

ALVIE HOLYOAK ESTATE, ET AL.

IBLA 71-224

Decided January 11, 1973

Appeal from decision by Administrative Law Judge Robert W. Mesch affirming action by a District Manager, Bureau of Land Management, in establishing the grazing capacity of certain allotments as of the time of his decision in 1966, and in establishing a new season for use for each of the allotments.

Affirmed.

Grazing Permits and Licenses: Range Surveys

A range survey by the Bureau of Land Management determining the carrying capacity of a federal range area will not be disturbed solely on the basis of charges that it was not properly conducted where no substantial evidence is submitted demonstrating error in the survey.

Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation and Reductions

The determination of the carrying capacity, seasons and maximum annual period of use of the federal range in a grazing district or administrative unit is committed to the local Bureau of Land Management officials, and their findings are accepted in the absence either of evidence that the findings were improperly determined or of a proper showing as to what the correct determination should have been.

APPEARANCES: Milton A. Oman, Esq., Salt Lake City, Utah, for appellants.

OPINION BY MR. HENRIQUES

This is an appeal from a decision, dated January 28, 1971, of an Administrative Law Judge 1/ affirming the District Manager's

1/ Pursuant to an order by the Civil Service Commission, the title "Administrative Law Judge" has supplanted the title "Hearing Examiner." 37 F.R. 16787 (August 19, 1972).

action in establishing the grazing capacity of certain allotments within Utah Grazing Districts 6 and 9 as of the time of the Manager's decision in 1966, and in establishing the seasons of use for each allotment. The District Manager, as a result of the carrying capacity established by range surveys made by the Bureau of Land Management during 1963 and 1964, had adjudicated grazing privileges for the present appellants, 2/ with a consequent reduction both in numbers of animal unit months (AUMs) allowed on the federal range and in seasons of use. A copy of the Judge's decision is attached.

Appellants contend essentially that the proposed reductions, approximating 75 percent of their prior permitted use, are very severe, drastic, and destructive, and if effected will eliminate the economic value of their individual ranch operations. They argue that the range surveys were made by college students inexperienced in range livestock operations; that ocular reconnaissance range surveys employed were not based on precise forage use figures for the control pasture and that the control pasture was not closely similar in elevation, site, or annual precipitation to the allotments under discussion; that they had no opportunity to participate in the range survey, either to know the location of the control pasture or the time of the actual range reconnaissance; that no proper utilization checks have been made on the allotments under discussion, which allotments, they contend, have more forage (at the time of the hearing) than reported in the range survey; and that annual variation in precipitation has greater effect on vegetation than grazing use. They concede that the range now supports fewer numbers of livestock than during the historic past, but the reduction proposed by the District Manager will be confiscatory. They assert that the condition of livestock coming from the subject federal range is very good, indicating to them that the range is in better condition than the District Manager admits.

These contentions were pressed at the hearing and each is treated at length in the Judge's decision. There is no need to dwell on any of them further, as we agree with the Judge's findings and conclusions with respect to these contentions.

2/ The appellants are: Alvie Holyoak Estate, Arnel Holyoak, Clarence Holyoak, Glen A. Holyoak, Ray C. Holyoak, R. L. Holyoak, Stewart Somerville, George M. White, Collin A. Loveridge, Frank Shields, Jack W. Corbin, Carrol Junior Meador.

We add the following. Pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1970), the Secretary of the Interior has established the Federal Range Code for Grazing Districts, 43 CFR Part 4110, which, *inter alia*, provides that the District Manager, after recommendation by the advisory board, will establish the requirements for base property as a condition of qualification for a grazing license or permit, § 4111.2-1; will rate the grazing capacity of each unit in the grazing district, including reservation of sufficient capacity for wildlife use, and will classify each unit for the proper seasons of use, § 4111.3-1. The procedures to be followed in making downward adjustment in grazing use to balance the use with the grazing potential of the federal range are set out in § 4111.4-3.

The Department of the Interior has consistently refused to disturb a determination of range capacity in the absence of substantial evidence establishing error in the determination. See United States v. John W. Nicoll, 4 IBLA 333 (1972); Melvin Adams et al., A-30406 (November 1, 1965); Kermit Purcell, A-29661 (November 15, 1963); C. A. George et al., IGD 661 (1957); Fine Sheep Company, 58 I.D. 686 (1944); Spicer Brothers, IGD 138 (1939). The most that can be said for the appellants is that they have shown that the determination of grazing capacity of the range in question could be in error, but they have not shown that it is, or even that it probably is. They have not shown by any substantial evidence what the grazing capacity of the units should be; they have not shown that the information obtained by the Bureau through the range surveys was erroneous nor have they shown that a different carrying capacity should have been found on the basis of that information. And of greatest importance, they have not shown that the range in question was not steadily deteriorating and that the reductions in use were unnecessary.

