

Editor's note: Appeal filed Civ.No. 94-578 TUC RMB (D.Ariz. Aug. 23, 1994), dismissed, (May 19, 1995), appeal filed, No. 95-16109 (9th Cir. May 30, 1995), aff'd, (March 17, 1997). See also: Klump v. U.S., No. 94-309C (Fed.Cl.); 38 Fed.Cl. 243 (June 23, 1997).

WAYNE D. KLUMP
v.
BUREAU OF LAND MANAGEMENT

IBLA 93-559

Decided August 4, 1994

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., affirming in part and reversing in part a final decision of the Area Manager, San Simon Resource Area, Arizona, Bureau of Land Management, cancelling grazing permits and preferences and assessing trespass damages. AZ-040-93-01.

Affirmed in part, affirmed as modified in part, and reversed in part.

1. Grazing Permits and Licenses: Trespass

A grazing trespass appealed by the livestock owner will be upheld where the livestock were grazed on a permit issued to a third party without filing with BLM a document transferring control of the livestock to the permittee and specifying the brand, numbers of livestock, and anticipated periods of use as required by BLM.

2. Grazing Permits and Licenses: Trespass

A finding of trespass against a livestock owner grazing his cattle on an allotment permitted to a third party will be upheld where the grazing permit is applied for on an annual basis, the permit for the current season authorizes grazing of cattle bearing the brand of the permittee, and no control document for the current season transferring control from the livestock owner to the permittee specifying the brand, numbers of livestock, and anticipated periods of use has been filed with BLM.

3. Grazing Permits and Licenses: Hearings--Grazing Permits and Licenses: Trespass

A finding of a grazing trespass will be affirmed where it is supported by a preponderance of the evidence introduced at a hearing.

4. Grazing Permits and Licenses: Hearings--Grazing Permits and Licenses: Trespass

Hearsay evidence is admissible in a grazing trespass hearing if it is relevant and material.

5. Grazing Permits and Licenses: Trespass

A trespass will be considered willful where the evidence objectively shows that the circumstances did not comport with a finding that the trespasser acted in good faith or innocent mistake.

6. Grazing Permits and Licenses: Hearings--Grazing Permits and Licenses: Trespass

The procedures at 43 CFR Subpart 4150 for giving notice to the owner of livestock grazing without authorization in violation of 43 CFR 4140.1(b)(1); ordering removal; and for impounding unauthorized livestock are properly distinguished from the procedures for adjudicating an alleged trespass and the amount of damages under 43 CFR Subpart 4160 and for assessing penalties under 43 CFR Subpart 4170. Although proposed and final decisions subject to appeal for a hearing before an Administrative Law Judge are required to adjudicate an alleged trespass and assess damages or penalties, these are not a prerequisite to notice and impoundment of livestock grazing without authorization.

7. Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Hearings--Grazing Permits and Licenses: Trespass

Prohibited acts of unauthorized grazing in violation of 43 CFR 4140.1(b) are subject to civil penalties. The regulation at 43 CFR 4170.1-1(b) requires BLM to suspend or cancel, in whole or in part, grazing use authorized under a grazing permit and grazing preference for repeated willful violations of 43 CFR 4140.1(b)(1) including grazing without a permit or in violation of the terms of a permit.

8. Grazing Permits and Licenses: Cancellation or Reduction

In assessing the propriety of cancelling a grazing permit and preference in whole or in part, a "severe reduction" in grazing privileges (i.e., a permanent loss of privileges or a temporary loss of significant privileges for a period of years) may be imposed where the trespasses were both repeated and willful; involved fairly large numbers of animals; occurred over a fairly long period of time; and often involved a failure to

take prompt remedial action upon notification of the trespass. Any mitigating circumstances are also properly considered.

APPEARANCES: Steven Weatherspoon, Esq., Tucson, Arizona, for Wayne D. Klump; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Cross appeals have been filed by Wayne D. Klump and the Bureau of Land Management (BLM) from a June 23, 1993, decision of District Chief Administrative Law Judge John R. Rampton, Jr., affirming in part and reversing in part the September 14, 1992, final decision of the Area Manager, San Simon Resource Area, Arizona, BLM. The BLM decision had cancelled Klump's grazing permits and preferences in the Little Doubtful (No. 50610) and Simmons Peak (No. 51280) grazing allotments because of eight separate incidents of trespass over a period from January 1991 through June 1992. 1/ The BLM decision also assessed damages for certain of the trespass incidents. 2/

The present case concerns BLM's adjudication of a series of alleged grazing trespasses by appellant's cattle on various allotments in which either grazing permits or preference rights were held by appellant, his brothers, or members of their immediate families. 3/ The grazing trespass violations on which the BLM decision was based are of three basic types: grazing cattle on an allotment for which the grazing permit or preference right is held by another, failure to comply with ear-tagging requirements when grazing cattle, and grazing without authorization when no permit had issued.

According to the record, the Klump family had historically grazed their cattle collectively on their several allotments as part of a family operation (Tr. 71-73, 443-47). Beginning in January 1991 BLM sought to have the

1/ The eight trespass incidents are identified by the following trespass case numbers appearing on the notice of trespass issued by BLM to the operator: AZ-040-3-247; AZ-040-3-250; AZ-040-3-252; AZ-040-3-254; AZ-040-3-255; AZ-040-3-257; AZ-040-3-261; AZ-040-3-262. The trespasses are hereinafter cited by the last three digits of the trespass number. Trespass 247 was previously upheld by the Board, upon appeal from an Oct. 9, 1991, decision by Administrative Law Judge Ramon M. Child, in Wayne D. Klump v. BLM, 124 IBLA 200 (1992), and thus the validity of that trespass was not at issue in Judge Rampton's June 1993 decision. See Decision at 1-2.

2/ The Area Manager assessed trespass damages in the case of three trespass incidents, referred to as 250 (Willful - \$2,121.46), 252 (Repeated willful -\$7,034.63), and 257 (Repeated willful - \$826.45).

3/ Certain of the trespasses involved unauthorized grazing on lands not subject to a valid grazing permit, although the grazing preference right was held by a member of the Klump family at the time. For the sake of clarity, references in this opinion to "Klump" refer to appellant Wayne Klump. Appellant's brothers and other members of his family are identified by their full names.

Klump family bring this practice into compliance with the grazing regulations. Specifically, by letter dated January 15, 1991, the Area Manager informed Klump that he would be permitted to graze his branded cattle on an allotment of another family member (and vice versa) so long as there was submitted each year at the beginning of the grazing season (March 1), pursuant to 43 CFR 4130.5(d), a signed document transferring "control" of the cattle to the permittee and specifying the numbers of cattle, their brands, and the dates they would be on the allotment (BLM Exh. 2 at 2). ^{4/} Noting the existence at that time of grazing on the Klump family allotments that did not conform to this requirement, the Area Manager stated that the situation "need[ed] to be corrected immediately or the permittees of the allotment will be considered subleasing their allotment; [^{5/}] and the owners of the livestock other than the permittees will be in a willful trespass" (BLM Exh. 2 at 2). The record indicates that Klump received the Area Manager's letter on January 17, 1991. See BLM Exh. 2 at 3.

The first trespass cited by BLM in support of its decision to cancel Klump's grazing permits, trespass notice (247) for grazing cattle on the Roostercomb allotment (No. 51250) without any authorization, was issued following Klump's receipt of the Area Manager's January 1991 letter. The basis of the trespass was the BLM finding that, at the time, Klump had not submitted the necessary document transferring control over his cattle to his brother (Karry K. Klump), who held the grazing permit authorizing him to graze cattle on the allotment. Klump finally submitted the necessary document, dated March 7, 1991, on March 11, 1991. ^{6/} See BLM Exh. 6. However, he also protested the trespass notice and eventually appealed from the Area Manager's April 29, 1991, final decision upholding the finding of willful trespass for the period from January 30, 1991, through March 11, 1991. That decision was ultimately affirmed by the Board on October 21, 1992, in Wayne D. Klump v. BLM, supra.

On March 18, 1992, in the next grazing year, BLM issued another trespass notice (252) to Klump for grazing cattle on the Roostercomb and Steins Mountain (No. 51820) allotments without authorization. See BLM Exh. 7. Once again, BLM asserted that cattle owned by Klump were grazing on allotments where the grazing permit was held by his brother, without the benefit of any transfer of control of the cattle to the permittee. Klump denied in a March 22, 1992, letter, that he was guilty of the trespass, referring

^{4/} This Board has expressly noted the regulation at 43 CFR 4130.5(d), which requires "that if a permittee does not own the livestock grazing on public lands, the agreement giving the permittee control of the livestock must be filed with the authorized officer," in upholding a prior trespass based on the failure to file a proper control agreement with BLM. Wayne D. Klump v. BLM, supra at 201. This earlier case was pending on appeal at the time BLM issued its final decision in the present case on Sept. 14, 1992.

^{5/} Subleasing is a prohibited grazing practice. 43 CFR 4140.1(a)(6).

^{6/} BLM had held previous documents, submitted in January and February 1991 (BLM Exhs. 4 and 5), insufficient since, although they stated that Klump transferred control of his cattle on the allotment to his brother, they did not specify their brands and/or the numbers of cattle to be grazed on the allotment and the dates they would be grazed. See Wayne D. Klump v. BLM, supra at 200-201.

to the March 7, 1991, document transferring control of his cattle to his brother. See BLM Exh. 8 at 1. He also stated that his brother had control of his cattle on the allotments, but did not specify the numbers of cattle involved or the dates of use. Further, appellant indicated that the requirement to file a control document was pending on appeal to this Board.

