

MAX TANNER, CROSS (X) RANCH,
WARREN RASMUSSEN, ROSS
WARBURTON, APPELLANTS,
CLARENCE A. ELQUIST, INTERVENOR

IBLA 70-16 Decided April 22, 1971

Grazing Permits and Licenses: Appeals

An appeal to the Director 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 being late, but the circumstances surrounding the appeal will be examined to determine whether in the exercise of discretion the late appeal should be allowed.

Grazing Permits and Licenses: Apportionment of Federal Range

Where the grazing capacity of the federal range has been greatly increased due to the efforts and expenditures of the licensee with the cooperation of the Bureau of Land Management, and the range is to be divided into separate allotments for that licensee and a group of others, it is proper to allocate the increased capacity to such a licensee apart from the allocation of grazing privileges based on natural forage, especially when the individual licensee suffers a greater reduction of his class 1 demand than do the others.

Grazing Permits and Licenses: Advisory Boards – Grazing Permits and Federal Range

Licenses: Apportionment of

Where a proposed line dividing an area into spring/fall and summer

use areas and the criterion on which it is based has been discussed many times before an advisory board, the district manager may use that line in allocating grazing privileges despite the fact that it has not been set out in an advisory board recommendation.

Grazing Permits and Licenses: Federal Range Code

The provisions of the Federal Range Code dealing with protests to a decision of the district manager are satisfied if a person is notified of his right to protest from an initial decision if, however, that decision is changed as a result of another's protest, those dissatisfied with the amended decision do not have a further right to a protest hearing, but must take an appeal as the Range Code provides.

Grazing Permits and Licenses: Apportionment of Federal Range

A permittee or licensee has no right to any particular portion of that 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 privileges is a matter committed to the discretion of the Department.

IBLA 70-16: Nevada I-66-1

MAX TANNER, CROSS (X) RANCH,
WARREN RASMUSSEN, ROSS
WARBURTON, :
Appellants,

CLARENCE A. ELQUIST,
Intervenor

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: Appeal from allocation of
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: individual and group
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: allotments dismissed.
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: Reversed; decision of
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: hearing examiner
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: affirmed

DECISION

Max Tanner, Cross (X) Ranch, Warren Rasmussen and Ross Warburton have appealed to the Secretary of the Interior from a decision of the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated October 8, 1968, which dismissed their appeal from a decision of a hearing examiner affirming the establishment by the District Manager of the Elko Grazing District, Nevada, of the boundary line between the appellants' group allotment and the individual allotment of Clarence A. Elquist on the ground that their appeal was not timely filed. The decision also said that if the appeal were to be decided on the merits, it would uphold the allotments as established by the district manager.

The hearing examiner's decision is dated February 26, 1968. Under the provisions of the Federal Range Code for Grazing Districts effective at that time, the appeal, after several extensions had been granted, ought to have been filed in the Office of the Director on June 28, 1968. 43 CFR 1853.7(b). It was, in fact, mailed in Salt Lake City on June 27, 1968, and received on July 1, 1968.

The Office of Appeals and Hearings held that the appeal was filed and under the consistent rulings of the Department an appeal to the Director from a decision of a hearing examiner in a grazing case filed late must be summarily dismissed.

The appellants contend that the regulations do not require the summary dismissal of a late appeal and that the Secretary may exercise his supervisory authority to relieve the appellants of the consequence of a late appeal.

In a recent decision, Delbert and George Allan, 2 IBLA 35 (1971), the Department reviewed its rulings on late grazing appeals. It concluded that since the courts have held that the term "subject to summary dismissal" in other than grazing cases

does not justify a dismissal of an appeal without the exercise of discretion, it would follow the same rule for grazing appeals. It then held that a grazing appeal mailed within the appeal period and received one day late would not be dismissed solely for that reason, but that the circumstances surrounding the appeal would be examined to determine whether in the exercise of discretion the late appeal should be accepted. It concluded that a delay of one day would be excused where there was no prejudice to the other parties and no advantage to the filing party.

