

JOHN ESPIL

IBLA 81-470

Decided July 9, 1982

Appeal from the decision of Administrative Law Judge E. Kendall Clarke dismissing an appeal from the Bureau of Land Management's rejection of his grazing application N2-80-5.

Affirmed.

1. Administrative Procedure: Administrative Review -- Grazing and Grazing Lands -- Grazing Permits and Licences: Appeals

Where facts and law are properly set forth and applied in Administrative Law Judge's decision dismissing an appeal from the BLM District Manager's rejection of appellant's grazing application, and appellant has made no showing that the decision is in error, the decision may be adopted by the Board of Land Appeals and affirmed.

APPEARANCES: Craig M. Kellison, Esq., Susanville, California, for appellant; James E. Turner, Esq., Office of the Regional Solicitor, for the Government.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

John Espil has appealed from a February 26, 1981, decision of Administrative Law Judge E. Kendall Clarke, dismissing his appeal from the Bureau of Land Management's (BLM) Winnemucca Grazing District Manager's decision rejecting his application for grazing use for 1,000 sheep from June 15, 1980, to October 15, 1980, in the Buffalo Hills Allotment.

A hearing was held before Judge Clarke on November 19, 1980, in Winnemucca, Nevada. From the evidence presented, the Judge concluded that the rejection of the application was proper, consistent with standard grazing management practices, and supported by the record.

[1] We have thoroughly reviewed the record of this case and the arguments advanced by the parties. Judge Clarke's decision sets out a full summary of the testimony, the relevant evidence, and applicable law. We agree

with the Judge's findings and conclusions and adopt his decision as the decision of the Board. A copy of the Judge's decision is attached as Appendix A.

Appellant takes issue with the Judge's conclusions without presenting anything new on appeal. His brief on appeal is merely a reiteration of the arguments considered below. He contends that the issues presented for our review are identical to those raised before Judge Clarke, and therefore, he incorporates his opening and reply briefs as his statement of reasons. We find that the Judge's decision fully responds to appellant on these points and that further discussion is therefore not necessary.

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.

Gail M. Frazier
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

APPENDIX A

February 26, 1981

John Espil : Grazing Appeal
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 Appellant : N2-80-5
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DECISION

Appearances: Craig M. Kellison, Attorney
 Susanville, California
 for the Appellant

James E. Turner, Attorney,
 Office of the Regional Solicitor
 U.S. Department of the Interior
 for the Appellee.

Before: Administrative Law Judge Clarke.

Appellant John Espil of Espil Sheep Company has appealed from the March 27, 1980 decision of the District Manager of the Winnemucca Grazing District for the Bureau of Land Management. The District Manager rejected the appellant's request for a grazing use for 1,000 sheep from June 15, 1980 to October 15, 1980 in the Buffalo Hills Allotment. A hearing was held on November 19, 1980.

The appellant argues that several areas that have been closed to grazing can currently support the number of AUMs applied for. In particular, he contends that the Horse Closure area has a capacity of 15,000 sheep AUMs. Furthermore, he asserts very few horses actually graze in that area. Concerning the Granite Mountain Fire Rehabilitation Project, the appellant believes the vegetation there has re-established itself since the time of its closure. Consequently, he requests that the area be re-opened for grazing.

The District Manager's decision was based on the fact that there are two areas closed to livestock grazing in the Buffalo Hills Allotment. The first closure, known as the Horse Closure, commenced on April 30, 1978. The second closure, referred to as the Granite Mountain Fire Rehabilitation Project began on June 13, 1975. These closures were implemented in accordance with 43 CFR 4120.3 which states in part:

When the authorized officer determines that the soil, vegetation, or other resources on the public lands require protection because of drought, fire or for other similar reasons, he shall temporarily close allotments, or portions of allotments, to grazing by any kind of livestock and for any period of time.

