

BERYL SHURTZ

IBLA 70-521

Decided November 8, 1971

Notice -- Rules of Practice: Generally

A document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered registered or certified letter, such constructive service being equivalent in legal effect to actual service of the document.

Grazing Permits and Licenses: Appeals

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

BERYL SHURTZ : Grazing appeal dismissed
: Affirmed

DECISION

Beryl Shurtz has appealed from a hearing examiner's decision of February 16, 1970, dismissing his appeal from an earlier decision of the Kanab district manager on the grounds that all of the issues raised by the appeal were included in a prior final decision from which no timely appeal had been taken.

This appeal stems from a notice of an adverse recommendation by the district advisory board which appellant alleges he did not receive. The district office mailed the notice, dated July 24, 1968, by certified mail, return receipt requested. The government-franked envelope was correctly addressed to appellant's address of record. It was returned to the district office with a post-office notation on the envelope indicating that delivery had been refused by the addressee.

The notice recommended that appellant's exchange-of-use grazing allotment be reduced. Appellant had applied to graze 30 head of cattle from October 1, 1968, to April 15, 1969, on public land in exchange for allowing the Bureau of Land Management to regulate and control the use of his state leased land. The recommendation of the advisory board, which became final because no protest or appeal was undertaken, approved use of the Lower Cattle Allotment by 18 cattle at a grazing capacity of 117 AUMs, but rejected the requested additional use for 12 cattle at 78 AUMs. The reason for the reduction was that the application exceeded the grazing capacity of the state land as determined by a range survey made during the summer of 1968.

The following year appellant again applied to graze 30 head of cattle in an exchange-of-use agreement for the 1969-70 grazing season. The application covered the same land included in the prior decision of the district manager. Although the 1969 notice of advisory board adverse recommendation did not mention the previous year's decision, it recommended that the allotment be reduced because appellant had applied for more grazing use on federal lands than the capacity of the state lands offered in exchange, and the application did not correspond to the grazing fee year. The recommendation noted that the grazing capacity of the state lands was 113

AUMs as determined by the range survey completed during the summer of 1968. A note from the district manager explained that the rejection of use applied for beyond the newly adopted licensing year, from March 1 through February 28, did not affect the appellant's federal range qualifications, and he could subsequently apply for the next fee year. Appellant protested, but the district manager sustained the recommendation of the advisory board in a decision dated August 14, 1969.

The district manager's decision approved use of the Lower Cattle Allotment by 18 cattle from October 1, 1969, to February 28, 1970 (90 AUMs), and again rejected the requested use by 12 additional cattle (60 AUMs) because the applied for federal use exceeded the capacity of the offered state lands.

Shurtz appealed the August 14, 1969, decision of the district manager and requested that a hearing be held. He argued that the existing conditions did not justify a reduction in the number of livestock to be grazed on the area, and that the range survey completed in the summer of 1968 was speculative, prejudicial, biased, arbitrary, and capricious. The state director moved that the appeal be dismissed, referring to the July 24, 1968, notice of advisory board adverse recommendation which had been served by certified mail and returned marked "Refused." Citing the notice which provided that in the absence of protest or appeal the recommendation would constitute the decision of the district manager, the state director maintained that all issues included in the present appeal were included in the prior decision, and since no protest or appeal had been undertaken, that prior decision became final and precluded the present appeal.

Appellant objected to the motion to dismiss his appeal and alleged that the state director's motion to dismiss was procedurally defective. ^{1/} He asserted that he did not refuse delivery of the notice, that the notation on the envelope was false, and that the post office was unable to explain why it was so noted. He contended that as he did not receive the July 24, 1968, decision because of reasons beyond his control, he was appealing the August 14, 1969, decision, which expressly granted him that right.

^{1/} The hearing examiner's decision did not discuss this issue, and since appellant did not raise it on appeal, it is not discussed in this decision.

