

ELDON L. SMITH

IBLA 70-112

Decided June 14, 1972

Appeal from decision (Nevada 5-68-1) by Office of Appeals and Hearings, Bureau of Land Management, affirming hearing examiner's decision rejecting application for supplementary grazing license.

Affirmed.

Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Apportionment
of Federal Range

No readjudication of the boundaries of an allotment of the federal range will be made on the claim of a grazing licensee or permittee who has accepted such boundaries as set forth in an agreement executed by his predecessors in interest, and for a period of three successive years immediately preceding his claim has been issued licenses for grazing privileges restricted to the area delineated by the agreement.

Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Base Property
(Water)

An application for increased grazing privileges is properly rejected where the applicant has failed to show that he controls sufficient base water to justify the award of such privileges and his allotment is lacking in fences to prevent the drift of cattle into other portions of the federal range located in an adjoining state.

Act of August 2, 1946, 28 U.S.C. §§ 2671 - 2680 (1970) (Federal Tort Claims Act) --
Torts: Generally -- Torts: Torts Excepted from Act

An allocation of grazing privileges constitutes an act in performance of a discretionary function for which the federal government is immune from suit under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1970).

APPEARANCES: Eldon L. Smith, pro se; Otto Aho, Field Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY MR. FISHMAN

Eldon L. Smith has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated November 4, 1969, which affirmed a decision of May 2, 1969, by a hearing examiner in a case involving allocation of grazing privileges under the Taylor Grazing Act, § 3, 43 U.S.C. § 315b (1970). The hearing examiner's decision affirmed a decision of the Bureau's Las Vegas, Nevada, district manager, dated March 27, 1968, which rejected appellant's application for a license to graze 130 additional cattle on his Nevada allotment during the period April 1, 1968, through July 31, 1968.

Appellant in 1963 acquired two allotments from Ed and Wayne Yates, one in Arizona and the other a short distance away in Nevada. The principal grazing site has been the Arizona allotment. The Nevada allotment, in an isolated area of that state adjoining the Arizona border, was granted primarily to provide forage for cattle which might drift over the state line. Appellant has annually received a license to graze 20 cattle throughout the year in the Nevada allotment. During periods of favorable weather conditions and abundant supply of annual plants, privileges to graze additional cattle in the spring and early summer months have been granted.

In 1968 Smith requested a supplemental license for spring and summer grazing of 150 additional cattle on his Nevada allotment. The Las Vegas district manager granted to the appellant a supplemental license for 20 cattle for the period of March 18, 1968, through June 30, 1968, and one horse from March 18, 1968, to February 28, 1969. Appellant then filed an application, dated March 18, 1968, for a license for the period of April 1, 1968, through July 31, 1968, to graze the remaining 130 cattle. This application, which was denied on March 27, 1968, by the district manager on the grounds that the Nevada allotment was lacking in water and in fencing to control drift, and that the supply of perennial plants would be depleted through the grazing of such a large number of livestock, forms the basis of the current controversy.

At the hearing on the appeal from the district manager's decision, the parties stipulated the issues (Tr. 6) 1/ to be determined as:

1/ After the stipulation was entered into appellant suggested that the Bureau personnel had not complied with 43 CFR 4110.0-2 (1972), relating to objectives of range management, 43 CFR 4110.0-5 (1972), containing definitions of terms used in the federal range code, 43 CFR 4112.2-1 (1972), relating to minimum requirements and classification of base properties, and 43 CFR 4111.3-1 (1972), relating to rating and classification of the federal range.

1. What is the area encompassed in the appellant's allotment in the Las Vegas District?
2. What water or waters owned or controlled by the appellant is the Bureau of Land Management authorized to recognize as base water?
3. What is the carrying capacity of the useable federal range in the appellant's Nevada allotment?

Appellant argued that the allotment embraced a considerably larger area than that shown in the Bureau records (see Government's Ex. 1; appellant's Ex. A). The hearing examiner, however, accepted the description of the land as determined by the Bureau, on the ground that the boundaries had been fixed in an agreement entered into with the Government by Ed and Wayne Yates in 1949, when the allotment was established, which agreement had been accepted by appellant and had never been challenged by him until the commencement of the current appeal.

