

MRS. R. W. HOOPER

IBLA 70-68

Decided October 20, 1971

Grazing Permits and Licenses: Trespass

A finding by a hearing examiner that a count of horses in trespass was conducted by qualified employees of the Bureau of Land Management in a manner calculated to reach an accurate result will not be disturbed even though the permittee offers evidence of another count performed by her representatives in a different manner at another time.

Grazing Permits and Licenses: Cancellations and Reductions--Grazing Permits and Licenses: Trespass

A revocation of the grazing privileges of a licensee to graze horses will be ordered where the Government establishes that on three separate occasions the licensee willfully permitted her horses to trespass upon federal range, both within and without her private allotment, and it is not feasible to fence a portion of the allotment so that her horses would be restrained.

Rules of Practice: Evidence--Rules of Practice: Hearings

An appellant was not denied a fair hearing when she did not receive a copy of an exhibit which she requested, when it was shown that she had copies of numerous items from the exhibit in her possession and sufficient opportunity to examine the other items.

Rules of Practice: Evidence--Rules of Practice: Hearings

An appellant was not denied a fair hearing when she did not receive a copy of the exhibit she requested, when it was shown that a copy of such exhibit was not necessary to the preparation of her case.

IBLA 70-68 : Nevada 4-67-1(SC)  
MRS. R. W. HOOPER : Penalties assessed for  
: willful grazing trespass  
: Vacated in part, affirmed  
: in part

### DECISION

Mrs. R. W. Hooper has appealed from a May 3, 1969, decision of the Bureau of Land Management which affirmed the hearing examiner's decisions of October 12, 1967, and November 29, 1968, holding that a willful trespass had been committed and that damages in the amount of \$856.00 for forage consumed by the trespassing horses (computed on the basis of \$4.00 per AUM) should be assessed against the appellant. The examiner also directed the district manager to revoke Mrs. Hooper's base property qualifications and license by an amount equivalent to that previously recognized for the grazing of horses on public land and required her to provide a cash or corporate surety bond in the amount of \$5,000.00 for ten years to prevent future trespass of cattle.

Appellant bases her appeal on the grounds that the three trespasses in question did not occur, that the method employed by the Bureau to count the trespassing horses was not reliable and that Arnold C. Wood, a Bureau employee who counted the horses, was not qualified. Appellant also claims that her history of trespasses, which is a consideration in determining whether the present violations are willful, actually consists of only one trespass violation. Finally, appellant alleges a denial of due process because: (1) she was not granted a continuance for a later rehearing; 1/ (2) she was

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1/ The first hearing in this case was held on March 14, 1967, and a decision rendered on October 12, 1967. B. T. Hooper, Mrs. Hooper's son, who represented her, missed the first 30 minutes of the March 14 hearing. On appeal to the director, by a decision of May 16, 1968, the case was remanded. A rehearing was held on September 4, 1968, to afford Mr. Hooper the right to cross-examine the Government's witnesses on testimony entered in the record during the first 30 minutes of the previous hearing. Subsequently, the examiner rendered a decision on November 29, 1968, affirming the October 12, 1967, decision.

denied a copy of Government's Exhibits 1 and 2; and, (3) Government's Exhibits 1 and 2 were improperly admitted into evidence.

We affirm the decision below. We hold that three trespass violations occurred, that they were willful, and that appellant was afforded a fair hearing. However, we modify the penalty because the evidence indicates that the three violations do not warrant such a severe penalty.

#### (I) Trespass

The appellant's ranch, for which she or her family have held grazing privileges for many years, is located in the Pancake unit of the Ely Grazing District. Her license authorizes her to graze in a private allotment from 50 to 60 cattle year long and from 50 to 380 cattle for 9 months. The trespass notices alleged only trespass by horses.

We affirm the decision below that the trespass violations did occur. Our consideration of these violations is set forth as follows:

1. The Bureau's first count on August 10, 11, 1966, (Ex. 2-7) found 93 horses inside Hooper's allotment and 33 outside, a total of 126 horses (Tr. 25). 2/ Five of these horses were included in the Battle Mountain District count, leaving a total of 121 horses for the Ely District count. Since appellant's license permitted her to graze 60 horses (Ex. 2-3), 61 were cited in trespass by the August 26, 1966, Notice.

2. The second count on September 19 and 20, 1966 (Ex. 2-6) found 64 horses inside the allotment and 71 outside, a total of 135 horses (Tr. 27). Since Mrs. Hooper's license allowed 60 horses (Ex. 2-3), 75 horses were in trespass, although the September 20, 1966, Notice of Trespass cited only 74. (The Bureau admits this mistake at Tr. 27.) The Grazing Trespass Report confirms the fact of the 74 (sic) horses in trespass on September 20, 1966, and adds that 61 horses were in trespass from August 11, 1966, to September 19, 1966, although there is no Notice of Trespass in the file to this effect. On October 3, 1966, appellant made an offer of settlement which was rejected by the Bureau (Tr. 28).

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2/ References to the hearing transcript of March 14, 1967, are designated by Tr. and the page number. References to the transcript of September 4, 1968, are distinguished by the date.

3. The third count, December 19, 1966, (Ex. 2-5) found 26 horses inside the allotment and 44 outside, a total of 70 horses (Tr. 30). Since appellant's license for this period covered 50 horses (Ex. 2-3), the December 21, 1966, Notice of Trespass cited only the 44 horses grazing outside the allotment. The 26 inside the allotment were allowed by the license.

Attempting to discredit these counts, appellant questions (1) the validity of the method used by the Bureau for counting the horses, and (2) the qualifications of Mr. Wood, the Bureau employee who supervised the counts.

The hearing examiner found that the counts were made as follows:

Five employees of the Bureau of Land Management made three investigations of trespass. The investigations were made on August 10 and 11, 1966; September 19 and 20, 1966; and December 19, 1966. On each investigation, the area was first traversed by aircraft to determine the location of the horses and then the investigators traveled by vehicles, horses and on foot to each of their assigned areas. The horses were counted and identified by brands. Precautions were taken in selecting the areas and in making the count to preclude duplicate counting. Only horses six months of age or older were counted as trespassing horses. [Footnote omitted.] Three Notices of Violation were issued--the first was issued August 26, 1966; the second was issued on September 23, 1966; and the third was issued on December 21, 1966. The counts and tabulations for the three investigations are included in Government's exhibit 2. The locations and numbers of horses counted are shown on Government's exhibit 1.

(p. 2)

As the decisions below held, the method used by the Bureau of Land Management employees was calculated to reach a figure that did not overstate the extent of the trespass. The hearing examiner accepted this count as accurate, and we find no reason to disturb his finding.

Appellant did introduce a corral count (Ex. C), <sup>3/</sup> contending that the corral count was a more reliable method for counting horses than the method employed by the Bureau. We find this evidence alone to be insufficient for appellant to prevail. This testimony is merely opinion that the corral count is the better method. No evidence was introduced to prove that the corral count is the accepted procedure for an accurate count or that the method used by the Bureau is not.

Regarding Mrs. Hooper's second objection to the Bureau's count, Mr. Wood's qualifications, we find that Mr. Wood's eight years of experience with the Bureau, two and a half of which were devoted to livestock and trespass counts, were sufficient to qualify him to conduct the counts. Even if appellant had proven that Mr. Wood was not qualified, this would not materially have affected the validity of the counts. Four other employees, whose credentials were not questioned by appellant, also participated in the counts. We agree that the Bureau count was properly conducted by qualified personnel and established the fact and extent of the trespass.

After a careful review of the record, we agree that the appellant's trespasses have been willful and repeated. The Government introduced evidence of seven prior trespasses occurring from 1952 through 1963. Although most of the earlier trespasses resulted from the appellant grazing her cattle and horses without a license, her lack of a license was caused by her failure to pay grazing fees on time, to apply for a license, or to construct a fence. These offenses are not of the same nature as the recent ones; they did not involve grazing on public lands for which the appellant had no license, or grazing in excess of her license on land for which she did have a license. Nevertheless, they demonstrate a propensity and willingness to disregard the grazing regulations. The regulation provides that repeated violations constitute a reason for disciplining a trespasser. 43 CFR 9239.3-2; Edmund and Jessie Walton, A-31066 (May 27, 1969).

The 1966 trespasses were of long duration, involved large numbers of horses, and occurred both within and without the appellant's allotment. The evidence plainly supports the finding that the trespasses were willful and amply justifies the imposition of some discipline in addition to monetary damages. However, the penalties

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<sup>3/</sup> Testimony as to this count and the exhibit were introduced at the second hearing by the appellant. Although this evidence was available to her at the first hearing and no convincing reason was offered for her failure to present it then, we have taken it into consideration on appeal.

imposed go somewhat further than we deem proper. First, the requirement that appellant furnish a surety bond to cover damages resulting from future violations seems unnecessary in light of appellant's past record of paying the damages assessed against her. Therefore, we conclude that the appellant is not required to furnish a surety bond.

Secondly, the hearing examiner not only revoked so much of appellant's license as permitted her to graze horses on her allotment, but revoked her base property qualifications to the same extent. In other words, the appellant was denied the opportunity to substitute cattle sufficient to consume the forage that had been licensed for her horses. Again, while the revocation of base property qualifications is a permissible penalty for willful and repeated violations, the record indicates that the refusal to permit the substitution of cattle for horses was recommended not so much as a penalty but as a method of reducing use of range land that the district manager believed to have been overgrazed (Tr. 43, 49, 81-82). The district manager testified that he would have no objection to reinstating cattle privileges if the condition of the range were to improve. The trespass problem, he said, arose because appellant could not or would not control her horses, but there had been no trouble with her cattle.

A trespass proceeding is not the proper method of reducing grazing privileges to the proper stocking rate of the Federal range. If the district manager deems a reduction in grazing privileges is necessary, the regulation has a separate procedure that must be followed. 43 CFR 4111.4-3(d)(e). Therefore, the determination to revoke appellant's base property qualification by an amount equal to that previously recognized for grazing horses on public land is vacated.

There remains only the revocation of her license to graze horses on the public range. This penalty is fully justified by the nature and extent of the trespasses. As we have seen, the source of the problem is the horses which can cross natural barriers, serving as boundaries to part of the appellant's allotment, that the cattle cannot or will not cross. Since the appellant's son testified that appellant's private land can support at least 80 horses, the appellant should be able to keep enough horses to maintain her cattle operation (Tr. 70-73).

We now consider Mrs. Hooper's other ground for appeal, denial of due process.

Although appellant's request for a continuance (letter of August 22, 1968) of the hearing September 4, 1968, was denied (Order of August 29, 1968), we do not find that this was prejudicial to her case. Appellant was notified of the scheduled hearing in the middle of July. Thus, she was afforded ample opportunity to prepare her

case. Furthermore, the request for continuance was properly denied on the grounds that it was not timely filed. 43 CFR 4.432, 36 F.R. 7201, formerly 43 CFR 1852.3-3(a).

We cannot agree with appellant's contention that the denial of her request for copies of Government's Exhibits 1 and 2 was prejudicial to her case in that she could not fully prepare for the hearing. Although appellant was denied copies of the exhibits, she had opportunity to examine these exhibits on the afternoon before the hearing.

The only item which she did not have a chance to study was the portion of the brand book contained in Exhibit 2, which we do not consider essential to the preparation of her case.

In examining these exhibits, we find appellant had sufficient understanding of them and was given adequate time to study them in order to meet the Government's case. No "surprise" evidence was introduced by the Government to which appellant could not respond. Furthermore, if appellant had decided that extensive study of these exhibits was necessary, her representative could have made a trip to Ely to examine them. Hearing Examiner Dent Dalby had informed Mrs. Hooper by his letter of August 26, 1968, that these exhibits would be available at the Ely office. Such a trip may have been an inconvenience, but not to the extent of affecting appellant's rights.

Considering appellant's opportunities to become familiar with the exhibits and noting that appellant had acquired possession of portions of Exhibit 2 at the first hearing, we find that failure to provide her with copies of these exhibits did not impair her ability to present her case.

Finally, we affirm the rulings below that Exhibits 1 and 2 were properly admitted into evidence and that official grazing files are public records of which notice may be taken by the Department in rendering its decisions. See M. P. Depaoli & Sons, 55 IGD 552 (1951), A-25978 (March 29, 1951). The weight to be given to this evidence is a matter for the examiner to decide initially and for the Board to decide on appeal. On the record, we do not find that appellant has offered evidence to prove that the information in these exhibits is incorrect.

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 vacated insofar as it required the appellant to post a surety bond and revoked the base property qualifications on her license by an amount equal to that previously recognized for grazing horses on the public land; it is affirmed

insofar as (1) it revoked her license to graze horses on public land, (2) as it directed the district manager to refuse to issue her a license until she has paid the damages found due, and (3) in all other respects.

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Martin Ritvo, Member

We concur:

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Newton Frishberg, Chairman

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Joan B. Thompson, Member