

ELDON L. SMITH

IBLA 71-151

Decided November 3, 1972

Appeal from Administrative Law Judge Robert W. Mesch's decision dated December 30, 1970, (Arizona 1-70-1) assessing trespass damages, and suspending all grazing privileges.

Affirmed.

IBLA 71-284

Appeal from Administrative Law Judge Dent D. Dalby's order dated May 13, 1971, (Arizona 1-71-1) dismissing an appeal.

Affirmed.

Grazing Permits and Licenses: Trespass--Trespass: Generally

Grazing livestock on federal public lands in excess of the authorized permit use, or without an appropriate license or permit, constitutes trespass for which damages may properly be assessed.

Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Trespass--Trespass: Generally

Where an applicant for grazing privileges has failed to pay damages assessed by the Secretary of the Interior for a grazing trespass, a district manager properly conditioned approval of the applicant's application upon payment of his outstanding trespass damages.

Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Cancellation and Reductions--Grazing Permits and Licenses: Trespass--Trespass: Generally

Where an applicant has been denied grazing privileges because he has failed to pay trespass damages assessed by the Secretary of the Interior but, despite repeated warnings by Bureau of Land Management personnel, he willfully and repeatedly grazed his livestock in trespass, an Administrative Law Judge, following a hearing on a show cause notice, properly assessed trespass damages and suspended the applicant's grazing privileges until three years after payment of the damages.

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

An Administrative Law Judge properly dismissed an appeal by a grazing applicant which failed to state clearly and concisely why a district manager's decision was in error, and afforded no basis for a hearing.

APPEARANCES: Eldon L. Smith, pro se; Fritz L. Goreham, Esq., Office of Field Solicitor, Department of the Interior, Phoenix, Arizona.

OPINION BY MRS. THOMPSON

For the purpose of this decision, two separate appeals, Arizona 1-70-1 and Arizona 1-71-1, filed by Eldon L. Smith, from separate decisions by Administrative Law Judges 1/ have been considered together and consolidated in this decision.

Judge Mesch rendered his decision of December 30, 1970, following a hearing held pursuant to a notice issued to Smith in accordance with 43 CFR 9239.3-2(e), to show cause why Smith's "base property qualifications for the Black Willow-Tasi Springs Allotment No. 1-25 should not be revoked and satisfaction of damages made". The notice also charged that Smith had repeatedly and willfully violated the terms of his grazing license, and it assessed trespass damages.

The Judge found that there had been a trespass of 43 cattle in excess of Smith's permit during the period from April 1, 1969, to June 17, 1969, for a total of 110 AUMs (animal unit months) during that season, and also unlicensed use constituting further trespasses of cattle and horses from July 1, 1969, to March 18, 1970, totalling 216 AUMs. He assessed the damages for the total 326 AUMs at \$4 per AUM, as provided by 43 CFR 9239.3-2(c)(d) for clearly willful, grossly negligent or repeated trespasses, for a total of \$1,304. He considered evidence of subsequent trespasses after the show cause notice had issued only for the purpose of considering the nature and extent of any reduction in Smith's grazing privileges. From all of the evidence he concluded that Smith's trespasses were clearly willful and repeated, and warranted disciplinary action. Therefore, he ordered a suspension of all of Smith's grazing privileges for a period of three years after Smith has paid all trespass damages that have been assessed against him. He included the sum of \$680, which had been assessed by the Department's decision, Eldon L. Smith, A-30944 (October 15, 1968), for an

1/ The title change from "Hearing Examiner" to "Administrative Law Judge" was effectuated by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

earlier trespass, to show a total of \$1,984 in outstanding assessed trespass damages.

It is unnecessary to set forth the detailed facts concerning the trespasses. They have been amply discussed in Judge Mesch's decision. Neither at the hearing nor in this appeal has Smith denied the accuracy of the Bureau's count of livestock within the allotment. Smith asserts that the "alleged trespass stems from the illegal denial by the Bureau of a proper license of the livestock that were already on the range." He asserts further that the claimed subsequent trespasses could not be trespasses because of the "illegal nature of the original illegal act of the Bureau". He makes vague, unsupported charges that the Bureau has been "trespassing" on his ranch, that Bureau employees have violated his constitutional rights, and are "guilty of illegal extortion, criminal and malicious neglect in their discharge of their duties and the law". Nowhere in the evidence presented at the hearing or in cogent, understandable arguments presented on appeal is there anything to support such flagrantly accusatory assertions.

