

DELBERT AND GEORGE ALLAN
ELDON L. SMITH, ET AL.

IBLA 70-11 Decided March 4, 1971

Grazing Permits and Licenses: Appeals – Rules of Practice: Appeals: Timely Filing

An appeal to the Director, Bureau of Land Management, from a decision of a hearing examiner which is received after the period set by the rules of procedure for grazing cases will not be dismissed solely for that reason, but the circumstances surrounding the appeal will be examined to determine whether in the exercise of discretion the late appeal should be accepted.

Grazing Permits and Licenses: Appeals – Rules of Practice: Appeals: Timely Filing

An appeal to the Director, Bureau of Land Management, from a decision of the hearing examiner which is mailed within the appeal period and received one day late will be accepted where there is no prejudice to the other parties and where the filing party derived no advantage from his tardiness.

Grazing Permits and Licenses: Adjudication – Grazing Permits and Licenses: Appeals

The applicability of regulation 43 CFR 4115.2-1(e)(13)(i) precluding the right of a licensee or other user of the range to demand a readjudication of grazing privileges after they have been held for a period of three years is not limited to situations where an adjudication of the unit has been made as set out in 43 CFR 4110.0-5(r), but is also applicable where adjudications of licenses in the unit have been made over a long period of time on the basis of information available and not challenged by other licensees.

Grazing Permits and Licenses: Apportionment of Federal Range

A permittee or licensee has no right to any particular area of the Federal range under the Taylor Grazing Act or the Federal Range Code and, although historical use is a factor to be considered in the determination of grazing privileges, the selection of the particular area in which the range user may exercise his grazing privileges is a matter committed to the discretion of the Department.

IBLA 70-11 :	Arizona 1-65-2, 1-65-3,	:	1-65-4, 1-66-2
		:	
DELBERT AND GEORGE ALLAN,		:	
ELDON L. SMITH,		:	Allocation of grazing privileges
Appellants,		:	affirmed; change of use allowed
		:	
BRINKERHOFF ESTATE, MARDELL,		:	
MAX AND LOUISA BRINKERHOFF,		:	
ROLAND ESPLIN, HEATON BROTHERS,		:	Reversed in part
MAX C. LAYTON, AND ED YATES,		:	Affirmed in part
Intervenors		:	

DECISION

Eldon L. Smith has appealed to the Secretary of the Interior from a decision dated August 6, 1968, of the Office of Appeals and Hearings, Branch of Land Appeals, Bureau of Land Management, which affirmed a decision of a hearing examiner allocating grazing privileges to him on public lands in Arizona.

Delbert and George Allan have also appealed to the Secretary of the Interior from the same decision which dismissed their appeal from the decision of the hearing examiner on the ground that it was not timely filed.

We shall consider the Allans' appeal first. The facts are not in dispute. The normal time for filing an appeal to the Director of the Bureau of Land Management from the decision of the hearing examiner was extended until the Allans could obtain a complete copy of the transcript of the testimony. The record shows that they received it on March 26, 1968. Under the Federal Range Code procedural rules, they then had thirty days from that date, or until April 25, 1968, to file their appeal to the Director in the Office of the Director. 43 CFR 1853.7(b). The appeal was received in the Director's office on April 26, 1968 – or one day late.

The Department has consistently held that a notice of appeal filed later than the 30-day period set by the Federal Range Code 1/ regulation will be dismissed. Winnie R. Snapp, A-31146 (June 26, 1969); Royall B. Wooley, A-30936 (March 20, 1968).

1/ Hereafter, appeals arising under the Federal Range Code for grazing districts will be referred to as "grazing appeals" and others as "non-grazing appeals."

The Allans contend that the regulation can be waived under proper circumstances and that the circumstances in the case justify a determination that their appeal was timely filed.

As to the circumstances, they assert that the appeal was mailed on April 23, 1968, at Minden, Nevada and that a letter mailed before 5 p.m. and handled in accordance with regular pickup and airmail schedules should have arrived in Washington on the following morning and been delivered to the Bureau of Land Management at some time on the 24th.

The Allans' account of the mailing procedure is somewhat incomplete since the affidavit of their attorney's employee who mailed the appeal does not state the time at which it was deposited at the Minden post office. If it were mailed after 5 p.m. or so close to then that it missed the Reno pickup, the suggested scenario could not have been followed.

