

BEN H. LYON ESTATE
v.
STATE DIRECTOR OF IDAHO

IBLA 71-97

Decided April 17, 1972

Appeal from order of hearing examiner (Idaho 2-68-2), dated October 2, 1970, dismissing appeal.

Affirmed.

Appeals--Grazing Permits and Licenses: Appeals-- Grazing Permits and Licenses: Hearings--Hearings-- Rules of Practice: Appeals--Rules of Practice: Hearings

An order of a hearing examiner dismissing an appeal to him, involving the partial rejection of a grazing non-use application, which order was based upon the willful non-appearance of the appellant or his representative at the hearing scheduled, will be sustained.

APPEARANCES: Ben H. Lyon, for the Ben H. Lyon Estate; Robert S. Burr, Field Solicitor's Office, Department of the Interior

OPINION BY MR. FISHMAN

The Ben H. Lyon Estate has appealed to this office from an order of a hearing examiner, dated October 2, 1970, 1/ dismissing its appeal from a decision 2/ of the district manager, dated January 11, 1968. The basis of the dismissal was that a hearing on the appeal from the district manager's decision was convened

1/ Amended October 23, 1970, to correct a typographical error.

2/ The decision of the district manager incorporating the recommendations of the district advisory board, granted the appellant non-use of 9 cattle, 5/1/68 to 9/30/68, in lieu of the non-use 25 cattle, 9/30/68 to 9/30/69, requested by appellant. The decision of the district manager recited in part: "I concur in the Advisory Board's recommendation for the reason that the portion of your application that is rejected exceeds your base property qualification (43 CFR 4111.4-3(2)) [1972] and is outside the established Season of Use (43 CFR 4115.2-1(e)(2)) [1972]."

in Burley, Idaho on September 29, 1970. The appellant did not appear in person or by representative. Counsel for the appellee moved that the appeal be dismissed with prejudice and the motion was granted.

The notice of hearing, issued August 18, 1970, stated in part as follows: "If the appellant(s) fail to appear at the hearing, the appeal may be summarily dismissed."

Appellant's letter of August 26, 1970, to the district manager acknowledges receipt of the notice by certified mail and states he will not appear at the hearing personally or by representative.

43 CFR 1853.5(b) (1970), now 43 CFR 4.474(b) (1972), provides:

(b) Unless the examiner orders otherwise, the State director or his representative will then make the opening statement, setting forth the facts leading to the appeal (or issuance of the show cause order where that is involved). Upon the conclusion of the opening statement, the appellant shall present his case, consistent with his specifications of error. Following the appellant's presentation, or upon his failure to make such presentation, the examiner, upon his own motion or upon motion of any of the parties, may order summary dismissal of the appeal with prejudice because of the inadequacy or insufficiency of the appellant's case, to be followed by a written order setting forth the reasons for the dismissal and taking such other action under this subpart as may be proper and warranted. An appeal may be had from such order as well as from any other final determination made by the examiner.

At the hearing scheduled for September 29, 1970, at 2:00 p.m., the hearing examiner waited until 2:15 p.m. and announced that the appellant had not appeared in person or by representative and inquired whether counsel for the appellee wished to make a motion. The motion was made and granted to dismiss the appeal with prejudice. The procedure followed is consonant with the regulations cited above. Cf. Alford Roos, I.G.D. 38 (1938).

Appellant's clear intention not to appear at the hearing, as manifested by his letter of August 26, 1970, negates any favorable consideration of his appeal. Cf. United States v. Richard P. Haskins et al., 3 IBLA 77 (July 30, 1971).

Accordingly, 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 examiner is affirmed.

Frederick Fishman, Member

We concur:

Joseph W. Goss, Member

Martin Ritvo, Member

