

E. S. KENNON

IBLA 71-216

Decided November 14, 1972

Appeal by the Bureau of Land Management from a decision by Administrative Law Judge Dent Dalby remanding a prior decision (Colorado 7-71-1) by the District Manager locating a grazing allotment boundary.

Affirmed.

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

A decision of a District Manager locating a boundary of an allotment will be reversed where a permittee sustains his burden of proving that that boundary was in another location.

APPEARANCES: George E. Longstreth, Esq., for the Colorado State Director, Bureau of Land Management; Clay Hanlon, Esq., Spiecker & Hanlon, of Grand Junction, Colorado, for appellee.

OPINION BY MR. RITVO

The Bureau of Land Management has appealed to the Secretary of the Interior from Administrative Law Judge Dent Dalby's 1/ decision of January 29, 1971, which remanded a decision, Colo. 7-71-1, by the District Manager, Grand Junction District, Colorado, fixing a boundary of a grazing allotment for the reason that the evidence did not support the District Manager's conclusion regarding the location of that boundary.

The two grazing allotments within Colorado Grazing District No. 7, which are currently involved in the boundary dispute, are designated as the Alkali Creek allotment and the Sunnyside allotment. The Alkali Creek allotment is to the north of Sunnyside. The Alkali Creek allotment is within the Garfield Resource Area, (formerly the Colorado Valley Unit or Unit No. 6), while the Sunnyside allotment

---

1/ By order of the Civil Service Commission the title "Administrative Law Judge" has replaced that of "Hearing Examiner." 37 F.R. 16787 (August 19, 1972).

is within the Plateau Resource Area (formerly the Collbran Unit or Unit No. 5). Between the allotments, and the Resource areas, lies Smith Gulch, trending northwest-southeast. The issue in the appeal is whether the boundary should run along the west rim of the gulch, enlarging the Alkali Creek allotment, or its east rim, enlarging the Sunnyside allotment. By a decision dated July 10, 1970, the District Manager fixed the boundary between the two grazing allotments as coinciding with the boundary between the Garfield and Plateau Resource Areas, with approximately a quarter section of the Plateau area placed within the Alkali Creek allotment. This boundary runs chiefly along the east rim of Smith Gulch.

The decision was appealed by E. S. Kennon, a member of the Alkali Creek allotment. He alleged that this boundary is one-half to one mile north of the previous boundary between the Alkali Creek and Sunnyside allotments and that the former southern boundary of the Alkali Creek allotment was the west rim of Smith Gulch, running southeast to the east boundary of "Charlie O'Brien's patented land." This would increase the Alkali Creek allotment by approximately two sections. Tr. 68. At the hearing, the parties agreed that the issue raised by the appeal was the determination of the previously established boundary between the Alkali Creek allotment and the adjacent Sunnyside allotment. Tr. 7.

The Bureau of Land Management introduced into evidence two maps from the District Office files dated 1941 (Government Exs. 1 & 2) depicting the Colorado Valley and Collbran Units. Each map attempts to show that the contested boundary between the Sunnyside and Alkali Creek allotments corresponds with the boundary imposed by the 1970 decision. It also introduced a map prepared in 1963. Gov. Ex. 4. This is a map which the then District Manager, after obtaining the recommendation of the district advisory board, had approved as designating the boundaries of the administrative units (Colorado Valley and Collbran) of Colorado District No. 7. It, too, shows the boundary as the District Manager fixed it in 1970.

Kennon testified that his cattle originally ran as far south as Horse Thief Creek, which is approximately two miles south of the boundary designated by the District Manager. He also produced a 1938 written agreement signed by the major grazers of the Alkali Creek and Sunnyside allotments and approved by the District Manager. The agreement stated that: "the division between Allotment No. 5 and Allotment No. 6 will be Smith's Gulch and the east boundary of Charlie O'Brien's patented land." Since about 1938 Kennon's licenses have read "Colorado Valley Unit." In another instrument dated January 26, 1961, the grazers of the Alkali Creek allotment agreed to divide the area into two separate distinct allotments.

The agreement, which was approved by the District Manager, specified that the Alkali Gulch spring range would be "bounded on the west by the west rim of Smith Gulch \* \* \*." Finally, in a 1960 Advisory Board Recommendation, recognition was given to a description of the spring range as being "[b]ounded on the west by Smith Gulch."

The evidence produced by Kennon was challenged on several grounds by the Bureau of Land Management. First, it pointed out that the 1938 grazing allotment was not signed by all the users of the two allotments and, therefore, had no binding effect. Tr. 14, 15. Secondly, the 1961 range division agreement was only signed by the users of the Alkali Creek allotment. Therefore, the Bureau contends the District Manager's acknowledgement did not affect the rights of the Sunnyside users. Thirdly, it points out that the 1960 Advisory Board recommendation was merely an advisory notice and not a "license" as the Judge defined it in his opinion, p. 4. Finally, the appellant charges that Kennon was put on notice to make an inquiry regarding the proper boundary since from 1938 Kennon's license read "Colorado Valley Unit" (Tr. 44).

The Judge, on the other hand, discredited the two Government's exhibits depicting the two grazing units in 1941. The Judge stated that the two maps "drafted by some unidentified employee" were in conflict concerning what portion of the Alkali Creek allotment was in the Colorado Valley or Collbran Unit. Without these maps, the Judge concluded that there had been no formal designation of the boundaries prior to 1963. The Judge also determined that Kennon was never informed of the District Manager's 1963 determination, since Kennon continued to file license applications for the Colorado Valley Unit under the mistaken assumption that all of the Alkali Creek allotment was within the Colorado Valley Unit. In fact, however, under the unit boundaries approved in 1963, the Alkali Creek allotment, as designated by Kennon, extended from the Colorado Valley Unit into the Collbran Unit. Therefore, Kennon's agreements with descriptions of the allotments would be sufficient basis for a finding that the prior boundaries coincided with Kennon's testimony.

The Judge concluded that the acceptance and approval by the Division of Grazing of the 1938 agreement and the approval by the District Manager of the 1961 agreement were sufficient affirmation of Kennon's allegations to warrant reversal of the District Manager's decision.

The Government in its brief contends that the record in no way supports the conclusions of the Judge. The appellant asserts that the Government's exhibits contradict the judge's finding that the

1941 maps were not in conflict. The Government further alleges that the Judge had no authority to designate the boundary line, since 43 CFR 4115.2-1(e)(13)(i) provides:

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

The Government charges that the Judge, by designating the boundary, is depriving the present Sunnyside users of an area allotted to them several years ago and designated within the Collbran Unit.

After thorough review of the evidence and record, this Board concludes that the Judge properly reestablished the Alkali Creek allotment boundaries. The appellee sustained the burden of proving his contention that the previously acknowledged southern boundary of the Alkali Creek allotment was the west rim of Smith Gulch.

While we agree with appellant that the 1941 maps introduced by the Government do not appear to be in substantial conflict, neither do they establish that the recognized boundary of Kennon's allotment was the east rim of Smith Gulch. Kennon's 1941 and later permits define the disputed boundary as "per Horsethief agreement." This reference can reasonably mean only the 1938 agreement which fixed the west rim as the boundary. Even later, in 1961, the then District Manager recognized the west rim as the boundary of the Alkali Creek allotment. Thus, the Bureau of Land Management has failed to demonstrate that precise boundaries were drawn prior to 1963. If this is the situation, knowledge of the boundary designated in 1963 by the District Manager cannot be charged to Kennon. He was not informed that his area of use was being reduced.

The Judge also acted properly in deciding the case notwithstanding 43 CFR 4115.2-1(e)(13)(i). This section of the code is not applicable to the present boundary controversy, for it cannot come into play where the issue is what land was included in a permit. Since we have concluded that Kennon is correct in his contention, the disputed area has been in his permit and he has had no reason to contest his allocation.

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

---

Martin Ritvo, Member

We concur:

---

Frederick Fishman, Member

---

Newton Frishberg, Chairman

