

EUGENE ALLEN  
LLOYD CHAPPELL  
v.

BUREAU OF LAND MANAGEMENT  
ALFRED GLEN DELEEUW  
v.

BUREAU OF LAND MANAGEMENT

IBLA 82-431, 82-432

Decided June 29, 1982

Appeals from the decisions of Administrative Law Judge Robert W. Mesch affirming the Bureau of Land Management's decisions reducing appellants' active grazing privileges. Utah 050-81-1 and Utah 050-81-2.

Affirmed.

1. Grazing Permits and Licenses:  
Adjudication

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

2. Grazing Permits and Licenses: Rang Surveys

A determination by the Bureau of Land Management of the carrying capacity of a unit of the Federal range, based on a range survey, will not be disturbed in the absence of positive evidence of error.

APPEARANCES: Rodney S. Page, Esq., Clearfield, Utah, for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

Eugene Allen and Lloyd Chappell have appealed from the December 30, 1981, decision of Administrative Law Judge Robert W. Mesch affirming decisions

of the Bureau of Land Management (BLM) reducing their authorized grazing privileges on the Neff Ranch Allotment from 52 to 44 active animal unit months (AUM's) and from 53 to 45 active AUM's, respectively. BLM concluded that appellants' 1981 authorized level of grazing use of the allotment exceeded the livestock carrying capacity of the allotment based on a 1976 range inventory and on the Parker Mountain Grazing Management Environmental Impact Statement (EIS).

Alfred Glen Deleeuw has appealed from a separate December 30, 1981, decision of Judge Mesch affirming a BLM decision that reduced his authorized grazing privileges on the Sand Wash Allotment from 54 active AUM's to 21 active AUM's over a period of 5 years. The basis for the decision was the same as that of the Allen/Chappell decision.

The circumstances giving rise to these appeals are similar. Both allotments are in the Henry Mountain Resource Area of the Richfield District in Utah, and the BLM decisions were issued by Larry Sip, Area Manager of the resource area in accordance with 43 CFR 4110.3-2(b). Although separate hearings were held August 11, 1981, by Judge Mesch in Loa, Utah, certain witnesses appeared at both hearings and presented substantially the same testimony. All of the appellants charged that the decisions of the Area Manager were arbitrary and capricious because the 1976 range survey was made in a drought year when the range was not in its typical condition. Allen and Chappell also argue that the survey failed to take into account the fact that deer feed extensively on their cultivated lands, rather than on the allotment, thus leaving more forage available on the allotment for sheep. Deleeuw argued that the survey allocated forage for deer but that few, if any, deer obtain forage from the Sand Wash Allotment. In view of the similarity of these appeals, the Board has sua sponte consolidated them for review.

At both hearings, 1/ Phil Zieg, a BLM natural resource specialist, testified about the circumstances of the range survey conducted on each allotment. He was in charge of the crew on contract from Utah State University that conducted the range survey for each allotment on July 22, 1976. The crew had also examined the allotments at an earlier time (A-C Tr. 73; D Tr. 13-14). On each allotment the survey crew did triangular paced transects using the ocular reconnaissance range survey method of determining plant density and species composition, and then recorded the data obtained on survey writeup sheets (A-C Tr. 75, 95; D Tr. 15, 58-59). These data were then used in conjunction with established proper use factors to calculate the carrying capacity of the allotment (A-C Tr. 96, 106). Neither the survey data sheets nor any survey report was introduced into evidence at either hearing.

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1/ The hearing transcript for the Allen/Chappell appeal will be cited as A-C Tr. The hearing transcript for the Deleeuw appeal will be cited as D Tr

When questioned as to the impact of a dry year on the survey, Zieg stated:

A. Well, the survey methodology is designed to try to give an average determination of the plants and plant density that the area contains. \* \* \*

Q Well, what I'm getting at is, you have one dry year. Will that dry year -- or, you take your survey during that dry year. Will that change the plant composition or the information that you obtain in an ocular reconnaissance survey?

A Well, if you're running a range survey in a dry year and you have plants that have been killed by that drought, you know, there are dead plants that are out there when you are running your range survey. You'd have to \* \* \* consider what that range would look like if those plants were living, to make your density determination and your specie determination combination to try to come up with an average to try to allow for that drought \* \* \*.

Q All right. Now, if you had a severe drought and no precipitation at all during the spring, your annuals would still be alive or be there, would they not?

A There would probably be some reduced annual, like Russian thistle would probably be a reduced growth on it, or not as much.

Q But perennials would normally be there?

A Normally.

Q You could see those even though they may not have had much growth?

A True.

Q So then, is it your methodology that you take that into account that the plants are there, but they may not have much growth that year?

A Yes.