Mr. Gerald Smith, Supervising Range Conservationist of the Winnemucca District Office of the Bureau of Land Management, was called to testify. His testimony was that Mr. Espil was never granted any grazing preferences in the Buffalo Hills Allotment. A Notice of Closure for the Granite Mountain Fire Rehabilitation Project, dated June 6, 1979, stated that the closure "will remain in effect until such time as a detailed evaluation indicates that the height of the quaking aspen, willow, and chokecherry reach a minimum of five feet in at least 80 percent of the critical wildlife habitat areas. These evaluations will be made on an annual basis." (Ex. 3). A similar notice was issued for the Buffalo Hills Allotment, dated June 6, 1979 to remain in effect until a detailed evaluation determines the key perennial forage species have recovered from over-utilization. In particular the notice recited, "[d]uring the remaining period of this closure, the evaluation will consider that the key species must have regained the necessary vigor for approximately 50 percent of the plants to produce seed and that reproduction is occurring." (Ex. 4). The Granite Burn Closure Area was inspected on June 27, 1979, and Eugene A. Dahlem recommended that the area remain closed to grazing. (Ex. 5). An evaluation of the Buffalo Hills Horse Closure Area was made on September 27 and 28, 1979. Key species of plants were examined and the findings were that they were low in vigor and reproduction. Overall range condition was poor to fair. The recommendation was made to keep the area closed. (Ex. 6).

Mr. Espil sought permission to graze 1,000 sheep on the Granite Mountain Range near Granite Peak. In Mr. Smith's opinion, Mr. Espil's application would have been rejected because he had no preference in that allotment and also because the area was closed.

Mr. Eugene A. Dahlem, Wildlife Management Biologist with the Bureau of Land Management, explained that "critical wildlife habitat area" refers to stands of Quaking Aspen, willow and chokecherry. (Tr. 36). Each stand was examined and most needed to be five feet in height. This height

requirement was needed so as to insure that the stands would survive in light of the grazing use. The height would make the stands less attractive for cattle to graze. Mr. Dahlem testified that the Granite Range is an important wildlife area. Mule deer, antelope and bighorn sheep are native to the area. (Tr. 37).

In 1979, Mr. Dahlem conducted a review of the Granite Burn Closure area. A similar review was carried out in the summer of 1980. Bighorn sheep were introduced in the closure area in March, 1980. The environment of the bighorn sheep conflicts with the grazing use. (Tr. 39).

Upon further questioning, Mr. Dahlem acknowledged that only 4,000 acres were burned in the Granite Closure Area despite the fact that 32,000 acres were closed to grazing. He justified this acreage closure because the existing fences and natural barriers were used to determine the boundaries of the closure. (Tr. 44).

Brad Hines, Area Manager, Sonoma-Gerlach Resource Area, which contains the Buffalo Hills allotment, testified that Mr. Selmi, Mr. Jackson and Mr. Casey are currently exercising their grazing privileges in the Buffalo Hills Allotment. Mr. Casey's grazing privileges have been reduced in two separate actions by the Bureau of Land Management. (Tr. 57). Approximately 15,000 sheep AUMs have been revoked from Mr. Casey's grazing privileges. Over 5,000 AUMs were in the Buffalo Hills Allotment. (Tr. 59).

Mr. Hines estimated the carrying capacity of the Buffalo Hills Allotment. His range survey determined that the open grazing areas will support 9,789 AUMs. Currently, the authorized grazing use exceeds the capacity. (Tr. 61). There is no additional forage available there. Prior to granting grazing authorization to a new applicant, there must be additional forage available. (Tr. 62). Mr. Hines further explained that the area open to grazing is authorized beyond its capacity. (Tr. 65). In the summer of 1980, a subsequent range inspection was conducted and a recommendation made that the Granite Mountain Fire Rehabilitation Area be open to cattle grazing. (Tr. 69). It was recommended, nonetheless, that it should not be open for sheep grazing. The grazing capacity for the Granite Mountain Burn Closure area for four months during the summer is 5,800 AUMs. (Tr. 72). The current range users graze cattle there that consume all the available forage that is authorized. (Tr. 73).

The Bureau of Land Management's policy is to prohibit the grazing of sheep in the Buffalo Allotment Area. (Tr. 77). Additionally, the number of horses in that area is also being restricted. These policies were established to restore the condition of the range which had been depleted by an over-population of horses. (Tr. 77). Further inquiry revealed that Mr. Espil could have been granted 800 sheep AUMs on the northeastern slope of the Granite Mountains and it would have been outside the horse closure area, absent any conflicts. (Tr. 78). However, in 1975, a Habitat Management Plan set forth the recommendation for the re-introduction of bighorn sheep into the Granite Range. Therefore, no domestic sheep would be allowed grazing privileges. (Tr. 82).