A decision by District Manager in setting up seasons for use of the federal range, if reasonable and in the interest of proper range management, will not be "lightly disturbed." Cf. Reuben Meeks, et al., A-30316 (September 10, 1964). Appellants have not questioned the validity of the law but argue only that elimination of April and May from the season of use of the federal range will create a hardship in their grazing operations. They have not shown that action by the District Manager in proposing a different season of use of the federal range was arbitrary or capricious, nor that it does not represent a reasonable compliance with the Federal Range Code for Grazing Districts.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Douglas E. Henriques, Member

We concur.

Joan B. Thompson, Member

Edward W. Stuebing, Member

January 28, 1971

DECISION

ALVIE HOLYOAK ESTATE,	:
ARNEL HOLYOAK,	:
CLARENCE HOLYOAK,	: UTAH 6-67-2 through UTAH 6-67-13
GLEN A. HOLYOAK,	:
RAY C. HOLYOAK,	:
R. L. HOLYOAK, :	Appeals from District Manager's
STEWART SOMERVILLE,	: Decisions dated August 22, 1966,
GEORGE M. WHITE,	: Monticello Grazing District.
COLLIN A. LOVERIDGE,	:
FRANK SHIELDS,	:
JACK W. CORBIN,	:
CARROL JUNIOR MEADOR,	:
	:
Appellants	:
	:
REDD RANCHES,	:
	:
Intervenor	:

PREFACE

Pursuant to the provisions of the Taylor Grazing Act, as amended, 48 Stat.1269 et seq. (1935), 43 U.S.C. 315 et seq. (1964), and the regulations in 43 CFR, Subpart 1853, the appellants filed separate appeals from decisions issued August 22, 1966, by the District Manager, Monticello Grazing District, Bureau of Land Management.

The District Manager's decisions established, among other things, the present and the potential grazing capacity (as of 1966) of the Blue Hill, the South Sand Flat, the Mill Creek, the Kane Spring and the Hurrah Pass

allotments; the base property qualifications of the appellants; the appellants' share of the present and potential grazing capacity within the allotments; and the season of use for each allotment.

At the hearing the parties agreed that the issues presented for determination are (1) whether the District Manager erred in establishing the actual grazing capacity of each of the allotments, and (2) whether the District Manager erred in establishing the season of use for each of the allotments (Tr. 121).

THE GRAZING CAPACITY

The District Manager established the grazing capacity of each of the allotments (as of the time of his decisions in 1966) on the basis of ocular reconnaissance forage surveys conducted by employees of the Bureau (Tr. 125). The forage surveys were made on a part of the area in 1963, and on the remainder of the area in 1964 (Tr. 126). The surveys were allegedly conducted in accordance with the Bureau's Manual of Instructions covering ocular reconnaissance forage surveys (Tr. 74, 504; Exs. 2, 20).

The appellants have the burden of showing by positive and substantial evidence that the District Manager's determination of the carrying capacity of their allotments (as of 1966) was in error. In the case of O. J. Cooper, et al., A-30974, April 29, 1969, the Department stated:

. . . the Department has consistently refused to disturb a determination of range capacity in the absence of positive and substantial evidence establishing error in the determination. Melvin Adams et al., supra, and cases cited. The fact that there is error in the Bureau's findings can be established only by showing that the Bureau's range survey methods are incapable of yielding accurate information, that there was material departure from prescribed procedures, or that a demonstrably more accurate survey has disclosed a different range capacity. Appellants have done none of these.

In determining whether any of the appellants have met the criteria stated in the Cooper case, I will set forth and consider in numbered form each of the contentions made by the appellants in their post-hearing brief.

1. The study area or actual use pasture, "is located entirely outside any part of the range area within which the reductions in livestock use are proposed" (Brief, p. 1); a "pasture ought to have been selected within the boundaries of the range upon which the livestock use reductions are to be imposed" (Brief, p. 2); and the "evidence and

testimony at the hearing disclosed no reason why such a pasture should not have been selected" (Brief, p. 2).

