

E. L. CORD

IBLA 71-66 Decided January 29, 1973

Appeal from decision of Administrative Law Judge L. K. Luoma affirming decisions of a District Manager, Bureau of Land Management, in establishing the grazing capacity of an individual allotment of appellant.

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 error in the survey is demonstrated.

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

The determination of the carrying capacity of the Federal range in a grazing district 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; however, where a reduction in licensed use is imposed which is greater than what the evidence supports, the reduction in licensed use will be adjusted upward accordingly.

APPEARANCES: William O. Bradley, Esq., of Bradley and Drendel, Ltd., Reno, Nevada, attorney for appellant; Otto Aho, Esq., Field Solicitor, United States Department of the Interior.

OPINION BY MR. FISHMAN

E. L. Cord has appealed to the Director, Bureau of Land Management, from two decisions, one dated June 30, 1969, and the other dated October 9, 1970. These decisions, which were both rendered by Administrative Law Judge 1/ L. K. Luoma, involved different

1/ Pursuant to an order by the Civil Service Commission, the title "Administrative Law Judge" has supplanted the title "Hearing Examiner".

aspects of the same case. The case was transferred from the Director to the Board of Land Appeals for final decision. ^{2/}

The appellant leases Federal range land to graze cattle in an individual allotment (hereinafter referred to as the Cord allotment) located within the Lone Mountain-Eagle Rock-Stampede Unit of the Elko District, Nevada. His recognized Federal class 1 demand has been 9,398 AUMs.

In acting on Cord's application for grazing privileges in 1968, the District Manager, by decision dated May 29, 1968, determined that the usable forage of the Cord allotment was 4,598 AUMs. The District Manager's decision was based upon the results of a range survey conducted in 1966 which included the lands embraced within the Cord allotment.

On June 10, 1968, Cord filed an appeal from that decision. A hearing on the appeal was held on March 11, 1969. The sole issue to be resolved, as agreed to by the parties, was the grazing capacity of the Federal range land within the Cord allotment. At the hearing Cord argued that his allotment had more than ample forage to sustain his recognized class 1 Federal range demand, and attacked the results of the 1966 range survey on several grounds. Based upon the evidence presented, the Judge, by decision dated June 30, 1969, found that Cord had failed to establish that the 1966 range survey was in error. The Judge found, however, that the utilization deduction estimates applied to the Cord allotment "were improperly made," and remanded the case to the District Manager to review all utilization deduction estimates in the field and to make such adjustments of this factor as he found appropriate.

The District Manager, on remand, made a determination not to impose any utilization deductions. Cord appealed to the same Judge who presided over the hearing on March 11, 1969. The only issue decided was whether utilization deduction estimates would be imposed on the Cord allotment. The Judge affirmed the District Manager's determination not to impose any utilization deductions. The Judge in essence found the total grazing capacity of the lands in issue to be 4,811 AUMs, including the 213 AUMs which had been earlier considered by the District Manager to be "utilization deductions."

In connection with the merits of the determination of the grazing capacity, the arguments raised by appellant were essentially the same

^{2/} The Secretary of Interior transferred jurisdiction over appeals taken from decisions arising out of the administration of grazing districts from the Director to the Board of Land Appeals for final decision. Circular 2273, 35 F.R. 10012.

ones raised at the hearing. We are of the opinion that the Judge properly decided those issues in his decision of June 30, 1969, and therefore adopt his decision, attached hereto.

Therefore, 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.

Frederick Fishman, Member

We concur:

Martin Ritvo, Member

Joan B. Thompson, Member

<u>Class 1 Demand</u>	<u>1969(16%)</u>		<u>1970(16%)</u>		<u>1971(17%)</u>		<u>Satisfied Suspended</u>		<u>Satisfied Suspended</u>	
	<u>Satisfied</u>	<u>Suspended</u>	<u>Satisfied</u>	<u>Suspended</u>	<u>Satisfied</u>	<u>Suspended</u>				
9398 AUM's	7894	1504	6390	3008	4793	4605				

In his appeal from that decision, the appellant contends that the range survey upon which the reduction was based does not accurately reflect the grazing capacity of the allotment and that there is ample forage available to satisfy all his Class 1 demand.

Issue

The sole issue to be resolved as agreed to by the parties at the hearing is: What is the grazing capacity of the Federal range land in the Cord allotment?

Findings of Fact

The Cord allotment within the Lone Mountain-Eagle Rock-Stampede Unit of the Elko District is comprised of 34,548 acres of Federal lands intermingled with 19,075 acres of privately-owned land, or a total of 53,623 acres. The private lands are either owned by appellant or leased by him from a railroad. Since 1962, the appellant has been the sole grazing licensee in the allotment with a recognized Class 1 demand of 9,398 AUM's. Beginning with the 1965 license, the allotment has been indicated to be 78 percent Federal range.

In the summer of 1966, the Bureau of Land Management conducted a grazing capacity survey of the Lone Mountain-Eagle Rock-Stampede Unit, including the Cord allotment, covering a total of approximately 251,000 acres. The survey was made by the ocular reconnaissance method as described in Part 4412.11A of the BLM Manual. The survey crew consisted of Mr. William R. Brigham as Chief of Party, who is a full-time employee of the Bureau of Land Management, Elko District, and four college students employed by the Bureau of Land Management for the summer. In making the survey the crew spent approximately two months in the field, devoting four eight-hour days of each week to actual field work and one day to travel, obtaining provisions and so forth. According to Mr. Brigham's best estimate, about one-fifth of the total time was spent performing the field work in the Cord allotment. Prior to entering the Cord allotment, the survey crew members received instructions and training in the ocular reconnaissance method from two BLM area managers and the assistant district manager. Each crew member was then assigned a specific area of the allotment to make the field study, operating independently of each other. The crew members traversed their assigned areas by four-wheel drive vehicles

or afoot doing the field studies and recording their findings on the prescribed write-up sheets. Later at the district office, the write-ups were summarized and further calculations made, resulting in a final determination with respect to the Cord allotment as shown on Exhibit G-8, as follows:

I - SUMMARY OF ALL ALLOTMENTS

	Range							
Base	%	Oblig.	Acres	Survey	AC/AUM	Acres	Survey	Average
Qualifi-	Demand	Rating	Public	Carry.	Aver.	Cord	Capac.	Rating
cations	Satis.	AC/AUM	Land	Capac.	Rating	Land	AUM's	AC/AUM
		AUM's						

9398 AUM's 48.93 3.68 34,548 4,598 7.51 19,075 2,614 7.3

Allotment total (Federal and Cord Private)

53,623 Total Acres 7,212 Total AUM's 63.76% Federal Range

1/

The completed survey was reviewed, both as to field work and office work, and accepted by the Area Manager, Mr. Raymond T. Peterson. Mr. Peterson entered on duty at the Elko District on October 1, 1968, so his review was of necessity made well after completion of the field work. The survey was also checked and approved by the District Manager, Mr. J. Kent Giles, as well as by several other range personnel of the BLM. These checks also occurred after completion of the field work, Mr. Giles having entered on duty at Elko on August 25, 1966.

The appellant contends that the BLM survey is not accurate and that the allotment has more than ample forage to properly sustain his recognized Class 1 Federal Range demand of 9,398 AUM's. He conducted no independent grazing capacity survey of any kind but relies in support of his contention on the testimony of Mr. Burt Lane, Superintendent of the E. L. Cord ranches in Nevada; Mr. Al Thome, Manager

1/ It is not entirely clear how the 49 percent downward adjustment can be reconciled with the results of the grazing capacity survey. Since the survey shows a grazing capacity of 4,598 AUM's, it would appear that the downward adjustment should have been 51 percent. It might also be observed that the effective reduction of use in the total allotment would not be based on that percentage since the survey revealed a change in the percent of Federal range from 78 percent to 63.76 percent. In other words, before the survey the total allowable use in the allotment, including both Federal and private lands, was 12,050 AUM's whereas under the new survey the total allowable use would be 7,212 AUM's. The difference in these figures, 4,838 AUM's, would amount to an actual reduction of only 40 percent.

of appellant's Circle L Ranch in elko; and on the cross examination of the BLM witnesses.

For the past fifteen years, Mr. Lane has supervised the appellant's range livestock operations, and has been familiar with the Cord allotment since 1955. He testified in essence that the grazing capacity of the allotment is in excess of appellant's Class 1 demand, that full stocking in the last two years has resulted in well-fed cattle with the range remaining in good condition, and that the range has shown improvement since 1962. He also testified that 1966, the year of the BLM survey, was the poorest range feed year to his knowledge because of a cold spring and lack of moisture. Mr. Lane acknowledged that appellant applied for considerable non-use in the years from 1962 through 1966, as shown on Exhibit A-1, partly in order for the range to make improvement.

Mr. Thome, a man of mature years, testified that he was born and raised on a ranch and has worked with range livestock operations all his life. He was employed in 1963 as manager of appellant's Elko ranch, which used the Cord allotment. He testified that from his observations from that time to the present the condition of the range has improved. He also testified that 1966 was a poor year for range forage production, particularly as to the annual plants, because of the combination of a cold spring followed by a hot summer and subnormal precipitation. The other years, both before and after 1966, according to Mr. Thome, were much better for forage production. With respect to the means of transportation and length of time to cover the allotment in making a range survey, Mr. Thome testified (Tr. 115):

BY MR. BRADLEY:

Q Is it possible to cover this Lone Mountain allotment to any degree to accurately determine the feed available on the allotment in any period of six days?

A Well, I couldn't.

Q Is it possible to cover this allotment by automobile – well, first, is it possible to cover this allotment totally by four-wheel vehicles?

A No.

Q You would have to go horseback, would you not?

A Yes.

- Q What portion of the allotment can be covered by four-wheel drive vehicles, proportionately?
- A In percentage?
- Q Yes.
- A I would say about 40%.
- Q And 60% you would have to either go afoot or horseback, is that right?
- A Yes.
- Q In a period of 6 days would it be possible for 5 men to cover 60% of this allotment on foot?
- A I don't think so.
- Q Did you ever see these 5 men attempting to walk into areas that they could not get their four-wheel drive into, for the purpose of sampling a range?
- A No.

On examination by appellant's counsel, Mr. Brigham testified that he grew up in Los Angeles, California; attended Los Angeles City College for two and one half years studying natural resources, obtaining an Associate of Arts degree; graduated from Humboldt State College, Arcata, California, in 1964, with a Bachelor of Science degree in wildlife management; and completed courses there in post graduate work in February, 1966, but as yet has not received a post graduate degree. Further testimony disclosed that he first came to Elko, Nevada, in February, 1966, when he was hired by the Elko District of the BLM as a range aid, temporary; that he worked for the BLM, Battle Mountain Nevada District, in the summer of 1963 as a range aid doing ocular reconnaissance survey work; and that he spent two college summers in the Idaho Falls District, BLM, doing range condition and trend studies and looking for and plotting section corners. Mr. Brigham also testified that he has had no experience whatsoever in running range livestock in the Elko area, nor in any other area. Likewise, the four college students who assisted him in making the survey had no experience in range livestock operations in the area. He also stated that neither he nor his crew members had any experience in checking or judging the condition of cattle as to whether they were in good, mediocre or poor condition.

As part of the field work involved in making an ocular reconnaissance survey, a judgment must be made as to what if any portions of the range are inaccessible or otherwise unusable by the particular livestock involved, because of rocks, slopes, distance from water, erosion and so forth. If such areas are found, they are recorded on the back of the individual write-up sheets as utilization deductions expressed in terms of percent of a given area not utilizable. According to the testimony of Mr. Brigham, such utilization deductions were made in various parts of the Cord allotment, the deductions ranging from five to twenty percent. They were based on the individual judgments of the five survey crew members working in their respective areas.

The following testimony of Mr. Thome (Tr. 114) indicates sharp disagreement with the survey crew's findings on inaccessibility:

BY MR. BRADLEY:

Q One other thing, Mr. Thome. You heard the testimony of Mr. Brigham that from a low of 5 to a high of 20% of this Lone Mountain allotment-Stampede allotment and Eagle Rock allotment is inaccessible to range livestock. What has been your observation as far as accessibility of this total allotment to livestock is concerned?

A I would say that there was probably 99.9% of it accessible to livestock.

Q And the livestock – you have covered this entire allotment horseback, I presume?

A Yes sir.

Q And have you seen not only cattle but evidence that cattle had been in every area of this total allotment?

A Yes sir.

BY MR. AHO:

Q Are you still employed by Mr. Cord?

A Yes.

Q In considering accessibility of areas of the allotment, is water any limiting factor? I mean are there any areas that are so far from water that cattle aren't apt to utilize or graze those areas?

A No.

Q How about slopes in the area? Any slopes that cattle wouldn't be likely to go because of the sloping terrain?

A No.

Conclusions of Law

The burden of proof is upon the appellant to show error in the District Manager's decision. E. L. Cord, dba El Jiggs Ranch, 64 I.D. 232 (1957). In amplifying on this rule, the Department stated in Harold Babcock et al., A-30301 (June 16, 1965), at page 5:

It is well established, however, that the burden of proof is upon the appellants as the ones alleging that they have been wronged to show by substantial and competent evidence wherein their rights have been impaired. If they are unable to furnish such evidence, it is unnecessary even to look at the evidence offered in rebuttal by the Bureau for the appellant's case will fail of itself.