Q So in that sense, there is an adjustment factor built into the methodology to account for a dry year?

A Yes.

(A-C Tr. 104-05). Zieg indicated at both hearings, however, that he had not seen any signs of drought conditions at the time the surveys were made (A-C Tr. 100; D Tr. 17).

Through the testimony of county extension agent Verl Bagley, appellants introduced evidence of precipitation levels at the Loa, Utah, reporting station in the vicinity of the allotments during the 1975-77 period. For 1975, there was a reported 6.21 inches of precipitation, a departure of minus 1.27 inches. For 1976, there was 4.11 inches, a departure of minus 3.37 inches. For 1977, there was 5.24 inches, a departure of 2.34 inches (A-C Tr. 81-83; D Tr. 23-25). When asked if he remembered the conditions in the area at this time, Bagley testified:

A If I remember, 1977 was a very dry, extremely dry year.

Q And do you recall '76 at all?

A I remember that the fall, the fall of '76, late summer and fall of '76 was extremely dry also.

(A-C Tr. 84; see D Tr. 25).

Under cross-examination at the Allen/Chappell hearing, Bagley gave his opinion that there could be a good growing season in a year of less than normal precipitation if effective precipitation occurred during the growing season, in this case the spring (A-C Tr. 89-91). When asked whether it was true that, although 1976 was one of the worst water years since the 1930's, it was a good grazing season on the public range, Bagley stated: "I know that that was the case on the Forest Service [lands]. On some of our winter ranges to the south of us" (A-C Tr. 91). At the Deleeuw hearing, the Government elicited similar testimony from Bagley. The Government established that the May 1976 precipitation level was slightly better than normal by examining the precipitation charts introduced at both hearings and also established that May was the critical growing month for cool season plants on the allotment (D Tr. 30-32).

In furtherance of their arguments that 1976 was a drought year, appellants at both hearings introduced into evidence a portion of the EIS, directing attention to page 22, which states that "[t]he 1975-1977 drought was the worst drought period in Utah since 1892." 2/ Appellant Chappell characterized the 1975-77 period as the driest his ranch had experienced (A-C Tr. 32). Appellant Allen testified that the period was dry enough for the sagebrush to die in 1977 and that it's just now beginning to come back (A-C Tr. 52-53). In answer to questions by Judge Mesch, Allen also indicated that he had not been running his full licensed use on the Federal allotment over the past 5 years because of the condition of the range (A-C Tr. 69). Appellant Deleeuw described the 1976-77 periods as very dry (D Tr. 37). He also testified, however, that he believed the forage on the allotment to be better at present than 15 years ago (D Tr. 40).

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2/ The complete Parker Mountain Environmental Impact Statement was not entered into evidence at either hearing.

At each hearing considerable testimony was taken on the relative use of the allotments by appellants' sheep and wildlife. It was established that many of the plants occurring in the region are eaten by both sheep and deer (A-C Tr. 150-52; D Tr. 15-16). Appellants Allen and Chappell asserted that the deer grazed on their private lands (A-C Tr. 28, 53-55), and appellant Deleeuw stated that there were few, if any, deer in his area (D Tr. 39). Witness Zieg indicated that a range survey is directed to the amount of available forage on the allotment, not the number of animals that are grazing a region (A-C Tr. 101-02; D Tr. 16). Carl Thurgood, team leader for preparation of the EIS, testified that consideration of wildlife use of the Neff Ranch Allotment was made in preparing the EIS (A-C Tr. 113-14).

Finally, each appellant testified that he was not consulted as to an adjustment in the carrying capacities of the allotments until after the decision to reduce AUM's was made in each case (A-C Tr. 33-34, 57; D Tr. 41). Glenn Patterson, a BLM employee, testified, however, that he met with each of the appellants in February 1980 following public presentation of the final EIS and in November or December 1980 in conjunction with the specific proposed reductions (A-C Tr. 124-25, 133-35; D Tr. 71-72).

[1, 2] Implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1976), is committed to the discretion of the Secretary of the Interior. Hugh A. Tipton, 55 IBLA 68 (1981); Kenneth H. Earp, 50 IBLA 235 (1980). Section 2 of the Taylor Grazing Act specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary \* \* \* to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a (1976). 3/ An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100. Rachel Ballow, 28 IBLA 264 (1976); 43 CFR 4.478(b).

In cases questioning the accuracy of a range survey, a determination of range capacity will not be disturbed in the absence of substantial evidence establishing error in the determination. It is not enough for a range user to show that the grazing capacity could be in error; he must also show that it is erroneous. Rachel Ballow, supra.

In each case, Judge Mesch reached the following general conclusions and then cited specific evidence supporting his conclusions.

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3/ Provisions of the Federal Land Policy and Management Act of 1976 reinforced the Federal commitment to protection and improvement of the Federal range lands. See 43 U.S.C. §§ 1751-1753 (1976).

At the hearing in this proceeding, no evidence was presented showing that a more accurate range survey, or in fact any survey, disclosed a different range capacity from that found in the Bureau's 1976 survey. No evidence was presented showing that there was any departure from prescribed procedures in conducting the 1976 range survey. Some evidence was presented in an attempt to show that the Bureau's range survey was incapable of yielding accurate information. This evidence showed that (1) the 1976 range survey was made during a 1975-1977 drought which was considered by Bureau personnel to be the worst drought period in Utah since 1892; and (2) sheep and deer consume the same plants within the allotment and the survey did not take into consideration the fact that deer feed on the adjoining land of the appellants.

The facts established by the appellants do not show that the Bureau's range survey was incapable of yielding accurate information. I cannot conclude, without some supporting reason, and there is none in the record of this proceeding, that (1) a range survey cannot properly be made during a drought period and as a consequence, any such survey is necessarily incapable of yielding accurate information; or (2) the availability of other feed for deer on other lands [or "the fact that few, if any, deer feed on the allotment"] would be a critical consideration because, for some unknown reason, it would necessarily mean that more forage would be available for sheep within the allotment.

(Judge Mesch's Decisions at 2).

After a thorough review of the evidence presented at each hearing, we find that we agree with Judge Mesch's conclusions.

In their statements of reasons, appellants make two principal arguments. First, they challenge the results of the 1976 range surveys because they were conducted during a severe drought. Second, they assert that BLM's decisionmaking was arbitrary and capricious because (1) it is based on the 4-year old range survey which was conducted under conditions which may or may not be the same as present conditions; (2) BLM made allowance for deer forage without considering whether deer were actually competing for forage on these allotments; and (3) appellants were not consulted by BLM until after the AUM allocation decisions were made. In support of these contentions, appellants note that Phil Zieg admitted that the range survey would not have taken into account any plants which did not come up at all because of drought conditions. Appellants assert that the EIS did not evaluate the impact of deer feeding on private property or the absence of grazing by deer on the public land. Finally, appellants urge that the burden imposed upon them in these appeals -- to show that the survey was incorrect -- is insurmountable. Appellants contend that they had no notice of the 1976 survey until the proposed decisions were issued in 1980, and thus they have no way of recreating the

conditions evident in 1976 so that they could obtain data to rebut the Government survey.

We have no trouble accepting appellants' contention that drought conditions to some degree existed in 1976. We have difficulty, however, in thereby accepting the argument that the results of the 1976 range survey must automatically be presumed to be in error as a result. To the contrary, as appellants seemingly recognize, there must be evidence to support such a conclusion. We recognize the difficulty of appellants not having their own 1976 surveys to rebut the BLM survey. Nevertheless appellants made no attempt to challenge the data in BLM's survey. For example, one of appellants' arguments is seemingly that the 1976 survey is out-of-date, yet appellants presented no evidence of current conditions that might tend to show the unreasonableness of basing a 1980 decision on a 1976 survey. At a minimum, we wonder why, since the BLM survey details the types of plants on the allotment, appellants did not provide a current inventory of plant life to support their allegation that certain annual plants on the allotment did not grow because of the drought and thus were missed by the BLM survey team. In addition, although precise data were presented during the hearings on precipitation levels, appellants made no attempt to relate those data to the amount of water the plants on the allotment need during the relevant seasons to exist and thrive.

The records in these appeals contain no evidence that the procedures used in making the survey or in formulating the EIS were improper, or that applicable regulations were not followed.

Finally, as testified to by Phil Zieg, the 1976 range survey was intended to determine the nature and extent of the plant life available on the allotments. Use factors for various grazing animals were then applied to determine how many AUM's of forage were available for allocation. The record indicates that in preparing the EIS prior to the decisions on appeal, BLM undertook an analysis of the competing interests of wildlife and domestic livestock. Appellants clearly thought this analysis was insufficient, but they did not provide specific evidence challenging particular data or conclusions in the EIS. The portion of the EIS in the record reflects that there were ample opportunities for local public participation in the formulation of the EIS. Although it could be argued that appellants should have been asked directly for their views on these matters because of their grazing privileges, we find it difficult to believe that they were totally unaware of what was going on in the region. The testimony of Glenn Patterson also indicates that appellants were contacted with respect to the impact of the final EIS on their individual grazing privileges.

We conclude that appellants have not shown by substantial evidence that the decrease in their grazing privileges is arbitrary and capricious or that any violation of the Federal range code has occurred.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 30, 1981, decisions of Administrative Law Judge Robert W. Mesch are affirmed.

Bernard V. Parrette  
Chief Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