BLM responded by letter dated March 30, 1992, stating that, "[a]s of March 1, 1992, [7/] your pasturing agreement/control statement with Mr. Karry Klump has expired and a new * * * control statement has not been filed" (BLM Exh. 9 at 1). A BLM livestock count found 38 of Klump's branded cattle on the allotments on April 9, 1992. See Tr. 77, 144-45; BLM Exh. 10. The BLM reply further indicated the case involved a new trespass, distinct from the prior one under appeal. Following up the trespass notice, BLM issued an April 24, 1992, notice of intent to impound appellant's cattle found to be in trespass on the Roostercomb and Steins Mountain allotments, as well as other specified allotments (BLM Exh. 56). Subsequently, in a May 8, 1992, proposed decision, BLM charged Klump with a repeated willful trespass for the period from March 1, 1992, through April 27, 1992, 8/ and required payment of \$7,304.63 in trespass damages. See BLM Exh. 11. Klump protested the proposed decision.

On April 14, 1992, BLM, on the basis of its April 9, 1992, observations of cattle, issued another trespass notice (257) to Klump for grazing cattle on the Badger Den allotment (No. 51100) without authorization. See BLM Exhs. 21, 22, and 23. Prior to the grazing season running from March 1, 1992, through February 28, 1993, the grazing permit on the allotment was held by Klump's brother (Luther W. Klump). However, neither Klump nor his brother were authorized to graze cattle on the allotment during that season as BLM had not approved a grazing application for that year. See Tr. 162-65, 488; BLM Exh. 31. Klump denied in an April 21, 1992, letter, that he was guilty of the trespass. See BLM Exh. 25. A notice of intent to impound the cattle was issued on May 8, 1992. See BLM Exh. 31 at 2. On May 11, 1992, Klump filed a document transferring control of "over 5 head of my cattle * * * that are on the Badger Den allotment" to his brother (BLM Exh. 27). A BLM livestock count verified that one of Klump's branded cattle was on the allotment on June 16, 1992. See Tr. 161; BLM Exh. 29. In a June 25, 1992, proposed decision, BLM charged Klump with a repeated willful trespass during the period from March 1, 1992, through June 16, 1992, and required payment of \$826.45 in trespass damages. See BLM Exh. 24. Klump protested the proposed decision.

On June 10, 1992, BLM, on the basis of its June 8, 1992, observations of cattle, issued another trespass notice (262) to Klump for grazing cattle on the Flying W allotment (No. 51190) without authorization. See BLM Exhs. 76 and 77. At that time, the grazing privileges on the allotment were held by Klump's nephew (John L. Klump). See Tr. 402, 470. The evidence indicated that Klump had filed no control agreement transferring control of the cattle to the permittee (Tr. 405).

7/ This date marked the beginning of the new grazing season.

8/ The date of Apr. 27, 1992, was the date on which the calculation of trespass damages was made (Tr. 78).

In addition to the alleged acts of unauthorized grazing by Klump's cattle on the allotments of others (without the benefit of a proper trans-fer of control), BLM determined that Klump was grazing on allotments for which he held the grazing preference right either without complying with the requirement to place BLM ear tags on his cattle or without any issued grazing permit giving him authorization.

On August 2, 1991, BLM issued, on the basis of its July 2 and 24, 1991, observations of cattle, a trespass notice (250) to Klump for grazing cattle on the Little Doubtful allotment without BLM ear tags. See BLM Exhs. 36, 42, 44, 45. At that time, Klump, who held the grazing permit for the allotment as a result of a transfer of the grazing preference from his brother (see Tr. 199, 498; BLM Exh. 39 at 1), had been issued a grazing permit for the grazing season running from March 1, 1991, through February 29, 1992. Klump had filed an application for grazing use on January 14, 1991, objecting to the requirement (contained therein) to place BLM ear tags on all cattle by crossing out that term on the application. See BLM Exh. 38. The altered application was treated by BLM as a protest of the eartagging requirement. By proposed decision of January 29, 1991, and final decision of February 15, 1991, BLM denied Klump's objection to the eartagging requirement while treating the application as an issued permit (App. Exh's. 58, 59). Klump then took an appeal, continuing his objection to the eartagging requirement. The February 1991 BLM decision was ultimately affirmed by the Board on October 13, 1992, in Wayne D. Klump v. BLM, 124 IBLA 176 (1992). In that decision, we specifically upheld "BLM's imposition of eartagging as a term and condition of Klump's grazing permits," noting that Klump was barred from challenging the eartagging requirement where he had not appealed the August 1983 BLM decision initially imposing the requirement and that, in any case, the requirement was supported by both Departmental regulation and Board precedent. Id. at 183. ^{9/}

In view of the eartagging requirement contained in the grazing permit and the denial of appellant's protest, BLM issued its trespass notice on August 2, 1991, after Klump was found to be grazing cattle on the allotment without BLM ear tags. Klump denied that he was guilty of the trespass noting the appeal of the BLM decision denying his protest which was pending at the time. See BLM Exh. 66. In a June 10, 1992, proposed decision, BLM charged Klump with a willful trespass for the period from July 2, 1991, through February 29, 1992, and required payment of \$2,121.46 in trespass damages. See BLM Exh. 40. Klump protested the proposed decision.

^{9/} The eartagging requirement had first been imposed by BLM as a term and condition of the permit for grazing on the Little Doubtful allotment in an Aug. 16, 1983, decision. See Wayne D. Klump v. BLM, 124 IBLA at 178. It was designed to assist BLM in the identification of numbers and ownership of cattle (given the terrain and vegetation of the allotment). See id. The August 1983 decision was issued to Karry K. Klump, Klump's predecessor-in-interest. See id. At the time of transfer of the preference from his brother in 1988, Klump was required to accept the terms and conditions of the old permit. See 43 CFR 4110.2-3(a)(3); BLM Exh. 40 at 1. Also, it is undisputed that Klump accepted annual grazing authorizations, containing the eartagging requirement, for the grazing seasons starting Mar. 1, 1989, and Mar. 1, 1990. See BLM Exh. 43.

On March 31, 1992, BLM issued another trespass notice (254) to Klump for grazing cattle on the Little Doubtful allotment without any authorization. See BLM Exh. 51. At that time, Klump had not been issued a grazing authorization for the grazing season running from March 1, 1992, through February 28, 1993. See Tr. 272. While Klump had filed an application for grazing use (BLM Exh. 52) on December 23, 1991, it was rejected as explained by BLM in a February 5, 1992, letter because Klump had refused to agree to the requirement to place ear tags on all cattle. See BLM Exh. 39. BLM stated: "If you wish to graze cattle on the public lands within the [Little Doubtful and Simmons Peak] allotments, you must first submit properly completed applications * * *, consistent with the existing terms and conditions for these allotments." Id. at 2. BLM also notified Klump, by letter dated March 12, 1992, that, since it had not received an acceptable application for the Little Doubtful and Simmons Peak allotments, it would not issue a grazing authorization for the 1992/1993 grazing season until the applications were properly completed and any cattle found on the allotments would be considered in trespass. See BLM Exh. 54. That notice was received by Klump on March 13, 1992. Id. at 2. A BLM livestock count on April 9, 1992, disclosed that cattle were on the allotment. See BLM Exh. 55. A notice of intent to impound the cattle was issued on April 24, 1992. See BLM Exh. 56; App. Exh. 40 at 3. BLM then gathered and impounded Klump's cattle found on the public lands on May 20, 1992. See BLM Exh. 59. The cattle were sold at public auction on June 1, 1992, and the sale proceeds were returned to Klump, after deducting damages for a repeated willful trespass from March 1, 1992, through May 20, 1992 (\$6,230.02). See BLM Exh. 61. Following the May 1992 impoundment, BLM again observed Klump's cattle on the allotment on June 8, 1992, and issued another trespass notice (261) on June 11, 1992. See BLM Exhs. 73 and 74.

On March 31, 1992, BLM issued another trespass notice (255) to Klump for grazing cattle on the Simmons Peak allotment without authorization. See BLM Exh. 67. At that time, the grazing preference rights on the allotment were held by Klump. See Tr. 449. However, Klump had not been issued a grazing permit for the grazing season running from March 1, 1992, through February 28, 1993. While Klump had filed an application for grazing use (BLM Exh. 53) on December 23, 1991, it was also returned by BLM pursuant to its February 5, 1992, letter because Klump had refused to agree to the requirement to place ear tags on all cattle. 10/ See BLM Exh. 39. BLM also notified Klump, in its March 12, 1992, letter, that, since it had not received an acceptable application, it would not issue a grazing authorization for the 1992/1993 grazing season and any cattle found on the allotment would be considered in trespass. See BLM Exh. 54. A BLM livestock count found that cattle were on the allotment on April 9, 1992. See BLM Exh. 70. A notice of intent to impound the cattle was issued on April 24, 1992. See BLM Exh. 56; App. Exh. 40 at 3.

On June 24, 1992, the Area Manager issued a decision in which he proposed to cancel Klump's grazing permits and preferences on the Little

10/ In Wayne D. Klump v. BLM, 124 IBLA 176, we also affirmed a Feb. 15, 1991, BLM decision that finally approved Klump's application for grazing on the Simmons Peak allotment during the 1991/1992 grazing season and denied his objection to the ear tagging requirement. 124 IBLA at 178, 183.