In any event, the Department has stated repeatedly that unexplained delays in the handling of mail do not excuse a late filing. Charles F. McCuskey, 63 I.D. 22 (1956); Gerhard Evenson, 63 I.D. 331 (1956).

The regulation governing appeals procedures moderates the strict rule by providing for a grace period of 10 days for documents mailed before the last day for filing but not received on time. 43 CFR 1840.0-6(b). However, it also states explicitly that the grace period does not apply to Subpart 1853 except to 1853.7(c) – that is, it applies in grazing cases only to appeals to the Secretary from a decision of the Director, but not to appeals to the Director from a decision of a hearing examiner. ^{2/}

It would seem, then, that under the regulation as interpreted and applied in many decisions the dismissal of the Allans' appeal was correct.

^{2/} Effective July 1, 1970, the Secretary of the Interior created the Board of Land Appeals, authorizing it to render final decisions for the Department on appeals in public land cases. Circular 2273, 35 F.R. 10009. Intermediate appeals to the Director, Bureau of Land Management, in cases other than grazing cases were abolished. In the exercise of his supervisory authority, the Secretary transferred jurisdiction over appeals to the Director, taken from decisions arising from the administration of grazing districts, to the Board of Land Appeals for final decision. *Id.*, p. 10012. Since the appeals in the instant cases were filed pursuant to the rules in effect prior to July 1, 1970, the discussion herein relates to the procedural distinction between appeals to the Director and to the Secretary prevailing at that time.

However, the results of several court decisions applying an essentially similar provision of the rules relating to appeals in non-grazing cases require a reexamination of the Department's conclusions.

Before examining these decisions, it may be well to compare the two types of appeals. The non-grazing appeal regulations require that a notice of appeal must be filed within 30 days from the date on which the appellant received the decision he is appealing (43 CFR 1842.4(a)).^{3/} While no extension of time will be granted for filing the notice of appeal, (43 CFR 1842.4(b), 35 F.R.; 10010, formerly 43 CFR 1842.4(c) (1970)), the notice, if late but transmitted timely, may be accepted as filed timely under the provision for a grace period (43 CFR 1840.0-6(b)).

The appellant must then file a statement of reasons, if he did not file one with the notice of appeal, within 30 days from the date on which he filed the notice of appeal (43 CFR 1842.5-1, 35 F.R. 10010; formerly 43 CFR 1842.5-1 (1970)). Again, the grace period provision applies to the filing of a statement of reasons. *Id.*

In grazing cases a notice of intention to appeal is filed within 10 days of service of the hearing examiner's decision followed by the appeal within 30 days after receipt of the hearing examiner's decision. Since in either case the statement of reasons for the appeal may be filed with or in lieu of the first notice, either type of appeal can be a one or two stage proceeding. The only difference is that the period for completing a grazing appeal to the Director is at most 30 days (unless a request for a copy of the transcript has been made), while other appeals have 60 days.

In Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960), the Court dealt with a non-grazing appeal which arose under the rules of practice before the grace period provision had been added. The Court held that the Secretary had abused his discretion by refusing to entertain an appeal where the statement of reasons was filed after the 30-day period had elapsed. It said that the language of the regulation saying that such appeals "will be subject to summary dismissal" did not make dismissal mandatory but left the disposition of the appeal to the Secretary's discretion.

On March 22, 1958, the rules were modified by the addition of the "grace period" which granted relief in some circumstances to appeals that would otherwise have been found not to have been timely filed. Circular 1997, 23 F.R. 1930 (1958).

^{3/} Amended by Circular 2273, 35 F.R. 10009, 10010, to reflect the changes in the procedure on appeals following the establishment of the Board of Land Appeals.

The Department in considering the new provision ruled it so changed the filing procedures that the Pressentin case was not controlling and dismissed appeals filed even one day later under the new rule.

In one of these cases, Tagala v. Price, A-30715 (November 10, 1966), the statement of reasons was mailed one day after the 30-day period. Upon judicial review the United States Court of Appeals for the 9th Circuit held that dismissing an appeal because the statement of reasons was late, absent an exercise of discretion, was improper. It held, citing Pressentin, that the Director or Secretary must examine the circumstances of each appeal to determine whether it should be dismissed or the late filing accepted. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

Two United States Court of Appeal having held that the rules of practice cannot be read as requiring dismissal in all cases of late filing of the statement of reasons for appeal, the Department accepts the courts' interpretation as the correct construction of those rules.

