



RON AND LAURA HUMMEL

176 IBLA 225

Decided December 12, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

RON AND LAURA HUMMEL

IBLA 2008-140

Decided December 12, 2008

Appeal of a Demand for Payment issued by the Winnemucca Field Office, Bureau of Land Management requiring payment of trespass fees for willful trespass, a service charge, and impoundment expenses. N2-2008-07.

Reversed in part, modified in part, and remanded.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass

A grazing trespass exists when livestock are grazed on Federal public land in excess of authorized permitted use or without an appropriate permit or license regardless of how the animals came to be on the land.

2. Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass--Trespass: Willful Trespass

“Willfulness” is a subjective standard of the trespasser’s intent proved by objective facts. 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 innocent mistake, or that his or her conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

3. Administrative Procedure: Burden of Proof--Grazing Permits and Licenses: Trespass--Rules of Practice: Appeals: Burden of Proof

BLM has the burden of proving trespass by reliable, probative, and substantial evidence that establishes the facts supporting its decision. When the evidence indicates that the gate where cattle had previously entered an allotment had been repaired and that

cattle subsequently entered the allotment at a different place, there is no basis for concluding that the trespass was willful.

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

Neither 43 C.F.R. § 4150.1(b) nor 43 C.F.R. § 4150.3, as promulgated through 1995 and in effect in 2005, authorizes the assessment of impoundment expenses for nonwillful violations of the grazing regulations.

APPEARANCES: Ron and Laura Hummel, Winnemucca, Nevada, *pro sese*; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Ron and Laura Hummel have appealed a Demand for Payment (“Demand”) issued on March 3, 2008, by the Assistant Field Manager for Renewable Resources, Winnemucca, Nevada, Field Office, Bureau of Land Management (BLM), in the amount of \$17,357.83 for unauthorized grazing on the Dolly Hayden Allotment. The amount includes trespass fees for two animal unit months (AUMs)¹ at a willful trespass rate of \$26.00 per AUM, a service charge of \$10.00, and impoundment expenses of \$17,295.83 calculated at the rate of \$393.09 per head for 44 head.

The Hummels own 200 acres of irrigated pasture land adjoining the Dolly Hayden Allotment on which they raise 100 head of “mother cows.” Letter received Apr. 8, 2008 (Administrative Record (AR) 1) at 1.² They do not deny that their cattle were found within the allotment, for which they do not have a grazing license or permit, but they have claimed that the trespass was not willful and they should not be

¹ An AUM is “the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month.” 43 C.F.R. § 4100.0-5 (2005).

² This letter functions as the Notice of Appeal under 43 C.F.R. § 4.411 and as the Statement of Reasons under 43 C.F.R. § 4.412, and therefore will be referred to hereinafter as the “SOR.” The March 3, 2008, Demand noted: “As you [the Hummels] are neither an ‘applicant, permittee, lessee or an agent or lienholder of record’ as described under 43 CFR 4160.1(a), you are not entitled to the administrative hearing process afforded under §4160.4.” Demand at unpaginated 3. The Demand therefore stated that any person who wished to appeal “must do so under 43 CFR 4.411.” Demand at unpaginated 4. We agree that in the circumstances of this case, the Hummels’ right of appeal is found in 43 C.F.R. § 4.410 and not in 43 C.F.R. § 4160.4.

responsible for paying impoundment expenses. AR 4, 5. Based upon a review of the record, we agree with the Hummels and reverse the finding of willful trespass, the assessment of trespass fees at the willful rate, and the assessment of impoundment expenses. We modify the demand to assess trespass fees at the nonwillful rate.

Background

On December 3, 2007, BLM found six of the Hummels' cattle in sec. 28, T. 34 N., R. 37 E., Mount Diablo Meridian (M.D.M.), Pershing County, Nevada, within the Allotment and the next day found 14 head. AR 20, AR 22, AR 23. After receiving Trespass Notice NV-020-22-1235, the Hummels met with BLM and explained that the cattle had gotten out because a post on a gate had rotted and broken off and that they had retrieved their cattle when they discovered they were in the Allotment. AR 16 through AR 19. The notice was resolved as a nonwillful trespass with the payment of \$36.00 for 2 AUMs for 20 head. AR 15, AR 16.