Doubtful and Simmons Peak allotments because of repeated and willful unauthorized grazing use in violation of 43 CFR 4140.1(b)(1), citing the eight trespass incidents. See BLM Exh. 48. Klump objected to the proposed cancellation. See BLM Exh. 49.

In his September 1992 final decision, the Area Manager reaffirmed his three proposed decisions issued in May and June 1992, charging Klump with the three incidents of trespass referred to as 250, 252, and 257, and demanded payment of the trespass damages assessed. See BLM Exh. 50 at 1, 2. The BLM decision also reaffirmed the June 24, 1992, proposed decision cancelling in full Klump's grazing permits and preferences on the Little Doubtful and Simmons Peak allotments on the basis of all of the eight trespass incidents charged. Id. He noted that Klump had failed to offer any reason why the proposed decisions were incorrect. Id. at 1.

On appeal from the Area Manager's September 1992 final decision a hearing was held before Judge Rampton in Safford, Arizona, on March 25-26, 1993. In his June 1993 decision Judge Rampton affirmed three of BLM's seven findings of unauthorized grazing use (250, 252, and 257) and affirmed (with one exception) the trespass damages assessed with respect to these findings. 11/ See Decision at 19. However, he concluded that it was improper to consider the four other findings of unauthorized grazing use (254, 255, 261, and 262) because no final decision adjudicating the trespasses had yet been issued by BLM. See Decision at 19. Judge Rampton reversed BLM's cancellation of Klump's grazing permits and preferences in the Little Doubtful and Simmons Peak allotments on the ground that the Area Manager had improperly relied upon the four trespass findings which had not been the subject of prior proposed and final decisions in deciding to cancel and the Judge could not conclude that the Area Manager would have reached the same decision absent consideration of these four findings. See Decision at 18-19. Both Klump and BLM have appealed from the Judge's June 1993 decision.

Before reviewing cancellation of Klump's grazing permits and preferences in the Little Doubtful and Simmons Peak allotments, we will consider the decision affirming grazing trespasses in three cases, i.e., 250, 252, and 257, and determining damages. We initiate our analysis with a discussion of trespass 252 which is related to the previously appealed trespass 247.

TRESPASS AZ-040-3-252

In the case of trespass 252, it is clear that Klump grazed his branded cattle on the Roostercomb and Steins Mountain allotments during the period from March 1, 1992, through April 27, 1992, and that, at that time, the grazing privileges were held by his brother. See Tr. 41, 52-55, 483; BLM

11/ The Judge modified BLM's finding of unauthorized grazing use in the case of trespass 257, holding that such use involved only three cattle grazed over a 69-day period from Apr. 9 through June 16, 1992, thus resulting in trespass damages of \$540.95 (instead of \$826.45). See Decision at 19.

Exh. 10. Indeed, in his statement of reasons for appeal (SOR), Klump does not challenge the fact that his cattle were on his brother's allotments for at least part of the trespass period. See SOR at 10-12. Rather, Klump asserts that he had complied with the regulatory requirement by virtue of the March 7, 1991, letter, submitted at the beginning of the 1991/1992 grazing season and accepted by BLM. Acknowledging that BLM had required,

in its January 1991 letter, the annual submission of a control document

and that none had been submitted at the beginning of the 1992/1993 grazing season, Klump challenges this requirement on the ground that there is no basis in the regulation for requiring an annual filing of the statement

or requiring identification of numbers of livestock or periods of use. Further, Klump asserts this trespass could not have been willful, i.e.,

not in good faith or so lacking in reasonableness as to be reckless or negligent, because BLM did not reiterate the requirement to file the control statement annually in 1992 until after issuance of the trespass notice. Klump also contends that the trespass could not be repeated because, at the time of the trespass notice the earlier trespass for failure to file control documents was pending on appeal.

[1] Our decision in Wayne D. Klump v. BLM, 124 IBLA at 200, upheld a finding of a grazing trespass and assessment of damages when a cattle owner grazed his branded cattle on an allotment for which the grazing permit is held by another without having transferred "control" of the cattle to the permittee as required by BLM (specifying the brand, numbers of affected cattle, and anticipated periods of grazing use) and filed a copy of the transfer with BLM. 12/ Absent such a transfer, he is properly deemed to be engaging in unauthorized grazing use, and thus subject to appropriate penalties. That is clearly what happened to Klump in the case of trespass 247, which was sustained by the Board in the Klump case.

The Department is directed by section 2 of the Taylor Grazing Act, 43 U.S.C. § 315a (1988), to

make * * * rules and regulations and * * * do any and all things necessary to accomplish the purposes of th[e Act] and to insure the objects of [the] grazing districts, namely, to regulate their

12/ Klump challenges the Board decision regarding failure to file control documents as a ground for grazing trespass on the basis that the burden of establishing error was placed on the appellant, contrary to precedent in prior grazing trespass appeals. Although our decision in Wayne D. Klump v. BLM, 124 IBLA at 204, does refer to the burden of the appellant to establish error, it is clear from the context of the opinion that the error refers to the legal issue of what is required to comply with the requirement of the regulations at 43 CFR 4130.5(d) and (e), i.e., an agreement giving the permittee control of livestock owned by another grazing on the permittee's allotment. This is properly distinguished from the factual/evidentiary question of whether appellant's cattle were grazing on the allotment permitted to another, a matter conceded in the Klump case. Id. This is not contrary to the standard that places the ultimate burden of proving a trespass on BLM. See BLM v. Ericsson, 88 IBLA 248, 255 (1985). Judge Rampton properly followed this approach in the instant case. See Decision at 10 n.4.

occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use * * * of the range.

It is clear from Departmental regulations implementing the Taylor Grazing Act that if the grazing permittee does not own the livestock grazing the public lands, the agreement that gives the permittee control of the livestock shall be filed with BLM. 43 CFR 4130.5(d). Absent submission of a document transferring control of cattle from the owner of the cattle to the permittee, any grazing use by the cattle on the permitted land is properly considered by BLM to not come under the permit since the permit only covers cattle "own[ed] or control[led]" by the permittee. 43 CFR 4130.5(a). Accordingly, such use is properly considered "[w]ithout a permit," and thus unauthorized under 43 CFR 4140.1(b)(1) and 4150.1. See BLM v. Ericsson, *supra* at 250 n.1; BLM v. Holland Livestock Ranch, 39 IBLA 272, 289-90, 86 I.D. 133, 142 (1979), *aff'd*, Holland Livestock Ranches v. United States, No. R-79-78-BRT (D. Nev. Aug. 7, 1979), *aff'd*, 655 F.2d 1002 (9th Cir. 1981). Therefore, we conclude that BLM was clearly authorized and entitled, in the present case, to require (by means of its January 15, 1991, letter) the submission of a document transferring control of Klump's cattle to his brother when he sought to graze them on an allotment where the grazing privileges were held by that brother. The regulations regarding ownership and control of livestock further provide that the brand on livestock controlled but not owned by the permittee shall be filed with the BLM. 43 CFR 4130.5(e). Based on these regulatory provisions, we upheld the requirement that the control agreement filed with BLM also specify the numbers and periods of use for cattle covered by the control agreement. Wayne D. Klump v. BLM, 124 IBLA at 204.

[2] Klump challenges the requirement to refile a control agreement annually with the grazing application as set forth in the January 15, 1991, BLM letter on the ground that it goes beyond the requirements of the regulations themselves and was not promulgated in conformity with rulemaking procedures involving publication of proposed rules and opportunity to comment. A rule, whether it be deemed substantive or procedural, must be promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1988), in order to have the "force and effect of law." Union Oil Company of California, 110 IBLA 62, 64 (1989); Shell Offshore, Inc., 96 IBLA 149, 171-72, 94 I.D. 69, 82 (1987); 13/ see Chrysler Corp. v. Brown, 441 U.S. 281 (1979). However, we find the assertion that the requirement set forth in the BLM letter to Klump constitutes a regulation having the force and effect of law mischaracterizes the letter. Klump's trespass in No. 247 was upheld by the Board on the basis that the January 15, 1991, BLM letter requiring specification of the number of cattle and the period of use was a proper interpretation of the regulations at 43 CFR 4130.5(d) and (e). Hence, a finding of trespass was sustained for the period after Klump was notified of this requirement and before Klump filed the required document. Wayne D. Klump v. BLM, 124 IBLA at 204-05. 14/

13/ Aff'd, 923 F.2d 830 (Fed. Cir. 1991), *cert. denied sub nom. Pennzoil Co. v. United States*, 112 S. Ct. 167 (1991).

14/ As Klump has pointed out in his appeal, the Board decision in Klump did not address the requirement to refile the control agreement for subsequent grazing years.

It is true that the regulations, unlike the BLM letter to Klump, do not specify when the control document must be filed or refiled with BLM. The BLM Area Manager found in his January 15, 1991, letter to Klump that the control document must be filed each year at the beginning of the grazing season (March 1). Reference to the evidence in this case supports the reasonableness of this requirement. The testimony established that an allotment grazing application must be filed each year, specifying brands and period of use. See Tr. 89. An annual control statement is required as part of the annual grazing application. See Tr. 43. Thus, the grazing application for the Roostercomb allotment filed by the permittee, Karry K. Klump, on February 10, 1992, and approved by BLM on February 11 specified grazing for 127 cattle bearing Karry Klump's brand from March 1, 1992, to February 28, 1993. See BLM Exh. 16. Karry Klump was also the permittee for the Steins Mountain allotment. See Tr. 41. In this context, a tres-pass finding is properly affirmed when Klump's cattle were grazing on the allotment without filing a control agreement for the current grazing season. 15/

Since Klump had failed to provide a document specifically transferring control of his cattle on the Roostercomb and Steins Mountain allotments to his brother with respect to the 1992/1993 grazing season, BLM was justified in finding that any grazing by his cattle was unauthorized. 16/ See Tr. 51. In particular, BLM concluded that 120 of Klump's cattle were on the allotments during the period from March 1, 1992, through April 27, 1992. See BLM Exh. 11 at 2; BLM Exh. 12. Klump disputes this finding on the ground it is based on hearsay testimony. See SOR at 11-12. Noting that the BLM compliance check on April 9, 1992, disclosed only 38 of Klump's cattle on the allotment, Klump contends the finding of a trespass by 120 head is not supported by the evidence. In its answer, BLM points out that Klump had filed a control statement in 1991 covering 125 head, he did not state that he removed those cattle, and the trespass of 120 head was based on reliable and credible information received from the permittee's spouse and a State live-stock inspector.