Comparing the notice of advisory board adverse recommendation dated July 24, 1968, which the state director contended became final because of failure of appellant to protest or appeal, with the district manager's decision of August 14, 1969, the hearing examiner noted that at first glance it may appear that the latter decision reduced the cattle allotment of the former. The 1968 decision granted 117 AUMs; the 1969 decision, 90 AUMs. However, the 1969 licensing year commenced on March 1 and ended on February 28; whereas the 1968 licensing year ended on April 15. The effective dates of the exchange-of-use agreement were changed to coincide with the newly adopted licensing year, March 1 to February 28. Proportionately, 117 AUMs were granted for each licensing year. Appellant was informed that he could submit another exchange of use application to cover the complete season. Responding to the contentions of appellant that he was not properly served, the hearing examiner cited 43 CFR 1850.0-6(e), governing service of documents, which reads in part: 2/

(1) Wherever the regulations in this part require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

(2) . . . Service by registered or certified mail may be proved by a post-office return receipt showing that the document . . . could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. . . .

The hearing examiner dismissed the appeal and held that the service of the 1968 decision was in compliance with the regulations; for the proportion of the year involved the 1969 decision allotted

2/ The newly unified and revised hearings and appeals procedures of the Department are now recodified without substantive change in part 4 of title 43 of the Code of Federal Regulations. The up-dated citation of this regulation is 43 CFR 4.401(c), 36 F.R. 7199 (April 15, 1971).

the same grazing privileges as did the 1968 decision; and all issues involved in the appeal were included in the prior final decision from which no timely appeal was made.

The first issue raised on appeal is whether there was constructive service. Constructive service is defined as "a legal inference or legal presumption of notice which may not be disputed or controverted; it is notice which is imputed by law" 66 C.J.S. Notice § 6 (1950). The doctrine of constructive service as applied by the hearing examiner has been the basis of a number of Departmental decisions. In James W. Heyer et al., 2 IBLA 319 (1971), the appellant had been served by certified mail which was returned with the notation "Unclaimed." The Board held that "a document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered, certified letter, such constructive service being equivalent in legal effect to actual service of the document." In Duncan Miller, A-31054 (August 21, 1969), the Department held that the doctrine of constructive service is well established and "the legal effect of [constructive] service is exactly the same as that of actual service." See also United States v. Asbestos Development Corp., 73 I.D. 82 (1966).

The regulation, supra, was intended to govern in such cases as this. The record contains a copy of the envelope in which the 1968 notice was sent to appellant. It bears the stamp of the Post Office stating, "Returned to Writer, Reason Checked," and the word "Refused" has a check mark beside it. Appellant offers no evidence to disprove the notation other than to state that it is not true. In the absence of any evidence tending to show that the postal service did not attempt delivery of the notice and that the envelope was falsely noted, the government is not required to prove affirmatively the truth of the notation. Therefore, we conclude that appellant had service of the 1968 notice within the meaning of the regulation.

Since there was constructive service of the notice, the provisions of the notice must be given effect. The notice provided that in the absence of protest or appeal, the recommendation would constitute the decision of the district manager. The Department has held that the failure of an applicant to protest or appeal a decision of the district manager within the allotted time bars the applicant from challenging the matters adjudicated in that decision. Richard McKay, Eureka Ranch Co., 2 IBLA 1 (1971); Malvin Pedrolli et al., 75 I.D. 63 (1968); Archie L. Carberry, A-30704 (October 23, 1967); Levell Neal, A-30529 (May 2, 1966). This rule is codified in 43 CFR 4.470(b), 36 F.R. 15117 (August 13, 1971), formerly 43 CFR 1853.1(b):

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

The final question to be considered is whether all issues involved in this appeal were included in the prior final decision from which no timely appeal was taken. Our examination of the July 24, 1968, and the August 14, 1969, decisions of the district manager leads us to the conclusion that the only difference in the 1968 and 1969 allotments is that the 1969 decision coincides with the licensing period of the newly adopted grazing year. It would appear that despite the fact appellant alleges he is not appealing the 1968 decision, in effect, he is appealing that decision. The hearing examiner correctly held that the 1969 decision granted the same privileges as did the 1968 decision. All issues involved in this appeal were included in a prior final decision from which no appeal was taken. Accordingly, the appeal was properly dismissed for the reasons given in the decision of the hearing examiner.

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 appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Francis E. Mayhue, Member

Anne Poindexter Lewis, Member.