The Court decisions treated appeals arising from non-grazing proceedings in the Department. As we have seen the appeal procedure in grazing cases differs in some particulars from that prescribed for other matters. Yet they are comparable and where they differ, the grazing rules are the more stringent. For example, a grazing appeal to the Director must be completed in 30 days as compared to 60 for non-grazing appeals and the grace period provisions do not moderate the time requirements for grazing appeals to the Director as they do in non-grazing cases.

The grazing regulation does not contain a specific provision dealing with the consequences of a late filing. Paragraph 1853.7(b) dealing with appeals to the Director states, however, that: "The appeal in all other respects shall be made in accordance with Part 1840, except that no filing fee is required." Whether this provision was intended to incorporate the summary dismissal authorized by 1842.5-1 and 1840.0-7 is not clear. These provisions speak of "notice of appeal" and "statement of reasons," terms which have no direct counterpart in the grazing proceedings. They can be made applicable if "notice of appeal" and "statement of reasons" are read to include, respectively, "notice of intention to appeal" and "appeal and brief" of the grazing proceedings procedure. See Stanley Garthofner, et al., 67 I.D. 4 (1960), rev'd, Garthofner v. Udall, Civil No. 4194-60, in the United States District Court for the District of Columbia, November 27, 1961. If the terms are interpreted in this manner, then the Circuit Court decisions are applicable to them and the dismissal of the Allans' appeal would then have to be examined in accordance with their holdings.

If the two procedures are not merged on this point, there is no specific provision in the grazing appeal regulation governing the consequences of late filings. The Secretary may nonetheless impose a reasonable penalty for the infraction of a mandatory regulation for which no specific penalty is provided. Cf. Celia R. Kammerman, et al., 66 I.D. 255, 262, 263 (1959). In grazing appeals the Department has held that the failure to file an appeal within the time allowed by the provisions of the governing regulation warrants dismissal of the appeal. Bert and Paul Smith, 67 I.D. 300 (1960). The issue becomes whether the Department should apply the same treatment to late filing in both grazing and non-grazing appeals. Up to now the practice has been the same and no strong considerations occur to us to justify a more stringent practice in the one case than in the other. Under the ruling in the Tagala case the Department will not summarily dismiss a late filing of a statement of reasons in a non-grazing case. A similar policy will be followed for grazing cases. Therefore, the Allans' late appeal will not be dismissed outright, but the circumstances will be examined to determine whether in the exercise of discretion it should be allowed or rejected and the appeal dismissed.

On the facts, as we have seen, the appeal was mailed within the appeal period, but arrived in Washington one day late. If this had been a non-grazing appeal, it would have been accepted as timely filed in accordance with the "grace period" provision. If it is desirable, as we think it to be, to keep the appeal procedures similar where possible, then the late filing should be waived here too. Furthermore, there appears to have been no actual prejudice to the other parties involved in the proceeding nor did the Allans, having mailed their appeal several days before the last day for filing, derive any advantage from the delay in transmission. We conclude, then, under the circumstances that the Allans' appeal is to be received as timely filed and considered on the merits.

We now turn to the substantive issues raised by the appeals.

The hearing examiner set out the history of the disputed area as follows:

The District Manager's decisions from which the appeals were taken allocated among various applicants a grazing area in northwestern Arizona in Townships 32, 33, 34, 35, 36 and 37 North, Ranges 14, 15 and 16 West, Gila and Salt River Meridian. The area was established as a part of the grazing district by order of the Secretary of the Interior, dated June 9, 1935 (exhibit G-14). ^{4/}

^{4/} The Government's exhibits are identified by the letter "G"; the Allan exhibits by the letter "A"; the Anderson exhibits by the letter "B"; and the Smith exhibits by the letter "C."

