LLOYD PEWONKA, JAMES CAVES AND H. R. SUDBRACK
ROY KINDLE AND SONS

IBLA 72-15 December 7, 1972

Appeal from a decision by Administrative Law Judge Rudolph M. Steiner, Montana 1-67-2, 3, 4, dismissing appeals from a reduction of grazing privileges.

Affirmed.

Grazing Permits and Licenses: Adjudication

An Administrative Law Judge's decision adjudicating grazing privileges within a grazing district will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal Range Code for Grazing Districts.

Grazing Permits and Licenses: Apportionment of Federal Range

Where a grazing allotment includes both private and federal range lands, the Bureau of Land Management may properly determine the grazing capacity of all the lands in the allotment and require, as a condition to the issuance of a permit or license to graze the federal range, that the number of livestock using the private lands be limited to the recognized capacity of the lands.

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 determine the grazing capacity of the federal range and to issue grazing licenses or permits regardless of any written agreements between the Bureau of Land Management 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 federal range.

APPEARANCES: Stephen Granat, Esq., Granat and Cole, Malta, Montana, for Appellants; Robert Hurly, of Glasgow, Montana, for Intervenor; Garry V. Fisher, Office of the Solicitor, Department of the Interior, Billings, Montana, for Appellees.

OPINION BY MR. RITVO

Lloyd Pewonka, James Caves and H. R. Sudbrack have appealed from a decision of Administrative Law Judge Rudolph M. Steiner, 1/ dated June 17, 1971, which affirmed the decision of the District Manager, Malta District, Montana, dated January 18, 1967, reducing the appellants' grazing privileges to comply with the grazing capacity of the federal range.

The appellants are three of the five ranchers with grazing privileges in common in the Saco Hills allotment. The District Manager's decision imposed substantial reductions on each appellant's grazing privileges. An undivided allotment, now held by Roy Kindle & Sons, Intervenor, adjoins the Saco Hill allotment to the west and south. The private land in this area, which with adjacent public land is now known as the Kindle unit, was owned by one Harry Krieger, who used it with federal range in the unit from prior to 1953 until 1959. It then passed to Kindle through mesne conveyances.

The allotment was administered under a cooperative agreement between the Bureau of Land Management and the South Phillips Cooperative State Grazing District.

Judge Steiner described the agreement thus:

> Under this cooperative agreement the Bureau of Land Management certified to the State District the extent of grazing privileges for the Federal range which was to be used by each rancher, and issued a license to the State District for all of the Federal range within the area covered by the cooperative

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

agreement. The State District then issued individual allocations to the ranchers within the District which covered not only the Federal range but all other lands, including the ranchers' private lands. The ranchers paid their fees to the State District which in turn paid the Bureau of Land Management for the Federal range. Thus, there were no prior grazing licenses issued by the Bureau of Land Management to the individual ranchers. Adjustments were made to segregate the Federal range use from the total use in the allocations. Preference rights for public land grazing use in the Malta District is determined under special rule No. 2 (24 FR 7582) (Sept. 19, 1959), which establishes a priority period of 1954 to 1958.

The parties at the hearing agreed that the issues were:

1. Whether the appellants may claim any privileges by exchange of use or otherwise in the Kindle unit; and

2. The grazing capacity of the Saco unit.

Roy Kindle denies that appellants had any provable exchange of use agreement with the predecessors to the Kindle land. Any allocation of additional grazing lands in the area would, he claims, be to Kindle's detriment, assuming the range is at its full carrying capacity.

Appellants contended that an area of land within the Saco allotment, but owned by Kindle and its predecessors, had been the subject of an exchange of use for public lands within Kindle's individual unit. They contend that since Kindle has denied others use of its private land in the Saco Hills allotment they should be given grazing privileges on public land within the Kindle unit.

Appellants further argued that the District Manager's reduction was not warranted because they had not run short of grass, they had not been required to move their cattle for want of grass and the range had not deteriorated.

The Judge found that there was no probative evidence of any right to grazing privileges by exchange of use or otherwise on Kindle's private or allotted land.

He further found that the carrying capacity of the federal range in the Saco Hills common allotment is, as the District Manager had

determined, 448 animal unit months; therefore the District Manager was correct in imposing a reduction on appellants' licensed use as required by 43 CFR 4115.2-1(e) (3). 2/

In his decision the Judge thoroughly analyzed the evidence relating to the two issues developed at the hearing. We agree with his findings and conclusions and adopt them as our own. A copy of his decision is attached. Furthermore, the pertinent regulation provides that an adjudication of grazing privileges will not be set aside on appeal if it appears that it is reasonable and that it represents substantial compliance with the provisions of 43 CFR 4110, which is the Federal Range Code for Grazing Districts. 43 CFR 4.478(b); Joe H. Nettleton et al., 7 IBLA 282 (1972). The District Manager's decision satisfies this criterion.

On appeal to the Secretary, appellants have presented no new argument. However, we wish to comment briefly on several matters.

