

HAROLD J. HEATH  
LAWRENCE WALKER

IBLA 81-931

Decided May 23, 1983

Appeal from decision of Administrative Law Judge Michael L. Morehouse affirming a decision of the District Manager, Boise District, partially rejecting an exchange-of-use application. IDAHO 01-80-1.

Affirmed.

1. Grazing Permits and Licenses: Exchange of Use

The District Manager has discretion to grant or reject an exchange-of-use application. Where the District Manager considers the equities on both sides of a dispute involving an exchange-of-use application and partially grants the application, his decision will not be disturbed on appeal if it is reasonable, within the scope of his authority, and comports with sound management practices.

APPEARANCES: Harold J. Heath and Lawrence Walker, pro sese; Gerald L. Weston, Esq., for Chipmunk Grazing Association; Robert S. Burr, Esq., Office of the Solicitor, Boise Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Harold J. Heath and Lawrence Walker appeal from a decision of Administrative Law Judge Michael L. Morehouse, dated July 13, 1981, affirming a July 1, 1980, decision of the Acting District Manager, Boise District Office, Bureau of Land Management (BLM), partially rejecting an exchange-of-use application filed by the Chipmunk Grazing Association (Chipmunk).

Chipmunk appealed from the Acting District Manager's decision and a hearing was held before Judge Morehouse on February 24, 1981, in Boise, Idaho. Heath and Walker appeared as intervenors. The Judge summarized the pertinent facts as follows:

Chipmunk Grazing Association is a corporation formed in 1967 for the purpose of purchasing and operating grazing land in the Owyhee District. It controls approximately [sic] 34,800 acres, 16,990 of which are owned, the remainder being

under private or state lease. Prior to 1970, the area in question (see Ex. G-1) was grazed in common by appellant, Mr. Walker and Mr. Heath's predecessor-in-interest. In 1972, appellant and intervenors together with a number of other licensees agreed to the Hardtrigger Allotment Management Plan (Ex. G-2), part of which delineates the use to be made of the Rats Nest and Shares Basin Allotments. Appellant owns some private land and leases a State-owned section in the Shares Basin Allotment (see Ex. G-1), which presently generate 86 AUMs [animal unit months]. Under the Allotment Management Plan appellant agreed to use the Rats Nest Allotment exclusively except for trail use across Shares Basin, it being understood that those AUMs that were not used up in trail use could be used on an exchange-of-use basis in Rats Nest.

Pursuant to this understanding, between 1972 and 1979 appellant was granted an exchange-of-use license in Rats Nest for its Shares Basin AUMs. However, by decision dated May 7, 1979, BLM rejected appellant's exchange-of-use application for the use of the Shares Basin AUMs in Rats Nest because the lands offered by appellant as a basis for the exchange of use application were not located within the exterior boundaries of Rats Nest. The regulation in pertinent part in effect at that time, 43 CFR 4130.4-1, had been changed to read:

An exchange-of-use grazing agreement may be issued to any applicant who owns or controls lands within the exterior boundaries of the allotment in which the land offered in exchange-of-use is located. An exchange-of-use agreement may be issued to authorize use of public land within the allotment to the extent of the livestock grazing capacity of the land offered in exchange-of-use. \* \* \*

BLM interpreted this regulation to require that exchange-of-use licenses could only be issued to users within an allotment in which the land offered in exchange-of-use is located. Appellant appealed that decision and a hearing was held at Boise, Idaho, on November 6, 1979. During the course of that hearing (case number IDAHO 1-79-4), appellant was informed by BLM that although exchange-of-use across allotment lines could no longer be permitted, appellant could use its grazing privilege in the Shares Basin Allotment if it would make proper application. That portion of the appeal was therefore dismissed and by letter dated March 3, 1980, appellant proposed three alternatives to use its Shares Basin AUMs in an exchange-of-use agreement:

1. Trail use through Shares Basin Allotment, May 29, 30 and 31, for 402 head, and 55 head from May 24 to July 9.

2. Trail use through Shares Basin Allotment, May 29, 30 and 31, for 370 head, and 32 head from April 1 to July 9, 1980, in all three fields in the above allotment.