The public land involved in this proceeding was governed by a Special Rule signed by the Director on March 23, 1940 (F.R. Doc. 50-2798, filed April 4, 1950), and was thereafter known as the Pakoon Special Rule Area. The Special Rule provided that base property within the meaning of the Grazing Regulations should not be a requirement or recognized for grazing privileges in the area and that grazing privileges should be allowed, first to applicants who had or whose predecessors in interest had, since the establishment of the grazing district, made substantial use of the area, and secondly, to applicants who had not or whose predecessors in interest had not, since the establishment of the grazing district, made substantial use of the area.

For several years preceding the Special Rule, Appellant Anderson and Intervenor Esplin, Heaton Brothers, and the Brinkerhoffs grazed sheep in the Pakoon Area. The sheep, which were brought principally from base properties in Utah, grazed during the winter and spring months. The area was also grazed by cattle owned by Max C. Layton, Ed Yates, and Wayne Yates, who had adjacent base properties. In 1949, two individual allotments were established by the Bureau for the exclusive use of Ed and Wayne Yates pursuant to an agreement signed by them. One of these allotments, consisting of about 29,900 acres, is adjacent to and on the western boundary of the Special Rule Area, and the other allotment, consisting of approximately 40,600 acres, is two miles to the south. Licenses were thereafter issued to the Yates which restricted their livestock operations to their allotments, except for normal drift into the Pakoon Area. In 1956, the Yates sold the base properties upon which their northern allotment was based to Delbert Allan (exhibit A-8), who transferred a one-third interest to George Allan the following year (exhibit A-10). In 1963, the base property upon which the Yates' southern allotment was based was sold to Appellant Smith (exhibit G-9C). Licenses issued by the Bureau to Appellants Allan and Smith also restricted their Federal range use to their respective allotments except for natural or reasonable drift into the Pakoon Area.

The Special Rule Area was deficient in water. The sheep operators used what pot holes were available and obtained water from adjacent livestock operators. In 1956, pursuant to authorization issued by the

Bureau, Appellant Anderson and Intervenor Esplin, Heaton Brothers and the Brinkerhoffs drilled two wells in Pakoon which provided sufficient water for their sheep operations.

The Director of the Bureau of Land Management issued an order revoking the Special Rule in 1964 (F.R. Doc. 84-11878, filed November 19, 1964). The order stated that, "The establishment of base property requirements, the apportionment of grazing privileges, and administration within the area will be in accordance with the applicable provisions of 43 CFR, Part 4110." The District Manager then made his adjudication of the Pakoon Area pursuant to the provisions of these Grazing Regulations.

The Arizona Strip District is classified as water base. Grazing licenses and permits are issued on the basis of ownership or control of a full time water (43 CFR 4111.2-1(b)). A full time water is water which is suitable for consumption by livestock and available, accessible and adequate for a certain number of livestock during those months of the year for which the range is classified as suitable for use (43 CFR 4110.0-5(o)). Owners of prior or class 1 waters have a preference right under the regulations in the allocation of the Federal range (43 CFR 4111.3-1(d)(2)). A prior water is one used as a base for a livestock operation during the priority period from June 29, 1929, to June 28, 1934 (43 CFR 4110.0-5(p)). When the Pakoon Area was adjudicated, the District Manager concluded that all class 1 preference rights had been satisfied. This had been accomplished through signed agreements and the resulting allocations of individual allotments.

In making the adjudication, the District Manager solicited from all livestock operators applications showing the waters that each operator owned or controlled and upon which he was making a claim for an allotment of the Pakoon Area. The waters owned or controlled by Appellants Allan and Smith, upon which their individual allotments were based, were considered as class 2 in competition with full time water of other applicants. These waters were considered to have in the aggregate additional water value above that necessary to support all livestock which could properly use their respective allotments.

The mechanics used in allocating Federal range in a water base district is to designate on a map the location of all of qualified full time waters listed in applications of competing applicants and to draw circles from, those waters on the basis of a five-mile radius (the standard service area adopted by the District as being proper for grazing the Federal range from a stock water). Where the circles from competing waters overlap, the arcs are drawn from the intersecting points of the circle so as to divide the Federal range equidistant from the two competing waters. The boundaries of areas thus delineated are modified to form boundaries of a grazing area on a practical and usable basis. The boundaries are also further modified where a natural barrier exists which would inhibit normal grazing operations of livestock from a given qualified water.