Specifically, Smith contends the case should not have been heard because there were prior cases on appeal concerning him that have a direct bearing on the case. Although Smith's appeal is long on broad accusations and short in articulate reasons, it appears his position is that because of his prior appeals he should have been allowed to graze in accordance with his previous rights. His prior rights were indicated by the District Manager in a decision dated March 28, 1968. It approved Smith's application for grazing privileges as to a total of 1,190 AUMs, including 785 AUMs nonuse, and rejected his application for 7,532 AUMs nonuse, for the reason that nonuse exceeds the numbers authorized at the time Smith appealed an earlier decision involving the former Pakoon Special Rule Area adjudication. It indicated that he was entitled to use privileges granted the year preceding the appeal.

His allegations that his prior use was more than the District Manager indicated and that he was entitled to more use were rejected in Eldon L. Smith, 6 IBLA 310 (July 12, 1972). That decision held that Smith failed to show that before his appeal in the case involving the Pakoon Special Rule area, there was a right to graze more than that allowed by the subsequent decisions of the District Manager for allotment No. 1-25. The fact Smith appealed the earlier decision gave him no rights beyond what had previously been authorized. Also, the fact he subsequently applied for use or nonuse in excess of that amount and appealed from decisions rejecting such excess gave him no right to graze in excess of the authorized use.

The Federal Range Code prohibits "grazing livestock . . . in violation of the terms of a license or a permit . . . by exceeding the number of livestock permitted . . ." 43 CFR 4112.3-1(b), and "[g]razing

livestock . . . without an appropriate license or permit . . ." 43 CFR 4112.3-1(a). Smith was on notice by express language in decisions by the District Manager that he was not entitled to graze in excess of what was authorized. Therefore, the grazing of cattle in excess of his permit in 1969 was in violation of the terms of his permit and the Code and constituted trespass. 43 CFR 9239.3-2(c)(2). In 1969 after receiving the Department's decision of October 15, 1968, assessing trespass damages of \$680, the District Manager refused to grant further grazing privileges until the trespass damages were paid. Grazing thereafter without authorization constituted trespass for which damages were properly assessed. Id.

Smith makes certain contentions similar to those made in another appeal, Eldon L. Smith, 5 IBLA 330, 79 I.D. ____ (1972). What we there held is applicable here, namely, that in accordance with the Federal Range Code, the District Manager properly conditioned approval of Smith's application for grazing privileges until outstanding trespass damages have been paid, and no license or permit will be issued or renewed until payment of any amount found to be due has been offered. We note again that Smith's appeal from the Pakoon Special Rule Adjudication was resolved by decision of this Board, Delbert and George Allan, Eldon L. Smith, et al., 2 IBLA 35 (1971). The result of that decision belies Smith's contentions concerning the "original illegal" action of the Bureau.

The evidence in this case and the other decisions involving Smith evince a failure on Smith's part to comply with specific decisions and warnings of the Bureau. His pending appeals in no way gave him any rights beyond what he had before the appeals. When he failed to pay the trespass damages assessed by the Department's decision in 1968, he was no longer entitled to any grazing privileges until payment was made (in the absence of any countermanding court order). He grazed his livestock willfully and repeatedly at his own peril after his application privileges had been denied and despite repeated warnings by Bureau personnel. Nothing that appellant has presented on appeal justifies changing Judge Mesch's decision assessing the damages, and in suspending Smith's privileges. Cf. John Gribble, 4 IBLA 134 (1971); Mrs. R. W. Hooper, 3 IBLA 330 (1971); Alton Morrell and Sons, 72 I.D. 100 (1965).

Judge Dalby's decision of May 13, 1971 (Arizona 1-71-1), dismissed Smith's appeal from the District Manager's decision of January 26, 1971, which again conditioned approval of any grazing privileges upon Smith's payment of the trespass damages assessed by the Department's decision of October 15, 1968. The dismissal was for the reason the appellant had failed to state clearly and concisely why the District Manager's decision was in error as required by 43 CFR 1853.1(a) (1970), now 43 CFR 4.470. Such an appeal afforded no basis for a hearing. It was proper to dismiss Smith's appeal for the reason given. Cf. United

States v. Lewis Maus and Frank G. Morrison, 6 IBLA 164 (1972). Appellant now requests only that evidence considered in previous appeals be considered. Our foregoing discussion sufficiently indicates why Smith has no basis for an appeal from a denial of grazing privileges so long as outstanding trespass damages determined in a final decision of this Department remain unpaid.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Joan B. Thompson, Member

We concur:

Frederick Fishman, Member

Martin Ritvo, Member

