

GRANITE TRUST ORGANIZATION

v.

BUREAU OF LAND MANAGEMENT

IBLA 2004-54

Decided June 30, 2006

Appeal from a decision of Administrative Law Judge Robert G. Holt affirming four decisions of the Idaho Field Office, Upper Snake River District, Bureau of Land Management, related to the adjudication and management of grazing privileges on the Beck Canyon Allotment. ID-074-2001-001 (IBLA 2002-221); ID-074-2002-0010 (IBLA 2002-435); ID-074-2001-002 (IBLA 2002-150); and ID-IDF-508 (IBLA 2002-76).

Affirmed as modified.

- 1, Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations. A BLM decision affecting the grazing privileges of a livestock permittee may be regarded as arbitrary, capricious, or inequitable only if it is not supported by any rational basis, and the burden is on the objecting party to show by a preponderance of the evidence that the decision is unreasonable or improper.

2. Grazing Permits and Licenses: Cancellation or Reduction--  
Grazing Permits and Licenses: Trespass

In determining whether grazing trespasses are “willful,” intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or by innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

3. Grazing Permits and Licenses: Cancellation or Reduction--  
Grazing Permits and Licenses: Trespass

The BLM properly penalizes a grazing permittee for unauthorized grazing on public lands. In determining the severity of a reduction in grazing privileges, the reduction must be gauged in terms of the impact on all of the grazing use authorized under a particular grazing permit. The objective is to reform a permittee’s grazing practices by curtailing all or part of the permittee’s authorized use in the affected area. The reduction of a permittee’s grazing privileges is a proper exercise of BLM’s discretion when finding that the permittee has engaged in willful and repeated trespass.

4. Grazing Permits and Licenses: Cancellation or Reduction--  
Grazing Permits and Licenses: Trespass

The BLM properly cancels a permittee’s grazing privileges when the permittee has engaged in willful and repeated trespass during four prior consecutive grazing seasons, and the permittee has offered no evidence to show that BLM’s findings were in error.

APPEARANCES: C. Tom Arkoosh, Esq., Gooding, Idaho, for Granite Trust Organization; Kenneth M. Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Granite Trust Organization (GTO) has appealed from the September 30, 2003, decision of Administrative Law Judge Robert G. Holt affirming four final

decisions issued to GTO by the Idaho Falls Field Office, Bureau of Land Management (BLM), regarding the Beck Canyon Allotment (#11017) (the Allotment). GTO's appeals from those decisions were consolidated for hearing, which was conducted by Judge Holt on April 15-16, 2003.

GTO, through its management by the Babcock Family, has grazed livestock on the Allotment since the turn of the century. Lawrence Babcock is the current designated representative for GTO in dealing with BLM. The Allotment, which has approximately 1,850 acres of public land and 640 acres of private land, is divided into three pastures, referred to as the lower, middle, and upper pastures. The middle and upper pastures are entirely public, and the lower pasture includes GTO's private land.

On or about January 10, 1985, BLM issued a decision for a permit with a 10-year term allowing GTO to graze 91 head of cattle during an authorized season of use from May 1 to October 15 for a maximum of 175 animal unit months (AUMs) at 75 percent public land usage. (Ex. 2.)<sup>1/</sup> GTO signed the permit on April 12, 1985, for a term from March 1, 1985, to February 28, 1995. (Ex. 24.) Although the permit inexplicably identified the authorized grazing period as ending on July 17, the course of dealing by the parties, see Exs. 29-35, as also reflected in their 1987 management agreement (Ex. 3), suggests that permit dates were used to simplify annual billing and was not intended to establish a defined, shortened grazing season.

On November 10, 1987, GTO and BLM executed a Management Agreement (1987 Management Agreement) (Ex. 3), which provided for the Allotment to be divided into three separate pastures, the upper, middle, and lower pastures; for the rotation of cattle through the pastures on a scheduled basis with only one pasture to be grazed at any one time; for the lower pasture to be billed at 23 percent allocated to public land range in the lower pasture (for an estimated 26 public land AUMs), and 77 percent private range owned by GTO; for the middle and upper pastures to be billed at 100 percent public land range for a total of 149 AUMs split between the two; for turnout to be in the lower pasture annually with the cattle to be moved to either the middle or upper pasture after moderate to heavy use occurred on Federal land in the lower pasture; for grazing to be rotated in accordance with an attached grazing schematic between the middle and upper pastures, each to be grazed only once each season unless special authorization was given by BLM; and for all livestock to be moved back to the lower pasture, after a total of 149 AUMs was consumed in the middle and upper pastures. (Ex. 3). Special stipulations required GTO to advise BLM of the turnout and move dates between pastures and to submit actual use reports within 2 weeks after the close

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<sup>1/</sup> All Exhibits cited in this opinion are those introduced by GTO and BLM at the hearing before Judge Holt.

of the grazing season. Under the 1987 Management Agreement, BLM agreed to evaluate GTO's grazing use in the Allotment on an annual basis and to entertain GTO's application for supplemental forage if any were available at the end of the grazing season. (Ex. 3, Special Stipulations 1-4.) Although the record is less than a model of clarity or procedural correctness, we find that the 1987 Management Agreement was then binding on the parties not only as a contract, but also as an authorized permitted use under 43 CFR 4130.4, an implied exchange of use agreement under 43 CFR 4130.6-1 and/or a consensual permit modification under 43 CFR 4130.3-3.

On March 19, 1996, BLM issued a proposed grazing decision in accordance with the grazing regulations adopted on February 22, 1995. See 60 FR 9968. This decision proposed to renew GTO's grazing permit for the Allotment from April 1, 1996, through March 31, 2006. (Ex. 4.) BLM provided GTO with a copy of the grazing permit authorized by the grazing decision. (Ex. 21.) The permit was based upon the Big Lost Management Framework Plan (MFP) (Ex. 7), the MFP Decision and Status Summary (Exs. 6 and 65), the Big Lost-Mackay Grazing Environmental Impact Statement (EIS) (Ex. 64), and monitoring information, including utilization mapping (Exs. 69 and 68.) This proposed decision was consistent with the January 10, 1985, grazing decision, the 10-year permit signed by GTO on April 12, 1985, and the parties' 1987 Management Agreement. See Exs. 2, 3, and 24. Idaho Watersheds Project protested the proposed decision.

In apparent response to GTO's protest, BLM sent a 3-year permit to GTO which it promptly signed and returned before the 1996 grazing season began (Ex. 22). Although BLM later rejected the protest and issued a final decision to "renew" GTO's grazing permit for 10 years (Ex. 4), it inexplicably executed the 3-year permit rather than a renewed 10-year permit (Ex. 22). Whether a mistake, intended to authorize GTO's grazing on public lands prior to May 24, 1996 (e.g., during the pendency of the protest and before a final BLM decision was issued), or considered to be an experimental permit is of little moment here because this permit expired on February 28, 1999.

In the absence of a new permitting decision by BLM, we find that when the 3-year permit expired the parties were bound by the May 24, 1996, final decision to "renew" GTO's permit for 10 years. We, therefore, concur in Judge Holt's conclusion that the terms and conditions applicable to GTO's grazing use after expiration of the 3-year permit were "the 1986-1996 permit (Exhibit 24) incorporating the 1985 Area Manager's Decision (Exhibit 2) as modified or supplemented by the 1987 Management Agreement (Exhibit 3)" (hereinafter "renewed permit"). (ALJ Decision at 18.)

[1] At the outset, we will define the legal standards applicable to the four BLM decisions addressed by Judge Holt. Section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (2000), authorizes the Secretary, with respect to grazing districts on public lands, to “make such rules and regulations” and to “do any and all things necessary to \* \* \* insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range.” Implementation of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (2000), is committed to the discretion of the Secretary, through his duly authorized BLM representatives. E.g., James Ross v. BLM, 152 IBLA 273, 282 (2000); West Cow Creek Permittees v. BLM, 142 IBLA 224, 235 (1998).

The Department’s grazing regulations define an AUM as “the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month.” 43 CFR 4100.0-5. The term “permitted use” is defined as “the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs.” 43 CFR 4100.0-5. A “prohibited act” on public lands administered by BLM includes, inter alia, “[a]llowing livestock or other privately owned or controlled animals to graze on or be driven across these lands \* \* \* [i]n violation of the terms and conditions of a permit, lease or other grazing use authorization including, but not limited to, livestock in excess of the number authorized,” or “[i]n an area or at a time different from that authorized.” 43 CFR 4140.1(b)(1)(i) and (ii). A violation of 43 CFR 4140.1(b)(1) constitutes “unauthorized grazing use” requiring BLM to “determine whether a violation is nonwillful, willful, or repeated willful,” and “[v]iolators shall be liable in damages to the United States for the forage consumed by their livestock, for injury to Federal property caused by their unauthorized grazing use, and for expenses incurred in impoundment and disposal of their livestock, and may be subject to civil penalties or criminal sanction for such unlawful acts.” 43 CFR 4150.1.

BLM enjoys broad discretion in determining how to manage and adjudicate grazing privileges. Under 43 CFR 4.478(b), BLM’s adjudication of grazing privileges will be upheld on appeal if it appears reasonable and substantially complies with the provisions of 43 CFR Part 4100. In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an ALJ and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis, and the burden is on the objecting party to show by a preponderance of the evidence that the decision was improper. James Ross v. BLM, 152 IBLA at 282; West Cow Creek Permittees v. BLM, 142 IBLA at 235-36.

[2] More specifically and, as to the three decisions in which BLM determined that GTO's trespass had been willful and repeated, Judge Holt applied the following standard, which was articulated by the Board in Eldon Brinkerhoff, 24 IBLA 324, 338, 83 I.D. 185, 191 (1976):

Although "willfulness" is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespassers are "willful," intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

(ALJ Decision at 23.) Noting that this language was quoted with approval in Holland Livestock Ranch v. United States, 655 F.2d 1002, 1006-07 (9th Cir. 1981), Judge Holt further acknowledged that a finding that a trespass was willful or knowing may be negated by a good faith belief that the requirement did not apply in the circumstances of a given case. See Baltzor Cattle Co. v. BLM, 141 IBLA 10, 18 (1997).

We will now consider each of BLM's decisions within the context of these standards.<sup>2/</sup> Our review of the record shows that Judge Holt properly ruled that GTO failed to meet its burden of showing by a preponderance of the evidence that BLM's decisions were issued in error. See, e.g., West Cow Creek Permittees v. BLM, 142 IBLA at 236. In fact, the record demonstrates that BLM acted with commendable restraint in adjudicating GTO's repeated unauthorized use on the Allotment for 5 years. As becomes apparent from the following analysis, GTO's persistence in grazing on the Allotment as it pleased, despite admonitions from BLM and this Board, suggests that if GTO were not actively seeking cancellation of its own lease, it certainly grazed its livestock on the Allotment with a troubling lack of concern as to the inevitable consequences of which it had been made aware.

2000 Trespass Decision (ID-074-2001-001; IBLA 2001-221)

After conferring with GTO, by letter dated May 9, 2000, BLM informed GTO as to the grazing system that it would use to manage the Allotment for the 2000 grazing season. See Ex. 44. BLM sent GTO a billing statement with an annual authorization, which GTO paid on May 22, 2000. (Ex. 45; see ALJ Decision at 9.) BLM, through its range technician, documented unauthorized grazing on the

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<sup>2/</sup> In this opinion, we consider the four decisions in chronological order, which is the order in which Judge Holt addressed them.

Allotment during the 2000 grazing season through grazing use supervision reports, certified livestock counts, and photographs. See Exs. 46 and 60. GTO sent a letter to BLM on September 22, 2000, pointing out errors in BLM's notice of trespass. (Ex. 47.) BLM responded to these errors by letter dated September 22, 2000. (Ex. 48.)

On January 31, 2001, BLM issued a proposed decision addressing GTO's unauthorized use in the Allotment during the 2000 grazing season. (Ex. 49.) BLM determined that there were 78 AUMs of unauthorized use by livestock on the Allotment between August 15 and September 22, 2000, and determined that the use was willful and repeated<sup>3/</sup> and billed the unauthorized use at \$33.30 per AUM<sup>4/</sup> for a total of \$2,597.40, as well as reasonable expenses (mileage and employee time) in the sum of \$784.00, for a total due BLM in the amount of \$3,381.40.<sup>5/</sup>

GTO did not file a protest, and the trespass decision became final 15 days after receipt by GTO. GTO appealed from and filed a petition for stay of BLM's decision. By order dated April 25, 2001, the Board granted GTO's petition for stay and stated: "A stay of this BLM decision assessing liability for trespass does not authorize grazing which is not otherwise authorized pursuant to the relevant permit and BLM range management decisions." The case was referred to the Hearings Division for a hearing on the merits.

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<sup>3/</sup> In January 2000, GTO and BLM settled two willful trespasses (ID-030-11480 and ID-030-11481) for unauthorized use on the Allotment in 1998 and 1999, with GTO paying \$3,000 to BLM. See Ex. 12.

<sup>4/</sup> The willful and repeated trespass rate is three times the nonwillful unauthorized use rate; the nonwillful unauthorized use rate is set each year and accordingly differs from year to year. See 43 CFR 4150.3(a) and (c).

<sup>5/</sup> Subsequent to the hearing, in its Response to GTO's Opening Brief, BLM amended its calculation of unauthorized use. BLM had based its calculations upon 100 percent public use, even though use in the lower pasture had been calculated at 16 percent public land use, with the remaining 84 percent attributed to GTO's private land use in the lower pasture. (BLM's Response to GTO's Opening Brief at 12; see BLM v. Babcock, 32 IBLA 174, 184 (1977) ("[I]t is therefore reasonable to conclude that of the total forage consumed by appellant's cattle, federal forage comprised the same percentage as it comprised of the total forage available in the allotment, i.e., 33 percent".)) BLM again determined that the unauthorized grazing use was willful and repeated and would be billed at \$33.30 per AUM for a recalculated total of \$699.30, with reasonable expenses remaining the same, for a recalculated total due BLM for the 2000 trespass in the amount of \$1,483.30.

In his decision, Judge Holt began by defining the burden of proof and scope of review, with which we agree, as follows:

The party appealing a decision of BLM has the burden of proving error therein. National Park Service (Stuart G. Ramstead), 125 IBLA 335, 345 (1993). The appeal must “state the reasons, clearly and concisely, why the appellant thinks the final decision . . . is in error.” 43 C.F.R. § 4.470(a). An appeal is insufficient if it merely reiterates arguments raised in a protest and fully addressed in BLM’s decision. In Re Suce Creek Timber Sale, 131 IBLA 206, 208 n. 2 (1994). The appeal must be supported by “argument or evidence” establishing error by the standard of a preponderance of the evidence and, absent such proof, BLM’s decision must be affirmed. Leonard J. Olheiser, 106 IBLA 214, 216 (1988).

An appellant cannot raise new issues in an appeal which were not included in the protest and not addressed by BLM in its decision. Southern Utah Wilderness Alliance et al., 128 IBLA 52, 58 (1993). The rationale for this approach is well settled.

[G]enerally it is best to allow the initial decisionmaker to confront objections to proposed actions and to limit the Board’s review to appeals of decisions addressing those objections because such a process follows the logical framework for decisionmaking within the Department, as it relates to BLM actions.

Southern Utah Wilderness Alliance et al., *supra*, 128 IBLA at 59.

(ALJ Decision at 16-17.)

As Judge Holt notes, on May 9, 2000, BLM sent GTO a letter (Ex. 44) with a bill and grazing authorization for the 2000 season (Ex. 45). The letter estimated 26 AUMs of public land in the lower pasture, 74 AUMs in the upper pasture, and 75 AUMs in the middle pasture, for a total of 175 AUMs. BLM also described a rotation system through the various pastures during the season: “The main management concern in the Beck Canyon Allotment is the need to improve the condition of the riparian areas. This can be accomplished by shortening the grazing season period on the riparian zones and using the upper pasture early to allow for maximum regrowth of vegetation along Beck Canyon Creek.” (Ex. 44.) BLM then purported to require that all cattle be returned to the lower pasture on or about July 3, and that they be removed from all public lands by no later than August 13, 2000.

In addition, Judge Holt found no merit in GTO's argument that BLM had failed to follow the procedures prescribed in 43 CFR 4110.3-2<sup>6/</sup> and 4110.3-3.<sup>7/</sup> While there are some similarities between BLM's 2000 letter and the renewed permit, there are also significant differences. The renewed permit allowed consumption of 175 AUMs between May 1 and October 15, with 149 AUMs to be consumed in the upper and middle pastures and the remainder to be consumed in the lower pasture (23% public land). The 1987 clearly eschews any fixed grazing season between May 1 and October 15, requires that only one pasture be used at a time, and mandates cattle rotation based upon consumption (e.g., begin in the lower pasture, move to the upper (or middle) pasture after moderate to heavy use on public lands, move to the middle (or upper) pasture after 75 AUMs consumed, and return to the lower pasture after an additional 74 AUMs consumed). The BLM letter purports to fundamentally restructure the parties' agreement by establishing fixed dates for initial entry onto public lands in the lower pasture, movement of cattle to and between the upper and middle pastures based on 25 days of use (not after 75 AUMs consumed), and removal of all cattle from public lands by no later than August 13, 2000. The 2000 letter permissibly required early movement from the lower to the upper pasture to address riparian concerns. Such a directive was not inconsistent with the renewed permit.<sup>8/</sup>

<sup>6/</sup> This regulation provides:

“(b) When monitoring or field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180 [Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration], or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce permitted grazing use or otherwise modify management practices.”

<sup>7/</sup> This regulation provides:

“(a) After consultation, cooperation, and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing § 4110.3-2 shall be issued as proposed decisions pursuant to § 4160.1, except as provided in paragraph (b) [emergency reductions] of this section.”

<sup>8/</sup> Judge Holt considered annual grazing bills as reflective of authorized use. See ALJ Decision at 18-19. The terms and conditions applicable to the grazing use of public lands are reflected in applicable permits, allotment management plans and other similar undertakings (e.g., 1987 Management Agreement). See 43 CFR 4100.5. Although the payment of annual grazing bills is a condition precedent to authorized use, 43 CFR 4130.8-2(e) and 4140.1(b)(1), such bills do not establish the terms and conditions of such use. To hold otherwise would empower BLM

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Further, Judge Holt found BLM's methodology for assessing damages against GTO to be proper:

BLM calculated the amount of forage consumed by the trespass by taking the number of cattle observed in the wrong areas on a particular day and assuming they remained there until the next inspection date. (Exhibits 46 and 60). BLM also used the percentage of federal forage in the lower pasture to calculate the forage consumed by the cows on the private and public land in the lower pasture. The IBLA has previously approved this method of calculating damages in a case involving the same allotment and GTO's predecessors. Bureau of Land Management v. Ross Babcock, 32 IBLA 174, 184-185 (1977). GTO did not present any conflicting evidence at the hearing about the number of cows found to be trespassing. GTO also did not present any substantial arguments that the method BLM used to calculate damages was not proper.

(ALJ Decision at 21.) Judge Holt affirmed BLM's finding that GTO's trespass was willful and repeated, as well as BLM's assessment of damages at three times the nonwillful rate as provided by 43 CFR 4150.3(c).<sup>2/</sup> He noted that GTO had previously settled two prior trespass decisions (see Ex. 12), and that GTO had offered no conflicting evidence. (ALJ Decision at 22.) Applying the Brinkerhoff rule, he determined that based upon objective facts GTO's trespass was willful, given that the "circumstances did not comport with the notion that [GTO had] acted in good faith or innocent mistake." 24 IBLA at 338, 83 I.D. at 191. See also Holland Livestock Ranch v. United States, 655 F.2d at 1006-07.

Based upon GTO's claim that it had the right to use the lower pasture where its private property is located and that this pasture had enough forage to support additional use, Judge Holt conceded that "GTO may have had a good faith argument

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<sup>8/</sup> (...continued)

unilaterally to change the terms and conditions of authorized use through billing and without complying with applicable procedural requirements.

<sup>2/</sup> 43 CFR 4150.3 provides:

"Where violations are willful, the authorized officer shall take action under § 4170.1-1(b) of this title. The amount due for settlement shall include the value of forage consumed \* \* \*. Settlement for willful and repeated willful violations shall include the full value for all damages to the public lands and other property of the United States; and all reasonable expenses incurred by the United States in detecting, investigating, resolving violations, and livestock impoundment costs."

to continued use of the lower pasture after the expiration of the authorized use.” (ALJ Decision at 22.) However, he found that “no such good faith claim can apply to the middle and upper pastures in violation of the authorization.” *Id.* Thus, he properly concluded that “GTO did not act with good faith or innocent mistake, particularly with respect to trespasses in the Middle and Upper pastures,” and that “GTO willfully ignored and violated the terms of the grazing authorization.” *Id.* at 22-23. We agree.

Judge Holt summarized GTO’s unauthorized grazing use in a table (ALJ Decision at 22-23). The record is clear that GTO repeatedly engaged in the unauthorized use of public lands by simultaneously grazing in multiple pastures in violation of the renewed permit, *i.e.*, the parties’ 1987 Management Agreement. GTO’s conduct is particularly troublesome because GTO had recently settled its 1998 and 1999 trespasses by agreeing to “repair and extend the division fence between the Lower and Middle Pastures \* \* \* [and] between the Middle and Upper Pastures” before the beginning of the 2000 grazing season (Ex. 12), actions obviously intended to ensure that accidental grazing in multiple pastures at any one time did not occur. Moreover, BLM even reminded GTO of this requirement in its May 9, 2000, letter transmitting the grazing bill for the 2000 season. (Ex. 44.) Since the parties’ 1987 Management Agreement required that all cattle be returned to the lower pasture after 149 AUMs were consumed, it does not appear that the presence of cattle in the lower pasture constituted a willful trespass in late August/September, as Judge Holt also found. (ALJ Decision at 22.) In quantifying damages for a willful trespass, we note that *BLM v. Holland Livestock*, 39 IBLA 272, 285 (1979), *aff’d*, 655 F.2d 1002 (9th Cir. 1981), held that “[t]he number of cattle designated as in trespass during a term of days in which a count is not made is the lesser number of either the beginning count or the ending count when the trespass was terminated by a subsequent count.” So considered, damages of not less than four AUMs would be appropriate for these wilful violations.<sup>10/</sup>

2001 Trespass Decision (ID-074-2001-0010; IBLA 2002-435)

[3] In reviewing BLM’s 2001 Trespass Decision, it is impossible not to have in mind GTO’s prior history of trespass. As noted, 43 CFR 4140.1(b) specifically

<sup>10/</sup> Based upon the above-identified table, the following trespasses and dates were identified: 23 cattle were trespassing in the middle pasture on May 16; 2 were trespassing in the upper pasture August 21 through 27; 12 were trespassing in the middle and upper pastures on August 28; 5 were trespassing on the middle and upper pastures August 29 through September 7; and 1 was trespassing September 8 through 14. *See* ALJ Decision at 22.

provides for the imposition of civil penalties under 43 CFR 4170.1 where privately-owned cattle are allowed to graze on the public lands “[w]ithout a permit” or “[i]n an area or at a time different from that authorized.” The BLM is permitted to suspend or cancel grazing privileges in the case of a nonwillful trespass. 43 CFR 4170.1-1(a). However, BLM is required to suspend or cancel grazing privileges in the case of a repeated willful trespass. 43 CFR 4170.1-1(b); BLM v. Burghardt Co., 138 IBLA 365, 369 (1997). It is in this context that Judge Holt considered the 2001 Trespass Decision.

For the 2001 grazing season, BLM again issued a grazing bill and authorization consistent with the renewed grazing permit. See Ex. 39. BLM’s cover letter dated April 11, 2001, specifically informed GTO that it was not authorized to be on any BLM land after July 21. BLM informed GTO that it did not presently have a valid signed permit for the Allotment and that in the near future BLM would begin the process of renewing the grazing permit. (Ex. 68, Attachment 6.) GTO responded by seeking to reactivate 143 suspended AUMs. See Ex. 37. GTO provided the following explanation for the changes:

The changes that are attached to the grazing application reflect the 143 AUM’s that were suspended for a number of years. I have repeatedly asked for Re-instatement of these AUM’s as it has been well established that forage is available on a sustained yield basis. This corrected application reflects at least the actual historical use of 500 AUM’s available on private ground plus 301 of the 318 AUM’s on public land, and reflects the actual total grazing period of 5/01 thru 10/15.

(Ex. 38.) By letter dated April 27, 2001, BLM refused to accept the modifications and emphasized that GTO would only be authorized to graze 91 cattle from May 1 to July 21, 2001. (Ex. 50.) On May 15, 2001, GTO paid the bill authorizing its use of public lands for the 2001 grazing season. (Ex. 39.)

BLM made several visits to the various pastures on the Allotment and documented unauthorized use during the 2001 grazing season. See Ex. 51. On March 20, 2002, BLM issued a proposed decision addressing GTO’s unauthorized use. (Ex. 52.) On April 15, 2002, GTO filed its protest (Ex. 53), and on June 10, 2002, BLM responded to the protest and issued its final decision dealing with unauthorized grazing by GTO on the Allotment during the 2001 grazing season. (Ex. 54.) BLM determined that there were 263 AUMs of unauthorized use on the Allotment between July 22 and October 17, 2001, based on 91 cattle at 100 percent Federal use.<sup>11/</sup>

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<sup>11/</sup> At the hearing, it became clear that BLM’s calculations had been based upon 100 percent public land use, even though it acknowledged that use in the lower

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BLM also determined that the unauthorized use was willful and repeated and billed such unauthorized use at \$32.70 per AUM for a total of \$8,600.10. BLM further assessed reasonable expenses (mileage and employee time) in the sum of \$840.00, for a total due BLM in the amount of \$9,440.10. Additionally, BLM reduced GTO's permitted use by 50 AUMs for a 5-year period beginning with the 2003 grazing season in accordance with 43 CFR 4170.1-1(b).

GTO appealed from and filed a petition for a stay of BLM's final decision. By order dated September 5, 2002, the Board denied GTO's motion for stay.

For the reasons given for affirming BLM's 2000 Trespass Decision, Judge Holt concluded that GTO's grazing trespass was again repeated. As with the 2000 trespass, GTO argued that it had the right to use the lower pasture where its private property is located and that this pasture had substantial forage to support additional use. Judge Holt again stated that "GTO may have had a good faith argument to continued use of the lower pasture after the expiration of the authorized use," but that "no such good faith claim can apply to the upper and middle pastures which are managed all by BLM," where "BLM found substantial numbers of cattle \* \* \* in violation of the authorization." (ALJ Decision at 24.) He concluded that "GTO did not act with good faith or innocent mistake" with regard to trespass in the middle and upper pastures, that BLM was required by the "mandatory terms" of 43 CFR 4170.1-1(b) to take action on the willful and repeated violations, and that "[t]he only discretion left to BLM is the choice of remedy, being either a suspension, in whole or in part, or a cancellation of the grazing permit." *Id.* Further, he found that in suspending 50 AUMs of use for five years, "BLM acted reasonably in choosing the least drastic alternative." *Id.* at 25-26.

Judge Holt stated that had GTO contested the partial suspension of its authorized use, he would have concluded that the suspension was reasonable under the following test:

Generally, the Department has limited severe reductions of a licensee's or permittee's grazing privileges to 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

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<sup>11</sup>/ (...continued)

pasture should have been calculated at 23 percent public land use, with the remaining 77 percent attributed to GTO's private land in the lower pasture. BLM accordingly revised its calculation of unauthorized grazing use to a total of 126 AUMs at the willful and repeated rate of \$32.70 per AUM resulting in \$4,120.20, plus reasonable expenses of \$840.00, for a total of \$4,960.20. See Exs. 51 and 60.

long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass.

(ALJ Decision at 26, quoting Eldon Brinkerhoff, 24 IBLA at 337.) He set forth the following reasons for upholding BLM's trespass decision:

GTO settled willful trespass decisions in 1998 and 1999. (Tr. 260, 331, Exhibit 12). The undersigned has also concluded above that the 2000 and 2001 trespasses were willful. Therefore the trespasses have been both willful and repeated. \* \* \* [T]he trespasses found by BLM involved fairly large numbers of cattle when compared to the total authorized number of cattle (i.e., 91). On nearly each occasion BLM found more than 50% of the 91 authorized cattle to be in trespass. The trespass occurred over a fairly long period of time. BLM found cattle on the allotment from June 16, 2001 to October 17, 2001 (four months) which is a third of an entire year. Finally there is no evidence that GTO took prompt remedial action upon notification of the trespass. Therefore, the undersigned concludes that the Brinkerhoff standards have been satisfied for BLM to have taken action suspending a portion of GTO's authorized use.

(ALJ Decision at 26.)

Judge Holt summarized GTO's unauthorized grazing use in a table. See ALJ Decision at 25. The record is clear that GTO repeatedly engaged in the unauthorized use of public lands under the renewed permit's requirement that only one pasture be grazed at any one time, with the upper pasture to be grazed first. These trespasses constitute willful violations of the renewed permit, as discussed infra. The willful nature of these trespasses is further demonstrated by BLM's rejection (Ex. 50) of GTO's request to extend the grazing season and increase AUMs (Ex. 37). Rather than complying while protesting BLM's rejection of its request (Ex. 50), GTO operated during 2001 as if its rejected request had been granted in full.

GTO claims that BLM was required to increase its AUMs for the 2000 and 2001 grazing seasons, but the record adequately supports BLM's rejection of this claimed right, as recognized by Judge Holt. See ALJ Decision at 20-21. As to GTO's alleged right to access its water on public lands in the lower pasture, it failed to establish that its "rights" were violated, as identified by Judge Holt. Id. at 21. In any event and as discussed above, clear trespasses occurred whenever cattle were in more than one pasture at any one time. As to the quantum of damages under the Holland

formula, we find that damages of no less than 15 AUMs would be appropriate for these willful violations.<sup>12/</sup>

In light of the above-identified circumstances, BLM also proposed to reduce GTO's allotment by 50 AUMs for 5 years. See Ex. 52. GTO protested (Ex. 53), and BLM issued its final decision on June 10, 2002 (Ex 54). There is no doubt that some AUM reduction was required under 43 CFR 4170.1-1(b) and warranted under the standards summarized in Brinkerhoff, 24 IBLA at 337. Since BLM had already modified GTO's grazing permit, as discussed infra, BLM's action resulted in GTO having only 51 AUMs for future grazing seasons. Whether a 50 AUM reduction was then warranted or excessive under these circumstances need not be decided as this issue is now moot under our resolution of the 2002 trespass, as discussed below.

2001 Permit Renewal Decision (ID-074-2001-002; IBLA 2002-150)

Concurrent with the 2001 grazing season, during which BLM documented GTO's willful and repeated trespass on the Allotment, BLM was finalizing a systematic evaluation of the Allotment to determine compliance with the "Standards for Rangeland Health and Guidelines for Livestock Grazing Management" (Standards for Rangeland Health), approved by the Secretary on August 12, 1997, in accordance with 43 CFR Subpart 4180. See Ex. 61. BLM based its assessment upon the report of an interdisciplinary team which relied upon and incorporated information from an inventory conducted by University of Montana Riparian and Wetland Research Program in 1994 (Ex. 40); an assessment conducted in 1999 (Ex. 41); monitoring data from BLM records including utilization mapping (Exs. 67 and 69); an Allotment inspection report with photographs, dated October 11, 2000 (Ex. 42); and an Allotment inspection report, with photographs, dated September 5, 2001 (Ex. 43). BLM determined that the Allotment met Standard 1 (Watersheds); Standard 4 (Native Plant Communities); and Standard 8 (Threatened and Endangered Plants and Animals). BLM determined that the Allotment did not meet Standard 2 (Riparian Areas and Wetlands); Standard 3 (Stream Channel/Floodplain); and Standard 7 (Water Quality). (Ex. 63.) BLM concluded:

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<sup>12/</sup> Based upon the above-identified table, the following trespasses and dates were identified: 23 cattle were trespassing on July 31; 14 were trespassing in middle and upper pastures August 1 through August 8; 1 cow was trespassing in upper pasture on August 8; 4 were trespassing in middle pasture August 9 through August 23; 35 were trespassing in middle pasture on September 18; 9 were trespassing in middle pasture September 19 through October 2; 6 were trespassing in middle pasture October 3 through 12; 1 cow was trespassing in upper pasture on October 12; 6 were trespassing in middle pasture October 13 through 17; and 2 were trespassing in middle pasture on October 17.

[A]ll of the applicable Standards for Rangeland Health are not being met and are not making significant progress and livestock management practices does not conform with all applicable Guidelines for Livestock Grazing Management in the Beck Canyon Allotment. Livestock grazing practices are a significant factor in the achieving the Standards for Rangeland Health and do not conform with the Guidelines for Livestock Grazing Management.

(Ex. 63 at 4.)

Having determined that grazing was a causative factor in the degradation of the public lands in the Allotment, BLM was required under 43 CFR 4180.2(c) to “take appropriate action as soon as practicable but not later than the start of the next grazing year to achieve the standards and conform with the guidelines that are made effective under this section [43 CFR 4180.2].” BLM utilized information from the Big Lost-Mackay Grazing Final EIS, the Big Lost MFP, the Beck Canyon Allotment Assessment, and monitoring studies to analyze its proposed actions regarding grazing management on the Allotment, resulting in an Environmental Assessment (EA) for the Permit Renewal of the Allotment (EA No. ID-074-01-052). See Ex. 15. On September 24, 2001, BLM issued its proposed decision to implement the proposed action described in EA No. ID-074-01-052 and set forth its specific terms. See Ex. 13. On October 13, 2001, BLM received GTO’s protest of its proposed decision. See Ex. 66. On October 25, 2001, BLM addressed GTO’s protest points and issued its final decision. See Ex. 14.

BLM’s final decision closed the upper pasture, where Beck Canyon Creek is located, to livestock grazing for a minimum of 3 years, after which it would be evaluated and livestock grazing allowed to resume if the riparian health of the Creek displayed a strong trend towards proper functioning condition. The final decision expressly eliminated “exchange of use”<sup>13/</sup> within the Allotment and changed the percent of Federal range in the lower pasture to 100 percent, which further necessitated changing the season of use in the lower pasture to 91 cattle for a period of 8 days. The final decision suspended 74 AUMs of use in the upper pasture until riparian conditions improved, a minimum of 3 years. GTO appealed from and filed a petition for stay of BLM’s final decision. By order dated January 23, 2002, the Board denied GTO’s motion for stay and the decision went into effect.

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<sup>13/</sup> GTO’s prior use of the lower pasture may have been authorized by an implied exchange of use agreement under the parties’ 1987 Management Agreement. It is nonetheless clear that the 2001 permit expressly rejected any such claimed right of use for 2002 and later.

In his decision, Judge Holt stated that GTO did not specifically address the 2002 permit, but rather made general arguments directed at all four appeals. As to GTO's argument that BLM was required to follow the formal decisionmaking procedures of 43 CFR 4160.1 through 4160.4 to reduce its permitted grazing use on the Allotment for the 2002 grazing season, Judge Holt stated that BLM had followed those procedures by issuing a proposed decision which GTO protested, and then a final decision which GTO appealed. We agree.

Judge Holt also addressed GTO's contention that BLM had relied upon wrong data to support its conclusion that the Standards for Rangeland Health were not being met, and that livestock management practices do not conform with the Guidelines for Livestock Grazing Management. He reviewed the testimony of the witnesses presented by GTO, including three brothers, James Babcock (Tr. 134-38), Ruben Babcock (Tr. 138-43), and Lawrence Babcock (Tr. 221-23), and a neighbor, Charles Huggins (Tr. 142-49), "who testified that the riparian areas in the Allotment were stable or better than they had been historically" (ALJ Decision at 28), and an employee of the National Resource and Conservation Service, Steve Cote, "who recalled that collaborative assessment of the riparian area was 'functional-at-risk' (Tr. 154) and that the allotment had more carrying capacity than BLM had determined (Tr. 161-173)." (ALJ Decision at 28.) Judge Holt evaluated GTO's evidence against the burden of proof as articulated in West Cow Creek Permittees v. BLM, 142 IBLA at 235-36, in finding that the opinions of GTO's witnesses concerning the "unchanged condition" of Beck Canyon Creek represent merely contrary opinions that fail to show that BLM erred when collecting and interpreting data, or when concluding that the creek was in a "non-functional" or "functional-at-risk" condition:

An appellant challenging the accuracy of a range study must show not just that the results of that study could be in error, but that they are erroneous. See Glanville Farms, Inc. v. BLM, 122 IBLA 77, 87 (1992); Dorius v. BLM, 83 IBLA at 37. Error in BLM's findings can be established only by showing that BLM's range study methods are incapable of yielding accurate information, that BLM materially departed from prescribed procedures, or that a demonstrably more accurate study has disclosed a contrary result. See Glanville Farms, Inc. v. BLM, 122 IBLA at 87-88; Dorius v. BLM, *supra*.

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Kings Meadow Ranches, 126 IBLA 339, 342 (1993); Animal Protection Institute of America, 118 IBLA 63, 76 (1991). A party challenging BLM's evaluation must do more than offer a contrary opinion; an appellant must show by a preponderance of the evidence that BLM erred when collecting the underlying data, when interpreting that data, or when

reaching the conclusion, and not simply that a different course of action or interpretation is available and supported by the evidence. Animal Protection Institute of America, *supra*, and cases cited. Mere professional disagreement voiced by an appellant's expert does not suffice to establish error in studies conducted by a BLM range conservationist. See Riddle Ranches v. BLM, 138 IBLA at 85-86.

(ALJ Decision at 30, quoting West Cow Creek Permittees v. BLM, 142 IBLA at 238.)

Judge Holt rejected GTO's argument that BLM erred in determining the carrying capacity of the lower pasture of the Allotment in the 2001 Permit Renewal Decision. See GTO's Opening Brief at 11. He stated that BLM did not make a determination as to carrying capacity, but that in the EA BLM had resolved to avoid the historical disagreement between itself and GTO "concerning how many AUMs are available on the private land and how much utilization of the range is appropriate" by allowing GTO and "BLM to each manage their land as they feel is most appropriate." (Ex. 2 at 3.) The EA stated that this objective would be achieved by fencing off GTO's private land from the public land. *Id.* Thus, according to Judge Holt,

the 2001 decision eliminated the need to resolve the dispute between GTO and BLM over 'carrying capacity' of the lower pasture by maintaining the existing AUMs for the total public portions of the allotment at 175, temporarily suspending a portion in the upper pasture to allow for recovery of riparian health and avoiding the historical disagreements over the carrying capacity of the lower pasture by eliminating the private land from the allotment.

(ALJ Decision at 30-31.) "Having observed the demeanor of the witnesses and judged their credibility and having considered all of the evidence submitted," Judge Holt found that GTO had "not satisfied its burden to prove by a preponderance of the evidence that the 2001 Decision [was] unreasonable or improper." *Id.* at 33. Again, we agree.

#### 2002 Trespass Decision (ID-IDF-508; IBLA 2003-76)

[4] Against this backdrop, BLM issued to GTO a grazing bill and authorization for the 2002 grazing season consistent with BLM's 2001 Standards & Guidelines and Permit Renewal Decision, which was not stayed by the Board, as just described. Since that decision had closed the upper pasture to livestock grazing for a minimum of 3 years until riparian conditions improved, BLM authorized GTO to graze 91 cattle on the lower pasture from May 1 to May 8, 2002, at 100 percent Federal use for 24 AUMs, and to graze 91 cattle on the middle pasture from May 9 to June 3 at

100 percent Federal use for 78 AUMs, for a total of 102 AUMs. <sup>14/</sup> (Ex. 55.) GTO paid the required fees under protest, listing several objections in a letter dated May 22, 2002. (Ex. 57.)

BLM conducted several visits to the Allotment and documented unauthorized grazing during the 2002 grazing season. See Exs. 58 and 60. On November 18, 2002, BLM issued a proposed decision dealing with GTO's unauthorized use on the Allotment during the 2002 grazing season. GTO did not file a protest, but it appealed from and requested a stay of BLM's decision. By order dated January 14, 2003, the Board denied GTO's motion for a stay and referred the matter to the Hearings Division for a hearing on the merits.

In his decision, Judge Holt again noted that GTO had settled two prior trespass decisions, and that he had affirmed BLM's trespass decisions for the 2000 and 2001 grazing seasons. On these facts, and considering that BLM had issued its 2001 Permit Renewal Decision reflecting the applicable Standards and Guidelines, we conclude that Judge Holt properly ruled that GTO's trespass in 2002 was willful and repeated. (ALJ Decision at 33.) We fail to see how he could have ruled otherwise. He again recognized that while GTO may have had a good faith argument to continued use of the lower pasture after the expiration of authorized use, "no such good faith claim can apply to the upper and middle pastures, which [are] all public lands," where "BLM found substantial numbers of cattle \* \* \* in violation of the authorization." Id. at 34. Again, we agree with his ruling that GTO "did not act with good faith or innocent mistake \* \* \* and thus willfully ignored and violated the terms of the grazing authorization." Id. at 35.

Judge Holt summarized GTO's unauthorized grazing use in a table. See ALJ Decision at 34. The record is clear that GTO repeatedly engaged in the unauthorized use of public lands by inter alia grazing in the upper pasture and in multiple pastures simultaneously in violation of the express terms of the 2001 final permit decision. These trespasses constituted willful violations of the renewed permit, as discussed above and by Judge Holt. See ALJ Decision at 35. As to the

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<sup>14/</sup> As noted by BLM, "[f]or whatever, reason, BLM elected not to adjust said grazing levels as set by the June 10, 2002 grazing trespass decision which, in accordance with 43 CFR § 4170.1-1(b), required BLM to suspend GTO's grazing use, in whole or part, for repeated willful violations, resulting in a reduction of GTO's permitted use by 50 AUMs for a 5-year period beginning with the 2002 grazing season." (BLM's Response to GTO's Opening Brief at 21 n.22.)

quantum of damages under the Holland formula, we find that damages of no less than 68 AUMs would be appropriate for these willful violations.<sup>15/</sup>

Judge Holt found that BLM was constrained to take action under 43 CFR 4170.1-1(b), given GTO's repeated willful violations. Observing that BLM had imposed a partial suspension for GTO's 2001 trespass, he concluded that BLM had acted reasonably in cancelling GTO's permit, given the fact that GTO continued to trespass during the 2002 grazing season. He noted that, had GTO not specifically contested BLM's decision to cancel the permit, he would have concluded that the cancellation was proper in any event. He again applied the Brinkerhoff standards in upholding cancellation of GTO's permit. Further, he found "that BLM had acted reasonably in choosing a more severe action when GTO continued to violate its authorized use." (ALJ Decision at 35.) His rationale is set forth below:

The Board has previously acknowledged in other cases that "[t]he objective is to reform a permittee's grazing practices in that area by curtailing all or part of a permittee's nearby authorized use." Bureau of Land Management v. Burghardt Co., 138 IBLA 365, 371 (1997). Payment of fines for trespasses in 1998 and 1999 did not prevent GTO from committing further trespasses in 2000 and 2001. Even after suspending a portion of authorized grazing for the 2001 violation and issuing a new permit for 2002 GTO continued to use the allotment according to what appears to have been its own wishes. With such a history of non-compliance, BLM could reasonably conclude that GTO would not reform its practices and that cancellation was necessary.

Id. We agree with this reasoning.

GTO's actions display a flagrant disregard of BLM's discretionary authority in adjudicating and managing the lands embraced by the Allotment, as well as action dictated by the Department's regulations when BLM confronts a case of repeated willful trespass. BLM is required to suspend or cancel grazing privileges in the case of a repeated willful trespass. 43 CFR 4170.1-1(b); BLM v. Burghardt Co., 138 IBLA at

<sup>15/</sup> Based upon the above-identified table, GTO engaged in repeated trespasses in the upper pasture (8 AUMs under the Holland formula): 4 cattle were trespassing August 8 through August 21; 1 cow was trespassing August 14 through 21; 1 cow was trespassing on August 21; 2 were trespassing August 22 through September 19; 6 were trespassing September 5 through 19; and 2 were trespassing September 11 through 19. GTO also engaged in repeated trespasses in the middle pasture (60 AUMs under the Holland formula), assuming GTO was permitted to graze up to 91 cattle for 26 days beginning on July 3 and ending on July 28.

369. BLM enjoys a level of discretion in selecting an appropriate penalty when faced with such trespass. Having made a finding of willful and repeated trespass, BLM was required to take action. The record shows no effort whatever prior to the 2002 grazing season on GTO's part to cooperate with BLM to formulate an arrangement for grazing the Allotment which would have been mutually beneficial to GTO and BLM. We find that BLM reasonably applied the Brinkerhoff standards, and conclude that by continuing to graze its livestock on the Allotment in virtual defiance of governing law and this Board's orders, GTO left BLM with no alternative but to cancel the permit. GTO has offered absolutely no evidence to show that BLM's decisions were in error.

In summary, with regard to the 2000 Trespass Decision (IBLA 2002-221), we affirm Judge Holt's finding of willful trespass but reduce the damages to \$917 (based upon 4 AUMs); with regard to the 2001 Trespass Decision (IBLA 2002-435), we affirm Judge Holt's finding of willful and repeated trespass but reduce the damages to \$1,230 (based upon 15 AUMs); we affirm the 2001 Permit Renewal (IBLA 2002-150); and with regard to the 2002 Trespass Decision (IBLA 2002-76), we affirm Judge Holt's finding of willful and repeated trespass and his cancellation of GTO's grazing permit, but reduce the damages to \$4,142 (based upon 68 AUMs).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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James F. Roberts  
Administrative Judge

I concur:

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James K. Jackson  
Administrative Judge