The Federal Range Code for Grazing Districts provides (43 CFR 4115.2-1(e)(13)(i)(1972)):

No readjudication of any license or permit, including free use license, will be made on the claim of any applicant or intervener with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the federal range allotment where such qualifications or such allotment has been recognized and license or permit has been issued for a period of three consecutive years or more, immediately preceding such claim.

In Mrs. Dulcie S. Williams, I.G.D. 280 (1942), the Department held that a range-line or allotment boundary agreement is to all intents and purposes a contract, and that "compliance with the terms thereof should be required unless it was consummated under conditions which, under general law, would warrant the rescission (sic) of a contract, or unless it is incompatible with the proper administration of the Federal range." Id. at 281.

It follows that no readjudication of appellant's claim can be made since he and his predecessor in interest have accepted boundaries pursuant to a range line agreement and he has received grazing licenses for a period of three years restricted to the area delineated in the agreement. Delbert and George Allan, Eldon L. Smith et al., 78 I.D. 55, 65 (1971).

The examiner found that appellant's only recognizable base water was Seven Spring, located in the Arizona allotment three and one-half miles east of the Nevada state line, which serves as the eastern boundary of the Nevada allotment. 2/ Appellant had stated that he would like to use water in Lake Mead or the Colorado River, both of which sources are within a short distance from the allotment. The examiner pointed out that appellant had never established a right to use those waters, nor had he ever offered them to justify an application for grazing privileges.

With respect to the grazing capacity of the range, the examiner accepted the Bureau's estimate that the allotment contained 7,500 acres, of which 3,200 were suitable for grazing, with an annual capacity of 400 AUM's, plus additional early spring forage. He held that the question of the exact capacity during the spring of 1968, which had been an unusually good year, was moot since that season had passed. The examiner stressed, however, that the basis of his dismissal of the appeal was not the lack of capacity in the allotment, but the detriment to the public grazing lands in nearby Arizona which would result from the uncontrolled drifting of large numbers of cattle across the border from a Nevada allotment lacking a water supply and without adequate facilities to fence in livestock.

2/ The Las Vegas District is a water base district, i.e., one in which an applicant for grazing privileges must show that he controls a base property consisting of a source of water. See 43 CFR 4111.2-1 (1972). The extent of that portion of the federal range to be allocated to a grazing applicant is dependent upon the service area, defined as "the area that can be properly grazed by livestock watering at a certain water." 43 CFR 4110.0-5(s) (1972). The service area as determined for the Las Vegas District consists of land within a radius of five miles from a water base (Tr. 22). Applying this test to the facts in the instant case, it was demonstrated at the hearing that the major portion of appellant's Nevada allotment falls outside of the service area of the source at Seven Spring (Government's Ex. 1; Tr. 22, 23).

The Office of Appeals and Hearings concurred in the examiner's findings, emphasizing the fact that appellant had failed to establish that he possessed sufficient base water to support his cattle in the Nevada allotment, and that he had no means to control drift of cattle into Arizona. In his current appeal appellant contends that the government has attempted to readjudicate and deprive him of his grazing privileges by restricting the area of his allotment to the boundaries shown in the Bureau's records, in violation of 43 CFR 4115.2-1(e)(13)(i) (see discussion supra). Also, he continues to maintain that he controls sufficient water to serve as a base for the increased number of cattle on his allotment. (See n. 2, supra). We find nothing in the record to warrant disturbing the examiner's and Bureau's findings.

Because he has been denied privileges to which he feels he is entitled, appellant asserts that the Bureau is liable to him for damages in the amount of \$13,000. This Board is without jurisdiction to consider such claims. Our disposition of the merits of his appeal shows his assertion of damages to be without substance. In any event, the grant or denial of grazing privileges is an act in performance of a discretionary function for which the government is immune from suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1970). Chournos v. United States, 193 F.2d 321 (10th Cir. 1951), cert. denied, 343 U.S. 977 (1952); United States v. Morrell, 331 F.2d 498 (10th Cir. 1964).

Upon careful consideration, we find no basis to disturb the decision of the Office of Appeals and Hearings. 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.

Frederick Fishman, Member

We concur:

Douglas E. Henriques, Member

Joan B. Thompson, Member