[3] Upon review of Judge Rampton's June 1993 decision sustaining BLM's finding that 120 cattle were in trespass on the public lands the question is whether the finding is supported by a preponderance of the evidence. This

15/ There is some discussion in Klump's brief regarding whether a control agreement is required to be filed by the owner of the cattle or the permittee. The applicable regulation does not specify. See 43 CFR 4130.5(d). All it says is that the document "shall be filed." Id. We conclude that it does not matter who files the document (the permittee or the owner), but in the absence of the filing of such a control agreement, the owner of cattle grazing on an allotment other than the authorized permittee may be liable in trespass.

16/ We do not regard Klump's Mar. 22, 1992, letter (BLM Exh. 8) as an adequate control document since it did not identify his cattle grazing the Roostercomb and Steins Mountain allotments or the dates of their use. See Wayne D. Klump v. BLM, 124 IBLA at 204. BLM also, in effect, rejected this letter on Mar. 30, 1992, but Klump neither appealed nor submitted another control document until May 1992. See BLM Exhs. 9 and 15.

Board has held that grazing appeal hearings required under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), are an adjudication "required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of the APA, 5 U.S.C. § 554(a) (1988). Eason v. BLM, 127 IBLA 259, 262-63 (1993). Such hearings are governed by section 7(c) of the APA, 5 U.S.C. § 556(d) (1988), which provides in pertinent part:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. [Emphasis added.]

5 U.S.C. § 556(d) (1988). Similar language requiring that a decision be based on "consideration of the whole record * * * and in accordance with the reliable, probative, and substantial evidence" is found in the relevant Departmental regulation regarding grazing hearings and appeals. 43 CFR 4.478(a). As we noted in Eason:

In Steadman v. Securities & Exchange Commission, 450 U.S. 91, 102 (1981), the Supreme Court was called upon to construe section 7(c) in deciding the appropriate standard of proof for a hearing under 5 U.S.C. § 554(a) (1988). The Court held: "The language and legislative history of § 7(c) lead us to conclude * * * that § 7(c) was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of-the-evidence standard." [Footnote omitted.]

Eason v. BLM, 127 IBLA at 262; see Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984).

It is true, as Klump points out, that the only evidence of a BLM inspection disclosing that Klump's cattle grazed the Roostercomb and Steins Mountain allotments during the 1992/1993 grazing season was obtained during an April 9, 1992, helicopter flight when 139 head of cattle were counted. Of those, 38 head of Klump's cattle, identified by their brand, were observed by a BLM employee in the allotments. See BLM Exh. 10 at 1. Testimony established the difficulty of identifying the brand on the cattle from the air due to their "haired over" condition. See Tr. 145-46. However, the BLM finding that 120 of Klump's cattle were on the allotments from March 1, 1992, through April 27, 1992, was also based on other evidence.

The testimony established that the permits for the Roostercomb and Steins Mountain allotments authorized grazing of 125 and 55 head of cattle, respectively. See Tr. 54, 450. Klump acknowledged that most of the cattle grazing the allotments were his. See Tr. 450. The BLM figure of 120 trespassing cattle was based in part on the fact that Klump had acknowledged

grazing 125 cattle in the prior trespass proceeding (247). See Tr. 75-76; BLM Exh. 6 (Klump's control document). Further, BLM presented evidence that Karry K. Klump, the permittee, reported, at the time of the helicopter flight, that he was then grazing about 40 cattle on the allotments and the remainder were cattle owned by Klump. See Tr. 144-45, 149; BLM Exh. 10 at 1. Also, BLM presented evidence that Kathy Klump, Karry's wife, reported on April 27, 1992, that Klump had removed all but 5 or 10 cattle from the allotments. See Tr. 94-95; BLM Exh. 17 at 1. ^{17/} Although she did not specify how many of Klump's cattle had been removed or when they had been removed (see Tr. 98), BLM also presented evidence that Johnny Logan, a State livestock inspector, informed BLM on May 4, 1992, that about 120 of Klump's cattle had been removed from the allotments. See Tr. 95; BLM Exh. 17 at 1. The BLM employee who talked to Logan believed on the basis of the conversation that the removal had recently occurred. See Tr. 100-01.

[4] It is well established that hearsay evidence is admissible in an administrative proceeding if it is relevant and material. Richardson v. Perales, 402 U.S. 389 (1971); Myers v. Secretary of Health & Human Services, 893 F.2d 840 (6th Cir. 1990); Williams v. United States Department of Transportation, 781 F.2d 1573 (11th Cir. 1986); Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981); R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 150-51 (1991). Further, hearsay evidence may constitute substantial evidence to support an Administrative Law Judge's decision. Richardson v. Perales, supra at 402; Calhoun v. Bailar, supra at 149. That principle is applicable to the testimony in this case and we find Judge Rampton's decision is supported by a preponderance of the evidence.

With respect to the issue of the willfulness of the trespass, Klump asserts that Judge Rampton's finding was in error because he in good faith believed that the control agreement filed in 1991 was still effective. Klump notes that upon receipt of the BLM March 1992 trespass notice, he promptly notified BLM that his brother controlled all of his livestock on the allotments. See BLM Exh. 8.

[5] We have held that a trespass will be considered willful when the evidence "objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake." Eldon Brinkerhoff, 24 IBLA 324, 338, 83 I.D. 185, 191 (1976). That standard was adopted by the court in Holland Livestock Ranch v. United States, 655 F.2d 1002, 1006-07 (9th Cir. 1981).

Klump's grazing on the Roostercomb and Steins Mountain allotments without filing a control agreement during the 1992/1993 grazing season was in defiance of BLM's requirement in its January 1991 letter that no grazing occur during any grazing season on any allotment when the grazing privileges

^{17/} This was essentially consistent with Klump's testimony that by May he "had already moved a bunch of them because that's when I gave Karry the control documents" (Tr. 486). By statement dated May 1, 1992, Klump gave Karry control over 24 head of cattle on the Roostercomb and Steins Mountain allotments (BLM Exh. 15).

were held by one of his brothers prior to the filing of a document specifically transferring control of his cattle to his brother with respect to that season. It was not necessary that BLM remind Klump of this obligation prior to the 1992/1993 grazing season, since the January 1991 letter provided adequate notice that the control agreement had to be filed annually. See BLM Exh. 2 at 2 ("Th[e control] document must be filed each year at the beginning of the grazing season, March 1"). Indeed, Klump's response to the trespass notice indicated that he did not intend to comply further with the requirement pending resolution of the prior appeal. See BLM Exh. 8. In his testimony, Klump indicated that he understood the annual filing requirement but felt a control agreement was not required under the regulations. See Tr. 485.

Regardless of the fact that Klump was challenging the requirement to file a control document in the context of the appeal of trespass 247, we find that his failure to comply for the grazing season beginning March 1, 1992, in the face of explicit written instructions provided by BLM's letter of January 15, 1991, supports a finding of a lack of good faith. The grazing authorization for the 1992 season was applied for and obtained by Karry

Klump on the representation that his branded cattle would be using the allotment. The fact that Klump had challenged on appeal the BLM require-ment to file a control agreement did not mean that Klump could ignore the requirement with impunity. While the stay of the effect of the prior trespass decision pending resolution of the appeal effectively stayed imposi-tion of trespass penalties, it did not absolve Klump of the obligation to comply with the requirement as a condition of grazing his cattle on an allotment permitted to another. Thus, we find no basis for concluding

that Klump's reliance on the March 1991 control document was in good faith. Klump simply refused to abide by the annual filing requirement until prodded to do so. See BLM Exhs. 7 and 8. Therefore, we hold that Judge Rampton properly concluded that BLM established that Klump did not graze cattle on the allotments on the basis of any good faith or innocent mistake. His actions were willful. Judge Rampton's finding to that effect is supported by a preponderance of the evidence.

Similarly, with respect to the finding of Judge Rampton that the trespass was repeated in nature, we must reject Klump's argument that this finding is barred by the fact that the prior trespass (247) was pending on appeal at the time of the decision. A distinction is properly drawn between the initial trespass resulting from failure to file a control agreement and the repetition of such a trespass by grazing cattle on an allotment permitted to another without benefit of a current control agreement in a subsequent grazing season. We recognize that Klump's appeal to the Board of trespass 247 suspended the effect of BLM's April 29, 1991, final decision pending resolution of the appeal. See 43 CFR 4.477(a). However, this does not support Klump's contention that BLM was precluded from charging him with a repeated willful trespass. A party found to have committed an act of grazing trespass similar to that charged in a prior trespass proceeding is properly charged with a repeated trespass regardless of the fact that an appeal of the initial trespass charge is still pending. The opportunity to appeal the repeated trespass charge, which Klump has pursued, protects the appellant's rights to contest both the subsequent trespass charge and

the repetitive nature of the trespass. The preponderance of the evidence supports Judge Rampton's finding that trespass 252 was a repeated willful trespass. 18/

We, therefore, affirm Judge Rampton's June 1993 decision to the extent that he sustained the Area Manager's September 1992 final decision upholding BLM's finding of repeated willful trespass in the case of trespass 252.

