

Editor's note: 78 LD. 86

DAVID ABEL ET AL.

IBLA 70-25

IBLA 70-26

IBLA 70-28 Decided March 26, 1971

Grazing Permits and Licenses: Adjudication – Grazing Permits and Licenses: Range Surveys

Where a grazing allotment includes both private and federal range lands, the Bureau of Land Management may properly determine the grazing capacity of all of the lands in the allotment and require, as a condition to the issuance of a permit or license to graze the federal range, that the number of livestock using the private lands be limited to the recognized capacity of the lands.

Grazing Permits and Licenses: Range Surveys

A determination of the carrying capacity of a unit of range by the Bureau of Land Management will not be disturbed in the absence of positive evidence of error.

Grazing Permits and Licenses: Generally – Grazing Permits and Licenses:

Exchange of Use

Where grazing privileges have been exercised in the past on the basis of an agreement whereby the use of private lands in one pasture has been exchanged for the use of federal lands in another, the agreement may properly be construed either as an exchange of the use of an area of land for the privilege of using another designated area of land for grazing or as an exchange of the use of the first area for the privilege of grazing a specified number of animals on the second.

Grazing Permits and Licenses: Apportionment of Federal Range

Where an apportionment of grazing privileges is made among livestock operators upon the basis of past authorized use, as shown by the records of a state grazing district, and one of the operators denies that he exercised or was allocated the grazing privileges which the records indicate he exercised in a particular year, the case will be remanded for the development of further evidence relating to the allocation of grazing privileges in that year.

IBLA 70-25 : [*88] Montana 4-67-2, 4-67-5
IBLA 70-26 : and 4-67-6
IBLA 70-28 :

DAVID ABEL ET AL. : Appeals from allocations of
: grazing privileges dismissed
:
: Affirmed as modified

DECISION

David Abel, Nick Janich and John Propp have separately appealed to the Secretary of the Interior from decisions dated January 14, January 6, and January 9, 1969, respectively, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed decisions of a hearing examiner dismissing their respective appeals from decisions of the Billings, Montana, district manager adjusting their grazing privileges with respect to numbers of animals permitted to be grazed and areas and seasons of use. Because the issues are almost identical in all three cases, the appeals are consolidated here.

Appellants are all livestock operators who utilize federal lands which were, at the time these proceedings were commenced, administered through the Buffalo Creek Cooperative State Grazing District, an organization of livestock operators created under the Montana Grass Conservation Act, Sections 46-2301 to 46-2332, Revised Codes of Montana, 1947. ^{1/} The controversies here arise from reductions in grazing privileges imposed as a result of a range survey conducted by the Bureau of Land Management in 1964 and 1965. The backgrounds of the appeals are as follows:

^{1/} The lands administered by the Buffalo Creek Cooperative State Grazing District consist of intermingled private lands, state lands and federal lands (public domain and acquired "LU" or "Land Utilization" lands), and lands owned or directly controlled by the District itself. The conduct of livestock operations in the District has entailed the execution of numerous formal and informal exchange of use agreements among operators, the District and the Bureau of Land Management, resulting in some instances in the creation of complex patterns of land ownership and use.

IBLA 73-25 -- David Abel

In an application dated December 30, 1966, Abel requested a license or permit authorizing grazing use totaling 4,530 animal-unit months (AUM's) during the 1967 grazing season in the Upper Buffalo Common, Home Ranch, Section 19, Brooks, Holding, Turley Place and Heifer pastures. The pastures embrace an area of about 21,165 acres, of which approximately 6,536 acres, or 23 percent, are federal land (see Abel Tr. 48-52; Ex. A-1). 2/

By a decision of March 13, 1967, the Billings district manager approved the application as to 3,613 AUM's, while rejecting it as a 917 AUM's. Upon Abel's appeal from the district manager's

fn. 1 (cont.)

On January 28, 1963, the Bureau and the State Grazing District entered into an agreement which provided, inter alia, that the Bureau would establish and fix, in cooperation with the State District, the grazing capacity of the federal and District land, that it would issue to the District an annual license or term permit for the grazing privileges that may be utilized on the federal land by the District's licensees and certify to the District a list of applicants qualified to use the federal land and the extent of the privileges to which each is entitled, and that the District would use or permit the use of the federal land for grazing purposes in accordance with the terms of the agreement, fixing, subject to approval of the Bureau, the numbers and kinds of livestock to be grazed on the federal land, not in excess of the grazing capacity and the seasons of use. That agreement was terminated by the Bureau, effective September 25, 1968, upon the failure of the District to conform its 1968 allocations to the Bureau's certification after the Bureau had conducted a range survey which resulted in a determination that the capacity of the federal range was substantially less than the previously-authorized use. The authority of the Bureau to determine the capacity of the federal range, without the concurrence of the District, and the propriety of the Bureau's actions following that determination were judicially recognized in Buffalo Creek Cooperative State Grazing District v. Tysk, 290 F. Supp. 277 (D. Mont. 1968).