On December 11 and 14, 2007, BLM published in the *Humboldt Sun* (a twice-weekly paper published in Winnemucca) a Notice of Intent to Impound cattle on 16 grazing allotments, including the Dolly Hayden, and "the burned areas, which are closed to livestock grazing" on an additional 29 allotments. AR 13. Pursuant to the notice, BLM undertook an impoundment action on January 21, 2008, during which it seized 164 head of cattle at four locations, including 44 head owned by the Hummels that were found within sec. 16, T. 34 N., R. 37 E., M.D.M. AR 10, AR 11, AR 12. Ron Hummel approached BLM personnel at the site, claimed his cattle while they were being gathered, and they were turned over to him. AR 9, AR 10. On the same day, BLM issued Trespass Notice NV-020-11-1246, citing the Hummels with violating 43 C.F.R. § 4140.1(b)(1)(i) (2005).³ AR 8. The regulation provides:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

³ Enforcement of the grazing regulations at 43 C.F.R. part 4100, as amended effective Aug. 11, 2006, and published at 71 Fed. Reg. 39402 (July 12, 2006), was enjoined by the court in *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1325 (D. Idaho 2008); see also *id.* at 1311 (prior decisions dated Aug. 11 and Sept. 25, 2006, preliminarily enjoined implementation of final rules); Instruction Memorandum No. 2007-137 (June 15, 2007). Citations in this opinion are to 43 C.F.R. part 4100 (2005) as the "current" regulations. In regard to the specific provisions affecting this appeal, the differences in wording between the enjoined regulations and the 2005 version are minor, not substantive, and unrelated to the issues addressed by the court.

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(i) Without a permit or lease, and an annual grazing use authorization. . . .

BLM did not serve the Trespass Notice on the Hummels until it sent a copy of the notice with the March 3, 2008, Demand for Payment which they have appealed. AR 6, AR 7 at 1, AR 8 at 2. The “Rationale” portion of the Demand notes that the Hummels had been given a copy of the Notice of Intent to Impound at the time the previous trespass was settled. AR 7 at 2. The rationale explains that, during the impoundment action on January 21, 2008, Ron Hummel had told the Assistant Field Manager that their cattle “had gotten onto the public lands through a downed fence,” but because the Hummels “were aware of the Notice of Intent to Impound and had sufficient notice to make needed repairs to your fence,” he determined that the trespass had been willful. AR 7 at 3.

In regard to impoundment expenses, the Demand refers to an “attached breakdown.” AR 7 at 2. Although a “breakdown” does not accompany the copy of the Demand in the record before the Board, we presume that BLM provided the Hummels a copy of the five pages of information it has submitted on appeal. Two pages list the names of 62 individuals under the title “employee,” with dollar amounts assigned to each for “pre-gather” and for January 20 and 21. AR 12 at 3-4. The list does not expressly identify them as BLM employees and provide their titles or positions. Nor does it provide information about the nature of their work on the impoundment, the number of hours worked, and the hourly salary or other basis on which the amounts were calculated. *See generally Klump v. United States*, 54 Fed. Cl. 167 (Fed. Cl. 2002) (reducing inadequately documented impoundment expenses). Another list shows per diem charges for 24 employees, who presumably traveled from outside the Winnemucca Field Office to participate in impoundment operations. AR 12 at 5. A third list provides mileage charges for 31 vehicles. AR 12 at 2. In addition, BLM incurred expenses for “horse use” and a “flight.” AR 12 at 1.

On March 14, 2008, the Hummels met with BLM personnel to discuss the Demand. The Conversation Record prepared by BLM reports that the Hummels said “they keep their livestock behind a fence, and feed them, so they have no reason to put their cows out” on BLM land unlike two individuals they named. AR 5 at 1. They also stated that they had trouble with other people’s livestock breaking onto their land. In regard to the impoundment action, the Hummels said they had repaired the fence after the previous trespass and had constantly tried to keep their livestock on their land, “but with the individuals in that area it is difficult.” *Id.* The Hummels are also reported to have said they had tried to keep their cows on their land “but that the cows were hungry and had busted out.” *Id.* at 2.