The District Manager followed this standard procedure in making the allocations of Pakoon to the competing applicants. Max Layton was awarded an area of approximately 3,200 acres in the northwest portion of the Special Rule Area on the basis of his ownership or control of the water known as the Black Knoll Tank. Intervenor Layton and Cloyd H. Brinkerhoff were awarded an adjacent area of approximately 4,700 acres in the northeast portion on the basis of their ownership or control of a water known as End of the Pipeline. Appellant Anderson and Intervenor Esplin, the Brinkerhoffs and Heaton Brothers were awarded an area of approximately 43,900 acres in the central portion of Pakoon on the basis of ownership and control of water designated as Upper and Lower Wells. Appellant Eldon L. Smith was awarded an area of approximately 53,700 acres in the southern portion on the basis of his ownership or control of Grapevine Springs, Whiskey Springs, Seven Springs, Gyp Wash Reservoir, Tasi Springs, Pigeon Reservoir and Upper Pockets. One water listed by Smith, Yates Tank, was not considered because it was not in serviceable condition at the time of the lifting of the Special Rule. Appellants Allan were awarded an area of approximately 1,780 acres on the northeast border of their previously allotted area of use and an area of approximately 2,110 acres on the southwest border based upon two waters, Wayne's Well and Allan's Lower Well. One of the Allan waters Pakoon Springs, was not considered in the adjudication because a

ridge between it and the Pakoon Area constituted a natural barrier impeding the movement of livestock. Two portions of the Pakoon Area were unallotted because they were not within the service area of a qualified water.

The appellants objected to their areas of use thus designated. Their appeals set forth objections in very general terms. At the hearing, the Government and the appellants agreed that the following issues were raised by their various appeals:

Appellant Anderson:

1. Whether Appellant Charles C. Anderson and Intervenor Heaton Brothers, Esplin, and the Brinkerhoffs are entitled, under the Grazing Regulations, to the exclusive use of the Pakoon Area lying north of their designated area of use. (This would include the area of use assigned to Intervenor Layton and Intervenor Brinkerhoff Estate and part of the area assigned to Appellants Allan.) (Tr. 11).
2. Whether Appellant Anderson is entitled to change his operation from sheep to cattle and to have a cattle allotment (Tr. 12, 13).

Appellants Allan:

1. Whether the District Manager followed the procedural requirements of the Grazing Regulations in the award of grazing privileges to Delbert and George Allan (Tr. 17, 18).
2. Whether the District Manager was arbitrary and capricious in awarding grazing privileges and an area of use to Delbert and George Allan (Tr. 18, 19).

Appellant Smith:

1. Whether Eldon L. Smith had been awarded all of the Federal range which was in the service area of his base waters as may be modified by competing waters (Tr. 24, 25).

2. Whether any parties, other than Layton, the Allans, and Smith, have grazing privileges within the Pakoon Area (Tr. 25, 26).

3. Whether the District Manager was arbitrary and capricious in awarding grazing privileges to Eldon L. Smith (Tr. 25, 26).

The hearing examiner found that the class 1 preference of the base waters of Smith and the Allans had been satisfied by the award to them of individual allotments pursuant to an agreement entered into by their predecessors, the Yateses, in April 1949. He then held that appellants, in any event, could not now raise the issue as to the class 1 demand of their base waters because they had not appealed from decisions restricting them to the use of the allotments agreed upon. He pointed out that the grazing regulation provides that base property qualifications in whole or in part will be lost for failure for any two consecutive years to include the entire base qualifications in an application for a license, permit or renewal (43 CFR 4115.2-1(e)(9)). Furthermore, he said, the regulation also provides that no adjudication of any license or permit will be made upon the claim of an applicant with respect to the qualifications of the base property where such qualification or allotment has been recognized and a license or permit issued for a period of three consecutive years or more. (43 CFR 4115.2-1(e)(13)). Under either of these provisions, he concluded, the appellants are precluded from challenging the adequacy of their allotments to satisfy the class 1 demand of their properties.

He then held that an applicant does not acquire a right to use a particular portion of the federal range on the ground that he has used it in the past. He next dismissed the appellants' objection to awarding class 2 grazing privileges to Anderson, Esplin, Heaton Brothers and the Brinkerhoffs on the basis of the upper and lower wells drilled in 1959. He said there was no logical reason why the challenged waters could not compete on an equal basis.

