

Editor's note: Appealed – dismissed, Civ.No. 1-72-35 (D.Idaho Sept. 28, 1973)

BALL BROTHERS SHEEP
COMPANY ET AL.

IBLA 70-58 Decided April 12, 1971

Grazing Permits and Licenses: Apportionment of Federal Range

A division of an area of federal range into separate allotments will be upheld where its implementation will not result in such hardship as to constitute a serious impairment of the allottee's livestock operation. Under such circumstances it is unnecessary to determine whether the allotment is so arbitrary or capricious as to render valueless an objecting allottee's privately owned land and improvements or to seriously endanger the possibility of his continuing in the livestock business.

Grazing Permits and Licenses: Exchange of Use

The district manager may in the exercise of his discretion refuse to allow an exchange of use of lands leased by a licensee in an area in which it has no grazing privileges for privileges in an area allotted to it.

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| IBLA 70-58 : | Idaho 3-66-1 | : | |
| BALL BROTHERS SHEEP COMPANY, | | : | Allocation of grazing |
| Appellant | | : | allotments affirmed |
| ROBERT ELLIS ET AL., | | : | Affirmed |
| Intervenors | | : | |

DECISION

Ball Brothers Sheep Company has appealed from a decision dated April 1, 1969, by the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a hearing examiner's decision of December 10, 1968. The hearing examiner affirmed the decision of the district manager, Idaho Falls Grazing District (Idaho No. 3), dividing the Crooked Creek subunit of the Medicine Lodge unit into allotments. The hearing examiner, however, remanded the case to the district manager for a recomputation of the carrying capacity of one of the allotted areas, the Deep Creek allotment, and a reallocation of the areas of use specified in the latter's decision, as modified at the hearing, if the recomputation should disclose that appellant had been allotted usable forage insufficient to satisfy its recognized federal range demand. Robert Ellis and the other permittees in the subunit intervened ^{1/} at the hearing. The Idaho State Director filed a brief in opposition to the appeal by Ball Brothers Sheep Company. The intervenors concur in and adopt his brief.

The district manager's decision divided the Crooked Creek subunit into four allotments, assigning appellant's sheep use of two of them, Devils Gap and Deep Creek Allotments, with trail use through a third, the Crooked Creek Allotment. The Crooked Creek Allotment, and the fourth, Blue Creek Allotment, were allotted to the intervenors, who have cattle operations.

^{1/} The other intervenors are: Mary G. Ellis, Lamar Ellis, George Thomas, Thomas E. Sullivan, Mrs. Frank Sullivan, Franklin W. Sullivan, Weldon M. Ellis, Lois E. Hawker, and Gene E. Thomas.

In summary, the reasons advanced by appellant as error are:

(1) The examiner erred in holding that it must show that the district manager's decision was so arbitrary or capricious as to render valueless the privately owned lands and improvements of the appellant adjacent to the grazing district or seriously endanger the possibility of its continuance in the livestock business;

(2) The examiner erred in holding that the evidence failed to support the appellant's assertions that the district manager's decision, even after recomputation of the range survey, would cause undue hardship, losses, loss of sheep, loss of revenue, loss of forage, and that it would result in damage to the range and sheep allotments;

(3) The examiner erred in determining that the apportionment of the federal range set forth in the district manager's decision is conducive to good range management.

Appellant also raised other issues which will be noted later.

The decisions below have set out in detail the evidence presented at the hearing. It need not be repeated here except as it is pertinent to the discussion of a particular issue.

The threshold issue is the standard by which the validity of the district manager's action is to be judged when questioned by a licensee. The hearing examiner stated the standard, which he said was set out in National Livestock Company and Jack Cox, I.G.D. 55 (1938), as:

Whether the allocation of the allotments for the use of the appellant is so arbitrary or capricious as to render valueless [its] privately owned land or seriously endanger the possibility of its continuation in the livestock business.

Ball Brothers, on the other hand, contends that the test should be whether the licensee can show that use of the area allocated to it would create such hardship as to constitute a serious impairment of its livestock operation.

The test is to be used to judge the propriety first of creating allotments out of a common area and then of allotting certain of the areas to the licensees. Further, even if an allocation is not defective on these grounds, it may also be challenged by an assertion that it does not contain adequate forage to satisfy a licensee's qualified range demand. Thomas Ormachea and Michael P. Casey, 73 I.D. 339, 343, 344 (1966). On the latter issue, the hearing examiner found that except for the possible effect of the recomputation of the carrying capacity of the Deep Creek Allotment referred to above, the appellant's allotments contained adequate forage to satisfy its qualified range demand.

In opposing this finding, the appellant stresses testimony of its witnesses that in some years one of the areas allotted to it, the Devils Gap Allotment, produces very little feed. The district manager based his determination of the grazing capacity of the area upon a range survey conducted in 1953 in accordance with accepted procedures and techniques. The determination will not be disturbed in the absence of a positive evidence of error. O. J. Cooper et al., Redd Ranches, A-30974 (April 29, 1969). The appellant offered no such evidence. The fact that the amount of forage produced may vary from year to year does not warrant disregarding the results of the range surveys.

Turning to the general test, we need not resolve the problem of which standard to adopt. In our view, the appellant cannot prevail even under the less rigorous test urged by it. To see why we look to the particulars of its objections to the allocation scheme devised by the district manager.

Prior to its division into the proposed allotments, Ball Brothers and the intervenors were authorized to graze throughout the whole of the subunit. The allocation, as we have stated, recognizes the full extent of Ball Brothers grazing privileges, but restricts the areas in which they can be used. Such a limitation is, of course, the usual result of the creation of individual grazing allotments out of an area previously grazed in common. The Department has consistently sustained such allocations of the range as a proper exercise of Departmental discretion where it is determined to be in the interest of sound range management. Thomas Ormachea and Michael P. Casey, *supra*. The hearing examiner and the Office of Appeals and Hearings found that there was a reasonable basis for the determination that the subunit should be divided into allotments.

The record amply supports this conclusion. The Government witnesses testified that the allotments would lead to better harvesting of the available forage throughout the subunit and lessen overutilization

in one congested area. They further stated that development of range improvements and the institution of grazing systems would be facilitated. While the appellant disputed these assertions, the evidence shows that the district manager's decision represents a reasonable approach to administering the grazing privileges in the subunit. Therefore, although there may be other feasible range management plans, the one proposed has not been shown to be so contrary to sound range management that it should be proscribed.

The appellant also contends that the operation of the proposed allotment plan will subject it to serious adverse economic effects. It will, it says, require additional expense for men and equipment to haul water, lead to an increase of lambs separated from their mothers ("bummers"), and create much more difficulty in keeping its bands of sheep separate. It also asserts that the plan would subject it to greater loss of sheep from feeding on poisonous plants. While none of these contentions are devoid of merit, it is our conclusion that their total effect would still not constitute a serious impairment of its livestock operation. Without doubt the appellant would have to rearrange its grazing plan and bear some additional expense for water. However, some of the added costs would be amortized over several years and would not loom large for an operation of its size. The areas made available are large enough and the periods of use long enough to permit it to develop an economic method of operation.

Therefore, we find that implementation of the allotments devised by the district manager does not constitute a serious impairment of its livestock operation, let alone render its adjacent privately owned lands valueless or seriously endanger its continuation in the livestock business.

The appellant also objects to the refusal of the district manager to allow it an exchange of use for a state section it leases in the Blue Creek Allotment. The appellant does not have any grazing privileges in Blue Creek under the allotment plan. The district manager reasoned that he could not allow an exchange of use where the privileges of the exchanges within that particular area could not be reduced if the lessee were to lose control of the leased lands. The district manager has discretion to reject an exchange of use. Alton Morrell and Sons, 72 LD. 100, 107, 108 (1965). The district manager's determination not to grant an exchange of use based on lands leased from the state is reasonable, within the scope of his authority and will not be disturbed. Id.

Finally, the other points raised by appellant have been carefully considered and found not to warrant a reversal of the decision appealed from.

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.

Martin Ritvo, Member

We concur:

Newton Frishberg, Chairman

Francis E. Mayhue, Member.