First, the Bureau of Land Management presented evidence of two range surveys conducted in accordance with its standard practices, which clearly showed that the federal range was being licensed for use in excess of its carrying capacity. Its determination will not be disturbed in the absence of positive evidence of error. This the appellants failed to do. Therefore, the determination of the Bureau will be upheld. United States v. John K. Johnson, 8 IBLA 68 (1972); David Abel et al., 2 IBLA 87, 78 I.D. 86 (1971).

Next appellants contend that, because of its agreement with the Cooperative district, the Bureau had no authority to determine their grazing privileges. The Board recently considered this issue and reaffirmed the right and duty of the Bureau to rate the grazing capacity of federal range and to issue grazing permits and licenses regardless of agreements between it and a cooperative state grazing district. United States v. Johnson, supra.

Appellants also argue that the "* * * decision is an attempt by the District Manager to assume management and control of grazing lands beyond his jurisdiction, namely state and private land * * *."

The Department held in David Abel et al., supra:

> Where a grazing allotment includes both private and federal range lands, the Bureau of Land Management

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2/ This section states: "No license or permit will confer grazing privileges in excess of the grazing capacity of the Federal range to be used, as determined by the District Manager. * * *"

> may properly determine the grazing capacity of all the lands in the allotment and require, as a condition to the issuance of a permit or license to graze the federal range, that the number of livestock using the private lands be limited to the recognized capacity of the lands. (Syllabus)

In that case, as here, the grazing lands were allotted under a cooperative agreement between a State District and the Bureau of Land Management. For the reasons stated in Judge Steiner's decision as supplemented herein, the appeals were properly dimissed.

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 of the Administrative Law Judge is affirmed.

Martin Ritvo, Member

We concur:

Douglas E. Henriques, Member

Newton Frishberg, Chairman.

IBLA 72-15

June 17, 1971

DECISION

Lloyd Pewonka	:	Grazing Appeals
	:	MONTANA 1-67-2
James Caves	:	1-67-3
	:	1-67-4
H. R. Sudbrack	:	
	:	
Appellants	:	
	:	
Roy Kindle and Sons,	:	
	:	
Intervenor	:	

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The Appellants filed similar appeals from decisions of the District Manager, Bureau of Land Management, for the Malta District, dated January 18, 1967.

A hearing on the appeals was held in Malta, Montana. Gary Fisher, Esq., Office of the Solicitor, United States Department of the Interior, appeared on behalf of the Bureau of Land Management. Stephen Granat, Esq., appeared on behalf of the Appellants. Robert Hurly, Esq., appeared on behalf of the Intervenor.

The District Manager's decisions from which the appeals were taken imposed a reduction upon each of the Appellants, who are three of five ranchers in the Saco Hills allotment. Appellant Pewonka's Federal range use was reduced from 241 to 142 animal unit months; Caves', from 146 to 86; and Sudbrack's, 230 to 136 animal unit months.

Bordering the Saco Hills allotment on the west and to the south is an individual allotment claimed by Roy Kindle and Sons who intervened in the proceedings. The areas in question were administered under a cooperative agreement between the Bureau of Land Management and the South Phillips Cooperative State Grazing District. Under this cooperative agreement the Bureau of Land Management certified to the State District the extent of grazing privileges for the Federal range which was to be used by each rancher, and issued a license to the State District for all of the Federal range within the area covered by the cooperative agreement. The State District then issued individual allocations to the ranchers within the District

which covered not only the Federal range but all other lands, including the ranchers' private lands. The ranchers paid their fees to the State District which in turn paid the Bureau of Land Management for the Federal range. Thus, there were no prior grazing licenses issued by the Bureau of Land Management to the individual ranchers. Adjustments were made to segregate the Federal range use from the total use in the allocations. Preference rights for public land grazing use in the Malta District is determined under special rule No. 2 (24 FR 7582) (Sept. 19, 1959), which establishes a priority period of 1954 to 1958.

At the outset of the hearing, counsel for the Appellants made an oral motion for dismissal, contending that the Appellants were not properly before the Hearing Examiner and that, under the cooperative agreement, the issues herein should be resolved by the Bureau and the state grazing district. The motion was denied. (See David Abel et al., 2 IBLA 87, (March 24, 1971).

The two issues agreed to at the hearing by the parties were as follows:

1. Whether the Appellants may claim any privileges by exchange of use or otherwise on the Kindle unit.

2. What is the grazing capacity of the Saco unit?

Henry Kruger owned the private lands and used the Federal range now known as the Kindle unit for some time prior to 1943 until 1959. In 1946 he obtained a permit from the Bureau of Land Management to erect a fence. Part of the fence separated Kruger's operation from the rest of the Saco Hills common allotment and ever since that time the Saco Hills users have grazed in common while the lands segregated by the fence were used by Kruger and his present successor, Kindle. The fence left a substantial amount of Kruger private land in the Saco Hills common allotment where it was grazed by the Appellants. In 1966, Kindle erected a fence which separated the private lands in the common allotment from use by the Saco Hills users. Since 1966, Kindle has used these private lands exclusively. Kruger and the Appellants testified that the appellants used the private Kruger lands remaining in the Saco Hills common allotment from 1946 to 1966 in lieu of Federal range which Kruger had fenced into his individual allotment. None of the deeds and contracts in the chain of title from Kruger to Kindle reflect any agreements to this effect.

Kruger testified that, in exchange for use of his private lands lying east of the original fence, he received the use of Federal lands west of

the fence. "The South Phillips County Grazing Cooperative agreed, we exchanged grazing with the consent of the Bureau of Land Management". (T. 26). He stated, "Supposed to be a written agreement, it should be somewhere." (T. 28).

Neither Kruger nor the Appellants were able to produce a copy of the alleged written exchange of use agreement. A comprehensive search of the records of the Bureau of Land Management failed to reveal any evidence of the existence of such an agreement.

The Appellants have failed to introduce probative evidence of any right to grazing privileges, by exchange of use or otherwise, on the Intervenor's private or allotted lands.

The Bureau of Land Management has conducted two range surveys of the areas in question, one in 1953 and one in 1964. The surveys were conducted in accordance with standard procedures adopted by the Bureau of Land Management. The surveys clearly show that the licensed Federal range use exceeds its surveyed carrying capacity.

The Appellants testified that the reduction was not warranted because they had not run short of grass nor had they been required to move their cattle for want of grass on the range; that the range had not deteriorated from 1967 through 1970; that the cattle were in good shape when they went in to graze on the Saco unit and they were in good shape when they came out; that their calves compared favorably in weight with other calves in the neighborhood; that the Saco unit had not deteriorated in any way in the past 30 years; that the present condition of the range is "excellent"; and that the condition of the livestock when removed from the Saco unit is average to good.

Lowell K. Brown, Area Manager of the Phillips Resource Area, stated that the 1964 survey was an ocular reconnaissance survey. He described the condition of the range as "fair". Livestock counts were made in the Saco Hills Unit in 1967, 1968, 1969 and 1970. Each year, the number of livestock counted was less than the number authorized.

Harry R. Cosgriffe, natural resources specialist, had made range utilization studies of the Saco unit in 1968, 1969, and 1970. The same areas in the unit are being heavily used year in and year out. The forage resources were showing depletion and deterioration. He described the condition of the range as "poor to fair."

The Department has consistently held that a Bureau of Land Management range survey will not be disturbed in the absence of positive evidence demonstrating error in the survey. In Kermit Purcell, A-29661 (November 15, 1963), it was held:

> "Appellant challenges the determination of the carrying capacity of the 18 mile unit on the ground that the 1960 survey, upon which the determination was based, was not conducted in a reasonably accurate manner and that an accurate trend and condition study was not made. Appellant, however, offered no positive evidence establishing any error in the determination, such as the result of an independent study or survey. In these circumstances, the Department has held that the determination of range capacity will not be disturbed."

In David Abel et al., 2 IBLA 87 (March 24, 1971), it was held:

> "The Bureau's findings in these cases were made after a systematic study of the areas of range here in question, in which accepted standards were employed. If the standards are valid, and if the survey was conducted in accordance with the standards, the conclusion seems inescapable that its determination of the grazing capacity of the lands was sound.
>
> "Appellants have not directly questioned the survey method employed by the Bureau. They have neither pointed to any error in the manner in which the survey was conducted nor have they attempted by an independent survey to show how much usable forage is produced annually on the lands in question. Rather, they have inferred from the fact that greater numbers of animals than the Bureau will now authorize have grazed on the lands year after year that the lands must produce more usable forage than the Bureau's survey has disclosed."
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> "Having found, then, that the Bureau has the authority to determine the capacity of an entire grazing unit where federal and nonfederal lands are indiscriminately used together, we also find that appellants have failed to show error in the Bureau's determination of the grazing capacity of these particular tracts of land."

See also Western States Cattle Company, Inc. et al., A-30572 (October 10, 1966); Foster L. Mills, et al., A-29330 (January 14, 1963; Virgil and Elizabeth Russell, et al., A-29232 (January 14, 1963; Stanford Bennett, et al., A-29164 (February 20, 1963); Newell A. Johnson, et al., A-29301 (July 19, 1963).

The Appellants have failed to introduce any specific probative evidence of error in the Bureau's range survey.

It is found that the carrying capacity of the Federal range in the Saco Hills common allotment is 448 animal unit months.

The District Manager properly imposed the reduction on the Appellants' licensed use to achieve conformance with the carrying capacity reflected in the range survey as required by 43 CFR 4115.2-1(e)(3) which provides as follows:

> "No license or permit will confer grazing privileges in excess of the grazing capacity of the Federal range to be used, as determined by the District Manager * * *."

FINAL CONCLUSION

The Appeals are dismissed.

Rudolph M. Steiner
Hearing Examiner

Enclosure: Statement of Appeal Procedure

Distribution:

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