While it would appear that the termination of the agreement may have some effect on other contractual relations established in the past, it does not appear that the issues raised in the present appeals are directly affected by the Bureau's action.

2/ References to hearing transcripts and exhibits are identified by the names of the appropriate parties, except where the absence of possible ambiguity makes such identification unnecessary.

decision a hearing was held at Billings, Montana, on April 19, 1968, to determine, as the hearing examiner found:

1. Whether the Government is bound by agreements of February 4, 1964, and April 8, 1966, between Abel and the State Grazing District, which were approved by the Bureau of Land Management; and
2. What is the carrying capacity of the Upper Buffalo Common, Home Ranch, Section 19, Brooks and Turley Place pastures. ^{3/}

In a decision dated June 3, 1968, the hearing examiner held the first issue to be immaterial, inasmuch as neither agreement purported to specify the extent of the grazing use which would be authorized by the Bureau of Land Management. From the evidence developed at the hearing, he concluded that the carrying capacity of the appellant's allotments was as disclosed by the range survey and dismissed the appeal.

IBLA 70-26 -- Nick Janich

By application dated January 6, 1967, Janich requested authority to use 533 AUM's of forage on federal land in the South-K-Henry allotment, in addition to 232 AUM's on private land in the same pasture. The pasture consists of 5 1/2 sections of land, of which 3 7/8 sections are federal land (Janich Tr. 6; Ex. A-1).

In a decision dated March 13, 1967, the Billings district manager approved the application for 276 AUM's, rejecting it for the balance. ^{4/} At a hearing held at Billings on April 18, 1967,

^{3/} Abel was granted the full use applied for in the Holding and Heifer pastures (60 AUM's and 250 AUM's, respectively), and there is no question before us relating to those particular areas.

^{4/} In a "Notice of Allocation of Grazing Privileges and Allotment Boundaries," dated January 17, 1967, the district manager advised Janich that his federal range demand and adjusted grazing privileges in the South-K-Henry allotment were as follows:

<u>Federal Range Demand</u>	<u>Active</u>	<u>Suspended Non-use</u>
80 AUM's	39 AUM's	41 AUM's

pursuant to Janich's subsequent appeal from the district manager's decision, the parties agreed that two issues were raised by the appeal:

1. What is the appellant's customary use: and
2. What is the carrying capacity of the South-K-Henry allotment:

In a decision dated August 9, 1968, the hearing examiner found that Janich had entered into an oral agreement with the State District to trade the use of land which he owns in the Central-K-Henry allotment for a specified area of federal land in the South-K-Henry allotment, and the use of a reservoir which he owns in the North-K-Henry allotment for a license to graze 10 cattle for 8 months in the South-K-Henry allotment. He found that Janich also owned 720 acres of land in the South-K-Henry allotment. Prior to the district manager's decision, the hearing examiner determined, Janich was authorized "to graze in the South-K-Henry allotment livestock deemed sufficient to harvest the forage produced on the exchange federal and private land and an additional 10 head." He further found that Janich's authorized use during the "customary use" period 5/ averaged

fn. 4 (cont.)

The district manager then advised Janich that his application was approved for 46 cattle from May 1 to October 30 (276 AUM's) and rejected for 43 cattle for the same period (260 AUM's). Those figures were recited again in the decision of March 13, 1967, without further explanation.

5/ The "priority period", used in determining the "customary use" which serves as the basis for the award of grazing privileges under the Federal Range Code, is defined as:

"the five-year period immediately preceding June 28, 1934, except that if such Federal range was placed within a grazing district after June 28, 1938, or added to an existing grazing district by boundary modification after the latter date, the priority period shall be the five years immediately preceding the date of the order establishing such district or effecting such addition, as the case may be." 43 CFR 4110.0-5(k)(1) (see similar language in 43 CFR 4110.0-5(p)(1)).

The hearing examiner found that all of the federal lands within the boundaries of the Buffalo Creek Cooperative State Grazing District were added to the administrative area of the Billings

778 AUM's, that all of this use was based on self-furnished range, for which reason Janich was not charged the customary grazing fee, and that Janich, therefore, was not and never had been a "regular licensee." ^{6/} The hearing examiner concluded that the district manager had awarded Janich his "customary use" of the range in the South-K-Henry allotment, adjusted to conform with the capacity of the allotment, that no error had been shown in the Bureau's determination of the range capacity, and that Janich had been awarded all of the grazing privileges to which he was entitled.

fn. 5 (cont.)