He then considered the several water sources offered as qualified base water which the range manager had refused to accept. He agreed that Smith had not presented any evidence to show that either "Ed's Tank" or "Lower Pockets" was qualified or full time water, while the Government's evidence proved that "Ed's Tank" was not in serviceable condition at the time of the lifting of the Special Rule. As to the Allans, he also found that the manager properly refused to assign a service area to "Pakoon Springs", which would compete with Lower Well for a small area of range, because it was separated from the Pakoon grazing area by a sharp decline which formed a natural barrier.

He then held that Anderson was properly denied an individual allotment carved out of the community allotment but concluded that there was no reason why Anderson could not change his operation from sheep to cattle.

On appeal, the Bureau of Land Management dismissed Smith's appeal and affirmed the hearing examiner's decision as to the other parties.

The appellants assert that the allocation of grazing privileges denies them a preference right based on their past use of the area. The decisions below correctly pointed out that a grazing permittee has no right to any particular area of the federal range, absent an arbitrary or capricious allocation, so long as his base qualifications are satisfied. Thomas Ormachea and Michael P. Casey, 73 I.D. 339 (1966). As to preference right, the statute and the regulation give equal weight to owners of water as to owners of land. 43 U.S.C. § 315(b); 43 CFR 4111.3-1(c), (d). The appellants can show no better right than the other parties to privileges based on class 2 water nor have they offered any evidence that the allocation was arbitrary or capricious.

The Allans allege that they did not receive an equitable portion of the area made available for allocation upon the revocation of the Special Rule. They point out that they were awarded only 3,800 acres whereas the others were awarded up to 53,700 acres. They also contend that the "sheep operators" were permitted to develop the wells on which their claim to grazing privileges depend very late in the life of the Special Rule, and that they and Layton were denied the right to develop additional water before the Special Rule was terminated. These assertions are vague and general. Appellants do not contend that there was no authority to permit wells to be developed in the Special Rule area, but only that the drilling was allowed over their protests. Their assertion that they were denied an opportunity to develop additional water resources is based only on an informal conversation with the range manager, who said such a move by the Allans would cause tension in the area (Tr. 817-818). 5/

The Allans also assert that the use of a five mile service area is contradicted by the testimony that the cattle drifted naturally much further. The five mile rule, however, is based upon the general practice in the district that has been accepted as a guide in allocating grazing privileges. The fact that at certain times of the year cattle may go further when forage conditions or the availability of water in temporary water holes are favorable does not invalidate the use of an average radius based upon the usual behavior of cattle (Tr. 46, 47, 55, 246, Ex. G-17, pp. 4, 5).

5/ This and similar references are to the transcript of the hearing.

Finally the Allans urge, as does Smith, that their base waters are entitled to class 1 privileges in the special rule area, or, in other words, that their class 1 preference had not been satisfied by the award of individual allotments to their predecessor.

Perhaps the clearest expression of what was intended to be accomplished by the establishment of individual allocations in the Special Rule area is found in the memorandums from the Acting Regional Administrator to the Director and from the Director to the Secretary recommending the special rule (Exhibit A-7).

In the first, dated November 10, 1949, the Acting Regional Administrator wrote:

There is transmitted a proposed special rule for the consideration of the Secretary under the provisions of the Federal Range Code for grazing districts (43 C.F.R., Sec. 161.5) with respect to seasonal grazing use in the Pakoon Area of the Arizona Strip Grazing District.

The Pakoon Area has long been recognized and used as a sheep range for intermittent short periods in the Spring during favorable years. It is a rough broken desert area in the southwest corner of Arizona District 1. Perennial vegetation is principally unpalatable black brush and assorted desert shrubs. In years of favorable precipitation annual weeds provide good sheep grazing for periods of from 2 to 6 weeks. The area does not contain livestock water, consequently is suitable for sheep use only during the time when succulent green weeds are available. This type of sheep use antedates the establishment of the grazing district.

At one time it was decided that grazing privileges within the Pakoon Area should be adjudicated on a land base because of the lack of water to service the area. A careful study has convinced us that at this time there are no base lands which can qualify as "dependent by use" or "dependent by location" for grazing privileges in the Pakoon Area without seriously disrupting the existing livestock industry of the district.