3. Trail use through Shares Basin Allotment, May 29, 30 and 31, for 402 head, and any other arrangement that the Bureau of Land Management will accept whereby Chipmunk Grazing Assn., Inc., can obtain the use 117 AUMs in the Shares Basin Allotment.

In response to this, the District Manager issued a proposed decision to approve trail use through Shares Basin with the cattle licensed in Rats Nest not to exceed three days. The remaining use applied for was rejected as being in conflict with the Allotment Management Plan. Appellant protested this proposed decision and a final decision was issued by the District Manager on July 1, 1980, the decision at issue, which provided:

Approve - Trail use through Shares Basin and Squaw Creek pastures with the cattle licensed in the Rats Nest Allotment not to exceed two (2) days. Trail use must be made prior to May 21 on odd numbered years.

Approve - Grazing use in the Shares Basin Pasture in accordance with the Allotment Management Plan Use Schedule to the extent of the available forage in excess of that required for trail use. Trail use and grazing use will not exceed 86 AUMs\* as per current forage inventory. As forage inventory data is updated, the total number of AUMs authorized will be adjusted.

Approved use is as follows:

1980 - Trail use only (two days).

1981 - Trail use (two days) plus grazing use for the amount of forage produced in excess of that needed for the two days trail. Use will be between May 21 and July 9. The number of cattle licensed will be dependent upon amount of trail use taken.

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\* 1980 range survey on state section (54 AUMs) plus 32 AUMs on private land as requested in Exchange-of-Use Application dated 3/03/80.

1982 - Same as 1980. This schedule will be followed on even numbered years.

1983 - Same as 1981. This schedule will be followed on odd numbered years.

Reject - Fifty-five (55) head of cattle from May 24 to July 9 in Shares Basin Allotment and trail use for one day.

Reject - Thirty-two (32) head of cattle from April 1 to July 9 in Shares Basin Allotment and trail use for one day.

At the outset of the hearing, the parties thus focused on the issue involved: There are 54 AUM's of exchange rights on the state section leased by Chipmunk and 32 AUM's on private lands owned by Chipmunk for a total of 86 AUM's of exchange-of-use. There is no dispute over the 27 AUM's for trail use. The controversy centers on where Chipmunk should use the remaining 59 AUM's to which it is entitled (Tr. 12-13).

Oscar Anderson, Owyhee Area Manager, testified for BLM and the following relevant evidence was adduced: The exchange-of-use allowance was not spelled out in the range line agreement portion of the allotment management plan (AMP), although it was inferred (Tr. 24). It was understood by the parties concerned with the AMP that each rancher would have his or its own allotment to use (Tr. 24). The AMP specified that Chipmunk would use Rats Nest and Heath and Walker would use Shares Basin. However, BLM felt it could not allow the exchange-of-use in Rats Nest as requested in Chipmunk's application because of the change in the regulation, and allowed a portion of the use in Shares Basin (Tr. 24-25). Subsequently, the regulation was changed again and would allow an exchange-of-use in Rats Nest (Tr. 25-26). <sup>1/</sup> If Chipmunk applied for an exchange-of-use in Rats Nest, BLM could allow it, but BLM would reduce the Federal privileges so that it would not over obligate the Rats Nest pasture. In other words, Chipmunk's AUM's would be reduced. According to Anderson, the condition of Rats Nest has "probably gone downhill from what it was in '72" (Tr. 26).