TRESPASS AZ-040-3-257

In the case of trespass 257, BLM originally found that Klump had grazed five cattle in trespass on the Badger Den allotment from March 1, 1992, through June 16, 1992. See BLM Exh. 24 at 2; BLM Exh. 28 at 1. Judge Rampton modified this finding, concluding that the evidence only supported a finding that Klump had grazed three cattle in trespass from April 9, 1992, through June 16, 1992.

We agree with Judge Rampton that there is no evidence that any of Klump's cattle were on the Badger Den allotment prior to April 9, 1992. See Decision at 12. However, on April 9, 1992, BLM employees clearly observed three cattle bearing his brand, out of a total of about 115, on the allotment. See BLM Exhs. 22 and 23. Klump admits that three of his cattle were in trespass. See SOR at 14. The next definite sighting of his cattle on the allotment occurred on June 16, 1992, when a BLM employee observed one cow, out of a total of 94, bearing Klump's brand. See BLM Exh. 29. Klump does not dispute these observations. Rather, he contends that he removed the other two cattle after receipt of the April 14, 1992, trespass notice on April 16, 1992 (see BLM Exh. 21 at 2) subsequent to the April 9, 1992, sighting, since he did not know that any of his cattle were on the allotment prior to that time. See SOR at 13, 14. While it seems clear that two of the cattle observed on April 9 were removed from the allotment sometime prior to June 16, it is not clear when this occurred. See Tr. 173. Since BLM bears the burden of proving a trespass, we find the evidence supports a trespass of two head of cattle through April 16 and one head thereafter. That means that the evidence establishes that two cattle were on the allotment from April 9, 1992, through April 16, 1992, and one cow was there from April 9, 1992, through June 16, 1992. 19/

18/ The result would have been different if the earlier trespass finding had been reversed on appeal. See Calvin C. Johnson, 35 IBLA 306, 322 (1978) (Stuebing, A.J., concurring in part and dissenting in part) ("[A] finding of repeated trespass * * * based on charges later dropped would be incorrect").

19/ We note that Klump's May 1, 1992, letter (BLM Exh. 27) transferring control of "over 5 head of my cattle * * * that are on the Badger Den allotment" could be construed as an admission that Klump had as many as 5 head on the allotment after Apr. 17, 1992, and it was so construed by BLM. See Tr. 160; BLM Exh. 24 at 2. However, we agree with Judge Rampton that the evidence demonstrates that the letter was not intended to be such an admission. See Decision at 12. Rather, the document was intended only to bring any stray cattle that might be on the allotment under that authorization (Tr. 490-91).

Next, Klump contends that Judge Rampton improperly affirmed BLM's determination that trespass 257 was willful as he was not aware that cattle had strayed onto the allotment and there was no evidence that he should have discovered this fact and returned the cattle. See SOR at 13, 15-16. We cannot agree.

It is well established that a trespass will be considered willful if the evidence "objectively shows that * * * [the trespasser's] conduct was so lacking in reasonableness or responsibility that it became reckless or negligent." Eldon Brinkerhoff, supra at 338, 83 I.D. at 191. That standard was also adopted by the court in Holland Livestock Ranch v. United States, 655 F.2d at 1006-07.

It is undisputed that 3 miles of common fence separate the allotment from land leased for grazing purposes to Klump by the State and that a road runs between the allotment and the leased land. See Tr. 166-67, 175-76, 464; BLM Exh. 20. Where the road crosses over the boundary line, there is a cattle guard and a gate that likely allowed the cattle access to the allotment. See Tr. 167-68, 464-65. Klump asserts that he did not know that his cattle had strayed onto the allotment, especially where they were found 5 miles inside an allotment that encompasses about 65,000 acres. See SOR at 13, 15. That may be true. See Tr. 172, 179. However, there is evidence that the cattle guard would periodically clog with dirt, thus permitting cattle to cross over it. See Tr. 167-68, 190, 464. Further, there is evidence that the gate was often left open. See Tr. 168, 190, 465. Finally, Klump admitted that he was aware of these circumstances (see Tr. 464, 465), but he did not take any steps to prevent cattle from passing into the allotment in this manner, beyond running the fence line once every 2 months. See Tr. 465. We do not regard this as adequate. Thus, a preponderance of the evidence supports a finding that Klump was negligent in failing to maintain the cattle guard by means of routine cleaning and to ensure that the gate was closed, so that cattle did not cross over into the allotment. Accordingly, we affirm the Administrative Law Judge's finding of a willful trespass.

Finally, Klump challenges BLM's determination that trespass 257 was repeated willful on the same basis that it challenged BLM's similar finding in the case of trespass 252, i.e., that it was based on findings of trespass subject to pending appeals. In the case of trespass 257, the prior findings of trespass were 247 and 252. See BLM Exh. 24 at 2. Neither had been finally affirmed on appeal at the time of BLM's April 1992 issuance of its trespass notice. We dispose of this challenge for the reasons enunciated above. Thus, we affirm the decision of the Administrative Law Judge that the trespass was repeated willful in nature.

Because we modify BLM's finding of unauthorized grazing use in the case of trespass 257, we must also modify the trespass damages assessed. Trespass damages (for forage consumed) are properly recomputed to be \$75.49 (rather than \$471.75, as computed by BLM, or \$185.65, as computed by Judge

Rampton), based on $(0.23 \text{ months} \times 2 \text{ cattle} = 0.46 \text{ AUM's } \underline{20/}) \times \$27.75 + (2.26 \text{ months} \times 1 \text{ cow} = 2.26 \text{ AUM's}) \times \27.75 . See BLM Exh. 28 at 1; Decision at 13.

We, therefore, affirm Judge Rampton's June 1993 decision to the extent that he sustained the Area Manager's September 1992 final decision upholding BLM's finding of repeated willful trespass in the case of trespass 257, but modify the amount of trespass damages assessed.

TRESPASS AZ-040-3-250

In the case of trespass 250, BLM originally found that Klump had grazed 10 cattle without BLM ear tags on the Little Doubtful allotment from July 2, 1991, when the cattle were first observed on the allotment, through February 29, 1992, i.e., the end of the 1991/1992 grazing season. 21/ See BLM Exh. 40 at 2; BLM Exh. 42 at 2. Klump does not challenge the fact that BLM had, in its February 15, 1991, decision, finally approved grazing during the 1991/1992 season subject to the eartagging requirement or that he grazed 10 cattle on the allotment during the period from July 2, 1991, through February 29, 1992, without BLM ear tags.

Rather, Klump contends only that he acted in good faith reliance on Departmental regulations, which provided that the effect of the February 1991 BLM decision would be suspended while it was subject to appeal, and thus he reasonably believed that the "eartagging requirement was suspended" (SOR at 17). In these circumstances, Klump argues that his trespass should be considered nonwillful. We disagree.

The eartagging requirement had been imposed prior to the February 15, 1991, BLM decision. It was already contained in the terms and conditions of Klump's permit for grazing on the allotment. See Wayne D. Klump v. BLM, 124 IBLA at 178; Tr. 199, 202, 221, 256; BLM Exh. 40 at 1; BLM Exh. 58 at 1. The February 1991 BLM decision constituted simply a denial of Klump's request to change the terms and conditions of the permit to delete the eartagging requirement. 124 IBLA at 179. Klump acknowledges that "the eartagging requirement remained a condition of the permit" (SOR at 20). Thus, the effect of Klump's appeal from that decision was simply to suspend BLM's refusal to change the terms and conditions of the existing permit during

20/ An AUM (animal unit month) is the amount of forage necessary to sustain one cow or its equivalent for 1 month. See 43 CFR 4100.0-5.

21/ Trespass notice 250 cited Klump with a violation of 43 CFR 4140.1(a)(1), for failing to abide by the eartagging requirement contained in the terms and conditions of his grazing permit. See BLM Exh. 36 at 1. Grazing without complying with the eartagging requirement also constitutes a violation of 43 CFR 4140.1(b)(1), which prohibits unauthorized grazing use. See 43 CFR 4150.1. BLM assessed damages in the amount of the forage consumed and expenses incurred by BLM in resolving the trespass. See BLM Exh. 40 at 2; BLM Exh. 42 at 2. Such damages are properly assessed for unauthorized grazing use. See 43 CFR 4150.1 and 4150.3. Thus, it is clear that Klump was actually

the 1991/1992 grazing season, pending a decision by Judge Rampton and eventually by the Board (see 43 CFR 4160.3(c) and 4.477(a)). See BLM Exh. 58 at 1. The appeal plainly did not suspend the eartagging requirement since it was a condition of his grazing permit. Put another way, suspension of the February 1991 BLM decision denying Klump's requested change in the grazing permit did not effect a change in the permit by deleting the eartagging requirement. Clearly, Klump could not have reasonably believed otherwise. Thus, when Klump grazed cattle without BLM ear tags on the allotment from July 2, 1991, through February 29, 1992, he did so in violation of the permit's eartagging requirement. That constituted unauthorized grazing use under 43 CFR 4140.1(b)(1) since Klump was grazing without "comply[ing] with a requirement under [43 CFR] 4130.5(c)," specifically, BLM's requirement that "special * * * tagging" be placed on cattle. See 43 CFR 4150.1.