Since the establishment of the Arizona Strip Grazing District, grazing privileges in this area have been allowed under temporary licenses, generally on the basis of priority of use, without consideration of either land or water as base property. We have had numerous discussions with the Advisory Board during

the past 3 years relative to the need for a special rule, and have exhausted all possibilities of administering the area under the Code without a special rule. The proposal we are now submitting will, in our opinion, stabilize as far as possible and practicable such grazing use of the area as has been recognized through the issuance of temporary licenses since the establishment of the district.

The area described in Advisory Board resolution of June 10, 1949, makes a substantial reduction from the original Pakoon Sheep Area to eliminate any possible competition with existing base properties.

The Director on March 23, 1950, after summarizing that memorandum said:

The Advisory Board has recommended the special rule and in its resolution of June 10, 1949, described the area to be administered thereunder which area has been substantially reduced from the Pakoon Allotment to eliminate any possible competition with the existing base properties (emphasis added)

These memorandums make it clear that the Special Rule area was considered to be an area not subject to class 1 rights and that the class 1 rights of the adjacent cattlemen had been taken care of in their individual allocation. 6/

Since the allotments were unfenced, the Yateses were allowed a normal drift of cattle from their allotment into the adjacent Special Rule area.

6/ In a letter dated August 29, 1961, to a realty company, the Acting District Range Manager, Owen S. Wright, said that the base class 1 waters were satisfied prior to setting up the Pakoon Special Rule area. (Yates file)

Again, in a summary of minutes of a meeting held on July 29, 1960, to discuss the division of the Special Rule area on a class 2 basis, at which Yates and his son-in-law, Gentry, were present, the District Manager wrote: "Mr. Gentry brought up the subject of the Yates base water and ask[ed] why there was no 5 mile radius applied. It was pointed out that Mr. Yates' class 1 allotment was adjudicated by agreement and that he was given the range he requested at the time" (Yates file) See also Tr. 108, 109.

----- END FOOTNOTES -----

The allocation and the normal drift were intended to satisfy all of the Yates class 1 rights. Wayne Yates testified that he had accepted the range line agreement as representing the full qualified demand for Pakoon Springs in which the Allans operate (Tr. 298). They accepted this determination over a long period of years and they or their successors cannot now challenge it. The grazing regulation precludes a grazing licensee from demanding a readjudication of grazing privileges after they have been held for three years (43 CFR 4115.2-1(e)(13)(i)). The regulation applies not only to formal adjudications made pursuant to 43 CFR 4110.0-5(r), but also to "adjudications" made on the basis of available information and adhered to over a long period of time. Malvin Pedroli et al., 75 I.D. 63, 68, 69 (1968).

There remain the objections to the application of the rule for determining service areas and to the recognition of water sources on which the application of the rule is based.

The Allans objected to the service area assigned to Pakoon Springs. The hearing examiner pointed out that the line used to set off the Allans' area from the Pakoon grazing area follows a sharp decline, which constitutes a natural barrier to the movement of cattle. It is, he said, halfway between Pakoon Springs and the Lower Well, the competing water, and is a natural division point. The Allans have not pointed out any error in this reasoning, and we find none.

Smith, in turn, contends that a reservoir known as "Ed's Tank" and another water source known as "Lower Pockets" were incorrectly refused recognition as qualified base water. The district manager testified that neither one was in a serviceable condition as a water source on the day the Special Rule was revoked. (Tr. 119, 120, 126, 923, 1133.) Ed's Tank was repaired some time in 1956 and was in service at the time of the hearing (Tr. 123, 113). It, however, had been out of repair for several years before the revocation date (Tr. 122), and only waters serviceable as of that date were considered.

Accordingly, it was proper not to base any service areas on the possibility that they might be made serviceable in the future.

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 dismissing the

Allans' appeal is reversed, the decision of the hearing examiner as to the Allans' appeal is affirmed, and the decision of the Bureau of Land Management as to Smith's appeal is affirmed. 7/

Martin Ritvo, Member

We concur.

Francis Mayhue, Member

Joan B. Thompson, Alternate Member.

7/ In an action entitled Smith v. Hickel, et al., Civil No. 69-245 Pct., in the United States District Court for the District of Arizona, Smith sought review of the Bureau's decision of August 6, 1968, and another matter. Defendant's motion to dismiss was granted on February 3, 1970.