It is BLM's position that, due to further study and information that has been made available, it appears that the district was incorrect in 1978 in rejecting the association's exchange-of-use application, in spite of the change in regulation (Tr. 61-62). The district has agreed that the Hardtrigger AMP did provide for this exchange-of-use whereby the AUM's on the private and state lands in the Shares Basin allotment were to be given

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<sup>1/</sup> 43 CFR 4130.4-1(b) (1980) reads as follows:

"(b) The lands offered for exchange-of-use shall be within the exterior boundaries of the allotment to be used, except that lands outside such boundaries may be included where it would otherwise meet specific objectives identified in a land use plan or allotment management plan."

the exchange-of-use in Rats Nest (Tr. 62). Anderson stated that any additional AUM's in Shares Basin should be allowed to the permittees (Heath and Walker) in the allotment to activate suspended nonuse that they have been carrying since before 1967 (Tr. 31, 68).

Anderson testified that the Shares Basin Allotment which is used by Heath and Walker consists of three pastures: Shares Basin pasture, Ion pasture, and Squaw Creek pasture (Tr. 20-21). Shares Basin is used under a rotation grazing system whereby Squaw Creek field is used from July 9 to September 30 every year and Ion field and Shares Basin field are used from May 21 until July 9 in alternate years (Tr. 22-23). The purpose of alternating the spring use is to allow the forage plants or grass plants to maintain strength and to set seed every other year. The condition of these fields has improved to a point where they are in a "fair condition" class (Tr. 23). There was no rotation system devised for Rats Nest (Tr. 38).

Adam H. Blackstock, secretary-treasurer of Chipmunk, testified on behalf of Chipmunk concerning the following: Regarding the water situation in Rats Nest, there is "good water" on the east side, but no water at all on the west side, with the exception of Rosebud spring, which is very intermittent (Tr. 127). Chipmunk signed the Hardtrigger agreement with the understanding that it would operate in Rats Nest, but as a condition to moving to Rats Nest, Chipmunk was promised that water would be developed (Tr. 128-129). BLM constructed a fence on the west side of Rats Nest in 1980 and Chipmunk had requested that it not be completed until water was made available on the west side Tr. 128-129). Because of the fence, the east side of Rats Nest is utilized to its full extent, particularly around the water (Tr. 130).

Richard Bass, a member of Chipmunk, who was active in the negotiations prior to the AMP, also testified that it was his understanding that as a condition to giving up rights in Shares Basin and going into Rats Nest, there would be some development of water in that area (Tr. 145-46). BLM has tried to develop two springs; the Dick Bass Spring which is not very good and the Upper Rats Nest Spring, a spring which is good, but only in a limited area (Tr. 147-48).

Heath testified that when he acquired his interest in the area in 1973, he believed that his interest would be governed by the range line agreement of 1972 (Tr. 178). Heath said he was under the impression that Chipmunk was qualified for exchange-of-use in Rats Nest, but not Shares Basin (Tr. 110-11). He understood that the only way the agreement could be changed was by agreement of all three parties -- himself, Walker, and Chipmunk, and he is against BLM's decision changing that agreement (Tr. 179-80). Heath said that he and Walker have worked with BLM to improve the allotment and now the grass in Shares Basin has improved (Tr. 181).

Walker testified that when he entered into the AMP, he understood he was given "somewhat of a private allotment in the Shares Basin" (Tr. 168).

He testified that there was no objection to that portion of the District Manager's decision granting Chipmunk trail use across Shares Basin (Tr. 162).

Judge Morehouse stated that the burden was on Chipmunk and/or the intervenors to show by a preponderance of the evidence that the decision complained of was arbitrary and unreasonable. The Judge concluded that the decision of the District Manager was not arbitrary and unreasonable, and that BLM was "trying to strike a middle ground between two views and to resolve a dispute for which it is responsible at least in the first instance."

Heath and Walker appealed the Judge's decision. Their statement of reasons, which in essence asserts that Chipmunk should exercise its exchange use in Rats Nest rather than in Shares Basin, reads as follows:

1. The Hardtrigger Rangeline Agreement states, that Chipmunk Association would make all use in Rat's Nest Allotment. Their appeal verifies this intention. See AMP and Chipmunk Grazing Association Appeal, dated July 28, 1980. [2/]

2. The Hardtrigger Rangeline Agreement established allotments based upon qualifications at 9 acres per AUM. The Shares Basin allotment was allocated at 7.1 acres per AUM, which indicates an allowance may have been made for the exchange-of-use to be made elsewhere by Chipmunk. See AMP and District Manager's Memo of May 8, 1980.