On March 20, 2008, Ron Hummel signed a "Settlement of Unauthorized Use Obligation Offer" proposing to settle the trespass for \$36.00, based upon two AUMs at \$13.00 each and a \$10.00 service charge. AR 4. In the offer, he states that he "maintain[s] the fences on our ranch on a regular basis year around" and explains:

A hole had been cut in the barbed wire to place junk cars in the field. I repaired this spot as best I could; however due to the frozen ground I could not set the posts needed to repair it properly.

I checked the fences regularly and really believed they were satisfactory. When I was told the roundup was in progress I went again to check my fences. When I discovered it was down in this weakened corner I foll[ow]ed the tracks of my cattle immediately.

This could only have been a 24 hour period of time because I only took Sunday off.

AR 4 at 2. By letter dated April 2, 2008, BLM declined the offer of settlement because it did not cover the "costs incurred by the United States during investigation of the said unauthorized use in conformance with 43 CFR 4150.3 and 4150.3(c)." AR 3 at 1.

On appeal the Hummels challenge the determination that the trespass was willful and dispute the imposition of impoundment costs. They again assert that they "have had an ongoing problem with outside cattle invading our fenced enclosures" and "would not allow our cattle to run together with this livestock due to risk of disease or vanishing; we could only envision how much supplement and water they would consume." SOR at 1. They state that they maintain approximately 4 miles of four-strand, barbed-wire fence year round, but that winter makes repairs less effective. *Id.* They note that they have previously informed BLM about unauthorized cattle on the Dolly Hayden Allotment and in support submit an April 3, 2001, letter to BLM. They acknowledge being aware that BLM planned a "gather of these rogue cattle" after the first of the year and "would not knowingly have allowed our cattle to roam in this area closed to grazing and risk trespass or impoundment." *Id.* They state, however, that they "possess a couple of mother cows who do not respect fences," although most do, and "if a gate opens and several go through they all will, and quickly too." *Id.* at 2. They also point out they have had only three trespass violations in 18 years. *Id.*

In its Response to the SOR, BLM explains that the Dolly Hayden Allotment was included in the December 7, 2007, Notice of Intent to Impound because it is known to have trespass grazing and for this reason half of the allotment is closed to grazing even by the one permittee authorized to graze the allotment. Response at 2. BLM

views the Hummels' SOR as asserting that their cattle entered the allotment either as a result of problems with fence maintenance or because a gate had been left open. *Id.* at 4, 5, 6. BLM asserts that the Hummels “were aware that they were responsible for keeping their livestock from entering the public lands, such as by ensuring that needed repairs were made to their fence.” *Id.* at 7. BLM also claims that, during the time between the December and January trespass events, the “Appellants had sufficient opportunity to make needed repairs to their fencing, and were aware of the consequences of not doing so.” *Id.* BLM argues that their “failure to make needed repairs to prevent their livestock from entering the public lands demonstrates that Appellants did not act in good faith or innocent mistake.” *Id.*

BLM contends that the assessment of impoundment costs is required by 43 C.F.R. § 4150.1 (2005), arguing that the provision is not limited to willful trespass, but applies whenever there is unauthorized grazing under 43 C.F.R. § 4140.1(b)(1). *Id.* at 8. BLM asserts that “regardless of whether Appellants’ trespass was willful or nonwillful, Appellants remain liable for impoundment costs.” *Id.* BLM also argues that the impoundment expenses were necessary and reasonable and were appropriately apportioned per head of impounded livestock. *Id.* BLM explains that sufficient personnel were needed to cover the “approximately 26,000 acres within the closed portion of the allotment,” apparently meaning the Dolly Hayden Allotment. *Id.* at 9.⁴

Analysis

I. *BLM Has Not Shown that the Trespass Was Willful.*

[1] The Hummels admit that their cattle were on the Dolly Hayden Allotment on January 21, 2008. As BLM correctly understands, “[a] grazing trespass exists when livestock are grazed on federal public land in excess of authorized permit use or without an appropriate permit or license,” regardless of how the animals came to be on the land. *Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1005 (9th Cir. 1981), citing *Eldon Brinkerhoff*, 24 IBLA 324, 83 I.D. 185 (1976), and *Eldon L. Smith*, 8 IBLA 86 (1972); *Holland Livestock Ranch*, 588 F. Supp. 943, 945 (D. Nev. 1984) (“Under the version of 43 C.F.R. § 4140.1(b)(1) in effect in 1981, livestock may not be on public lands without a permit, lease, or other grazing use

⁴ In addition, BLM claims that law enforcement officials were present “to ensure the security of BLM staff and the public” and that the need was confirmed when they “dealt with threats to employees, leading to the arrest of one individual.” *Id.* at 9. The record does not provide any documentation showing the presence of law enforcement officials or an arrest. The assertions raise a question as to whether law enforcement officials are included in the list of 62 “employees” whose time was used to calculate impoundment costs.

authorization.”). Consequently, at a minimum, the Hummels are responsible for damages for nonwillful trespass.

