capacity equal to his base property qualifications, he cannot appeal from a later decision reducing his grazing privileges for the reason that the forage capacity of his allotment was originally erroneously computed, if he does not dispute the accuracy of the new computation.

Grazing Permits and Licenses: Appeals

The failure to appeal from a decision setting up an allotment does not deprive the grazing user of his right to appeal from a later decision reducing his grazing privileges by deleting a small area from his allotment, even though he does not dispute the propriety of the deletion.

Grazing Permits and Licenses: Cancellation and Reductions

Where the grazing privileges of one grazing user are in part reduced by a deletion of an area from his individual allotment on the ground that the area should have been allocated to another user when the allotments were set up the first user must be compensated for the lost grazing privileges.

IBLA 70-125	:	Nevada 6-68-2
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RICHARD McKAY	:	Grazing privileges within individual allotment reduced
	:	
EUREKA RANCH COMPANY,	:	
Intervenor	:	Affirmed, as modified

DECISION

Richard McKay has appealed to the Secretary of the Interior from a decision dated January 21, 1970, of the Office of Appeals and Hearings, Bureau of Land Management, adversely affecting his grazing privileges.

The facts are undisputed. McKay and others have been for some time cattle operators in the Antelope Unit of the Battle Mountain District, Nevada. By a decision of the district manager, dated September 27, 1965, the Class I qualification of McKay's base property was established at 1170 animal unit months (AUMs) in the Antelope Unit. The decision also described an area allotted to McKay for his individual use which was indicated to have a grazing capacity of 1170 AUMs. The decision also advised McKay of his right to protest the adjudication and informed him that if he did not the allocation of grazing privileges and the allotment would become final. McKay did not file a protest.

Thereafter, McKay was granted 601 AUMs active use and 569 AUMs nonuse for 1966, and 725 AUMs active use and 425 nonuse for 1967. In 1967 he applied for 1170 AUMs active use for 1968. In a decision dated January 23, 1968, the district manager first noted that the District Advisory Board had considered the application but refused to take any action. He then held that McKay's base property qualifications were 910 AUMs, that the grazing capacity of his allotment was 910 AUMs and that his 1968 license would not exceed 910 AUMs. The decision also contained a description of the allotment which the manager said conformed to the area allotted McKay in 1965, except for the deletion of 178 acres on the western slope of the Antelope Mountain Range, an area lying in the northwest corner of the allotment.

At the hearing held pursuant to McKay's appeal, at which Eureka Ranch Company appeared as an intervenor, the parties stipulated that McKay's base property qualifications were 1170 AUMs. In his

decision the hearing examiner held that the Advisory Board's determination not to make a recommendation concerning McKay's application did not deprive the district manager of his authority to act upon it. He then held that the revised description encompassed the same area, except for the deletion of 178 acres, as the 1965 one had. He finally held that McKay was not to be limited to the grazing capacity of this allotment, but that if the allotment could not provide 1170 AUMs, McKay was entitled to an area that would give him his proportionate share of the grazing privileges in the unit and that any reduction should be apportioned among all the users in the Antelope Unit.

On appeal the Bureau of Land Management reversed the hearing examiner's final ruling. It held that McKay, having failed to appeal from the 1965 decision which established his allotment, could not thereafter challenge its adequacy even though a later examination revealed that his allocation contained substantially less forage than it had first been judged to have. It concluded that the area of the allotments as described in the 1968 decision did not change the boundary lines of the allotment in any manner prejudicial to McKay and that McKay's grazing privileges could be exercised to the extent of his qualifications within the allotted area, but not to exceed the forage capacity of the allotment.

McKay contends on appeal that the lands described in the 1965 and 1968 decisions do not cover the same area. He does not object to the removal of the triangular area from his allotment. It falls on the western side of a fence that he agrees is in the area grazed by one Segura (Tr. 89, 103).

The difficulty arises from the location of the north boundary of McKay's allotment, which is also the south boundary of the Eureka Ranch Company allotment. The 1965 decision described the line in part, as:

... thence northwesterly crossing the south fork of Willow Creek in the SW 1/4 NW 1/4, Sec. 22, T. 14 N., R. 51 E., thence northwesterly up the main ridge dividing the north fork of Willow Creek and the south fork of Willow Creek to the Nine Mile fence and along the fence to a point on the drainage divide in the center of Sec. 7, T. 14 N., R. 51 E., thence south along the main drainage divide, a distance of about ten (10) miles.

The 1968 decision describes the north boundary in part as:

... thence northwesterly crossing the south fork of Willow Creek in the SW 1/4 NW 1/4 Section 22, T. 14 N., R. 51 E., thence northwesterly up the main ridge dividing the middle fork of Willow Creek and the south fork of Willow Creek through the N 1/2 NE 1/4, Section 21; SW 1/4 SE 1/4, Section 16; NW 1/4 SE 1/4, Section 16; and the N 1/2 SW 1/4 Section 16; through the N 1/2 SE 1/4 Section 17; through the NE 1/4 SW 1/4 Section 17; and to the hydrographic divide of the main ridge of the Antelope Range in the NW 1/4 NW 1/4, Section 17, T. 14 N., R. 51 E., thence southerly from approximately the south end of the existing Nine Mile Fence (Project No. 113) along the main drainage divide of the Antelope Mountain Range, a distance of approximately ten (10) miles through the following Sections . . . .

The district manager testified that the lines were intended to be and were the same up to the south end of the "Nine Mile Fence."

While the 1965 line followed the fence northwesterly for approximately one half of a mile and then turned south for about a mile before it met a point on the drainage divide common to both lands, the 1968 line turns south from approximately the south end of the fence and then runs south along the divide.

The district manager testified that the 1965 line was based on a map (Gov. Ex. 3) showing the divide as running through the middle of section 7 and 18 whereas it actually runs into the NW 1/4 NW 1/4 section 17 near the southern end of the Nine Mile Fence (Tr. 38-41, 45). The 1968 description terminated the north boundary of McKay's allotment at this point and then returned it south along the divide. So situated, the district manager testified, it coincided with the western boundary of the area McKay had grazed under his previous licenses (Tr. 44, 45).

McKay contends that the reference in the 1965 description to the north boundary and Nine Mile Fence means that the intersection point is somewhere to the north of the southern terminus of the fence, perhaps even at its northern terminus. To reach so far north, the boundary must follow some other watershed than that relied upon by the district manager.

After careful consideration of the exhibits and testimony, we concur in the conclusion reached in the prior decisions that the 1968 decision placed the northern boundary in the same position as the 1965 one did, except for the area omitted in the northwestern corner of the allotment. Since McKay agrees that the triangular tract does not fall within his grazing area and that he does not desire to graze on the other side of the fence, the area was correctly removed from his allotment.

Having concluded that the 1968 decision, with the exception noted, merely recreated the 1965 allotment, we may now examine the other issues raised by McKay.

First, the determination by the Advisory Board not to make a recommendation did not deprive the district manager of his authority to act upon McKay's application. Since the district manager need not follow the Advisory Board's recommendations, he can act when the Board has said it would take no action. Having had an opportunity to consider the application, the Board was offered an opportunity to fulfill its intended role. Its refusal to act cannot give it greater power than its expression of an opinion would. In either case the final determination rests with the district manager and he must proceed with the disposition of the application.

We now turn to the most serious aspect of the appeal, that is, McKay's argument that all matters involved in the 1968 decision are open to review on appeal. He places particular emphasis on his right to have the boundaries of his allotment changed to accommodate the full extent of his base property qualifications. While the hearing examiner agreed with him, the Bureau of Land Management held that he was restricted to the grazing capacity of the area included within the boundaries created by the 1965 decision.

Both decisions referred to a provision in the regulation governing grazing appeals which reads:

Any applicant for a grazing license or permit or any other person who, after proper notification, fails to protest or appeal a decision of the district manager within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in such final decision. 43 CFR 1853.1(b).

The hearing examiner reasoned that an appellant could not be deprived of his share of grazing privileges:

... simply because he did not appeal an adjudication that purported to give him an allotment containing sufficient forage to satisfy, on an active basis, all of his base property qualifications. ...

To so hold, he reasoned, would permit the Federal range to be adjudicated without giving the user an opportunity to question the adjudication.

The Bureau of Land Management points out that the 1965 decision specifically stated that if McKay did not protest within the time allowed, the allocation of his grazing privileges and the allotment described in the decision would become final. It said the issue was whether McKay could rely upon representations of the district officials or whether he was under a duty to satisfy himself that he was being granted an allotment of Federal range commensurate with his base property qualifications. It pointed out the importance of stability in grazing operations and in particular in the establishment of allotments, citing Fred E. Buckingham et al., 72 I.D. 274 (1965) and W. Dalton LaRue, Sr., and Juanita S. LaRue, A-30391 (March 16, 1966).

The hearing examiner apparently concluded that if the permittee agrees with the district manager's judgment of the grazing capacity of the allotment, the regulation is not controlling. If the permittee disagrees, of course, he can appeal, and appeals on such grounds are common. <sup>1/</sup> We fail to see why the permittee's concurrence makes the district manager's decision any less final.

The permittee has not been deprived of a right to appeal. He had one but he simply did not exercise it; he, thus, lost it with respect to the issues decided in the first decision.

He was, of course, free to appeal any issue decided in the second decision that had not been adjudicated in the first. He did appeal from the altered description and from the issuance of a decision without a recommendation from the advisory board. He did not appeal, although he could have, from the determination that the forage capacity

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<sup>1/</sup> Thomas Ormachea and Michael P. Casey, 73 I.D. 339 (1966); Harold Babcock et al., A-30301 (June 16, 1965).

of his allotment was substantially less than the 1965 decision had stated. He also could have disputed the deletion of the triangular tract from his allotment. Here too, he conceded the propriety of the district manager's action and did not ask that this tract be retained in his allotment.

We conclude that if this were all there was to the appeal we would affirm the Bureau of Land Management's decision, with its one modification <sup>2/</sup>, upholding the district manager's action. There is one point, however, which we believe requires further consideration. None of the prior decisions considered the deletion of the triangular tract and the loss of its forage capacity as a separate issue. They treated this loss as though it stemmed from a recomputation of the forage capacity of the area remaining in the allotment. In other words, they did not distinguish between a loss flowing from a reduction in acreage and one based upon a reappraisal of the acreage remaining in the allotment.

The situations are, nonetheless, quite different. In arriving at the 1965 decision, the district manager decided that McKay's base property qualifications were 1170 AUMs and allocated him an area which he believed, however mistakenly, was capable of producing that amount of forage. The 1968 decision held that the area of about 178 acres producing 81 AUMs had been improperly placed in McKay's allotment and ordered it removed. While the removal may be consistent with good range management and past use, and is accepted by McKay, it does deprive him of 81 AUMs. Those AUMs were charged to him when his and the other allotments in the unit were set up. In 1965 the district manager intended to allot McKay an area sufficient to yield 1170 AUMs. If he had not assigned him the triangular tract he would have in its stead placed other acreage of equal forage capacity in McKay's allotment. The realization that one tract does not belong in McKay's allotment does not justify the diminution of the forage capacity the allotment was intended to yield. That is, McKay may have to bear the consequences of not contesting the district manager's computation of the forage capacity of the area allotted to him, but he cannot be penalized for accepting without complaint an area which was not intended to be placed in his allotment.

When that area is removed from his allotment, the forage capacity it represents must be replaced.

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<sup>2/</sup> The Bureau of Land Management held that McKay's base property qualifications were not to be reduced to the forage capacity of his allotment, pending attempts to increase its capacity.

Thus, McKay's allotment must be revised to give him an area to replace the AUMs lost to him by the excision of the triangular tract from his allotment. The decision below, which confined McKay to the redescribed allotment, is modified to direct that such revision or addition be made.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed as modified herein and the case remanded for further proceedings consistent herewith.

Martin Ritvo, Member

We concur:

Francis Mayhue, Member

Anne Poindexter Lewis, Member.