3. Shares Basin Allotment has been in a rotation grazing system since 1972. The allotment has improved to the extent that suspended non-use may be activated. The permitties [sic] with qualifications in the allotment should receive the increase.

4. Sorting a small bunch of cattle out of the main herd in mid July will be a hardship on the livestock and the operators. There are no sorting corrals or other holding facilities. The weather is too hot to work cattle without loss of weight and possible injury. Dust pneumonia is a possibility during this dry period. See District Manager's Proposed Decision, Dated Mar. 20, 1980.

Chipmunk filed a motion to dismiss the appeal. In support of its motion Chipmunk asserts that the Judge's decision of July 13, 1981, affirms the District Manager's decision of July 1, 1980; that the intervenors did not file a notice of appeal from the District Manager's decision; that the

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2/ In its notice of appeal dated July 28, 1980, Chipmunk stated, "The Hardtrigger Allotment Plan is based on a plan of use which would isolate the Chipmunk Grazing people into a separate area."

intervenors have no basis to appeal the decision of the Administrative Law Judge which merely affirms the District Manager's decision.

In its response, BLM asserts that the utilization of the exchange-of-use AUM's by Chipmunk has no adverse effect on the appellants since they are AUM's used in exchange for AUM's that are within the Shares Basin Allotment. BLM states that these AUM's must be used in accordance with the grazing schedule set up for Shares Basin, so their use does not interfere with the grazing schedule in the area. BLM contends that the District Manager's decision does not prohibit appellants from enjoying an increase in forage that has been generated by the rest-rotation grazing system. BLM explains that the decision allows Chipmunk to utilize the AUM's on its private and leased lands within Shares Basin on an exchange-of-use basis and does not grant Chipmunk any forage on Federal lands on the basis of an increase in grazing capacity on the Federal lands. BLM admits that there will be a problem separating the livestock, but feels confident that the livestock people can handle the situation.

We will first consider Chipmunk's motion to dismiss. The District Manager's decision of July 1, 1980, partially rejected Chipmunk's exchange-of-use application. Chipmunk requested a hearing and Heath and Walker intervened. As intervenors, they were parties to the case. 43 CFR 4.410 provides that any party to a case who is adversely affected by a decision of an Administrative Law Judge has the right to appeal to the Board. We find that Heath and Walker are parties adversely affected by the Administrative Law Judge's decision within the meaning of 43 CFR 4.410, and are entitled to appeal to this Board notwithstanding the fact that the Judge's decision affirmed the District Manager's decision. The District Manager's decision was directed to Chipmunk and therefore Heath and Walker were not required to appeal that decision in order to preserve their right to further appeal.

[1] The Department has defined exchange-of-use as a method adopted by the Department which permits a livestock operator having ownership or control of non-Federal land interspersed and normally grazed in conjunction with the surrounding Federal range to agree with the grazing officials that he may graze on the surrounding land to an extent not to exceed the grazing capacity of his land in consideration of his granting to the Bureau the management and control of his land for grazing purposes. Alton Morrell and Sons, 72 I.D. 100 (1965). 43 CFR 4130.4-1(a) provides that "[a]n exchange-of-use grazing agreement may be issued to any applicant who owns or controls lands which are unfenced and intermingled with public lands when use under such an agreement would be in harmony with the management objectives for the allotment." The District Manager has the discretion to reject an exchange-of-use application. See Ball Brothers Sheep Co., 2 IBLA 166 (1971); Alton Morrell and Sons, supra.

The District Manager exercised his discretion in partially granting the exchange-of-use application and his action was not unreasonable. He weighed the equities on both sides and attempted to reach a solution that

would allow Chipmunk to use the 59 AUM's to which it was entitled without depriving appellants of their grazing privileges.

Appellants object to the exchange-of-use in Shares Basin granted to Chipmunk in BLM's decision because the Hardtrigger Rangeline Agreement provides that Chipmunk's use be confined to Rats Nest. Appellants assert that the fact that the Hardtrigger agreement established allotments based upon qualifications at 9 acres per AUM and the Shares Basin allotment was allocated at 7.1 acres per AUM indicates that additional acreage was allowed to compensate for exchange-of-use lands. While this may be true, the agreement did not provide for the exchange-of-use (Tr. 45-46). Although the agreement does not specifically deal with the exchange-of-use issue, the testimony at the hearing shows that both appellants and Chipmunk understood the agreement to mean that Chipmunk's use would be confined to the Rats Nest allotment. At the hearing, BLM admitted that, based on the AMP, it was in error to reject Chipmunk's application for an exchange-of-use in Rats Nest in 1978. Notwithstanding the fact that the District Manager's decision of July 1, 1980, also goes against the AMP in granting Chipmunk's exchange-of-use in Shares Basin, we find that this was a fair way for BLM to allow Chipmunk to use its 59 AUM's. <sup>3/</sup> Granting the exchange-of-use in Rats Nest in 1980 would not have been beneficial to Chipmunk as the area is overgrazed and privileges there would be reduced. The 59 AUM's granted to Chipmunk are in exchange for AUM's in the Shares Basin allotment. Appellants have not shown this is adverse to their interests.

BLM's denial of the exchange-of-use in alternate years favors appellants. Partial rejection of the exchange-of-use in Shares Basin is harmonious with the intent of the AMP. BLM denied the application because Chipmunk had applied for more than 86 AUM's and because the area and times requested by Chipmunk did not coincide with the grazing schedule in Shares Basin (Tr. 94). BLM also denied use in the alternate years because it felt that any additional use in the Shares Basin should be allowed to those who have grazing privileges there until their suspended use of AUM's is activated. Appellants are still carrying 607 AUM's of suspended nonuse in Shares Basin (Tr. 31-32). 43 CFR 4110.3-1, the regulation dealing with additional forage, provides in pertinent part as follows:

(b) Additional forage permanently available for livestock grazing use shall first be allocated in satisfaction of grazing preferences to the permittee(s) or lessee(s) authorized to graze in the allotment in which the forage is available.

(c) Additional forage permanently available for livestock grazing use over and above the preference(s) of the permittee(s) or lessee(s) in an allotment may be allocated in the following priority to:

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<sup>3/</sup> An AMP may be revised by an authorized officer of BLM 43 CFR 4120.2-3. Objection of a grazing user who is a party to the AMP will not preclude modification of the plan by BLM based on a reasonable finding that the plan is inconsistent with BLM objectives and good range management. Bert N. Smith v. BLM, 48 IBLA 385 (1980).

(1) Permittee(s) or lessee(s) in proportion to their preferences or in proportion to the permittee's or lessee's contribution or efforts which resulted in increased forage production \* \* \*.

Appellants assert that they should receive any increase in forage generated by the rest rotation system. The District Manager's decision allows Chipmunk to utilize the AUM's on its private and leased lands. It does not grant Chipmunk any forage on Federal lands on the basis of an increase in grazing capacity on Federal lands.

The District Manager also took into account the fact that, if Chipmunk were allowed to run every year, the area used and the time of use would not coincide with appellants' grazing system since appellants run every other year (Tr. 94).

We understand that sorting the cattle will cause an inconvenience to appellants but appellants have not submitted any proof that it would be impossible to sort the cattle without injury.

We concur with Judge Morehouse's finding that appellants did not sustain their burden of proof that the District Manager's decision was arbitrary and capricious. Having reviewed the evidence we find that the District Manager's decision comports with sound range management. The District Manager's decision to partially grant and partially reject the exchange-of-use application is reasonable, within the scope of his authority, and will not be disturbed. See Balls Brother's Sheep Co., supra at 170; Alton Morrell and Sons, supra at 107, 108.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is affirmed.

Anne Poindexter Lewis  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

