

ELDON L. SMITH

IBLA 70-681

Decided July 12, 1972

Appeal from decision of hearing examiner Graydon E. Holt dismissing appeals Arizona 1-68-1 and Arizona 1-67-2.

Affirmed.

Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Appeals

When consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed.

Res Judicata -- Rules of Practice: Appeals: Generally

Where an appeal has been taken and a final Departmental decision has been reached the principle of res judicata will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim, and the same issues, absent compelling legal or equitable reasons for reconsideration.

APPEARANCES: Eldon L. Smith, pro se.

OPINION BY MR. STUEBING

Eldon L. Smith has appealed from a decision of the hearing examiner issued April 18, 1969, dismissing appeals filed by Smith pursuant to the provision of § 3 of the Taylor Grazing Act, 43 U.S.C. 315b (1970). The hearing examiner dismissed the appeals because the appellant offered no documentary or other probative evidence that additional grazing privileges were licensed during the years immediately before his appeal of the Pakoon Adjudication decision in 1965.

The history of the appeals in question (Arizona 1-67-2 and Arizona 1-68-1) originates with Smith's applications filed in 1967 and 1968 to graze cattle and horses in the Black Willow and Tasi Springs Allotment No. 1-25 within the Arizona Strip district. Because this allotment was formerly part of the Pakoon Special Rule Area, this present appeal is necessarily interwoven with other appeals concerning the Pakoon area. 1/

Appellant acquired the base property for allotment No. 1-25 from Ed Yates in 1963. As a result of a 1949 agreement between Yates and the Bureau, Yates' use of the federal range had been restricted to allotment No. 1-25 except for a natural and reasonable drift into the Pakoon area. When Smith acquired the property the Bureau issued him licenses with the same restrictions that had been placed on Yates. After the special rule for the Pakoon area was revoked in 1964, Smith and competing land owners were awarded additional privileges in the Pakoon area by the district manager's decisions of May 21, 1965, and May 20, 1966. Smith, contending that he was entitled to more privileges in the area, appealed these decisions. While these appeals were pending before the Secretary, Smith filed his applications for the 1967 and 1968 grazing seasons.

In 1967 appellant applied for 20 cattle and three horses year-long active use and 280 cattle nonuse. The district manager issued a decision on May 22, 1967, allowing year-long active use within the allotment for 20 cattle and three horses and 76 cattle nonuse. In 1968, appellant applied for 30 cattle and four horses active use and 700 cattle nonuse. The district manager allowed 30 cattle and four horses and 66 cattle nonuse. In both instances, the balance of nonuse was rejected because the use Smith requested exceeded that allowed by 43 CFR 4.477(a) (1972). 43 CFR 4.477(a) (1972) provides as follows:

An appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal. Where the appeal is concerned with the grazing privileges to be granted under the current application, an appellant who was granted grazing privileges in the preceding year may continue to use such privileges pending final action on the appeal, unless the decision appealed from is made immediately effective, as herein next provided.

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1/ The special rule was in effect from 1950 to 1964. The order revoking the special rule (F.R. DOC. 84-11878, filed November 19, 1964) brought the area within the ambit of the provisions of the Federal Range Code for Grazing Districts, 43 CFR Part 4110. Grazing privileges in the area are water-based.

Appellant contends that prior to 1965, the year the Pakoon Adjudication was first appealed, he had the privilege of grazing up to 300 head of cattle on his individual allotment as well as on the surrounding area. He bases his contention on a letter written in 1946 by the Regional District Grazier to Ed Yates, Smith's predecessor in title, stating that Yates had the privilege of grazing 300 head. Smith also alleges that district manager Earp allowed him 100 head active and 200 head nonuse in 1964-1965. Appellant, however, was unable to present proof of such an allowance at the hearing and the Bureau's records fail to indicate that a license was issued to him in that year. The Bureau's records show that appellant and his predecessor have been licensed for approximately 100 AUs year long use plus additional privileges to utilize spring forage of annual species when weather conditions are favorable.

The main issue for the Board's determination is whether, in accordance with 43 CFR 4.477(a) (1972), the Bureau granted Smith the privileges to which he had been entitled prior to his appeal in 1965.

Area of use and grazing capacity are necessarily part of this issue. In Delbert and George Allan, Eldon L. Smith et al., 78 I.D. 55 (1971), the Board rendered the final Departmental decision determining area of use in the Pakoon Area. The Board held that the Bureau had awarded Smith all of the Federal range which was in the service area of the base waters modified by competing waters. In the absence of compelling legal or equitable reasons for reconsideration, the principle of res judicata will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim and the same issues. Eldon L. Smith, 5 IBLA 330, 79 I.D. 149 (1972). The Dredge Corporation, 3 IBLA 98 (1971); Gabbs Exploration Co., 67 I.D. 160 (1960), aff'd, Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963), cert den. 375 U.S. 822 (1963).

The only question remaining is that of capacity. Because the 1967 and 1968 grazing seasons have expired, the issue of denial to grant grazing privileges is moot since grazing privileges for past seasons cannot be granted or awards changed; therefore, the issue will not be resolved on appeal unless it will bear upon future awards. W. Dalton LaRue, Sr. and Juanita S. LaRue, A-30391 (March 16, 1966); Eldon L. Smith, 5 IBLA 330, 79 I.D. 149 (1972). In this context the examiner noted in the decision below that the real issue the appellant wished to raise was whether the grazing capacity survey conducted by the Bureau in 1953 is presently accurate and applicable to his allotment, and he observed that this issue could be raised in a proper appeal only after the

adjudication of the allotment (then pending on appeal before the Department) became final. Presumably the examiner had reference to the matter of Delbert and George Allen, Eldon L. Smith, et al., supra, which decision is now final for this Department.

Smith contends that he has been damaged because the Bureau deprived him of his grazing privileges. The previous decisions have answered this contention. Moreover, the awarding of damages is not within this Board's jurisdiction. Eldon Smith, 6 IBLA 166 (1972).

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 decisions appealed from are affirmed.

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Edward W. Stuebing, Member

We concur:

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Frederick Fishman, Member

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Joan B. Thompson, Member