The allotments cover lands in Townships 25 South through 28 South, in Ranges 20 East through 23 East (Ex. 1). The study area that was used by the Bureau covers parts of Townships 29 South and 30 South, in Range 22 East (Tr. 169). It lies within the unit that contains the Hurrah Pass and the Kane Spring allotments (Tr. 278). The particular area was selected because it was the only pasture, in the opinion of the Bureau employees, for which good actual use figures were available at the time of the surveys (Tr. 79). Pastures within each of the allotments could have been established; however, according to the Bureau employees, actual use figures would not have been available for several years after the forage surveys had been made (Tr. 262). This presumably would have resulted in an unreasonable delay in the adjudication of the Federal range.

There is no evidence that indicates in any way that a more desirable area, from the standpoint of location, was available and could have been used at the time of the surveys. There is no evidence that even remotely suggests that the use of a study area outside the individual allotments resulted in an erroneous determination of the grazing capacity of the allotments. It is not sufficient to simply allege that Bureau employees acted erroneously. The allegation must be supported by facts showing that the action was erroneous.

2. The actual use pasture "is at a substantially higher elevation than the average range with which we are involved", and "conditions within that control pasture, the length of the growing season, the species of vegetative cover, soil conditions, [and] annual precipitation were shown to vary considerably from anything approaching conditions identical to those within the range areas used by appellants" (Brief, p. 2, 3).

One of the appellants testified that the actual use pasture was not comparable to the allotments in that "it is not the same forage there . . . [and] the land up there is better soil and should produce more feed with moisture" (Tr. 444). Another appellant was not sufficiently familiar with the study pasture to make a comparison, but he did believe that the elevation was "considerably higher than any of the allotments" (Tr. 353-354). No other appellants testified on this particular point.

The District Manager estimated, on the basis of contour maps, that the average elevation would be five thousand to six thousand feet in three of the allotments, forty-four hundred feet in two of the allotments, and six thousand feet in the actual use pasture (Tr. 220-221). He also gave figures, obtained from information provided by the United States Weather

Bureau covering a 29-year period (Ex. 5), indicating that the precipitation in the allotments and in the study area was quite comparable (Tr. 216-217). The chief-of-party for the forage survey covering two of the allotments testified that the study pasture "is approximately the same elevation, and the precipitation would be approximately the same" as in the allotments he surveyed (Tr. 82). He also stated that the vegetative types would be approximately the same (Tr. 82). The chief-of-party for the survey covering the other three allotments testified:

... The actual use pasture is perhaps not completely 100 percent identical to any given allotment within the Moab Unit. But generally it is very close in plant composition, in elevation, in precipitation and soil conditions.

Q. Where it is not as similar as in some other cases, would that in any way make it invalid?

A. No, definitely not. (Tr. 505)

The evidence does not, in my opinion, support the broad allegations made by the appellants. While the conditions within the study pasture are not absolutely identical with all of the conditions within all of the allotments, there is nothing in the evidence that would support the conclusion that the forage surveys are invalid because of dissimilarities between the actual use pasture and the allotments.

3. The "evidence and testimony show that the Bureau of Land Management officers did not know, of their own knowledge, how many livestock were taken into the control pasture, when this was done, [and] whether additional livestock grazed the area" (Brief, p. 3); there "was no control gate or entrance to the actual use pasture" (Brief, p. 4); there "were several ways to enter and to leave that pasture with livestock" (Brief, p. 4); and "at no time was any count made of the livestock entering the area, none was made while the range was being utilized, and no count was made when the livestock left this pasture" (Brief, p. 5).

The only evidence on this point was that elicited from Bureau employees. The District Manager testified that the use that was made of the study pasture was determined "from actual counts of our own made by our people and also from data provided by the individuals themselves who grazed those areas" (Tr. 168, 169, 195); that the area of the study pasture is "either under fence or controlled by topography" (Tr. 169); that "we had individuals who were out supervising the use of the range and had there been some trespass use made, I am sure they would have reported it"

(Tr. 204); and that "there was nobody kept there constantly on a 24 hour basis" during the controlled use period which extended from 1961 through 1964 (Tr. 173, 205). Another Bureau employee testified that the actual use of the study pasture was determined from "counts conducted by the BLM personnel as well as documents submitted by the users of this test pasture" (Tr. 566); that "the area was either enclosed by fence or natural barriers" (Tr. 563); and that it "is possible" that a "man could drive in or out with a truckload at any time without contacting" the Bureau (Tr. 563-564). This evidence does not, in my opinion, establish that the Bureau did not have a reliable use history for the study pasture.