Further, we find that Klump did not act in good faith in failing to place BLM ear tags on his cattle during the trespass period. The Departmental regulations clearly authorize BLM to require that special tags be placed on cattle. See 43 CFR 4130.5(c). It did so in originally issuing the grazing permit to Klump's predecessor-in-interest. Grazing without such tags is clearly unauthorized grazing use under 43 CFR 4140.1(b)(1) subjecting Klump to grazing trespass damages. See 43 CFR 4150.1. Thus, by grazing, Klump deliberately sought to evade an existing eartagging requirement that was plainly supported by Departmental regulations (as well as Board precedent). 22/ The fact that Klump had appealed from an interim decision refusing to delete the eartagging requirement from the permit has no relevance because Klump is also deemed to have known that only that decision was suspended by 43 CFR 4160.3(c) and 4.477(a). 23/ In all of these circumstances, we simply cannot conclude that Klump grazed cattle on the allotment without BLM ear tags as a result of any good faith belief or innocent mistake. Thus, we hold that his actions were willful. See Eldon Brinkerhoff, supra at 338, 83 I.D. at 191. Accordingly, we affirm Judge Rampton's June 1993 decision to the extent that he sustained the Area Manager's September 1992 final decision upholding BLM's finding of willful trespass in the case of trespass 250, and assessment of trespass damages.

We now turn to the remaining four trespass acts charged and relied upon by BLM in deciding to cancel Klump's grazing permits and preferences in the Little Doubtful and Simmons Peak allotments.

fn. 21 (continued)

deemed by BLM to have violated 43 CFR 4140.1(b)(1)(iv) for grazing without "comply[ing] with a requirement under [43 CFR] 4130.5(c)," i.e., BLM's requirement that "special * * * tagging" be placed on cattle grazing the Little Doubtful allotment. Judge Rampton properly so viewed the violation charged, noting that it consisted of "grazing * * * without ear tags" (Decision at 14).

22/ The record also indicates that, when asked on July 10, 1991, whether he intended to place BLM ear tags on his cattle on the Little Doubtful allotment, Klump replied "no" (BLM Exh. 46 at 2). See also Tr. 234, 458.

23/ Regulation 43 CFR 4160.3(c) provides for the suspension of "[d]ecisions that are appealed," and 43 CFR 4.477(a) provides for the suspension of "the effect of the decision from which [an appeal] is taken."

TRESPASS AZ-040-3-254

In the case of trespass 254, BLM determined that Klump was grazing in trespass on the Little Doubtful allotment during the early part of the 1992/1993 grazing season where cattle were found grazing the allotment in the absence of BLM approval of his application (BLM Exh. 52), submitted December 23, 1991, for grazing use during that season. See Tr. 272, 282-83; BLM Exhs. 55 and 59. Indeed, by letter-decision dated February 5, 1992, BLM had returned Klump's grazing application because he refused to agree to the ear-tagging requirement. See BLM Exh. 39. Thereafter, cattle were gathered, impounded, and sold at public auction, and trespass damages (on the basis of a repeated willful trespass from March 1, 1992, through May 20, 1992) were deducted from the proceeds of the sale returned to Klump.

Klump does not deny the fact he grazed cattle on the Little Doubtful allotment during the period from March 1, 1992, through May 20, 1992, without the benefit of an approved grazing application. This constituted unauthorized grazing use under 43 CFR 4140.1(b)(1)(i). See 43 CFR 4150.1. Nor does he deny that the trespass was repeated and willful. Rather, he contends that BLM was not entitled to impound and sell cattle determined to be in trespass and to deduct trespass damages from the proceeds of the sale where it had not issued proposed and final decisions under Departmental regulations. In particular, Klump asserts that BLM should have issued a proposed and final decision either rejecting his grazing application because of his refusal to agree to the ear-tagging requirement or approving the application but refusing to alter the requirement (as it had done with respect to the 1991/1992 grazing season), and another proposed and final decision supporting its subsequent finding of trespass and demanding payment of trespass damages. See SOR at 20-21.

A trespass notice was first issued to Klump on March 31, 1992. See BLM Exhs. 51, 56. On April 9, 1992, BLM found 54 cattle on the allotment, despite the fact that Klump had never been issued a grazing permit for the 1992/1993 season and the fact that Klump had been advised that any cattle found on the allotment would be deemed in trespass. See BLM Exhs. 39 and 55. Next, BLM issued, on April 24, 1992, a notice of intent to impound cattle found in trespass on the allotment. See BLM Exh. 56. The notice was received by Klump on April 25, 1992. See BLM Exh. 56 at 3. By letter dated May 6, 1992, Klump objected to the impoundment on the basis that he had not been found guilty of a trespass. See BLM Exh. 57. BLM informed Klump again by letter dated May 12, 1992, that, in the absence of submission of an acceptable grazing application, it had no choice but to impound the unauthorized cattle on the allotment. See BLM Exh. 58 at 3. Eighty-four cattle were gathered on the public lands within the allotment and impounded by BLM on May 20, 1992. See Tr. 352; BLM Exh. 59. A notice of the impoundment was issued to Klump on May 21, 1992. See Tr. 293; BLM Exh. 60 at 5-6. The notice stated that, unless redeemed by Klump, the cattle would be offered for sale by public auction on May 28, 1992. The notice was received by Klump on May 22, 1992. See BLM Exh. 60 at 8. The sale actually occurred on June 1, 1992, following issuance of another similar notice (setting the sale date and providing for redemption by payment of trespass and impoundment costs) on May 29, 1992. See Tr. 292-93; BLM Exh. 60 at 1-2. Klump was notified following the sale, by letter dated June 17, 1992, that trespass

damages in the amount of \$6,230.02 had been deducted from the proceeds of the sale that would be returned to him. See BLM Exh. 61. The trespass was considered to be repeated because of the prior trespasses detailed previously (247, 250, and 252) and willful because Klump had twice been offered the chance to file a proper grazing application. See Tr. 356-57; BLM Exh. 48 at 2.

Klump's assertion that BLM was required to issue a proposed decision either rejecting his application for grazing during the 1992/1993 grazing season or approving the application without amendment does not withstand analysis. Klump's right to protest BLM's eartagging requirement was fully recognized by BLM when issuing the proposed and final decisions of January 29 and February 15, 1991, denying that protest. The eartagging requirement was a longstanding term of the grazing permit dating back to 1983 when Klump's predecessor in interest held the permit. As noted above, although BLM's denial of Klump's protest was stayed pending the Board's decision on appeal at the time the 1992/1993 permit application was filed, the BLM decision was a denial of Klump's request to change the permit terms and, thus, the appeal did not stay the eartagging requirement which had long been a term of the permit. Hence, the BLM letter-decision of February 5, 1992 (BLM Exh. 39), rejecting Klump's grazing application for the Little Doubtful allotment on the basis of his deletion of the eartagging term contained therein did not abridge Klump's right to challenge this condition. A BLM decision rejecting a grazing permit application is properly affirmed where it is clear that the applicant did not intend to comply with the terms and conditions required by BLM to issue the permit. Stamatakis v. BLM, 115 IBLA 69 (1990). As BLM had already issued a proposed and final decision adjudicating Klump's request to drop the eartagging requirement, BLM was not required to repeat this exercise where Klump indicated his unwillingness to agree to the permit terms. 24/

[6] We also conclude that BLM was not required to issue a proposed decision upholding its finding of trespass with respect to the Little Doubtful allotment as a prerequisite to its impoundment and sale of the cattle deemed to be in trespass thereon. Departmental regulations require issuance of a proposed decision in the event that BLM is seeking to exact damages or suspend or cancel grazing use authorized under an existing permit as a result of a determination that a permittee is engaging in unauthorized grazing use on the public lands, as prohibited by 43 CFR 4140.1(b)(1). See

24/ Klump asserts that, faced with BLM's return of the grazing application in February 1992, he had no alternative but to complete the application as required by BLM, thus agreeing to the eartagging requirement. He expresses concern that this would have threatened his position before the Board at that time, wherein he was objecting to the requirement. See SOR at 27. It is true that, if Klump desired to graze cattle on the allotment during the 1992/1993 season, he was required to accede to the eartagging requirement. However, he could have done so under protest, thus clearly not jeopardizing his position before the Board. What he could not do is refuse to submit an acceptable application, and yet graze on the allotment. That was clearly not authorized.

43 CFR 4160.1-2; 4170.1-1(a) and (b). The permittee is entitled to protest the proposed decision within 15 days after receipt of the decision. See 43 CFR 4160.1-2 and 4160.2. In the absence of a protest, the proposed decision becomes the final decision, and, in the event of a protest, BLM is required to issue a final decision. See 43 CFR 4160.3(a) and (b).