District of the Bureau of Land Management by Public Land Order 2586 of January 15, 1962, 27 F.R. 580, to be administered, pursuant to regulation 43 CFR 4111.3-2(d), as "lands additionally available." The priority period for determining "customary use" was therefore found to be the years 1957 through 1961.

^{6/} The Federal Range Code provides that:

"Regular licenses and permits will be issued to qualified applicants to the extent that Federal range is available in the following preference order and amounts:

"(i) To applicants owning or controlling land in class 1 [dependent by use or full-time water], licenses or permits to the extent of the dependency by use of such land; to applicants owning or controlling water in class 1, licenses or permits to the extent of the priority of such water.

"(ii) To applicants owning or controlling land or water in class 2 [dependent by location], licenses or permits for the number of livestock for which range is available and which can be properly grazed in connection with a livestock operation which involves the use of such land or water." 43 CFR 4111.3-1(d)(2).

The Code also provides for the charging of fees for the grazing of all livestock on public lands, except for that authorized under a free-use license, including a minimum charge of \$10 on all regular licenses and permits (43 CFR 4115.2-1(k)). Therefore, to the extent that Janich was not a regular licensee his right to use federal lands in the South-K-Henry allotment was derived from an exchange of the use of his land outside the allotment, or from an exchange of water for grazing privileges (as all of it appears to have been), rather than from a recognized privilege of utilizing federal lands in addition to his own grazing lands, for which a fee is exacted.

IBLA 70-28 – John Propp

By application dated December 29, 1966, Propp sought grazing privileges for the 1967 grazing season totaling 400 AUMs, 320 of which were to be in the Mill Creek Common allotment, which Propp uses jointly with E. T. Brown, and the balance of which were to be in the Propp Individual allotment.

A decision of the Billing district manager dated March 13, 1967, approved Propp's application for 168 AUM's in the Mill Creek Common allotment and 49 AUM's in the Propp Individual allotment, a total of 217 AUM's. Propp appealed from that decision on the ground that the pastures had been used at the same stocking rate for the last 22 years without deteriorating, and a hearing was held at Billings on April 17, 1968, to determine the carrying capacity of the two allotments. In a decision dated May 10, 1968, the hearing examiner accepted the Bureau's determination of the carrying capacities of the lands in question and, finding no dispute with respect to the allocation of the available range between Propp and Brown, dismissed the appeal.

In their current appeals to the Secretary, all appellants challenge the authority of the Bureau of Land Management to regulate the grazing use of private and state lands in carrying out its policies with respect to federal lands. They argue that the landowner had the right to determine the carrying capacity of his own lands, that the State of Montana has the exclusive authority to determine the carrying capacity of state lands, and that the State Grazing District has control of private and state lands within its boundaries. Abel and Propp question the correctness of the Bureau's determination of the grazing capacity of the state and private lands involved in these proceedings. It appears that the dispute with respect to grazing capacity relates only to such lands, and that neither appellant questions the propriety of the Bureau's determination with respect to federal lands. The third appellant, Janich, also disputed the Bureau's findings with respect to range capacity. However, he does not appear now to question the Bureau's determination of grazing capacity so much as its determination of his proportionate share of the available grazing privileges in the South-K-Henry allotment.

Federal lands constitute from 14 to 18 percent of the grazing lands within the Buffalo Creek State Grazing District (see Abel Tr. 45). ^{7/}

^{7/} Compare Abel Tr. 45 (14%) with Propp brief (18%) and Buffalo Creek Cooperative State Grazing District v. Tysk, supra, n. 1, (approximately 17%).

Appellants point to this disparity in ownership as illustrative of the inequity of the Bureau's attempt to manage the entire range in accordance with its concepts of how its own small part should be used. There is no evidence in the record before us that the Bureau is attempting such broad management of other people's lands as appellants' arguments would imply. Moreover, the percentage of federal lands in the district as a whole has little meaning when we are inquiring into the propriety of range adjudication relating to individual pastures of widely-varying patterns of land ownership. For example, in the seven pastures utilized by Abel, the percentage of federal land ranges from approximately 18 percent in the Turley Place pasture to 100 percent in the Heifer pasture, federal lands constituting about 31 percent of those pastures (Abel Tr. 48-52; Ex. A-1). Approximately 70 percent of the land in the South-K-Henry allotment, utilized by Janich, is owned by the United States (see Janich Tr. 6; Ex. A-1), while 71 percent of the land in the Mill Creek Common allotment, utilized by Propp, and all of that in the Propp Individual allotment belong to the federal government (Propp Tr. 10; Exs. A-1, A-2).

Unquestionably, the administration of the federal lands involved in these cases in accordance with the Bureau's view of proper range management necessitates the exercise of some control by the Bureau over the use by grazing operators of their own lands or other nonfederal lands. Therefore, the question raised is what authority the Bureau has to exercise such control over the lands of others.