[2] The standard for determining whether a grazing trespass is willful has been established in earlier cases:

Although “willfulness” is basically a subjective standard of the trespasser’s intent, it may be proved by objective facts. Thus, 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 innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

Eldon Brinkerhoff, supra at 338, 83 I.D. at 191, *quoted with approval, Holland Livestock Ranch v. United States, supra* at 1006.

The record before the Board does not provide a basis for finding the Hummels’ trespass to have been willful. The basis stated in the Demand is that the Hummels had previously explained that their cattle “had gotten through your fence [in December 2007] at a gate where the post had rotted off” and that they “were aware of the Notice of Intent to Impound and had sufficient notice to make needed repairs to your fence.” AR 7 at 2-3. Like the Demand, BLM’s Response does not expressly assert that the Hummels failed to repair the gatepost, but it implies that the 44 head of cattle found on January 21, 2008, entered the allotment at the same place as the previous trespass in arguing that “failure to make needed repairs or to prevent their livestock from entering the public lands demonstrates that Appellants did not act in good faith or innocent mistake.” BLM Response at 7.

The record, however, does not support BLM’s inference. The Grazing Trespass Report, dated December 10, 2007, for the initial trespass that occurred on December 3 and 4, 2007, reports that Mrs. Hummel “stated that they had gotten all the livestock back on to their property and fixed the gate.” AR 20 at 2. As noted previously, the Hummels stated during the March 14, 2008 meeting with BLM that they had repaired the fence after the previous trespass in December 2007. AR 5 at 1. BLM has provided no evidence or information to the contrary. Further, in the March 28, 2008, settlement offer for the second trespass, Ron Hummel states that he discovered the fence was down at a corner where it had been cut and that he followed the tracks of his cattle, apparently until he reached the place where they had been rounded up by BLM, a location that was at least 1.5 miles (and possibly more

than 2 miles) from where the Hummels' cattle had been found on December 3 and 4, 2007.⁵

[3] BLM has the burden of proving trespass by “reliable, probative, and substantial evidence” which establishes the facts supporting its decision. *Thoman v. BLM*, 152 IBLA 97, 106 (2000), quoting *BLM v. Ericsson*, 88 IBLA 248, 257 (1985), *reconsideration denied*, 155 IBLA 266 (2001). The evidence in the record is uniformly to the effect that the gate through which the cattle entered the Allotment in December 2007 had been repaired. The only evidence as to where the cattle entered the Allotment on January 21, 2008, is Ron Hummel's uncontradicted statement, which shows that the entry on that date was at an entirely different location from the point of entry on December 3 and 4, 2007. The only additional information in the record is the map showing the four locations where cattle were found on January 21, 2008, but it identifies neither the boundaries of the allotment nor the location of the Hummels' land. AR 11. Accordingly, there is no basis for concluding that the Hummels' conduct was so lacking in reasonableness or responsibility that it was reckless or negligent. We therefore reverse BLM's finding of willful trespass.

II. *The Liability for Nonwillful Trespass Is the Value of Forage Consumed.*

As quoted above, 43 C.F.R. § 4140.1(b) (2005) refers to the “civil and criminal penalties set forth at §§ 4170.1 and 4170.2.” In light of our determination above that the trespass was not willful, the only relevant provision in those two sections is section 4170.1-1(c), which states: “Whenever a nonpermittee or nonlessee violates § 4140.1(b) of this title and has not made satisfactory settlement under § 4150.3,” BLM is to “refer the matter to proper authorities for appropriate legal action by the United States against the violator.” In turn, 43 C.F.R. § 4150.3(a) provides that the amount due for settlement of a nonwillful violation is “[t]he value of forage consumed as determined by the average monthly rate per AUM for pasturing livestock on privately owned land (excluding irrigated land) in each State as published annually by the Department of Agriculture.” The Hummels offered to settle by paying for two AUMs at the nonwillful trespass rate of \$16.00 per AUM and the \$10.00 service charge. AR 4. Presuming that the rate provided by BLM is the Department of Agriculture rate for Nevada as referred to in the regulation, the Hummels made an appropriate offer of payment for nonwillful trespass. We therefore reverse the assessment of trespass fees at the rate for willful violations.

⁵ Sections 16 and 28 in the relevant township are separated by sec. 21. Thus, the closest points in secs. 16 and 28 are a mile apart. The map at AR 11 showing the locations of impoundment on Jan. 21, 2008, indicates that the Hummels' cattle were found in the NW¼ of sec. 16, slightly more than 1/2 mile from the southern boundary of that section. The record contains no indication of where in sec. 28 the cattle were found in December 2007.

III. *Nonwillful Trespassers Are Not Liable for Impoundment Expenses.*

The remaining issue is whether BLM properly assessed impoundment expenses of \$17,295.83. As described above, the amount was calculated at the rate of \$393.09 per head for 44 head based upon total expenses of \$64,466.29 for the operation, as outlined in lists of expenses BLM has provided. AR 12.⁶ Questions as to whether and when impoundment expenses may be assessed for a nonwillful trespass have not previously been addressed by this Board. Review of the extended series of rulemakings under which the portions of the regulations applicable in this case were adopted reveals that they do not authorize assessing impoundment expenses for nonwillful violations.

Both the Demand for Payment and BLM's April 2, 2008, letter rejecting the Hummels' settlement offer quote a portion of 43 C.F.R. § 4150.3 (2005), which provides in part:

The amount due for settlement shall include the value of forage consumed as determined in accordance with paragraph (a), (b), or (c) of this section. Settlement for willful and repeated willful violations shall also 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.

The wording "shall also" clearly establishes that section 4150.3 allows an assessment for damages to Federal land and property, enforcement expenses, and livestock impoundment costs only in instances of "willful and repeated willful violations," not nonwillful violations. On appeal, however, BLM quotes 43 C.F.R. § 4150.1(b) (2005), which provides:

Violators shall be liable in damages to the United States for the forage consumed by their livestock, for injury to Federal property

⁶ The record does not identify the size of the Dolly Hayden Allotment, but it is difficult to understand the size of the force BLM deployed to round up 164 head on Jan. 21, 2008. See AR 12. Cf. *Holland Livestock Ranch*, 52 IBLA 326, 331, 88 I.D. 275 (1981), *vacated and remanded*, *Holland Livestock Ranch v. United States*, 543 F. Supp. 158 (D. Nev. 1982), *aff'd*, 714 F.2d 90 (9th Cir. 1983) (5 BLM employees impounded 89 head on June 13, 1978, and 147 head the next day). If the large number of personnel was assembled to remove cattle from all 45 allotments listed in the Notice of Intent to Impound, it is highly doubtful that costs incurred for other allotments properly could be allocated to the Hummels, even if one were to assume liability for impoundment costs.

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.

Response at 7-8. BLM contends that under this regulation the Hummels are liable for impoundment costs whether their trespass was willful or nonwillful. *Id.* at 8.

Both sections 4150.1(b) and 4150.3 originate in rulemaking undertaken by BLM in the late 1970's. The regulations in effect at that time, adopted in 1964, addressed grazing inside grazing districts at 43 C.F.R. part 4110 and outside of grazing districts and Alaska in part 4120, while grazing trespass and the enforcement of terms and conditions of grazing permits and licenses were the subjects of 43 C.F.R. § 9239.3. 29 Fed. Reg. 4602-16, 4639-40 (Mar. 31, 1964), *recodified*, 35 Fed. Reg. 9761-76, 9801-02 (June 13, 1970). In 1976, the Department proposed to bring these provisions together into a single regulatory structure. 41 Fed. Reg. 31504 (July 28, 1976). Similar to 43 C.F.R. § 4150.1 (2005), the proposed section 4150.1 stated that “[t]respassers will be liable in damages to the United States for the forage consumed by their livestock and for injury to Federal property caused by their trespassing livestock” as well as potential civil and criminal penalties. 41 Fed. Reg. at 31509. Although proposed section 4150.1 did not mention impoundment expenses, proposed 43 C.F.R. § 4150.3 stated that “[a]ll trespassers” would be responsible for payment of “[t]he value of forage consumed,” “[t]he full value for all damages to the lands or other property of the United States,” and “[a]ll expenses incurred by the United States in gathering, impounding, caring for, and disposing of livestock in cases which necessitate impoundment under § 4150.5.” *Id.*

The issuance of final regulations was delayed due to enactment of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, *codified as amended at* 43 U.S.C. §§ 1701 through 1785 (2000). BLM published a revised set of proposed regulations the following year. 42 Fed. Reg. 35334 (July 8, 1977). In doing so, it noted that it had received comments criticizing the previously proposed rules “for failing to treat willful and nonwillful trespass differently” and stated that the newly proposed rules did so. *Id.* at 35335. In particular, section 4150.3 was proposed to be modified to distinguish between a nonwillful violation for which “settlement shall be made under paragraphs (a)(1) and (a)(3)” and “willful and/or repeated” violations for which “settlement shall be made under paragraphs (a) (2), (3), and (4).” *Id.* at 35342. Paragraph (1) required payment for the value of forage consumed. *Id.* Paragraph (2) doubled the value of the forage for willful trespass. *Id.* Paragraph (3) made both willful and nonwillful trespassers responsible for damages to Federal land and property. *Id.* Paragraph (4), which applied only to “willful and/or repeated” violations, required the payment of expenses “incurred in gathering, impounding, caring for, and disposing of livestock in cases which necessitate impoundment under § 4150.5.” *Id.* At the same time, proposed section

4150.1 was revised to include a reference to the payment of “expenses incurred in impoundment and disposal.” *Id.* Although several changes were made to these provisions in the final regulations, including substituting “willful, or willfully repeated” for the awkward “willful and/or repeated,” both the description of liability in 43 C.F.R. § 4150.1 and the distinction of responsibility for expenses between nonwillful and willful violations was retained. 43 Fed. Reg. 29058, 29074 (July 5, 1978).

The primary conclusion to be drawn about the regulations promulgated in 1978 is that section 4150.3 established the specific fees to be paid for each category of trespass and section 4150.1 provided a general description of the kinds of fees which could be assessed. Under the regulatory structure, impoundment costs and other expenses could be assessed only in instances of willful or willfully repeated violations.

The fact that the 1978 regulations did not provide for the payment of impoundment expenses for nonwillful violations is confirmed by revisions made in 1982. The Department proposed to amend section 4150.3 so that

when unauthorized use is determined to be nonwillful, settlement would be required to include the expenses incurred by the United States, such as for gathering, impounding, caring for, and when necessary disposing of unauthorized livestock. Under the current regulations, this provision already applies to settlement for willful or repeated willful violations.

46 Fed. Reg. 56132 (Nov. 13, 1981). The proposed revision added a reference to paragraph (a)(4) in the list of fees to be paid in the settlement of a nonwillful trespass. *Id.* at 56136. Although there were objections, the final regulations included impoundment expenses as part of settlement for nonwillful trespass. 47 Fed. Reg. 41702, 41712 (Sept. 21, 1982).⁷ The preamble to the final rule explained:

All expenses incurred by the United States in cases necessitating impoundment of livestock are included in settlement costs for all categories of unauthorized use because impoundment action is taken only when an alleged violator refuses to remove the livestock following notification, or the owner of the livestock is unknown.

⁷ The final rule was more complex in that the Department developed a category of a “repeated nonwillful” violation for which settlement was to be at the rate of twice the value of forage consumed, resulting in renumbering paragraph (a)(4) as (a)(5). *Id.*

In these cases, the costs of impoundment result from the negligence of the alleged violator, and are therefore an obligation of the livestock owner and included in settlement charges.

In response to comments concerning settlement for nonwillful violations, the final rulemaking modifies this section to recognize that isolated instances of non[w]illful unauthorized use do occur and should be assessed, as specified, under section 4150.3(a)(1). . . .

Id. at 41707. Thus, while section 4150.3 as promulgated in 1978 did not provide for payment of impoundment costs in the settlement of nonwillful violations, it was amended in 1982 to include such costs.

When the Department streamlined the grazing regulations in 1984, it revised section 4150.3. The new version, however, continued to provide that “all settlements shall include . . . all expenses . . . incurred in gathering, impounding, caring for, and disposing of livestock in cases which necessitate impoundment” 49 Fed. Reg. 6440, 6454 (Feb. 21, 1984); *see* 48 Fed. Reg. 21820, 21826 (May 13, 1983) (proposed rule).

The Department next revised section 4150.3 in 1988. In doing so, it adopted both the precise wording for the portion at issue in this case and the use of figures published by the Department of Agriculture to determine the value of forage consumed. 53 Fed. Reg. 10224 (Mar. 29, 1988); *see* 52 Fed. Reg. 19032, 19040 (May 20, 1987) (proposed rule). Specifically, it revised the portion addressing “all settlements” to state that they “shall include the value of forage consumed” and added a new sentence: “Settlement for willful and repeated willful violations shall also include . . . all reasonable expenses incurred by the United States in detecting, investigating, resolving violations, and livestock impoundment costs.” 53 Fed. Reg. at 10235. The preamble (*id.* at 10232) did not mention the omission of impoundment expenses for nonwillful violations. When section 4150.3 was again modified in 1995 to provide authority to make nonmonetary settlements of nonwillful violations, no change was made to the essential structure of the regulation, which continued to provide that the value of forage would be determined in accord with paragraph (a), (b), or (c) and that settlement of “willful and repeated willful violations” would include other expenses, including livestock impoundment costs. 60 Fed. Reg. 9894, 9905, 9948-49, 9968 (Feb. 22, 1995); *see* 59 Fed. Reg. 14314, 14338 (Mar. 25, 1994) (proposed rule); 58 Fed. Reg. 43208, 43213, 43228 (Aug. 13, 1993) (advance notice of proposed rulemaking).

[4] It is apparent from this rulemaking history that 43 C.F.R. § 4150.3 (2005) provides for payment for damages to Federal land and property, enforcement expenses, and livestock impoundment costs only in instances of “willful and repeated

willful violations,” not nonwillful violations. BLM’s reliance on 43 C.F.R. § 4150.1(b) (2005) to provide the authority that was removed from section 4150.3 is misplaced. The regulatory history provides no support for its position. If BLM were correct about section 4150.1, neither the proposed revision of section 4150.3 in 1977 nor adoption of the final version in 1978 served the stated purpose of treating willful and nonwillful trespass differently. Nor was there any reason for the 1982 modification of section 4150.3 to specifically provide for payment of impoundment expenses for nonwillful violations. The addition of the words “impoundment and disposal” to section 4150.1 in 1978 would have already done so.⁸

As it did when it was promulgated in 1978, section 4150.1(b) today provides a general description of the types of liabilities for unauthorized grazing use imposed under the grazing regulations. The authority to impose costs for grazing violations is found in section 4150.1(b) and, as stated in that section, the amounts are defined in section 4150.3. Because neither 43 C.F.R. § 4150.1(b) (2005) nor 43 C.F.R. § 4150.3 (2005) authorizes the assessment of impoundment expenses for nonwillful violations of the grazing regulations, we reverse that portion of the Demand for Payment.⁹⁸

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the finding of the March 3, 2008, Demand for Payment that the Hummels engaged in willful trespass is reversed and the Demand is modified to find that there was a nonwillful violation of 43 C.F.R. § 4140.1(b)(1)(i) (2005) and to assess trespass fees at the nonwillful rate. The assessments of fees for willful trespass and impoundment expenses are reversed. The case is remanded to BLM with instructions to accept the Hummels’ offer of settlement for \$36.00.

/s/
Geoffrey Heath
Administrative Judge

⁸ The only modification to § 4150.1 since 1982 was to move the sentence that is now subsection (a) from § 4150.3. 60 Fed. Reg. 9894, 9968 (Feb. 22, 1995).

⁹ Because we reverse on the issue of liability for impoundment costs, it is unnecessary to address whether the Hummels received notice sufficient to comply with 43 C.F.R. §§ 4150.2(a) and 4150.4-1(a) (2005).

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge