

LAWRENCE F. BRADBURY

IBLA 70-73      Decided April 5, 1971

Grazing Permits and Licenses: Trespass -- Trespass: Generally

A grazing trespass will not be deemed clearly wilful where the licensee's conduct in committing the trespass is consistent with his view of the date on which the range had been opened to grazing, and the evidence that he knew the correct date is not persuasive.

2 IBLA 116

IBLA 70-73 : Idaho 4-69-1 (SC)

LAWRENCE F. BRADBURY

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: Penalties assessed for  
: wilful grazing trespass  
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: Affirmed as modified

#### DECISION

Lawrence F. Bradbury has appealed to the Secretary of the Interior from a decision dated July 29, 1969, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner assessing damages in the amount of \$102.00 for wilful grazing trespass.

On December 11, 1968, the Idaho State Director of the Bureau of Land Management issued an Order to Show Cause to Bradbury, 1/ directing him to appear before a hearing examiner to show cause why his grazing privileges should not be reduced or denied and damages paid for wilful, grossly negligent, or unauthorized grazing use of federal range lands. Specifically, Bradbury was charged with grazing 73 cattle for 7 days (May 8, 1968 - May 14, 1968) and 130 cattle for 10 days (June 16, 1968 - June 25, 1968) before and after, respectively, the period of use, May 15 - June 15, 1968, authorized by his grazing license.

The damages were assessed at \$6.00 per AUM, twice the commercial rate of \$3.00, or \$102.00 for the first trespass and \$264.00 for the second. At the conclusion of the hearing the State Director, through counsel, asked that the Bradbury grazing privileges be reduced at the most by 25% for five years.

The hearing examiner held that there had been a wilful trespass of at least 73 cattle for 7 days in May and assessed damages

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1/ Although the grazing license was issued to Floyd and Lawrence Bradbury, father and son, the proceedings were instituted only against Lawrence, who, it appears, is in active charge of the operation. No objection was raised to this limitation. (Tr. 53.)

of \$102.00. He refused to find that the grazing in June constituted a trespass and concluded that the facts did not warrant a reduction of grazing privileges.

The difficulty arose from events which took place in the spring of 1968. The hearing examiner summarized the facts as follows:

The Salmon District Office, Bureau of Land Management, issued a license for 1968 grazing privileges to the respondent and his father, Floyd Bradbury. The license authorized the grazing of 130 cattle (100 percent Federal range use) for the periods from May 1, 1968, to June 15, 1968, and from October 1, 1968, to October 15, 1968, in an area designated as the Squaw Creek Unit. The license further provided that (1) the actual turn-out date would be determined by a range readiness inspection, and (2) there would be no changes in the stated periods of use without prior approval of the District Manager. (Ex. SD-1)

On April 24, 1968, the Area Manager, the Bradburys, another user in the unit, and a representative of the Forest Service made a range inspection of the forage on the Federal range and the adjoining national forest in order to determine the actual turn-out date, and to coordinate the grazing on the lands administered by the two agencies. (Tr. 9, 10, 69, 80, 122)

As a result of the inspection it was determined that the Federal range in the unit would not be ready for grazing on May 1, 1968, and that the Bradburys' license and the licenses of other users in the unit would have to be modified.

There is either a conflict in the evidence or a misunderstanding on the part of the parties as to the decision that was made on the range inspection trip concerning the actual turn-out date. The Area Manager testified that he stated at the time that the turn-out or opening date would be delayed 15 days or until May 15. (Tr. 11, 29) The respondent testified that the Area

Manager stated at the time, "that it would be 15 days before the range was ready to use," and that the respondent "assumed that he meant 15 days from that day" or May 8. (Tr. 123, 126) The respondent also assumed that in counting 15 days from April 24, the first day would not be April 25, but April 24. (Tr. 126) The respondent's father, who holds a half interest in the livestock operation (Tr. 116), testified that it was his understanding that they could turn out "any time the grass got good enough." (Tr. 114) Other members of the inspection ride apparently understood that the turn-out date would be some two weeks late and not two weeks from the date of the ride. (Tr. 65)

Pursuant to the usual procedure of the District Office, follow-up letters were sent April 26 to the users in the unit notifying them that the range would not be ready for turn-out before May 15. (Tr. 12, 26; Ex. SD-3) The respondent testified that neither he nor his father received any such letter. (Tr. 123, 126) The only evidence that tends to rebut the flat denial of the respondent consists of the testimony of the District Manager that (1) while he was not "sure," it was his recollection that in a subsequent meeting with the Bradburys the respondent stated that he received the letter, but did not show it to his father, (Tr. 46, 47, 53, 62) and (2) the office copy of the letter was found in the Bradburys' file, and it is the common business practice of the office to file copies of letters only after the original has actually been mailed. (Tr. 52) The testimony of the District Manager is not, in my opinion, sufficiently definite to support the conclusion that the respondent did, in fact, receive the letter. And, under the circumstances, I do not believe that it would be proper to presume that the letter was actually placed in the hands of the Post Office Department, and then presume that the Post Office Department properly performed its functions and delivered letter.