Here, too, the appellants, having mailed their brief within the appeal period, have gained no advantage from their tardiness. And again, though the appeal was three days late, two of these days were nonbusiness days, a Saturday and Sunday. Further, there has been no prejudice to the intervenor from the appellants' default. Therefore, we conclude that in the circumstances the late filing will be waived and the appeal will be accepted and disposed of on its merits. 1/

1/ In a footnote, the decision below commented that the appeal was also defective because the appellants had failed to file proof of service of their appeal on the adverse parties. The appellants have submitted copies of post office return receipts showing that service was made within the time allowed. 43 CFR 1842.5-2.

Turning to the merits, we note that the appeal involves the allocation of grazing privileges in the Grande Unit of the Elko District, an area in the northeast corner of Nevada bounded by Utah on the east and approaching Idaho to the north. After proceedings before the District Advisory Board, the district manager approved a line dividing the area in question into an individual allotment for Elquist and a group allotment for the appellants. The dispute arises from the positioning of the dividing line.

The facts as summarized by the hearing examiner are:

The east portion of the Grande Range Unit embraces 76,111 acres, including private lands located primarily along water ways. The Intervenor owns 4,346 acres of private lands in the unit. Appellant Cross X Ranch owns 120 acres of private lands situated within the Appellants' proposed allotment. None of the other Appellants own any private lands in the unit.

On December 9, 1965, the district manager issued a "Notice of Initial Advisory Board Recommendation and Proposed Decision of District Manager on Allotment of Grazing Privileges" (Ex. 10). The notice states in part:

2. That the present total Class 1 obligation in the Elquist-Grouse Creek allotment is 8688 AUM's for livestock. Of this obligation, the Elquist proportionate share is 5913 AUM's or 68% and

the Grouse Creek proportionate share is 2775 AUM's or 32%. There is a wildlife obligation in this allotment of 2000 AUM's

3. That based on range survey studies, the estimated grazing capacity of the Elquist-Grouse Creek allotment is 7350 AUM's for livestock and 5000 AUM's for wildlife.

4. That the estimated present and potential forage production of the Elquist-Grouse Creek allotment is 10,641 AUM's for domestic livestock.

5. That the Elquist-Grouse Creek allotment be divided into individual and group allotments in accordance with 48 [sic] CFR 4111.3-2(c) as per the attached map which shows the location of these allotments and the operators designated to use them. This division provides for the equitable apportionment of the allotment considering the available forage, the developed potential and the undeveloped potential and is summarized as follows:

	<u>Elquist</u>	<u>Grouse Creek</u>	<u>Total</u>	
Available Native Forage	4835 AUM's	2515 AUM's	7,350 AUM's	
Developed Potential ^{2/}	1433 AUM's		1,433 AUM's	
Undeveloped Potential	1139 AUM's	719 AUM's	1,858 AUM's	
 TOTAL	 7407 AUM's	 3234 AUM's	 10,641 AUM's	
 % of Class I Demand	 125%	 117%		

^{2/} "Developed potential" describes the condition of the range at which it is producing the maximum amount of forage for the type of terrain and soil condition involved (Tr. 56). Undeveloped potential describes the amount by which the carrying capacity of the range can be increased by mechanical or other means (Tr. 57).

The map attached to the notice shows the proposed division line on the east side of the unit extending northerly from the southeast portion thereof to Meadow Creek. The Appellants' allotment is on the east side of the division line.

By letter dated January 7, 1966, counsel for the Appellants indicated that there was no reason to protest the division recommended by the advisory board (Ex. 11).

The Intervenor appeared at an advisory board meeting on January 10, 1966 and protested that the proposed division line set forth in the notice dated December 9, 1965 was unsatisfactory in that it prevented the movement of his cattle through Crooked Canyon. (The division line was on the west side of Crooked Canyon). He proposed to move a portion of the division line from the west side to the east side of Crooked Canyon. To compensate the Appellants for loss of the Crooked Canyon area, the Intervenor proposed to include in the Appellants' allotment the area north of Meadow Creek, known as the Hardesty area, which was in the Intervenor's proposed allotment. Mr. Thomas, representing the Cross X Ranch, and Appellant Warburton indicated that they preferred to use the Crooked Canyon area because the Meadow Creek area was too far from their home ranches. The advisory board recommended that the new division line proposed by the Intervenor be adopted.

The district manager's decision of January 12, 1966 established the division line proposed by the Intervenor, made provisions for providing water for the Appellants' cattle, and referred to a future transfer of the Intervenor's private Meadow Creek lands for Federal lands lying within this allotment.

The appellants raised six objections to the proposed division:

1. The appellants have been denied an opportunity for a proper hearing before the District Advisory Board.
2. The proposed division line requires the Appellants to use certain portions of the Federal range which were heretofore used by others; that such range is without adequate water; and that the use thereof would require as much as 20 miles of trailing.
3. The proposed division line will require an unreasonable length of fencing, part of the cost of which must be borne by the Appellants.
4. The proposed division line will deny the Appellants their customary and essential summer use, the denial of which will destroy the Appellant's proper balance of grazing use and seriously damage their grazing operations.
5. The proposed division line does not give the Appellants their necessary and equitable share of the available Federal range forage in the Grande unit.
6. The proposed division line does not provide the Appellants with their necessary and equitable share of the water in the Grande Unit.

At the hearing, the issues were rephrased to three:

1. Does the proposed Appellants' group allotment provide them with a sufficient amount of usable Federal range forage to satisfy their proportionate share of the Federal range demand in the Grande Unit?

2. Is the establishment of the proposed Appellants' group allotment so arbitrary or capricious as to seriously impair their livestock operations?

3. Was any provision of the Grazing Regulations contravened by the advisory board in its consideration of and recommendation on the establishment of the proposed allotments and, if so, was this contravention so substantial that the district manager's decision should be set aside to permit reconsideration by the advisory board?

The hearing examiner first pointed out that the Bureau's determination of the present and potential carrying capacity of the apportioned land had not been challenged and that there was no evidence in the record to refute testimony that the carrying capacities of the Crooked Canyon Area and the Meadow Creek (or Hardesty) area are identical, that is, 381 animal unit months. Further, he said, the record establishes that the proper season of use for the southern portion of the unit is summer, that almost all of the Crooked Canyon and Hardesty areas are designated for spring/fall use, and that the appellants received substantially the same amount of summer forage under the January 12, 1966, decision as they would have under the proposed division of December 9, 1965. He pointed out that the Intervenor's allotment provided him with approximately 85% of his qualified demand, while the appellants received 91% of theirs, and that the appellants received

667 of the 2212 AUM's classified for summer use, 31 short of their 31% proportionate share. He did not find this shortage significant. He then noted that the intervenor was given 1433 AUM's of developed potential, raising his allotment to 106% of his qualified demand. He found it proper to give the intervenor the benefit of the increased grazing capacity resulting from reseeded operations he carried out, at substantial cost to himself, with the cooperation of the Bureaus and without any contribution whatever from any of the appellants. He then said that the realization of the undeveloped potential in the intervenor's allotment and the appellants' allotment would give the intervenor in all 125% of his qualified demand and give appellants 117% of their qualified demand in their area. He concluded that it was not arbitrary or capricious to base the division of the range on a carrying capacity representing only the natural forage and found that the appellants' group allotment provided them with a sufficient amount of federal range forage to satisfy their proportionate share of the federal range demand.

In discussing the appellants' allegation that the proposed allotments would seriously impair their livestock operations, he noted that appellants contended that their allotment did not give them sufficient forage for their summer use and that it required extensive trailing beyond their area of customary use.

He pointed out that there is insufficient summer forage in the unit to satisfy the summer use requirements of both the appellants and the intervenor and again noted that the appellants had been allotted the same amount of summer use as in the December 9, 1965 proposed division, which they had been willing to accept. He concluded that it had not been shown that appellants' livestock operations would be seriously impaired by the failure to allow them all the summer use they desire.

He then disposed of their objections to the change in the area of use by holding that an applicant has no right to the use of any particular portion of the federal range. After stating that the appellants had been using for spring/fall grazing an area now designated for summer use, he found that despite the necessity for some additional transportation, there was no evidence that the appellants could not utilize the Hardesty area and that its use would not seriously impair their livestock operations.

Finally, he held that the manner in which the proceedings before the advisory board had been conducted had not denied appellants an opportunity for a proper hearing.

On appeal the appellants contend that several actions of the district manager were in contravention of the law and regulations.

First they allege that the Bureau of Land Management has "sold" federal range forage to the intervenor instead of disposing of it under the preference provisions of the law and regulation. In essence they urge that it is improper to allocate to the intervenor the federal forage resulting from the improvement of the carrying capacity of the range over that provided by natural forage. They say such capacity should be awarded in accordance with the provisions of the regulation governing class 1 and class 2 applicants.

The provision in the regulation which relates specifically to increases in grazing capacity reads:

Increases in grazing capacity, when conditions warrant, and after recommendation of the advisory board and approval of the District Manager, will be apportioned in a manner that will assist in the stabilization of livestock operations controlling qualified base property, with emphasis being given to the restoration of reductions that have been imposed to reach the grazing capacity of a particular allotment or range area, and to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases. 43 CFR 4111.4-2.

The regulation establishes a separate method of allocating grazing privileges arising from increases in grazing capacity. If

it had been intended that such increased capacity merely be placed into the common pot, as appellants would have it, the regulation would have said just that in so many words or it would have said that the increase would be awarded in the inverse order of the procedure for reductions. 43 CFR 4111.4-3.

We have found no cases dealing with the problem, nor have appellants cited any. We are left, then, with the guidance of the regulation directed specifically to the allocation of grazing privileges for forage resulting from increases in grazing capacity. It offers as guidelines: emphasis to be given "to the restoration of reductions that have been imposed to reach the grazing capacity . . ." and "to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases."

Here the district manager has relied upon the latter criterion. We believe he did so properly. The increased capacity resulted from fencing and reseeding operations towards which Elquist contributed about \$25,000 (Tr. 99, 122, 252, 289) and the appellants nothing (Tr. 99). The reseeded area lies within the portion of the unit customarily grazed by Elquist and not by the appellants. (Tr. 161-165). Further, if the natural forage

alone is considered, Elquist has been given only 82% of his class 1 demand while the appellants have received 91% of theirs (Ex. 2, Tr. 99). In other words, if Elquist had not developed some of the potentials he would have been entitled to a larger share of the natural forage – a share which could only come out of the portion now allocated to the appellants. The appellants, then, are also beneficiaries of the increased grazing capacity which Elquist developed.

In the circumstances, the allocation arrived at will assist in the stabilization of livestock operations controlling base properties by allocating the increased grazing capacity to an operation whose efforts were responsible for the increases. We conclude that the allocation is proper.

The appellants also assert that the range code does not sanction a distinction between carrying capacity based on natural forage and that based on increased available forage resulting from range improvements. As we have just said, it is our view that the regulation governing the disposition of increases in grazing capacity permits such a separation when the criteria it sets are met.

Next the appellants contend that the proper seasons of use for the proposed allotments were not set in accordance with the regulations. The regulation, 43 CFR 4111.3-1(a), provides:

(a) The District Manager, after recommendation by the advisory board, will rate the grazing capacity of each unit or area in a grazing district and will classify each for proper seasons of use and for the maximum period of time for which any licensee or permittee will be allowed to use the Federal range therein during any one year.

The appellants say that the line dividing the area into summer and spring/fall seasons of use did not appear in any way attached to advisory board actions and was not presented to the advisory board as a "particular delineated area" (Tr. 54, 82). They argue that without such formal action the line has not been properly established in accordance with the regulation.

The record, however, reveals that the problem of seasonal use was discussed by the advisory board many times and that the board understood the district manager's proposed disposition and left to him the precise location of the line. This procedure falls well within the requirement that the advisory board have an opportunity to recommend the seasons in which areas will be open to use before the district manager makes his decision.

The record is quite explicit.

The district manager testified that the line was based upon information gathered during a range survey conducted in 1965 (Tr. 54, 55) and took into consideration such factors as vegetation type, elevations, terrain, and rainfall (Tr. 82, 83). The report on the 1965 survey (Ex. 2, p. 4), in commenting on the problem of season use, says:

In order to control cattle improvement and prevent improper season of use, a drift fence needs to be constructed along the base of the summer range. Under present conditions, the cattle are following the snow melt up the slopes and grazing the forage as it appears. This in itself is unsound management and is indicated by the increasing number of undesirable plants.

Further, the last page of this report has an analysis of the range capacity by AUM's, part of which sets out the AUM's of summer range for the parties in exactly the ratio adopted by the district manager.

The advisory board's recommendations, which were adopted by the district manager as his decision of October 6, 1965, setting up allotments and reducing livestock grazing use of the parties, referred to the range survey and stated,

[Y]ou may contact the District Manager to work out specific numbers and times within the proper season of use and within the maximum number of AUM's cited above.

At the board meeting of November 19, 1965, at which protests to the October 6 decision were voiced, the minutes read:

The board then asked for an explanation of the breakdown of summer and spring/fall ranges and what their present use was of the spring and summer ranges. . . .

The protestants were dismissed and the Board discussed the issues that were presented involving private lands, water, season of use, and access. (Ex. 8, p. 6.)

The minutes of the next meeting held on December 6 and 7, 1965, contain the following:

Don Rhea lead a discussion concerning the proposed allotment of the Grande Unit. Watering facilities, fencing, customary use, and seasons of use were discussed at length. Various aspects of the operations and their requirements were brought up. After these discussions, the board recommended that a proposed line, leaving Clarence Elquist's deeded ground within his own allotment, holding the Grouse Creek users south of Meadow Creek, keeping Mesquite Land Company, Inc. out of the Grande Unit, and dividing the AUM's proportionately by adjusting the line along the western boundary of the Grouse Creek users' proposed allotment, be approved (see map attached) See addendum #3.

The notices of December 9, 1965 (Ex. 10, 11), also referred the addressees to the district manager for a precise determination of season of use (paragraph 9), just as the earlier notice had.

The appellants had no serious objections to these decisions, saying in a letter to the Bureau (Ex. 13),

If certain details are worked out . . . our associates see no reason to protest the allotment recommended by the Advisory Board. . . . We think that a very fair arrangement has been made and certainly the effort to be fair to all parties is evidenced.

The notices of January 12, 1966 (Ex. 15, 16), which carried out the changes in the east boundary in the allotment line made no reference to seasons of use.

In their appeal, (Ex. 17), dated February 11, 1966, from the notice of January 12, 1966, the appellants objected to the division of the allotment on the grounds that it denied them "their customary and essential summer range" – an objection which indicates they knew where the line separating the seasons of use was.

As we said above, a decision of the district manager, made after so much discussion with the advisory board, is well within the scope of the regulation.

The appellants' next contention is that the advisory board's actions adversely affected their right to present their case. The substance of their complaint is that they should have been given a right to protest the district manager's decision of January 12, 1966, (Ex 15, 16), instead of being directed to appeal if they were dissatisfied. As the hearing examiner noted, the appellants were given an opportunity to protest the decision of October 6, 1965, and the decision of December 9, 1965, which vacated the former. They had notice that there would be a protest meeting on January 10, 1966, at which they could present whatever objections they had.