Mr. John Martin Espil testified he ran 5,000 head of sheep on the Granite Range for five years. He believes it is one of the best sheep ranges he knows of. (Tr. 84). He wishes to graze sheep in the Granite Hills. He has no desire to use the horse closure or burn closure areas. (Tr. 85). He has flown over the Granite Range in a plane and has observed bighorn sheep in the horse allotment. (Tr. 86). Mr. Espil believes there would be no conflict with grazing domestic sheep in an area inhabited by bighorn sheep. (Tr. 87). He believes there is feed for sheep although forage has been allocated to other cattle ranchers in the Granite Mountain Range. (Tr. 90).

Mr. Martin Larraneta, who ran sheep in the Granite Mountain Range for 10 years, was called to testify on behalf of the appellant. He testified that there was sufficient forage back in the 1950s to graze 10,000 head of sheep there. (Tr. 98). He stated the horse closure area does not have many wild horses because the western part of Granite Mountain is rough and rocky. (Tr. 99). Mr. Larraneta inspected the Granite Peak area in July, 1980 and found the forage good as it ever was. (Tr. 100).

Mr. John Russell Espil, Jr., from Susanville, California, testified he is familiar with the Granite Range. He has flown over the range looking for stray sheep for the last three years. (Tr. 118). He has spent 50 air hours searching for stray animals in the Buffalo Hills Allotment. He inspected the Granite Range in June and July of 1980. He found the range in better condition than before. (Tr. 119). Sheep can be grazed in the Granite Range and also be outside of the horse closure or burn closure. (Tr. 120).

Mr. Joel Burger, a zoologist with the Smithsonian Institute, was called as a rebuttal witness by the Government. (Tr. 124). He is currently conducting a study on the population of wild horses in the Granite Range. This study began in 1979. Mr. Burger disagrees with Mr. Espil's conclusion that domestic sheep do not have an adverse affect on bighorn sheep population. Domestic sheep can transmit diseases. (Tr. 127). In addition, wild horses and sheep would compete for the available forage in the Granite Peak area. (Tr. 129). Prior to making an assessment of the carrying capacity of a range, more than photographs must be analyzed. (Tr. 131). A quantitative analysis must be made.

Determination

A decision reached in the exercise of administrative discretion relating to the adjudication of grazing privileges may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. Bert N. Smith, et al. v. Bureau of Land Management, 48 IBLA 385 (1980); Calvin Cattle Co., Inc., 39 IBLA 176 (1979).

Implementation of the Taylor Grazing Act of June 24, 1934, as amended, 43 USC sec. 315-315f, 315h-315m, and 315n (1976), is committed to the discretion of the Secretary of the Interior. Section 2 of the 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. Bert N. Smith, et al., 48 IBLA 385 (1980).

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 Districts. 43 CFR 4.478(b); Rachel Ballow, 28 IBLA 264 (1976). The burden is upon the appellant to show by substantial evidence that a decision is improper or that he has not been dealt with fairly. Bert N. Smith, supra; John T. Smith, 19 IBLA 97 (1975).

The appellant has failed to establish that the District Manager's decision to deny them grazing privileges in the Buffalo Hills Allotment is arbitrary or not supported by any rational basis. I shall not substitute my judgment for that of the District Manager, whose expertise in the area

is greater than mine. Nonetheless, my analysis of the evidence leads to a conclusion that the two closure areas within the Buffalo Hills Allotment should remain closed until a time the District Manager sees that the area has been rehabilitated. There are multiple uses of the range to be considered in setting grazing allotments. The District Manager did not act in an arbitrary manner in rejecting the appellant's grazing application. Although I am aware that the Granite Fire Rehabilitation Area has been closed for many years the District Manager may manage it according to the discretion granted to him so long as there is no abuse of that discretion. It appears that parts of the Granite Range have been rehabilitated. Nevertheless, this was the intended purpose of keeping the range closed for several years. Consequently, the management practices have produced successful results. Since the area has multiple uses, it is reasonable that the District Manager set forth standards prior to allotting any further grazing privileges. Since these standards have not been met, I find that the District Manager acted properly in denying the appellant's grazing application where his decision was based on recent inspections of the range.

For the reasons stated above the appeal is hereby dismissed.

E. Kendall Clarke
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the Contestant whose name and address appear below. Additionally, rules that became effective September 24, 1980 state that, the Regional, or Field Solicitor of the Department of the Interior whose address is below, must be served with a copy of the notice of appeal and any statement of reasons, written arguments, or briefs.

Enclosure: Additional information concerning appeals.

Distribution attached.

