

MRS. MILDRED CARNAHAN

IBLA 72-160

Decided March 26, 1973

Appeal from the decision of Administrative Law Judge Dent D. Dalby affirming District Manager's decision rejecting in part licensee's application for grazing privileges.

Affirmed.

Grazing Permits and Licenses: Adjudication

Pursuant to 43 CFR 4115.2-1(e)(9)(i), providing that base property qualification will be lost in whole or in part for failure to include all of the qualifications in an application for two consecutive years, and 43 CFR 4115.2-1(e)(13)(i), providing that no readjudication of grazing privileges will be made where the qualifications have been recognized and license or permit has been issued for a period of three consecutive years or more, a licensee who failed to appeal a District Manager's decision determining her base property qualification for a period of over three years is precluded from later challenging the previously determined qualification of her base property.

Grazing Permits and Licenses: Apportionment of Federal Range

The determination of season of use is a matter committed to the discretion of the District Manager and will not be disturbed if it is not arbitrary or capricious and is not shown to have been based on insufficient or unreliable evidence.

Grazing Permits and Licenses: Advisory Boards

Where a grazing licensee has had full opportunity to present to the Advisory Board her protest against its recommendation, the fact that she was not present when the Bureau of Land Management representative discussed the case with the Advisory Board is not a fatal defect since the pertinent regulation does not provide for an adversary proceeding before the Board.

Administrative Procedure: Generally -- Grazing Permits and Licenses: Appeals -- Notice

In a decision of a District Manager, which adjudicates a licensee's grazing privileges by fixing the numbers and seasons of use, the omission of a reference to the pertinent provision of the Federal Range Code, as required by another of its provisions, is not fatal where (1) the decision sets out the basis for the action and refers to a specific pertinent provision of the Bureau of Land Management Manual, (2) the licensee fully discusses the issue in her appeal, raises no objection at the hearing, and presents evidence on the issue at the hearing, and (3) there is no indication that the licensee was in any way misled, or confused or prejudiced by the omission.

APPEARANCES: Donald R. Carnahan, King Hill, Idaho, for the appellant;
Robert S. Burr, Esq., Field Solicitor, Department of the Interior, for the appellee.

OPINION BY MR. RITVO

Mrs. Mildred Carnahan has appealed from a decision of Administrative Law Judge Dent D. Dalby, 1/ dated October 1, 1971, which affirmed a decision of the District Manager dated January 19, 1971, denying in part her application of November 13, 1970, for a license or permit to graze 96 cattle from April 1 to September 30, 1971, and 14 cattle from April 1 to November 15, 1971 (a total of 681 animal-unit months (AUM's) of forage). The District Manager instead approved a license for 91 cattle from April 1 to November 15, 1971, (totaling 682 AUM's). The reason given by the District Manager for the change in time of usage was "that on common use ranges the season of use for each class of livestock should be uniform as to the opening and closing dates."

The file of appellant's grazing privileges shows that she or her predecessors have exercised for many years grazing privileges in what is now the Saylor Creek Grazing Unit of the Jarbridge Resource Area, Boise, Idaho, Grazing District. From at least 1963, appellant has been licensed for 96 cattle from April 1 to September 30, 100 percent federal range, totaling 576 AUM's.

On November 17, 1965, the District Manager informed Mrs. Carnahan that the qualifications of each licensee in the unit had been reviewed and that her qualifications were recognized as 576 AUM's.

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

In a letter dated November 24, 1965, Dan Carnahan, appellant's son and lessee of the base property, reviewed the grazing history of the operation; he said that even though the Carnahan grazing had always been for the same period as the other users, its qualifications for some reason had been computed on a six month's basis while others were computed on a 7 1/2 month basis. He concluded that the appellant's qualifications were for 96 head of cattle for the grazing season and requested that they be stated as 96 head for six months with option for fall grazing until the AUM's can be updated to match the length of season of other users in the area.

On November 12, 1965, appellant applied for 96 cattle active use from April 1 to November 15, 1966, that is for 7 1/2 months (or 720 AUM's).

The District Manager's decision of January 3, 1966, stated:

The Advisory Board * * * recommended * * * that your application be approved to the extent of your base property qualifications, and no increase be allowed. The records indicate that your base property qualifications are 576 AUM's. Your application is in excess of this by 144 AUM's which would be disallowed in line with the above recommendations.

In accordance with this recommendation, your license will be issued for:

96 cattle 4/1 to 9/30 100% Federal Range 576 AUM's.

Extension of use beyond your qualifications may be allowed on a temporary basis depending on seasonal availability of additional forage.

No appeal was filed from this decision. The license for 1966 and following years was awarded for 576 AUM's on that base property.