However, the grazing regulations provide an entirely separate procedure where BLM finds it necessary to pursue impoundment and sale of cattle found to be in trespass. ^{25/} See BLM Response to SOR at 22. The first step is for BLM to serve the livestock owner with a notice of unauthorized grazing use and order to remove the livestock by a specified date. See 43 CFR 4150.2. This occurred with service of the trespass notice on March 31, 1992, which notice provided 14 days from receipt to remove all livestock on the allotment. See BLM Exh. 51 at 2. The notice was received on April 3, 1992. See BLM Exh. 56 at 2. The regulations further provide that any unauthorized livestock remaining on the public lands after the specified date "may be impounded." 43 CFR 4150.4. The next step is for BLM to serve the livestock owner with a notice of intent to impound, stating that unauthorized livestock may be impounded any time after 5 days from delivery of the notice. See 43 CFR 4150.4-1(a). On April 24, 1992, BLM issued Klump a notice of intent to impound cattle on the allotment. See BLM Exh. 56. It was received by him on April 25, 1992. See Tr. 499; BLM Exh. 56 at 3. Thus, after April 30, 1992, BLM was authorized to impound the unauthorized livestock "without further notice," under 43 CFR 4150.4-2, and it did so on May 20, 1992. See BLM Exh. 59. Klump was duly notified of the impending sale by notice dated May 29, 1992, in accordance with 43 CFR 4150.4-3. See BLM Exh. 60 at 1. Finally, BLM was authorized (in the absence of redemption by the owner) to sell the impounded livestock, under 43 CFR 4150.4-5, and it did so on June 1, 1992. See BLM Exh. 61.

There is no evidence that BLM failed to follow any of the required procedures for impounding and selling the cattle found in trespass on the allotment. See Tr. 410 ("We made very sure that we did everything that was required by both the regulations and the BLM Manual"); see generally Thacker v. BLM, 91 IBLA 356 (1986) (broad discretion of BLM in determining whether to impound and how to impound trespass animals). Also, this procedure ensured that Klump had notice at several times prior to the impoundment and sale, and the opportunity of removing the cattle in trespass or establishing that no trespass was occurring or (ultimately) of redeeming the impounded cattle. See also BLM Exhs. 39, 54, 58. Indeed, he objected to the notice of intent to impound, by letter dated May 6, 1992. See BLM Exh. 57. However, he took no other action.

Further, there is no requirement in any of these regulations that, before proceeding to impound and sell cattle in trespass, BLM must first issue a proposed decision upholding the underlying finding of trespass. Thus, impoundment and sale may occur even though BLM has not issued a

^{25/} The validity of similar regulations has generally been sustained. See Opinion of Under Secretary, 58 I.D. 47, 50 (1942) (referring to 36 CFR 261.13 (1939)).

decision adjudicating the trespass finding. See Thacker v. BLM, supra at 361-62; Herrera v. BLM, 38 IBLA 262, 268-69 (1978). Impoundment need not await final adjudication of the trespass by an Administrative Law Judge or the Board since to do so might permit a trespass, causing untold damage to the public lands, to continue while the case proceeds through the normal administrative review process. Rather, impoundment and sale is clearly viewed as a way of expeditiously correcting an ongoing trespass before any further damage occurs. See Herrera v. BLM, supra at 269.

Despite the fact that notice and impoundment of livestock found to be in trespass preceded administrative adjudication of the grazing trespass, it is clear that the trespass was the subject of both a proposed and final BLM decision. Klump was issued a proposed decision in the case of trespass 254 with issuance of the Area Manager's June 24, 1992, decision proposing to cancel the Little Doubtful and Simmons Peak allotments (BLM Exh. 48). See Tr. 386; BLM SOR at 33. In that decision, cancellation was expressly predicated on Klump's repeated and willful violations of 43 CFR 4140.1(b)(1), including that involved in trespass 254. See BLM Exh. 48 at 2, 3. Thus, the Area Manager, in effect, upheld the trespass finding in 254. Finally, Klump was provided 15 days to protest the proposed decision. See BLM Exh. 48 at 3. All of this accorded with the regulations regarding administrative remedies for grazing trespass. 43 CFR 4160.1-2. Klump protested the decision (BLM Exh. 49), pursuant to 43 CFR 4160.2, and it was sustained in the final decision issued by BLM on September 14, 1992 (BLM Exh. 50), pursuant to 43 CFR 4160.3(b). See BLM SOR at 33. We, therefore, conclude that BLM has complied with the applicable regulations with respect to issuance of a proposed and final decision finding a trespass with respect to grazing on the Little Doubtful allotment from March 1, 1992, through May 20, 1992.

Judge Rampton, however, concluded that BLM had not issued a proposed and final decision in the case of trespass 254, and thus made no ruling on the validity of BLM's trespass finding. See Decision at 17-19. 26/ Accordingly, we reverse this aspect of Judge Rampton's decision. It is clear from the record that 54 head of trespassing livestock were counted on April 9, 1992 (Tr. 281-82; BLM Exh. 55), and 105 head of trespassing livestock were counted on May 20, 1992 (Tr. 289; BLM Exh. 59). Further, as noted above, the evidence clearly supported a finding that the trespass was repeated willful. Hence, pursuant to our de novo review authority (see Eldon Brinkerhoff, supra at 337-38, 83 I.D. at 190), we affirm the Area Manager's September 1992 final decision upholding BLM's finding of repeated willful trespass in the case of trespass 254.

TRESPASSES AZ-040-3-255, AZ-040-3-261, and AZ-040-3-262

Similarly, we find that BLM issued a proposed and final decision in the three remaining trespass cases: 255, 261, and 262. See Tr. 386-87;

26/ The case of Rodney Rolfe, 25 IBLA 331, 83 I.D. 269 (1976), cited in the Administrative Law Judge's decision is distinguishable since, in that case, we held that BLM's disciplinary action was improperly based in part on trespass charges of which the lessee had never had notice and an opportunity to rebut. See id. at 338, 83 I.D. at 273.

BLM Exhs. 48, 50. The Area Manager's June 24, 1992, proposed decision essentially upheld the findings of trespass in each of these cases, noting the alleged violation and the basis for the finding of violation, and provided 15 days from receipt for filing a protest. See BLM Exh. 48 at 2, 3. It, thus, comported with 43 CFR 4160.1-2. The proposed decision set forth the action to be taken under the terms of 43 CFR 4170.1 (*i.e.*, cancellation of grazing privileges and preference on the Little Doubtful and Simmons Peak allotments) as required by 43 CFR 4160.1-2. Again, a protest was filed and the proposed decision was sustained in the September 14, 1992, final decision. See BLM Exhs. 49 and 50. Hence, we reverse the decision of Judge Rampton that no proposed and final decision were issued with respect to the remaining three trespass findings, in accordance with 43 CFR 4160.1-2 and 4160.3. See Decision at 17-19.

Since Judge Rampton concluded that BLM had not issued a proposed and final decision in the case of the remaining three trespass findings, he made no ruling on their validity. See Decision at 17-19. The record, however, clearly supports a finding that the grazing trespasses (grazing cattle without authorization) existed and were willful and repeated. See Tr. 306-07, 311-13, 379-80, 402-05; BLM Exhs. 70, 71, 74, 77, and 78. We, thus, will again exercise our *de novo* review authority. After reviewing all of the evidence, we affirm the Area Manager's September 1992 final decision upholding BLM's findings of trespass in the cases of trespasses 255, 261, and 262. Klump had no permit to graze cattle on these allotments when he intentionally placed cattle on the allotments. We, further, find that the three trespasses were repeated and willful.

Finally, BLM contends that Judge Rampton improperly overturned BLM's determination to cancel Klump's grazing permits and preferences on the Little Doubtful and Simmons Peak allotment because cancellation was adequately supported by the trespass findings. See BLM SOR at 9, 21.

CANCELLATION OF GRAZING PRIVILEGES

Judge Rampton overturned BLM's decision to cancel the two grazing permits and preferences on the basis that the Area Manager had improperly relied on four trespass findings, *i.e.*, 254, 255, 261, and 262 that had not been the subject of proposed and final trespass decisions under 43 CFR 4160.1-2, in deciding whether to cancel. See Decision at 18. Because we reverse this finding regarding the proposed and final decisions and we find that the record clearly establishes the existence of the repeated willful trespasses, we proceed to consider the propriety of the Area Manager's September 1992 decision to cancel the two grazing permits and preferences on the basis of the eight adjudicated trespass findings.

[7] There is no question that BLM is authorized by the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-315r (1988), and section 402(a) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1752(a) (1988), and their implementing regulations, to suspend or even cancel, in whole or in part, grazing privileges when a permittee has allowed cattle to graze in trespass on public lands, in violation of 43 CFR 4140.1(b)(1). See 43 CFR 4170.1-1; Diamond Ring Ranch, Inc. v.

Morton, 531 F.2d 1397, 1401-04 (10th Cir. 1976); BLM v. Holland Livestock Ranch, 39 IBLA at 299-301, 86 I.D. at 148-49. Departmental regulation 43 CFR 4140.1(b) specifically provides for the imposition of civil penalties under 43 CFR 4170.1 when livestock are allowed to graze on the public lands "[w]ithout a permit * * * or other grazing use authorization" or without "comply[ing] with a requirement under [43 CFR] 4130.5(c)." BLM is permitted to suspend or cancel grazing privileges in the case of a nonwillful and willful trespass. See 43 CFR 4170.1-1(a). However, BLM is required to suspend or cancel grazing privileges in the case of a repeated willful trespass. See 43 CFR 4170.1-1(b); Holland Livestock Ranch v. United States, 588 F. Supp. 943, 947 n.4 (D. Nev. 1984). BLM bears the burden of proving the appropriateness of the penalty assessed for trespass. See BLM v. Ericsson, supra at 255.