The problem is a practical one. There is no evidence in the record of any attempt by the Bureau to limit a landowner's use of his own lands where such use would not directly affect the use of federal lands. In each instance here the federal lands comprise all or a part of a tract which is grazed as a single unit. Inasmuch as appellants acknowledge the authority of the Bureau of Land Management to manage those federal lands which have been placed under its jurisdiction, how is this to be affected if cattle in uncontrolled numbers are permitted to graze throughout a pasture comprised in part of federal land?

This problem was considered by the Department in the case of Leandro Muniz, I.G.D. 302 (1942). After noting that the license issued to the appellant in that instance included both federal range and privately owned or controlled lands, the Department stated:

"No doubt all licensees feel that they are entitled to make such use of their private lands as they see fit. This is true in a certain sense, but where such use of the private lands will result in an excessive use of the Federal range, it would appear to constitute a violation of the terms of the license and thus warrant the cancellation of the license if the abuse was substantial". Supra at 305, 306.

In numerous other cases the Department has, expressly or impliedly, asserted a right to exercise a degree of dominion over the private lands of an individual in exchange for the granting of grazing privileges on federal lands intermingled with private lands. See, e.g., Leo Sheep Company, I.G.D. 629 (1957); Nick Choumos, A-29040 (November 6, 1962); Alton Morrell and Sons, 72 I.S. 100, 107 (1965); cf. J. Leonard Neal, 66 I.D. 215, 217 (1959), where a grazing operator, charged with trespass in his grazing of federal lands arranged in a checkerboard pattern with private and state-owned lands was granted his request that a portion of his private land in a separately-fenced pasture be withdrawn from a federal grazing district.

If appellants herein are willing to fence their own lands, and other nonfederal lands which they control, in such a manner as to facilitate control of access to the federal lands from adjacent private lands, we cannot deny their right to graze as many animals as they wish for as many months as they see fit on their own lands. However, if private and federal lands are to continue to be used in the same manner as in the past, it is proper for the Bureau of Land Management to insist that such limitations be imposed upon the total grazing use of an individual pasture as will assure protection against overgrazing of federal lands included in that pasture.

Turning then to the question of grazing capacity, we note appellants contend essentially that the Bureau has arbitrarily accepted the determination of its range experts with respect to the capacity of the lands and has given no weight whatsoever to the testimony of ranchers who know from years of experience how many animals a particular tract of pasture land is capable of supporting during a given season of use. We find no merit in this charge.

It appears from the record that grazing was authorized throughout the Buffalo Creek State District at the rate of 20 animals per section of land during the accepted seasons of use for some years

prior to the Bureau's range survey of 1965-1966 (see Abel Tr. 18, 20-21; Janich Tr. 16, 36; Propp Tr. 14-15, 34). The Bureau's survey, in addition to showing that the total authorized use has exceeded the capacity of the lands, indicated that there is substantial variation in the carrying capacities of individual pastures. ^{8/} Without attempting to show that the lands throughout the district have a uniform capacity, appellants contend simply that the prolonged acceptance by the range users of the 20-animal-per-section stocking rate should be persuasive evidence of its correctness.

As both the hearing examiner and the Office of Appeals and Hearings have already pointed out, the Department has repeatedly held that a determination by the Bureau of Land Management of the grazing capacity of a unit of the federal range will not be disturbed in the absence of positive evidence of error. As the Department recognized in O. J. Cooper et al., Redd Ranches, A-30974 (April 29, 1969):

"... There is inherent in ... [the Bureau's range studies] an element of human judgment which cannot be eliminated by the most meticulous observance of established procedures for measuring range capacity. However, ... [t]he fact that there is error in the Bureau's findings can be established only by showing that the Bureau's range survey methods are incapable of yielding accurate information, that there was material departure from prescribed procedures, or that a demonstrably more accurate survey has disclosed a different range capacity. ... " p. 12.

The Bureau's findings in these cases were made after a systematic study of the areas of range here in question, in which accepted standards were employed. If the standards are valid, and if the survey was conducted in accordance with the standards, the conclusion seems inescapable that its determination of the grazing capacity of the lands was sound.

Appellants have not directly questioned the survey method employed by the Bureau. They have neither pointed to any error in the manner in which the survey was conducted nor have they attempted by an independent survey to show how much usable forage is produced

^{8/} In the case of Abel's lands, for example, it appears from the Bureau's findings that the available forage on the lands in the individual pastures ranges from about 75 AUM's per section in the Holding pasture (59 AUM's from 502 acres) to 143 AUM's per section in the Home Ranch pasture (590 AUM's from 2,645 acres).

annually on the lands in question. Rather, they have inferred from the fact that greater numbers of animals than the Bureau will now authorize have grazed on the lands year after year that the lands must produce more usable forage than the Bureau's survey has disclosed.

We shall not attempt to debate the logic of appellants' premise. We simply find that, where there is conflicting evidence with respect to the grazing capacity of land, a determination of the quantity of forage available which is based upon a systematic study, the results of which are susceptible of verification or refutation, is more persuasive than a determination based upon what has been done in the past, without reference to definitive standards of proper range utilization or forage requirements. Having found, then, that the Bureau has authority to determine the capacity of an entire grazing unit where federal and nonfederal lands are indiscriminately used together, we also find that appellants have failed to show error in the Bureau's determination of the grazing capacity of these particular tracts of land. Accordingly, we conclude that the reductions in grazing authorization previously adverted to have been properly imposed.

We come, finally, to the question of the allocation of grazing privileges among Janich and other users of the South-K-Henry allotment. As we have seen, the hearing examiner found from the evidence that Janich's past authorized use of South-K-Henry lands was based upon (1) his ownership and control of private lands within the allotment, 9/ (2) the exchange of the privilege of using lands which he owns in the Central-K-Henry allotment for the privilege of using federal lands in the South-K-Henry allotment and (3) the exchange of the use of water which he owns outside of the allotment for the privilege of grazing an additional 10 head of cattle in the allotment for a period of 8 months per year.

The hearing examiner accepted as proper the district manager's allocation of grazing privileges within the allotment which, in effect, treated it as two separate allotments. The first of these consisted of Janich's private lands and the federal lands

9/ Private lands in the allotment consist of sec. 29 and the N 1/2 NE 1/4 sec. 30 and E 1/2 sec. 32, T. 5 N., R. 27 E., M.P.M. (Janich Tr. 6: Ex. A-1). Federal lands in the allotment consist of secs. 19, 20 and 31, the S 1/2 NE 1/4 and SE 1/4 sec. 30, and the W 1/2 sec. 32 (Tr. 6-7; Ex. A-1).

for which he exchanged the use of his own lands in the Central-K-Henry allotment. 10/ The district manager awarded Janich all of the recognized grazing capacity of those lands without consideration of the relationship of the number of animals now authorized to the number previously allowed to graze thereon and in disregard of the use made of other lands in the South-K-Henry allotment. With respect to the other lands in the allotment, the district manager found that certain numbers of animals had been authorized to graze on the lands during the years 1957 through 1961, and he allocated the available forage on those lands among the three licensed users

10/ The existence of a formal agreement, to which Janich was a party, effecting an exchange of use of Janich's lands in the Central-K-Henry allotment for public lands in the South-K-Henry allotment was not established at the hearing. However, copies of agreements between Degenhart Bros. and the State Grazing District and between R. G. Robertson and the State District, accepted by the Bureau of Land Management on February 21 and January 3, 1967, respectively, were submitted in evidence at the hearing (Exs. G-7, G-8). Under the terms of those agreements, the respective range users accepted the use of privately-owned lands in the Central-K-Henry allotment, consisting of the SE 1/4 NE 1/4, E 1/2 SE 1/4 and SW 1/4 SE 1/4 sec. 8, all sec. 17 and the E 1/2 sec. 18, T. 5 N., R. 27 E., as the equivalent of grazing privileges which they had established on public lands in the South-K-Henry allotment, consisting of the SE 1/4 sec. 30, all of sec. 31, and the W 1/2 sec. 32, T. 5 N., R. 27 E. In addition, the agreements recited that the respective range users had additional grazing privileges, including, in the case of Robertson, privileges in secs. 19 and 20 and the S 1/2 NE 1/4 sec. 30, T. 5 N., R. 27 E., in the South-K-Henry allotment. Inasmuch as the private lands described in the Central-K-Henry allotment belong to Janich, it was reasonably inferred that Janich exchanged the use of those lands for the privilege of using the relinquished public lands in the South-K-Henry allotment (see Tr. 69-70). Evidence was also submitted that Janich entered into a formal agreement on September 1, 1959, to permit the Grazing District to water District-permitted livestock from a reservoir owned by Janich in the NE 1/4 sec. 1, T. 5 N., R. 26 E., in exchange for 10 animal units of preference within the district (Ex. G-3).

The basic soundness of the Bureau's premise, so far as it relates to the nature of the agreement for the exchange of the use of land in the Central-K-Henry for the use of land in the South-K-Henry, is substantiated by statements which Janich makes in his appeal to the Secretary (see n. 15, infra).

in direct proportion to what he found to be their licensed use during the priority period. 11/ In other words, the district manager found that Janich had exercised grazing privileges in the past based, in part, upon the right to use certain lands in the South-K-Henry allotment and, in part, upon the right to graze a specified number of animals on other lands in the allotment. In allocating future grazing privileges, he reasoned that Janich's rights should not be determined by looking solely at the number of animals he had been permitted to graze in the past, but that his privileges based upon areas of use and those based upon numbers of use should be separately computed.

Janich, on the other hand, has contended from the outset that his grazing privileges in the allotment must be determined upon the basis of the actual grazing use made of all of the allotment lands during the years 1957 to 1961, which use constitutes "customary use" within the meaning of the Department's regulation. 12/ If a reduction is to be imposed, in Janich's view, his share of the total forage available should remain proportionately the same as his share of the total forage consumed during the priority period.

11/ Historic use of the lands in secs. 19 and 20 and the S 1/2 NE 1/4 sec. 30, it was found, was divided among three operators – Janich, Shirley Haley and R. G. Robertson. Janich's use of these lands during the priority period, as determined by the district manager, amounted to 80 AUM's per year (the amount of forage to which he was entitled to use in exchange for the use of his reservoir), while Haley received an average of 190 AUM's per year and Robertson received an average of 68. The total available forage on the lands, as determined by the Bureau, amounted to only 163 AUM's, approximately one-half that needed to satisfy recognized demand. This forage was divided among the three operators in the same proportions as their shares of the 338 AUM's which they were previously permitted to consume, Haley receiving 92 AUM's (approximately 56 percent of the total), Janich receiving 39 AUM's (24 percent), and 32 AUM's (20 percent) going to Robertson (Tr. 65-66; Ex. G-6).

12/ Regulation 43 CFR 4111.3-2(d)(1) provides that:

"Any land within the exterior boundaries of a grazing district made available for administration by the Bureau of Land Management, . . . after the grazing privileges in the area embracing the land have been adjudicated, will be administered in accordance with customary use so far as such administration may be practicable and consistent with good range management."

In addition, Janich charges that the Bureau has erred in its computation of past use of South-K-Henry lands, crediting Robertson with 176 AUMs in the allotment in 1957 which were neither allocated to nor used by him.

The total available forage in the South-K-Henry allotment, as calculated by the Bureau, amounts to 400 AUMs, of which the 276 AUMs awarded by the district manager to Janich constitute approximately 69 percent, 13/ 92 AUMs (23 percent) going to Haley and 32 AUMs (8 percent) to Robertson. Total authorized grazing use in the South-K-Henry allotment from 1957 through 1961, as determined by the Bureau from records of the State Grazing District, was as follows (see Tr. 6-8, 65-66, 102-103; Exs. G-6, G-9a thru G-9d):

	<u>AUM's</u> <u>1957</u>	<u>AUM's</u> <u>1958</u>	<u>AUM's</u> <u>1959</u>	<u>AUM's</u> <u>1960</u>	<u>AUM's</u> <u>1961</u>	<u>AUM's</u> <u>AUM's</u>	<u>Average</u> <u>of Total</u>	<u>Percent</u>
Janich	880	800	800	800	616	779	75	
Haley	248	176	176	176	176	190	18	
Robertson	<u>176</u>	<u>—</u>	<u>—</u>	<u>—</u>	<u>162</u>	<u>68</u>	<u>7</u>	
Total	1304	976	976	976	954	1037	100	

Actual use during that period, according to Janich, was as follows (see Tr. 11-12, 21-25):

	<u>AUM's</u> <u>1957</u>	<u>AUM's</u> <u>1958</u>	<u>AUM's</u> <u>1959</u>	<u>AUM's</u> <u>1960</u>	<u>AUM's</u> <u>1961</u>	<u>AUM's</u> <u>AUM's</u>	<u>Average</u> <u>of Total</u>	<u>Percent</u>
Janich	880	800	800	800	616	779	82	
Haley	<u>—14</u>	176	176	176	176	141	15	
Robertson	<u>—</u>	<u>—</u>	<u>—</u>	<u>—</u>	<u>162</u>	<u>32</u>	<u>3</u>	
Total	880	976	976	976	954	952	100	

13/ The 276 AUMs consist of the 39 AUMs awarded to Janich in the lands which he shares with Haley and Robertson plus those on the lands as to which he was awarded all of the available forage. At the hearing Duane Whitmer, a natural resource specialist employed by the Bureau, stated that the available forage on the other lands amounts to 234 AUMs, of which 171 AUMs represent the forage on the federal lands which Janich is receiving in exchange for his lands in the Central-K-Henry allotment and 87 AUMs represent the amount of forage on his private lands in the South-K-Henry allotment (Tr. 98-99). While some explanation or correction may be needed to reconcile these figures, we are concerned at this time only with determining the soundness of the principles employed by the district manager.