The District Manager was not required to set up another protest because the decision of January 12, 1966, from which appellants appeal, modified the decision of December 9, 1965.

The regulation does not provide for a succession of protest hearings; on the contrary it states that the district manager's decision after a protest meeting will be his "final decision for purposes of appeal." It provides:

Protests; reconsideration by advisory boards; service of notice. At the time and place fixed for the protest meeting, any licensee, permittee, or applicant may appear, in person or by attorney or other representative, or may file a written protest with the advisory board, which thereupon will reconsider its previous recommendation in the light of the protest and will make a final recommendation to the District Manager. If such recommendation is favorable to the protestant, and the District Manager approves, he will notify the protestant thereof by ordinary mail, which notice may be the fee billing. If the recommendation is to any extent adverse, and the District Manager approves, a notice giving the reason or reasons therefore will be served on the protestant in person or by certified mail, including a reference to the pertinent sections or provisions of the Federal Range Code for Grazing Districts that serve as controlling factors. Such notice will constitute the District Manager's final decision for purposes of appeal. 43 CFR 4115.2-1(b).

Therefore we conclude that the procedure followed was proper.

The appellants also contend that they have capriciously and arbitrarily been denied their equitable share of the federal range forage.

Their objections to the allocation of the "developed potential" have been discussed above. They also protest the treatment of "undeveloped potential" as equal to and interchangeable

[*204] with usable carrying capacity presently available for qualified demand. The point of this objection is obscure, in view of the fact that they have received 91% of their qualified demand while the intervenor has been allocated only 82% of his. The intervenor has lost more of his qualified demand than the appellants and the appellants have an equal opportunity to develop the capacity of their allotment.

The appellants assert that the federal range allocated to them is not usable to the extent of their equitable share. They question whether the assumptions that the undeveloped potential will be realized, that water will be available, and that land exchanges will be accomplished are sound. Without discussing their doubts as to future actions by themselves, the Bureau of Land Management or Elquist, it is enough to say that the plan is feasible and that the effect of future events will be examined as they occur.

Finally they object to the substitution of the Hardesty area for the Crooked Canyon area. As the hearing examiner stated, a permittee has no right to the use of any particular area of the federal range, and although historical use is a factor, the determination of areas of use is committed to the discretion

of the Department. Delbert and George Allan, supra; Thomas Ormachea and Michael P. Casey, 73 I.D. 339 (1966). Redd Ranches, A-30560 (July 27, 1966). While the Hardesty area will be less convenient for the appellants, we agree with the hearing examiner that they have not shown that they cannot utilize their proposed allotment without seriously impairing their livestock operation. The division of the range into summer and spring/fall use areas will in itself require appellants to move their cattle much further than they have had to under the existing arrangement. The difficulty is that the appellants have been using what has been determined to be summer range during the spring and fall and that while they have no great need of spring/fall use they do need summer range (Tr. 118, 138, 149, 216, 217). The appellants have made no showing that their share of the summer range is inequitable. We conclude that the proposed allocation of range use gives the appellants an equitable share of the available forage.

The appellants also present a discussion of some issues which they say are irrelevant and immaterial but which they fear have been injected into the proceedings to their prejudice. Of these only one is pertinent to this decision. It is offered as a quotation from the hearing examiner's decision.

[T]he Appellants would, in effect, benefit from the results of the intervenor's efforts to improve the range "if they were given a share of the 'undeveloped potential'".

As we have said earlier, such a result would flow from placing all the available forage in a common pool for allocation and it is our view that neither good range practice nor the regulation requires it.

The other issues need not be discussed.

Accordingly it is concluded that the district manager's allocation of the grazing privileges on the federal range was correct.

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 reversed insofar as it dismissed the appellants' appeal and the decision of the hearing examiner is affirmed.

Martin Ritvo, Member

We concur:

Francis E. Mayhue, Member

Joan B. Thompson, Member.