In 1968, appellant acquired additional use of 14 cattle for the 7 1/2 month period amounting to 105 AUM's. The added qualifications were recognized in the 1968 and later licenses.

Her application for the 1971 season was in the usual form 96 cattle from April 1 to September 30 and 14 cattle from April 1, to November 15. As we have seen, in the decision appealed from, the District Manager recognized appellant's qualification for 576 AUM's but required that they be used by grazing 77 head for 7 1/2 months. Appellant was also licensed to graze the 14 additional cattle for the same period, for 105 AUM's. The use was stated as

91 cattle for the 7 1/2 month period. In other words, aside from the 14 additional cattle, appellant's season of use was changed from 96 cattle for 6 months to 77 cattle for 7 1/2 months. Thus, her full qualifications of 682 AUM's was recognized but the number of cattle grazing the range was reduced.

Although apparently the only issue on appeal was the period of time during which the appellant would be required to use the Federal range, at the hearing and in her appeal, appellant contended that she should be entitled to a license for 96 cattle for the full 7 1/2 months of grazing April 1 - November 15 season (720 AUM's) and for the additional 14 cattle for the same period (105 AUM's) for a total of 825 AUM's. It was agreed at the hearing that the issue of appellant's total qualifications would be decided in the proceedings.

The Judge found that appellant was not entitled to additional grazing privileges beyond the 576 AUM's set out in the 1966 decision (aside from the additional 105 AUM's acquired in 1968) but that even if she were she would have lost them under the provisions of subsections 9(i) and 13(i) of 43 CFR 4115.2-1(e).

The issues for determination on this appeal are:

(1) Whether appellant is entitled to graze 96 cattle for 7 1/2 months, (720 AUM's), and, if not,

(2) Whether the decision of the District Manager setting the period of time during which the appellant would be required to use the Federal range was arbitrary and capricious.

43 CFR 4115.2-1(e)(9)(i) provides that base property qualifications will be lost in whole or in part for failure to include all of the qualifications in an application for two consecutive years; 43 CFR 4115.2-1(e)(13)(i) provides that no readjudication of grazing privileges will be made on the claim of applicant or intervenor where the qualifications of the base property have been recognized and license or permit has been issued for a period of three consecutive years or more.

As the Judge held, since appellant failed to apply for the additional use she now claims or to appeal the District Manager's decisions between 1966 and 1970, a period of over 3 years, she is precluded from now challenging the previously determined qualification of her base property. Jack G. Taylor, A-31014 (June 25, 1969).

Appellant asserts that her base property qualifications cannot be determined until her season of use has been decided. We cannot agree. The basic determinant of her grazing privileges is her base property qualifications. That has long been fixed as 576 AUM's and she has lost her right to have them readjudicated.

It may well be, as the appellant apparently argues, that she was permitted "extension of use" by the Bureau from September 30 to November 15 for grazing 96 cattle during the years 1966-1970 (in excess of the grazing privileges for 14 cattle acquired in 1968). If so, this temporary permit of use was purely at the discretion of the Bureau. Even if that use lulled her into not challenging the extent of her base property qualifications, she is not exempted from the clear language of the regulations.

As to the numbers and time of use, the Judge held that the District Manager's decision was not arbitrary. The District Manager testified (Tr. 33), and the appellant's witness agreed (Tr. 41, 42), that in a common use area it is desirable that the several users have the same period of use.

Testimony by the appellant's son, Don Carnahan, lessee of the property, indicated appellant used the 7 1/2 month grazing season even when given a permit for only 6 months. (Tr. 39-40.) Thus, the evidence supports the desirability of requiring the appellant to graze 91 cattle during the 7 1/2 month grazing period to control the trespass likely to occur if appellant were permitted use of 96 cattle for a 6-month period. The District Manager's decision approved by the Judge, therefore, not only is not arbitrary and capricious, but rather is a very reasonable one from both a standpoint of preventing trespass and of good range management.

Appellant argues that the use of 96 cattle should be permitted since it was "historically" her right. However, it is well settled that a licensee has no right to a particular season of use of the federal range under the Taylor Grazing Act or the Federal Range Code by reason of past use. Although historical use is a factor to be considered, the allocation of seasons of use is a matter committed to the discretion of the local officials and will not be disturbed if it is not arbitrary and capricious and is not shown to have been based on insufficient evidence. Harold Babcock, et al., A-303011 (June 16, 1965), George C. West, A-28862 (August 10, 1962).

The appellant raises several points in her appeal which she says were not discussed by the Judge. The first two are essentially that her season of use had been established in the past and cannot be changed now. As we have seen, there is no merit to that position.

Other arguments raise matters concerned with her investment in range facilities, the greater utility of spring grazing, and the existence of ample fall grazing feed on the range. Even if these factors are accepted as proven, they do not justify a revision of the District Manager's decision that all permittees have the same season of use.

She also refers to a conflict of interest by an unnamed Bureau employee, but offered nothing to substantiate the charge. Thus, it cannot be given any consideration.

Finally she calls attention to two alleged procedural defects. The first is that the Advisory Board heard the BLM's side of the case without her being present although the Advisory Board knew she was waiting in the reception room. Again assuming that the facts are as stated, we note that the regulation, 43 CFR 4115.2-1(b), which provides for protests to the Advisory Board, does not state how the meeting shall be conducted. It provides the licensee with an opportunity to appear before the Board and make his protest. In view of the other provisions for appeal and hearing, it is not necessary that a full scale adversary hearing be held before the Advisory Board.

The other procedural defect, the appellant says, arises from the failure of both the Advisory Board and the District Manager to refer in their respective recommendation and decision to the pertinent section or provisions of the Federal Range Code for Grazing Districts in which the application is deficient or which serve as controlling factors. 43 CFR 4115.2-1(a)(4) and 4115.2-1(b).

The Advisory Board's recommendation cited 43 CFR 4115.2-1(g)(4) 2/ and section 4111.32(c)(3) of the Bureau of Land Management Manual. 3/ The District Manager concurred in the Advisory Board's recommendation without citing any other provisions of the Federal Range Code. At the hearing government counsel conceded that the citation to the Code of Federal Regulations was incorrect. (Tr. 4.)

2/ This regulation provides for changes in use of the federal range for periods not provided for by his license or permit. The proper citation would have been 43 CFR 4111.3-1 which authorizes the District Manager to classify each unit or area in a grazing district as to seasons of use.

3/ Although a licensee is not bound by information in the Bureau Manual, which is ordinarily only for the elucidation of Bureau employees, Barbara Rubenstein, A-28508 (December 28, 1960), the manual is not classified information and is available upon request for public inspection.

While the BLM manual was not available at the hearing (Tr. 4), it is, however, directly applicable to the issue. It provides:

3. Class of Livestock. The class of livestock and type of animals, i.e., cows with calves, yearlings, steers, ewes with lambs, or dry sheep, must be taken into account in determining proper season of use. On common use ranges, the season or seasons of use for each class of livestock should be uniform as to the opening and closing date. Any variation in opening and closing dates for different classes of livestock or types of animals should be mutually agreed upon, if possible, by all range users within the unit. In instances where mutual agreement is not reached, there must be strong, overriding reasons affecting the stability of the different operations, adequate on-the-ground control of livestock, and compliance with proper use requirements before different opening and closing dates are established by the district manager. Exceptions may be made to the above in cases involving individual allotments, or common use areas containing only a small percentage of Federal range. (Emphasis added.)

The gist of the underlined sentence was set out in the Advisory Board's recommendation as the reason for changing appellant's season of use (and as a result her number of use) to conform with the season of use of the other licensees. Thus, appellant was fully apprised of the basis for the District Manager's action. The issue was clearly stated and agreed upon at the hearing (Tr. 5), and there is no indication that the reference to the regulation in any way prejudiced appellant's presentation of her case. Indeed, her evidence at the hearing consisted almost entirely of a summarization of her appeal in which she had stated in full her contentions as to how her grazing privileges should be allocated. Further, as we have noted, she was allowed to raise at the hearing the question of the amount of her privileges although that had not been an issue before the District Manager.

In a somewhat analogous situation the Department has held that failure of a complaint in a contest against a mining claim to raise the issues on which the contest was decided was not fatal to the proceedings where the United States made its position known at the hearing, and the contestee did not object and presented evidence on the issue, particularly where it could not be shown that the contestee had been prejudiced or misled in any way. United States v. Neil Stewart, et al., 1 IBLA 161 (1970), United States v. Harold

Ladd Pierce, 75 I.D. 270 (1968); cf. Harold Ladd Pierce, 3 IBLA 29 (1971). Here, as we have seen, the District Manager's decision fully informed the appellant of the reasons for his actions. It was defective only in that it did not cite regulatory authority for its conclusion. It did, however, refer to the specific pertinent provision in the BLM manual. See footnote 3, supra. At the hearing, appellant presented all the evidence she had on the issue and has not indicated that there is anything more she could add. In the absence of any indication that the appellant was misled or confused or in any way prejudiced, we do not find the omission warrants the dismissal of the proceedings.

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.

Martin Ritvo, Member

We concur:

Joseph W. Goss, Member

Anne Poindexter Lewis, Member.