[8] In judging the propriety of cancellation of a grazing permit and preference, the relevant test is that set forth in Eldon Brinkerhoff, supra at 337, 83 I.D. at 190 (quoted with approval in Holland Livestock Ranch v. United States, 655 F.2d at 1005). See Decision at 18. The Brinkerhoff test provides that a "severe reduction" in grazing privileges (i.e., a permanent loss of privileges or a temporary loss of significant privileges for a period of years) will be imposed in cases involving the following elements: "(1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass." Eldon Brinkerhoff, supra at 337, 83 I.D. at 190. However, in determining the proper penalty, BLM should also consider "any mitigating circumstances." Id. at 336, 83 I.D. at 189-90. Thus, it is clear that the assessment of a proper penalty is not solely based on the total number of cattle that have been in trespass over the total number of days.

It is clear from the record in the present case that Klump has committed both willful and repeated trespasses during the period of time from January 1991 through June 1992, thus satisfying this aspect of the Brinkerhoff test. While the requirement to file a control document with BLM annually at the time of the grazing permit application is not explicit in the regulations, we have found that such a requirement is within the contemplation of the regulations if the annual application for grazing permit provides for grazing by cattle owned by a third party. The failure to timely file such an agreement (trespass 252) is willful where done in disregard of explicit BLM instructions. In the circumstances of this case, it was also repeated. While it appears that Klump was confused regarding the effect of a stay pending appeal under the grazing regulations, his noncompliance was engendered more by his adversarial attitude and was contrary to advice received from BLM.

Similarly, in the case of trespass 250, it is clear that the eartagging violation was willful. Klump's belief that the eartagging requirement was stayed by the pending appeal was unrealistic in light of the history of eartagging dating to before the time he acquired the permit. The evidence also supports a finding that trespass 257 was repeated willful.

With regard to the remaining trespass cases (254, 255, 261, and 262),

the record establishes a substantially similar pattern of repeated willful trespass. For the Simmons Peak allotment involved in 255, Klump had been advised by BLM letters of February 5 and March 12, 1992, that he had no valid grazing authorization due to his alteration of the terms of the application submitted to BLM. This letter also addressed the rejection of his unacceptable application for the Little Doubtful allotment (trespass 254). His assertion that the pending appeal both stayed the eartagging requirement and allowed grazing without an issued permit was unrealistic and without reasonable foundation. Regarding trespass 261, this trespass was essentially a continuation of the prior trespass in the Little Doubtful allotment by cattle not previously impounded.

The trespasses at issue were, for the most part, neither small in numbers nor brief in duration. Trespass 252 involved a trespass by 120 cattle for a period of almost 2 months. Although trespass 250 involved fewer cattle (10), it lasted almost 8 months from July 2, 1991, to February 2, 1992. With respect to trespass 254, the record establishes substantial numbers of livestock over a substantial period (March 1 to May 20, 1992). Thus, 54 head of trespassing livestock were counted on April 9 and 105 head on May 20.

We also note that there is little evidence that Klump sought to remedy any of the trespasses promptly after he received the trespass notice. Thus, we cannot say that Klump acted promptly to solve the trespass situation. See Holland Livestock Ranch v. United States, 588 F. Supp. at 948. In most of the cases, much if not all of the period during which Klump is ultimately deemed to have been in trespass occurred after his receipt of a trespass notice. Thus, we note that trespass 247 was not corrected until March 11, 1991, despite a February 11, 1991, trespass notice. Likewise, trespass 250 was not corrected until February 29, 1992, despite an August 2, 1991, trespass notice. Also, trespass 257 was not fully corrected until June 16, 1992, despite an April 14, 1992, trespass notice. Further, trespass 252 occurred in April 1992, despite a March 18, 1992, trespass notice. Trespasses 254, 255, and 261 occurred in April - June 1992, despite a March 1992 trespass notice. Finally, trespass 262 continued until June 16, 1992, despite a June 11, 1992, trespass notice. Therefore, we must conclude that Klump often failed to take prompt remedial action after notification of the violation.

We recognize that the record establishes that recent years have seen some changes in the manner in which grazing upon allotments held by the Klump family is managed. Also by way of mitigation, we note from the record that there is little evidence that Klump has committed other trespasses in the past. See Tr. 500-501. Further, we note that prior to the trespass notice in 252 Klump had not been reminded of the refiling requirement since the prior year. After receipt of the trespass notice, Klump indicated that control over his livestock had been given to his brother, but at first failed to file a qualifying control document, indicating that the requirement was pending on appeal. With respect to the trespass on the Badger Den allotment, 257, it appears by way of mitigation that Klump was not aware of the trespassing livestock although he had an obligation to take reasonable precautions to prevent such an occurrence.

The fact that Klump has committed repeated willful trespasses requires that the Department impose a suspension or cancellation, in whole or in part. See 43 CFR 4150.3 and 4170.1-1(b). Given the willfulness, the confrontational approach, and the attempted intimidation which marked Klump's behavior as established by both the testimony and the exhibits in the record (see Tr. 235, 298-99; BLM Exhs., 35, 62-64), it is clear that a substantial penalty is warranted by the trespasses established on the record in this case. Klump has demonstrated a continued intent to push the limits of his obligations with respect to grazing on the public lands to the ultimate and beyond. In so doing, he has plainly failed to recognize BLM's legitimate authority to manage the Federal range. Rather, he has insisted on defying BLM's lawful commands with respect to grazing, whether it be the requirement to submit a proper control document, to place ear tags on cattle, or to submit an appropriate grazing application, and, in the absence of such action, to refrain from grazing on the public lands.

Instead of complying under protest by submitting a proper control document, placing ear tags on cattle, or submitting an appropriate grazing application (all in accordance with BLM's prior directions) while pursuing his administrative appeal remedies, Klump has proceeded to disregard these obligations while continuing to graze the public lands. He has also done so despite specific BLM notice to the contrary. Thus, we note that trespasses 247, 252, and 262 occurred in January - March 1991, April 1992, and June 1992, after Klump had been notified (in all cases), in a January 15, 1991, decision, and reminded (in most cases), in a March 30, 1992, letter, that grazing must be preceded by the submission of a proper control document. See Tr. 447-48, 449, 485; Wayne D. Klump v. BLM, 124 IBLA at 201; BLM Exh. 9. Also, trespass 250 took place in July 1991 - February 1992, after Klump had been notified, in a February 15, 1991, decision, that cattle must have ear tags. See Wayne D. Klump v. BLM, 124 IBLA at 179. Further, trespass 257 occurred in April - June 1992, in large part after Klump had been notified, in a May 1, 1992, letter, that he had no authorization to graze. See BLM Exh. 26. Finally, trespasses 254, 255, and 261 took place in April - June 1992, after Klump had been notified, in a February 5, 1992, and a March 12, 1992, letter, that grazing would be deemed in trespass in the absence of submission and approval of proper grazing applications. See BLM Exhs. 39 and 54. In each instance, absent at least compliance under protest, Klump's only option was to defer grazing. He did not do so.

We do not regard Klump's actions as that of a responsible grazer, trying his best to comply with BLM's directions while still challenging them (as was his right). To paraphrase what the court stated in Chournos v. United States, 193 F.2d 321, 323 (10th Cir. 1951), cert. denied, 343 U.S. 977 (1952):

A livestock owner does not have the right to take matters into his own hands and graze public lands without [proper authorization or not in accordance with that authorization]. If there is dissatisfaction with the action of the officials * * *, the livestock owner's remedy is by appeal as provided for in the [Taylor Grazing] Act and the [Department's regulations].

We, therefore, conclude that a substantial penalty is warranted by the facts of this case. Moreover, we find that all of the elements of the Brinkerhoff test have been satisfied during the course of the 8 acts of trespass involved here. In particular, we must recognize the repeated and willful nature of most of the acts of trespass. Nevertheless, we will not at this time impose the most severe penalties (i.e., cancellation) where the ultimate aim is to modify Klump's grazing practices, and it has not been shown that a less severe penalty will not be adequate to this end. See Holland Livestock Ranch v. United States, 588 F. Supp. at 949; Alton Morrell & Sons, 72 I.D. 100, 110 (1965). Indeed, cancellation should be invoked, in most cases, only when "lesser sanctions have proven to be of no effect." Rodney Rolfe, supra at 336, 83 I.D. at 272.

Accordingly, we impose a 50-percent reduction in Klump's grazing privileges on the Little Doubtful and Simmons Peak allotments for a period of 3 years. In the final analysis, we believe that such a penalty is commensurate with the nature and extent of Klump's trespasses and is that which is best designed to promote the orderly use of the Federal range, as required by section 2 of the Taylor Grazing Act. See Alton Morrell & Sons, supra at 109. Indeed, given Klump's history of repeated trespasses, we hold that "no lesser action will work a reformation of [his] operations on the Federal range." Holland Livestock Ranch, 52 IBLA at 358, 88 I.D. at 293.

Therefore, we hereby affirm Judge Rampton's June 1993 decision to the extent he upheld trespasses 250, 252, and 257, and affirm his assessment of damages based thereon, except as modified above in the case of 257. We also affirm Judge Rampton's decision to the extent that he held that BLM was not required to issue proposed and final decisions prior to impounding live-stock found to be grazing without authorization. We reverse Judge Rampton's finding that BLM failed to issue proposed and final decisions in trespasses 254, 255, 261, and 262, and his finding that it was error for the BLM Area Manager to consider these trespasses in his decision assessing a penalty for repeated willful grazing violations. Finally, we affirm Judge Rampton's decision reversing the Area Manager's September 1992 decision cancelling Klump's grazing permits and preferences on the Little Doubtful and Simmons Peak allotments, and modify that decision to provide for a 50-percent reduction in those grazing privileges for a period of 3 years.

Accordingly, 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 in part, affirmed as modified in part, and reversed in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge