

UNITED STATES
v.
JOHN K. JOHNSON

IBLA 71-135

Decided October 26, 1972

Appeal from Hearing Examiner Dent D. Dalby's decision dismissing an appeal from a District Manager's assignment (Montana 1-67-1) of an individual allocation to appellant and reduction of his grazing privileges.

Affirmed.

Grazing Permits and Licenses: Range Surveys

A determination by the Bureau of Land Management of the carrying capacity of a unit of the federal range will not be disturbed in the absence of positive evidence of error.

Grazing Permits and Licenses: Generally

The Bureau of Land Management has the right and the duty to rate the grazing capacity of the federal range and to issue grazing licenses or permits regardless of any written agreements between it and a cooperative state grazing district.

Grazing Permits and Licenses: Cancellation and Reductions

A reduction in grazing use by a licensee or permittee is proper to conform the use to the established grazing capacity of the allotment.

Grazing Permits and Licenses: Apportionment of Federal Range

The boundary of an individual allotment will not be disturbed where it is based on a fence line established to resolve a dispute over areas of use and the licensee or permittee does not sustain his burden of proof to show the determination was in error.

APPEARANCES: Stephen Granat, attorney, (for appellant).

OPINION BY MR. RITVO

John K. Johnson has appealed to the Secretary of the Interior from a Hearing Examiner's dismissal of his appeal from a determination by the District Manager of the Malta District (Montana No. 1) that his grazing privileges be reduced to comply with the grazing capacity of the range.

In his decision dated June 28, 1966, the District Manager determined Johnson's class I grazing privileges to be 437 AUM's (animal unit months), allocated him an area as an individual allotment, and reduced his grazing privileges to the grazing capacity of the allotted area.

Three issues were the subject of Johnson's appeal to the Hearing Examiner: (1) whether the appellant is entitled to additional federal range within his allotment; (2) what is the grazing capacity of Unit A; and (3) whether the Bureau of Land Management was precluded from reducing appellant's range use because of the agreement between the Bureau of Land Management and North Phillips Cooperative State Grazing District. All three issues were considered at the hearing and answered in the Examiner's opinion.

First, we consider the area of use allotted to Johnson. Johnson has operated his ranch outside Hinsdale, Montana, since 1948. The ranch consists of two unit allotments, A and B, containing 3701 acres and 482 acres, respectively. The Unit A allotment consists of 1,840 acres of public land, 1,146 acres of private land, 635 acres of state land, and 80 acres of uncontrolled land. The smaller Unit B is primarily private with only 75 acres of public land. From 1948 to 1965 appellant operated under a range allocation from the North Phillips Cooperative State Grazing District pursuant to the latter's agreement with the Bureau of Land Management. Johnson was a member of the North Phillips Cooperative State Grazing District, an organization of livestock operators organized under the Montana Grass Conservation Act (Mont. Rev. Code Ann. § 46 - 2301 *et seq.*, (1967)) and supervised by the Montana State Grass Commission, which administered the federal and privately controlled lands in the Cooperative's grazing district.

The decision of the District Manager made Johnson's northern boundary for Unit A irregular, cutting through the middle of sections 3, 4, and 5, and the southwest corner of section 2 of T. 35 N., R. 34 E., MPM, Montana. The appellant disputed this designation of Unit A's northern boundary and submitted two range allocations drawn up in 1955 by the then Bureau of Land Management range manager, William F. Townsend. The descriptions by Townsend listed Johnson as being assigned larger allotments within sections 2, 3, 4, and 5. They granted Johnson the "S 1/2, S 1/2 N 1/2, approx. 10

acres lot 4" of section 3; "S 1/2, S 1/2 N 1/2, approx. 100 acres N 1/2 N 1/2" of section 4; "all" of section 5; and "approx. 20 acres of SW 1/4 SW 1/4" of section 2. The portions to the north of Johnson's present allotment, which amounted to approximately 982 acres, were granted by the District Manager to William Wodtkey, predecessor of Moggen Ranch Co.

Johnson's grazing permits, which specified individual allotment for the years 1948 through 1957, 1959 through 1962, 1964 and 1965, gave no descriptions of the allotment. The 1958 permit did not specify the type of allotment, while the 1963 permit specified that Johnson received an "in common" allotment to be shared with the Moggen Ranch Co. and one Eldon Bernard. A letter from the District Manager, attached to the permit and addressed to the Board of Directors of the North Phillips Cooperative State Grazing District, stated that the individual allotments were in error and that the area would be grazed in common until division lines were agreed upon and range agreements signed.

At a meeting the North Phillips Cooperative State Grazing District resolved that a fence, alleged to be the boundary, be inspected and that if it would turn stock, individual allotments would be issued. Tr. 57-58. The fence is the one presently designated as the northern boundary of Unit A.

Johnson testified at the hearing that he made a verbal protest to the Bureau of Land Management regarding his individual allotment in 1964, even though no description was made in the permit. He also testified that the fence should not be used as a boundary line since it was down in some places and frequently crossed over by the cattle. While Johnson denies that the fence was the boundary of his allotment, there is no evidence of any other existing boundary marker. Tr. 42. Furthermore, the fence has been in place since 1955 or 1956. Tr. 41.

The Hearing Examiner approved the District Manager's decision that the fence marked the northern boundary of Johnson's land. After thoroughly reviewing the record, this Board finds no basis for overruling the decision of the District Manager. Through evidence submitted by the Government, the findings of the District Manager regarding the boundary have been substantiated. The appellant has not produced sufficient evidence to rebut the case made by the Government. Therefore, this Board affirms the Hearing Examiner's decision regarding the allotment for Unit A.

The second question concerns the grazing capacity of Unit A as designated by the District Manager. At the hearing the Government introduced into evidence a range survey initiated in 1963 and completed in 1966 by the Bureau of Land Management. The survey,

conducted in accordance with standard Bureau procedure, concluded that Johnson's area of use could produce 181 AUM's, of which 178 were in Unit A. The District Manager directed a reduction to 181 AUM's in compliance with the survey. In effect this curtailed the appellant's livestock operations to 61 head of cattle from a previous 100 head.

The reduction was authorized under 43 CFR 4115.2-1(e)(3), which directs that grazing permits be issued only in compliance with the federal range capacity as determined by the District Manager.

Appellant disputed the accuracy of the survey, but his only rebuttal evidence consisted of his personal observations that the range had not deteriorated and could continue to support 100 head of cattle. He also argued that a cut of 58.99 percent was unjustified and would result in severe economic hardship.

Johnson has failed to produce any positive evidence that the range survey was conducted improperly. In the absence of such proof a determination by the Bureau of Land Management of the grazing capacity of a unit of federal range will not be disturbed. David Abel, 78 I.D. 86, 93, 94 (1971); O. J. Cooper, Redd Ranches, A-30974 (April 29, 1969); Lawrence Edwards, 74 I.D. 120 (1967); Melvin Adams, A-30406 (November 1, 1965). Therefore, the decision of the District Manager regarding the grazing capacity of the federal range in Unit A and the subsequent reduction is upheld by this Board.

The final issue deals with the validity of the reduction in light of the agreement between the Bureau of Land Management and the North Phillips Cooperative State Grazing District. The appellant argued that he had carried on all business transactions with the State Grazing District, and that the Bureau of Land Management acted improperly in dealing directly with him rather than acting through the State Grazing District. The Hearing Examiner found no legal basis for the appellant's contention. He held that no agreement could abrogate the Bureau of Land Management's obligations for rating grazing capacity and issuing licenses or permits. Further, the Examiner concluded that nothing in the agreement purported to abrogate or modify these obligations. The regulations under 43 CFR 4111.3-1 are clear in imposing upon the District Manager the duty of rating, classifying, and licensing federal range for grazing purposes. As the Hearing Examiner correctly concluded, the agreement with the State Grazing District did not deprive the Bureau of Land Management of its authority. Cf. Buffalo Creek Cooperative State Grazing District v. Tysk, 290 F. Supp. 227 (D. Mont. 1968); David Abel, supra, 88, fn 1.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1(3), the decision of the Hearing Examiner is affirmed.

Martin Ritvo, Member

We concur:

Newton Frishberg, Chairman

Joan B. Thompson, Member