After finding that the early May grazing constituted a trespass of at least 73 cattle for 7 days, the hearing examiner reasoned:

If the respondent is given the benefit of the doubt and it is assumed (1) that he actually understood at the time of the range inspection that the turn-out date would be 15 days from April 24, and (2) that he did not receive the letter of April 26 setting the turn-out date for May 15, the facts are nevertheless not compatible with the notion of a good faith, innocent mistake in the use of the Federal range. I doubt that a responsible user of the Federal range would compute 15 days from April 24 and inadvertently arrive at May 8, rather than May 9. I do not believe that a responsible operator would fail to consult in advance with the District or Area Manager to clarify the turn-out date when, as in this case, there was a disagreement as to the date between the two parties operating under the same license. In addition, it is inconceivable that a reasonable user of a common allotment would fail to consult with the District or Area Manager when, as in this case, information was received from another user concerning the actual turn-out date for the allotment. It seems significant that the respondent did check with the representative of the Forest Service who was on the range inspection ride in order to ascertain or clarify the turn-out date for the forest lands (Tr. 126), (and, even then the respondent turned his cattle onto the forest lands one day earlier than authorized). (Tr. 72, 82)

He then concluded that Bradbury had not acted in good faith with innocent mistake and found the May trespass wilful.

In its decision the Bureau of Land Management affirmed on the ground that the district manager, having referred the matter to the state director, must perforce have considered the trespass wilful, since under the pertinent regulation, 43 CFR 9239.3-2, he notifies the state director of a violation only when the violator has not been able to make a satisfactory showing that there had been no wilful violation.

On appeal, Bradbury contends that the trespass, if any, was not wilful but was based on an honest misunderstanding. He refers to his prior objections to the holdings as to the area of trespass and the number of cattle found to be in trespass.

To begin with, the findings that the June events are not a trespass and the circumstances do not warrant a reduction in grazing privileges are accepted. Next, for reasons set out in the decisions below, the conclusion that there was a trespass in early May on public land of at least 73 cattle for 7 days is affirmed.

There remains only the issue of whether the May trespass was properly found to be wilful.

The hearing examiner, as we have seen, concluded that even if his version of the trespass is accepted, Bradbury did not act as a reasonable and responsible operator and was therefore a wilful trespasser. For purposes of the grazing regulation a trespass is clearly wilful where the circumstances do not comport with the notion that the trespasser acted in good faith and innocent mistake. J. Leonard Neal, 66 I.D. 215 (1959).

The Bureau's notion that the issue is settled when the district or area manager refers the matter to the state director is only partially correct. It is true that an alleged trespass will not be referred to the state director unless there is a prior determination that it was clearly wilful. 43 CFR 9239.3-2(b). However, when the state director issues a notice directing the trespasser to appear at a show cause hearing, the question of whether the trespass was "a clearly wilful, grossly negligent or repeated violation" (43 CFR 9239.3-2(e)(1)), becomes one for the examiner in the first instance to determine. See Eldon L. Smith, A-30944 (October 15, 1968); Edmund and Jesse Walton, A-31066 (May 27, 1969).

The test requires a determination as to Bradbury's state of mind, which, in the absence of an admission, can be established only by an examination of the circumstances. United States v. Vollweiler, 229 F. Supp. 558 (N.D. Cal. 1964).

The hearing examiner, in effect, held that Bradbury's conduct was so lacking in reasonableness or responsibility that it became reckless or negligent, making it a wilful act. While these are elements of wilful conduct, we cannot find that they are rightly applied to appellant's behavior.

If this version of his state of mind is accepted, then he believed his right to graze on the federal range began on May 8, 1968. Certainly he cannot be reckless or negligent because he misunderstood the date from which the 15-day delay was to be measured, using April 24 as the first day. If he honestly believed that May 8 was the turn-out date, he had no reason to consult further with the district manager. His conversation with the other licensee occurred after he was already on the range. It could not, then, have had any bearing on his state of mind on the day he went on the range. While it should have been enough to lead him to ascertain the propriety of his being on the range, there is no evidence that he could have gathered and removed his cattle before May 15. His disagreement, if any there, was with his father as to the turn-out date need not have led him to consult the area manager, for his father's version bore no relationship to the decision fixing a definite date Bradbury knew had been reached. Furthermore, there is no evidence that Bradbury ever discussed with his father their different assumptions of the turn-out date.

Finally, the state director asserts that the presumption that a letter was received arising from proof of the usual custom of mailing should apply. At best the presumption is rebuttable and, where denied by the addressee, the question becomes one for the trier of fact. 29 Am. Jur. 2d Evidence § 198 (1967). The hearing examiner declined to presume that the letter had been received. We have no reason to disagree with his conclusion.

We find, then, that the record does not support the finding that the May trespass, though it admittedly occurred, was clearly wilful.

The pertinent regulation provides that damages for trespass not deemed to be clearly wilful shall be computed at \$2.00 per AUM or at the commercial rate, if that rate is higher. Since the hearing examiner found the commercial rate to be \$3.00, the forage value amounts to \$51.00. The decision below is modified by reducing the demand to that amount.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35

F.R. 12081), the decision of the Bureau of Land Management is affirmed, as modified.

Martin Ritvo, Member

We concur.

Francis E. Mayhue, Member

Newton Frishberg, Chairman.