14/ In addition to the 176 AUMs which he alleges were improperly credited to Robertson in 1957, Janich excluded from his

[*101] Acceptance of Janich's theory of proper allocation would result in the award to him of 328 AUM's (82 percent of the 400 AUM's available) instead of the 276 AUM's allotted by the district manager, with 60 AUM's going to Haley and 12 AUM's to Robertson. 15/

fn. 14 (cont.)

actual use figures 248 AUM's which were allocated in 1957 to Haley's predecessor, Burcheck, but which apparently were taken in non-use (see Tr. 24, 38-40). Although Janich objected in his brief to the hearing examiner to the crediting of any use to Haley for 1957, it appears that his objection at this time relates only to the 176 AUMs credited to Robertson in 1957.

15/ In his appeal to the Secretary Janich asserts, inter alia, that:

"The trade use which the Appellant had with the State Grazing District of lands in the Central-K-Henry pasture was in effect during the customary use period and the lands exchanged in the trade use were as follows: The Appellant was trading the E 1/2 of Section 18 and that portion of Section 17 lying west of the rims (approximately 1/2 section, not all of Section 17 as indicated on the government list) and the S 1/2 SE 1/4, NE 1/4 SE 1/4, SE 1/4 NE 1/4 of Section 8, Township 5 North, Range 27 East, for the following government lands: the SE 1/4 of Section 30, all of Section 31, and the W 1/2 of Section 32 in the same township and range. . . .

"The error is that the government did not give the Appellant cr[e]dit for the exclusive use during the customary use period for all Sections 19 and 20 in the South-K-Henry pasture. Sections 19 and 20 were not used in common during the period. . . . Therefore, during the customary use period the Appellant would be entitled to the carrying capacity AUM's on Sections 19 and 20 which were 320 AUM's.

"The second error is found in the statement that ' . . . the Appellant was not charged the regular grazing fee since all of this grazing use was based on self furnished range.' This statement is not true because part of the Appellant's use was undertaken pursuant to his permit for 10 head for 8 months or 80 AUM's, for the development of water outside the district. This water was outside of the grazing district even though it is inside of the allotment. The water is not even located in the same county as the district lands. This water that was outside of the district was the basis for the 10 head for 8 months.

"In addition to this water outside the district the Appellant developed water inside the district in the North, Central and South-K-Henry pastures, and on Section 19 for watering Sections 19 and 20.

The Bureau rejected Janich's theory on grounds that it would give recognition to the existence of grazing rights independent of any proper basis for such rights and that it would, in effect, permit Janich to reclaim the use of his own lands in the Central-K-Henry allotment while continuing to utilize those lands in the South-K-Henry allotment which he has received in exchange for the use of his lands in the Central-K-Henry. The soundness of the Bureau's position and the fallacy in Janich's reasoning are readily demonstrable from the facts of this case.

It should be obvious that, to the extent to which the grazing privileges Janich exercises on federal lands in the South-K-Henry allotment are based upon an exchange for the right of others to use his private lands outside of the allotment, his privileges in the South-K-Henry would terminate upon his reclaiming the use of his private lands. Even now, Janich is attempting to avoid application of this elementary principle.

According to Janich's testimony, a segment of his private land in the Central-K-Henry allotment was taken out of that allotment beginning in 1961. At the same time his grazing authorization in the South-K-Henry allotment was reduced from 100 animal units (800 AUMs) to 77 animal units (616 AUMs), the amount of the reduction presumably reflecting the portion of his South-K-Henry privileges attributable to exchange for the land previously committed to the Central-K-Henry allotment (see Tr. 25-26). Were Janich now to be credited with that part of his past use of South-K-Henry lands which was based upon an exchange for the use of land since taken

fn. 15 (cont.)

The district allowed Appellant the use of Sections 19 and 20 for this water development inside the district, and the 320 AUM's were run there every year during the customary use period. The trade was for water. Not land for land as is generally the rule. These 320 AUM's for each year should have been adjudicated to the Appellant because he had the exclusive use of these two sections with the permission of the district for the customary use period." (Emphasis in original.)

It is not easy to tell exactly what Janich is trying to say. Apart from the fact that his statements relating to the basis for his use of secs. 19 and 20 are unsubstantiated by the evidence and seem to be inconsistent with some of his testimony at the hearing (see Tr. 35), Janich seems to have departed from his original simplistic concept which disregarded all factors except actual numbers of animals utilizing the lands during the priority years.

from the Central-K-Henry allotment, it would follow that he could reclaim the use of all of his Central-K-Henry lands while continuing to exercise all of his "customary use" of South-K-Henry lands. This cannot be. Clearly, past grazing authorizations can be utilized in determining future allocations only to the extent that they were based upon the same qualifications that now exist.

The question before us, in essence, is whether, in allocating grazing use within an allotment where consideration is to be given to historical use, a district manager may, as was done in this instance, resort to a formula which recognizes different bases for the historical use of the lands in the allotment or whether he must reduce all prior use, regardless of the basis upon which it originated, to a numerical value and then allocate the available forage proportionately among the qualified users. In other words, the question is whether Janich was authorized to graze a specified number of animals in the South-K-Henry allotment in exchange for the use of his lands in the Central-K-Henry allotment, or whether he was entitled simply to use the capacity of a designated area of land in the South-K-Henry. Assuming that the Bureau has correctly ascertained the bases for Janich's privileges in the South-K-Henry allotment, it could reasonably be found, as it was by the district manager, that his historical use of federal lands in the allotment consisted of the use of a designated area 16/ plus the grazing of a specified number of additional cattle on other allotment lands. It could, with equal rationality, be found that Janich's historical use of the federal range in the South-K-Henry allotment consisted of the number of animals which he was permitted to graze in the allotment in exchange for the use of his Central-K-Henry lands plus the additional number which he was authorized to graze in exchange for the use of water. It is conceivable that differing results might be obtained, depending upon which approach were taken.

16/ It appears that Janich did, in fact, have exclusive use of sections 19 and 20 during the priority period and that Haley and Robertson exercised their privileges during that time on lands which the Bureau found to have been committed to Janich's exclusive use (see Tr. 22, 35, 46-48). However, we do not find any particular significance in this fact, the hearing examiner having expressly found that because of the complicated pattern of land ownership in the area grazing preference of individual users is not necessarily related to the lands actually grazed in the past. The fact that, by informal agreement, Janich may have permitted Haley and Robertson to utilize lands committed to his use while he exercised exclusive control over lands in which the three were licensed to operate jointly would not alter the extent of the privileges which were exercised.

Upon the established facts of this case, we cannot say that the district manager erred in electing to take the first approach. This is particularly so in the absence of any showing that the results under the second method would be significantly different 17/ and, if so, that they would be more equitable. Although Janich has charged the Bureau with failure to recognize other bases for the exercise of his grazing privileges in the South-K-Henry allotment, the existence of such other bases is not established by the evidence. Accordingly, the district manager's findings, to this extent, will not be disturbed.

The question of Robertson's use of the South-K-Henry allotment in 1957 is a different matter. The Bureau's determination of historical use of the lands in the allotment was based upon a summary of State District records, which showed that in 1957 the District furnished Robertson forage for 22 animal units for 8 months in the South-K-Henry allotment (see Tr. 62-65; Ex. G-6). In a statement dated July 30, 1968, which was submitted by Janich with his brief to the hearing examiner, Robertson certified that he did not run any cattle in the South-K-Henry pasture during the year 1957, and that all of his cattle were allocated in the North-K-Henry pasture prior to the year 1961. Neither the hearing examiner nor the Office of Appeals and Hearings commented upon Robertson's statement.

The elimination of the 176 AUMs of use credited to Robertson's use in 1957 would result in a substantial reduction in Robertson's recognized privileges within the South-K-Henry allotment and in modest

17/ Using the 1957-61 use figures accepted by the Bureau, but adjusting Janich's recognized use to exclude use apparently based upon the trade of lands no longer offered in exchange (in other words, applying his 1961 use figure through the 5-year period), "customary use" during the priority period would have been:

	<u>1957</u>	<u>1958</u>	<u>1959</u>	<u>1960</u>	<u>1961</u>	<u>AUM's</u>	<u>Average</u>	<u>Percent</u>
Janich	616	616	616	616	616	616	70	
Haley	248	176	176	176	176	190	22	
Robertson	<u>176</u>	<u>=</u>	<u>=</u>	<u>=</u>	<u>162</u>	<u>68</u>	<u>8</u>	
Total	1040	792	792	792	954	874	100	

It will be seen that the results achieved with the use of these figures would be almost identical with the district manager's determination, Janich receiving 280 AUM's, Haley 88 AUM's and Robertson 32 AUM's.

IBLA 70-25

IBLA 70-26

IBLA 70-28

increases in those of Janich and Haley. In view of the conflicting evidence on this point, further investigation should be undertaken to ascertain whether or not Robertson was, in fact, allocated any use of the South-K-Henry allotment in 1957. In the event that the facts prove to be as alleged by Janich, the recognized grazing privileges of the respective users of the allotment should be adjusted accordingly.

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 decisions of the Office of Appeals and Hearings relating to Abel and Propp are affirmed, the decision relating to Janich is affirmed, as modified herein, and his case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

Martin Ritvo, Member

We concur:

Francis E. Mayhue, Member

Newton Frishberg, Chairman.