In cases questioning the accuracy of a grazing capacity survey conducted by BLM personnel, the rule has been further refined to show with some precision the obstacles confronting appellant which he must overcome in order to prevail. Exemplifying this is Melvin Adams et al., A-30406 (November 1, 1965), which states at page 6:

The Department has consistently refused to disturb a determination of range capacity in the absence of positive substantial evidence establishing error in the determination. See Spicer Brothers, IGD 138 (1939); Fine Sheep Company, 58 I.D. 686 (1944); C. A. George et al., IGD 661 (1957); Kermit Purcell, A-29661 (November 15, 1963). The most that can be said for the appellants is that they have effectively shown that the determination of grazing capacity in this instance could be in error, but they have not shown that it is. The appellants did not show by any substantial evidence what the grazing capacity of the unit should be. They did not show that the information obtained by the Bureau through range studies was erroneous nor did they show that a

different capacity should have been found on the basis of that information. * * *

See also Lawrence Edwards, 74 I.D. 120 (1967); Western States Cattle Company, Inc. et al., A-30572 (October 10, 1966); and N. J. Meagher and Company, A-30612 (December 12, 1966).

The appellant's attack on the survey of the Cord allotment as brought out by the evidence is directed at several points. These are (1) that the best yardstick for measuring grazing capacity is the actual use that can be made of the range by livestock over a period of time; (2) that the survey was made in the worst possible year insofar as range forage production is concerned, resulting in no consideration being given to certain annuals that in other years would have been present; (3) that the survey crew, including the Chief of Party, completely lacked experience in range cattle operations; (4) that the crew could not have adequately covered the area involved by four-wheel drive vehicle and afoot in the relatively short time they spent doing the field work; and (5) because of this inexperience coupled with the limited time spent doing the field work, the crew was not competent to make judgments on the movements of cattle over the range and their ability to utilize the forage throughout all parts of the area.

With respect to the first point, a similar contention was considered in the Lawrence Edwards case, supra, wherein it was stated, at page 121:

On appeal to the hearing examiner, the appellant contended that no reduction at all should be imposed on his grazing privileges and that the Department's decision did not preclude him from offering evidence to support this contention. Over the objection of the Bureau (Tr. 24-28), the hearing examiner permitted him to introduce such evidence as he had, which consisted of arguments similar to those presented at the first hearing, i.e., that his use of the range at his previously established rate and the good condition of the range and his cattle under such use demonstrated that the range could carry more than what the range survey showed. The hearing examiner held that the issue had been disposed of by the Department's first decision and that in any event the evidence did not show why or in what way the range survey was in error or what the carrying capacity of the area should be. Such evidence is necessary before a determination of grazing capacity will be made. N. J. Meagher and Company et al., A-30612 (December 12, 1966); Melvin Adams, A-30406 (November 1, 1965). We concur in the hearing examiner's conclusion that the

appellant's evidence does not demonstrate error in the determination of the carrying capacity of the range as shown in the range survey upon which the district manager relied in awarding grazing privileges.

Accordingly, evidence of history of actual use by cattle, their condition, and the condition of the range, cannot be accepted as a substitute for an actual range survey, such as the one conducted by the Bureau of Land Management. Since the appellant made no independent survey, the conclusion is inescapable that he has failed to meet the burden of proving what the grazing capacity of the range is.

While the rest of the points noted above tend to show that the determination of grazing capacity in this instance could be in error the appellant has not shown that it is, Melvin Adams et al., supra, except in respect to the utilization deduction factors applied to the write-ups by the individual survey crew members.

The BLM Manual, Part 4412.11A, provides:

Section (3)h. Utilization Deductions . Type estimates of amount of vegetation are made for the average of that part of the type that is accessible to grazing animals. Utilization deductions are for any portion of the type that may not be available for some reason to any of the animals making use. Also, deductions are established for other type conditions that either require use compensation or reduced use for correction of the condition.

Section (3)h.(2) Assuring Accurate Determinations . The chief of party will pay special attention to utilization deduction estimates made by the examiners to assure reliable and uniform determinations.

According to the testimony of Mr. Brigham, the utilization deduction estimates were made by the individual examiners without on-the-spot field checking by more experienced personnel. While it is not clear from the record as to what total effect these deductions have on the survey, indications are that various parts of the allotment were affected from 5 to 20 percent. The lack of experience of the examiners, including the Chief of Party, in range cattle operations renders the accuracy of their utilization deductions suspect and in questionable compliance with the manual instructions. The evidence presented concerning later inspections of the range by more experienced personnel does little to overcome this deficiency. On the other hand, the testimony that the allotment is 99.9% accessible to cattle

use was made by appellant's witness who demonstrated a lifetime of experience in range cattle operations and intimate knowledge of the Cord allotment itself. Accordingly, I find that the BLM grazing capacity survey is in error to the extent that the utilization deduction estimates were improperly made. What the correct deductions should be cannot be determined from the record.

Order

Therefore, the case is remanded to the District Manager to review all utilization deduction estimates in the field and to make such adjustments of this factor as he finds appropriate.

L. K. Luoma
Hearing Examiner

Enclosure:
Statement of Appeal Procedure

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Std. Grazing List