4. The range surveys were made "seven years prior to the time these figures are offered for use in assessing these livestock reductions" (Brief, p. 5); the "uncontradicted testimony of all of the appellants was to the effect that range conditions now . . . is very substantially better than the conditions which existed during the time the survey studies were being conducted" (Brief, p. 6); "within one year's time forage conditions can vary greatly in any area involved here with changes in precipitation and temperature conditions . . . and a 10-year period of time would seem to be much too long a period to allow to elapse between the time the survey data is collected and the time the resultant figures are applied" (Brief, p. 6).

The Bureau's Manual of Instructions provides, and the Bureau employees testified substantially (Tr. 105, 107, 177, 179), that:

. . . Capacity estimates are valid only at the time the survey is actually conducted and are properly used only as a starting point in management. Permissible grazing rates will vary with changes in range condition due to changes in weather or intensity of use. Continuous studies which may include actual use, climate analysis, condition and trend, utilization and production studies are necessary to follow up a survey and adjust initially established grazing capacities. (Exs. 2, 20)

In addition, the District Manager testified that "we should very carefully use surveys that are more than five years old" (Tr. 177); that "one has to perhaps reject" such surveys (Tr. 177); that "one could always go back and recheck a survey which had formerly been made, by going out and checking types" (Tr. 178); that "we made a recheck of the survey which was made in 1964, in the spring of 1965", but nothing has been done since that time (Tr. 178); and that the condition of the range "perhaps could have changed some" since the time of the surveys (Tr. 179).

The appellants' position might have considerable merit if I was assessing the propriety of the livestock reductions as of the present time. However, the issue for determination is not the grazing capacity of the allotments at the time of the hearing, but whether (as agreed upon by the parties) the District Manager properly established the grazing capacity of the allotments in his decisions of August 22, 1966, which are the subject of the appeals. Under this issue there was not an unreasonable period of time between the collection of the survey data and the application of that data in the District Manager's decisions. The appellants' contention does not have any merit.

While I could probably rule, under appropriate circumstances, on the grazing capacity of the allotments at the time of the hearing (cf. Lawrence Edwards, 74 I.D. 120 (1967)), I do not feel justified in doing so in this proceeding since the question was not raised as an issue, and the Bureau did not present any evidence relating to the present grazing capacity of the allotments (cf. Tr. 177-179, 183, 565). The appellants are not, however, precluded from raising the question of whether the grazing capacity of the allotments has increased since the time of the forage surveys in 1963 and 1964. This can be accomplished by filing applications for sufficient AUMs to cover what the appellants feel is the present grazing capacity of the allotments and insisting that the Bureau act on the applications in the light of present facts.

5. The forage surveys, conducted by students, in a "short period of time, during a drought year, nearly ten years ago", is not as persuasive as the evidence offered by men of "lifelong experience . . . who have devoted their full time to the ownership and operation of livestock upon the ranges involved" (Brief, p. 9); the "uncontradicted testimony was to the effect that cattle grazing these areas during 1963, and ever since that time, were in as good condition of flesh when they left these ranges as cattle were upon any ranges throughout the entire State" (Brief, p. 11); and "flesh conditions are not maintained upon ranges which are overgrazed" (Brief, p. 11).

One of the appellants testified that the forage conditions in his allotments (the Blue Hill and the Kane Spring) "have improved considerably" since 1963 (Tr. 297, 312); that "this year the cattle are in better shape than I have ever seen them" (Tr. 297); that "under a good management program [and "with the potential developed" (Tr. 311) through the installation of reservoirs (Tr. 312) and other improvements (Tr. 312, 327)] this range will carry everything that is allotted to it" (Tr. 310); and that "I have been concerned about this range and I have taken non-use" (Tr. 311).

Another appellant testified that he is acquainted with all of the allotments (Tr. 335); that the condition of the range in all of the allotments

is "four times better today than it was in 1963" (Tr. 337); and that there is sufficient forage to support on a sustained basis all of the appellants' class I demand (Tr. 338).

Another appellant testified that the range in the Mill Creek allotment (which he uses as a private allotment) "is better today than I have seen it in . . . forty years" (Tr. 404); that the Mill Creek allotment will adequately carry on a sustained basis all of his class I demand (Tr. 404-405); that "since the period of time that they proposed this I have taken a 50 percent non-use" to "see if it wouldn't help the range" (Tr. 408); and that the range in all of the allotments "has definitely improved" and it is "in better condition that I can ever remember" (Tr. 406).

Another appellant testified that he is familiar with all of the allotments (Tr. 433); that "the range is considerably better today than it was in 1963" (Tr. 436); that there is no need for any reductions to be imposed in any of the allotments (Tr. 438); that the Bureau "should improve the range and give us a chance to hold our holdings" (Tr. 439); and that the "cattle are in better shape now than I have seen them for several years" (Tr. 447).

The evidence presented by the appellants does not support their contention. There is no evidence that indicates that the forage surveys were in error in establishing the grazing capacity of the allotments in 1963 and 1964. The evidence offered by the appellants confirms the fact that the range was in poor condition at the time of the forage surveys.

6. "Considerable opportunity exists for the Bureau of Land Management to construct needed range improvements in an endeavor to avoid any need to impose reductions in livestock use" (Brief, p. 7); range improvements should be accomplished before reductions are made (Brief, p. 7, 8); and to reduce the appellants' present operations "will so diminish their herds that they will have little financial strength left from which to build back their numbers, in the event the latent potential carrying capacity shown by the Bureau of Land Management studies is developed" (Brief, p. 8).

The short answer to this contention is that the Bureau is prohibited from issuing licenses or permits which "will confer grazing privileges in excess of the grazing capacity of the Federal range . . . except as may be allowed" (1) by way of nonuse where the forage production potential is significantly greater than the allowable stocking rate, and (2) by way of a scheduled reduction over a three-year period where the reduction to meet the stocking rate would impose a serious hardship on the range users (43 CFR 4115.2-1(e)(3)). The District Manager's decisions in this case provided for nonuse and a scheduled reduction over a three-year period.

7. The Bureau of Land Management is charged, as one of its most important functions, to stabilize the livestock industry which is dependent upon the use of the public lands" (Brief, p. 11); and "for all practical purposes the reductions in use of the range proposed by the Bureau of Land Management are wholly destructive of the operations in which appellants are engaged" (Brief, p. 12).

There is no evidence that indicates in any way that the forage surveys were in error in establishing the grazing capacity of the allotments as of 1963 and 1964. Accordingly, I cannot conclude that the District Manager's decisions were in error and direct the District Manager, because of economic considerations, to issue licenses contrary to the provision of the regulations noted above which prohibits the granting of grazing privileges in excess of the grazing capacity of the Federal range.

THE SEASON OF USE

The decisions of the District Manager changed the season of use by, among other things, eliminating grazing (1) during April and May in the Blue Hill, the Kane Spring and the Hurrah Pass allotments, and (2) during May in the South Sand Flat and the Mill Creek allotments. This action was taken because, in the opinion of Bureau employees, the months of April and May are critical periods in the growing season of the desirable plant species in the allotments, and if grazing was eliminated during this period the plants would increase in vigor and sustain themselves for longer periods of time (Tr. 488-499). An exception was made with respect to the South Sand Flat and the Mill Creek allotments because of certain problems peculiar to the livestock operators in those allotments (Tr. 490-491, 499).

The appellants contend in their post-hearing brief that "the Bureau of Land Management desires to force the appellants to take their livestock out of the range lands during the months of April and May" (Brief, p. 12); that "during this time the appellants cannot place them in their fields where the crops have begun to grow and to be irrigated" (Brief, p. 12); that "the Forest Service endeavors to keep the appellants from bringing their livestock into the adjacent Forest areas before June 10" (Brief, p. 12); and that "this breaks up the continuous operation by the appellants of their livestock and leaves them with a period of time during which they have no place to take their livestock" (Brief, p. 13).

There is no evidence that even remotely suggests (1) that the appellants cannot place their livestock in their private fields, or (2) that there is no place to take their livestock during the period of time in question.

The appellants' evidence does, however, support the proposition that grazing during the months of April and May is detrimental to the forage resources (Tr. 327, 385, 412).

ORDER

The appellants have not shown (1) that the District Manager erred in establishing the grazing capacity of each of the allotments as of the time of his decisions in 1966, nor (2) that the District Manager erred in establishing the season of use for each of the allotments.

The appeals are dismissed.

Robert W. Mesch
Hearing Examiner

