

JOHN GRIBBLE

IBLA 70-136

Decided December 3, 1971

Grazing Permits and Licenses: Trespass -- Trespass: Measure of Damages

Where it has been determined that a grazing trespass on the Federal range, while not clearly willful or grossly negligent, is repeated, the regulation requires that the forage value shall be computed and assessed at \$4 per animal unit month or twice the commercial rate if such amount is higher. When the commercial rate is \$4, the assessment of damages at \$8 per animal unit month for repeated trespasses will be affirmed.

Grazing Permits and Licenses: Trespass -- Grazing Permits and Licenses: Cancellation and Reductions -- Trespass: Generally -- Trespass: Measure of Damages

Where a grazing licensee committed eleven grazing violations during the period 1956-62 and six violations during 1967 and 1968, the six violations, although not found to be clearly willful or grossly negligent, constitute repeated trespasses for which a reduction in grazing privileges may be imposed and a 10% reduction for one year is justified.

IBLA 70-136 : Montana 2-69-1 (SC)

JOHN GRIBBLE : Penalties assessed
: for repeated grazing
: trespasses

: Affirmed

DECISION

John Gribble has appealed to the Secretary of the Interior from a decision dated March 31, 1970, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed as modified a decision by a hearing examiner assessing damages and penalties against him for repeated grazing trespasses.

The facts of the controversy and the law applicable thereto are ably set forth in the hearing examiner's decision, which is attached.

The examiner in his decision assessed damages at \$111.52, based on 9.6, 2.69, .34, .44, .7, and .17 animal unit months (AUMs) of forage consumed respectively in six grazing trespasses computed at the rate of \$8 per AUM. Also, the examiner ordered that no license or permit be issued to Gribble for more than 90% of his total base property qualifications for a period of one year.

In modifying the hearing examiner's decision, the Office of Appeals and Hearings stated as follows:

Pursuant to Departmental practice, as set out in 1371.53A5 of Bureau of Land Management Manual, whenever fractional animal unit months are involved, they must be rounded upward to arrive at the total animal unit months to be assessed. The Hearing Examiner erred in failing to adhere to the prescribed method of computation. Upon a recomputation based thereon the following amount is due as damages for the non-willful repeated trespasses:

South Hungry Creek Pasture	10 AUMs at \$8	\$ 80
Bartch Pasture ^{1/}	5 AUMs at \$8	40
Pete Bartch's Hungry Creek Pasture	1 AUMs at \$8	8
[R]emuda Creek Pasture	1 AUMs at \$8	8

Total Damages \$136

The decision of the Hearings Examiner is affirmed as [so] modified . . . , and the appellant is required to pay the amount of \$136 before a license may be issued to him.

In brief, the hearing examiner found that the appellant had committed six grazing trespass violations during the period commencing September 12, 1967, and terminating September 11, 1968. The six trespasses are summarized at page 6 of the attached hearing examiner's decision. At the hearing, the Government presented substantial and direct evidence of the six trespasses. Four of the trespasses found by the hearing examiner were admitted by the appellant (Tr. 77-78, 81, 82; ^{2/} appellant's statement of reasons for appeal to the Office of Appeals and Hearings, at 1-2, 7; appellant's post hearing brief, at 6-7, 8), and two were denied. The appellant denied that (1) five of his cattle were in Bartch pasture during the period October 5-10, 1967, and (2) twelve of his cattle were in Remuda Creek pasture on September 11, 1968 (hereinafter referred to as the Remuda Creek trespass).

Appellant offered certain evidence in an attempt to show that the two trespasses he denied did not occur; the evidence is summarized at pages 3 and 4 of the attached hearing examiner's decision. It is obvious that this evidence failed to rebut the Government's substantial and direct evidence of the trespasses, which evidence is also summarized on said pages 3 and 4, for assuming, arguendo, that appellant's evidence is valid, it would not show that either of the two trespasses did not occur. Thus the hearing examiner's finding that all six trespasses had occurred is sustained. His finding of credibility of the witnesses, supported by substantial evidence, is not to be disregarded. State Director for Utah v. Edgar Dunham, 3 IBLA 155 (1971).

One of the two reasons given by the appellant for this appeal is as follows: "Failure on hearing and on appeal to give consideration to facts of movement of [appellant's] cattle by other people"

^{1/} There were three separate trespasses in Bartch pasture.

^{2/} This and similar references are to the pages of the transcript of the hearing held on May 21, 1969.

Since the only evidence in the record of movement of cattle by other people pertains to the movement of cattle into the Remuda Creek pasture, appellant's reason is apparently directed at the Remuda Creek trespass.

The essence of this argument is that even if twelve of appellant's cattle were in Remuda Creek on September 11, 1968, appellant should not be held responsible or penalized therefor because the twelve cattle were taken "from their proper pastures" by other people and put there. 3/

The short answer to this contention is it is based solely upon conjecture as to what transpired on that date (Tr. 86-87).

There is an affidavit of John Rabenberg in the record (Ex. R-3) 4/ and other evidence, mostly hearsay, which tends to show that (1) John Rabenberg, a farmer and land-owner, had at various unspecified times prior to October 19, 1968, found cattle trespassing on his farm, that he did not know who owned the cattle, and that he moved the unidentified cattle 5/ off his land and into the nearest pasture, which he "understands" is the Remuda Creek pasture (Tr. 83-84, 91; Ex. R-3), and (2) on October 19, 1968, Rabenberg found cattle trespassing on his land, that he did not know who owned the cattle, and that he moved the cattle off his land and into the Remuda Creek pasture, that the cattle belonged to Gribble (Tr. 83-85, 91; Ex. R-3).

There is also direct evidence that a "Charles Dunn" and another unidentified person were seen "one day . . . sometime" during the fall of 1968 ". . . chasing cattle of John Walton's from Rabenberg's grain field into the Remuda Creek pasture, which John put in [sic]." (Tr. 90; emphasis added.) It is apparent that this evidence falls far short of establishing appellant's contention. Thus appellant must be held responsible for all six trespasses.

3/ See page 6 of appellant's statement of reasons for appeal to the Office of Appeals and Hearings.

4/ This and similar references are to exhibits submitted at the hearing; "R" designates the respondent's (appellant's) exhibits, "G" designates the Government's.

5/ No evidence was offered as to the ownership or identity of the cattle.

At the hearing, the Government introduced evidence of eleven prior trespass violations by the appellant. The prior violations occurred during the period 1956-62. The appellant made settlement of all of them for amounts ranging from \$54 to \$0.33, and the cases were apparently closed. The total of the settlements was \$108.80 (Ex. G-13). The eleven prior trespasses were not denied by the appellant.

This history of trespasses plainly justifies a finding that the six trespass violations committed in the instant case are "repeated" trespasses within the meaning of 43 CFR 9239.3-2(c)(2). See Edmund and Jessie Walton, A-31066 (May 27, 1969).

The other reason given by the appellant for this appeal is as follows: "Assessment of damages in excess of going commercial rate of \$3.00 per AUM."

The essence of this contention is that even if the six trespasses did occur, and even if appellant is accountable for all six, and even if the trespasses are considered "repeated", the damages for forage consumption should be computed at \$3 per AUM and not at \$8 per AUM as was done by the hearing examiner. Appellant offers no reasoning in support of this contention.

This contention is without merit. At the hearing, the Government presented substantial evidence that the commercial rate for grazing in the area is \$4 per AUM (Tr. 25). Appellant presented no evidence as to the commercial rate. ^{6/} Thus the commercial rate must be considered \$4. The pertinent regulation clearly provides that where a grazing trespass is "repeated", the damage for forage consumption shall be computed at ". . . \$4 per animal unit month, or at twice the commercial rate if such amount is the higher." 43 CFR 9239.3-2(c)(2). The commercial rate being \$4, \$8 is obviously the proper measure of computation. Cf. Edmund and Jessie Walton, *supra*. ^{7/}

^{6/} In his statement of reasons for appeal to the Office of Appeals and Hearings, at page 2, appellant stated that, ". . . damages, if any are due, must be assessed at the commercial rate of \$4.00 per AUM" Appellant made a similar statement at page 13 of his post hearing brief.

^{7/} The Walton case involved a trespass that occurred in September 1967 at essentially the same time and place as some of the

Finally, we agree with the hearing examiner that a 10% reduction in grazing privileges is justified by the facts. Cf. Edmund and Jessie Walton, *supra*. We also agree with the Office of Appeals and Hearings' computation of forage damages as \$136.

Accordingly, 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 appealed from is affirmed.

Frederick Fishman, Member

We concur:

Martin Ritvo, Member

Joan Thompson, Member.

fn. 7 (Cont.)

Gribble trespasses in question (Tr. 23-24; appellant's post-hearing brief, at 11-12; appellant's statement of reasons for appeal to the Office of Appeals and Hearings, at 2). In Walton, the Department stated that, "\$8 is twice the commercial rate and is the rate used in assessing damages for a willful, grossly negligent or repeated trespass. 43 CFR 9239.3-2(a)(2)."

February 16, 1970

DECISION

JOHN GRIBBLE, : MONTANA 2-69-1(SC)
Respondent : Violation and Hearing Notice
: dated September 19, 1968,
: Miles City District.

The Acting Montana State Director, Bureau of Land Management (BLM), issued a notice 1/ dated September 19, 1968, citing the Respondent, Mr. John Gribble, to appear before a Hearing Examiner of the BLM to show cause why his license should not be reduced or renewal thereof denied and satisfaction of damages in the amount of \$144.00 made, for allowing livestock to graze on the Federal range without authorization, as follows:

In T. 25 N., R. 43 E., Sections 1, 10, 11, 12, and in T. 25 N., R. 44 E., Sections 5, 6, 7, 8 and in T. 26 N., R. 44 E., Sections 30, 31 (also known as Hungry Creek Pasture)

24 Cattle September 12 through September 23, 1967

In T. 25 N., R. 43 E., Sections 2, 3, 10, 11, and T. 26 N., R. 43 E., Section 35 (also known as Bartch Pasture)

37 Cattle September 19 through September 23, 1967
28 Cattle October 4, 1967
5 Cattle October 5 through October 14, 1967

1/ The notice was purportedly issued under the provisions of 43 CFR 9239.32, which apparently is a misprint in standard form 9230-15 (August 1964). The correct citation is 43 CFR 9239.3-2(e). There is nothing in the record to indicate that Respondent was misled or his rights prejudiced in any way by this error.

In T. 26 N., R. 43 E., Sections 14, 15, 22, 23, 24, 26, 27 (also known as Pete Bartch's Hungry Creek Pasture)

25 Cattle October 12 through October 14, 1967

In T. 25 N., R. 44 E., Sections 1, 2, 3, 9, 10, 11, 12, 14, 15 (also known as Remuda Creek Pasture)

12 Cattle September 11, 1968

The notice charged that such unauthorized grazing was in violation of the provisions of the Taylor Grazing Act and the Grazing Regulations, and constituted wilful, grossly negligent and repeated violations of the terms of Respondent's grazing licenses.

A hearing in the matter was held on May 21, 1969, at Miles City, Montana. The Acting State Director was represented by Mr. Garry Fisher, Office of the Solicitor, Department of the Interior, Billings, Montana, and the Respondent was represented by Mr. James A. McCann, Attorney at Law, P.O. Box 607, Wolf Point, Montana.

Preliminary

The geographical setting of this case is a rather remote area within the Big Dry Resource Area of the Miles City District. The specific area is comprised of a group of nine separate allotments, known as (1) Pete Bartch's Hungry Creek pasture, (2) West Fork pasture, (3) Bartch pasture, (4) South Hungry Creek pasture, (5) Morris Place, (6) Alexander Place, (7) Dunn-McNabb pasture, (8) King pasture, and (9) Remuda Creek pasture (Ex. G-1). These allotments, which are separately fenced, contain both Federal and private lands (with the exception of the South Hungry Creek pasture which contains Federal lands only), and are licensed by the BLM for grazing to several different livestock operators. At all times specified in the trespass allegations, the Respondent was under valid license to graze his livestock in the West Fork and Dunn-McNabb pastures only.

On September 5, 1967, the BLM Area Manager, Mr. Wilton Peterson, was informed by telephone that there were unauthorized livestock grazing in several of the above named allotments. After a preliminary investigation on September 9 revealed excess numbers of livestock in two of the allotments, he undertook to make an extensive inspection of the area for trespassing livestock. He was assisted by Norman Bower, Les Howard and Lynn Taylor, all BLM employees of the Miles City District, in making the inspection. As a result of the inspection, notices of trespass were sent to a number of the operators in the area, including the notice sent to Respondent which is under consideration here.

Alleged Trespass in South Hungry Creek Pasture
Designated as "Hungry Creek Pasture" in the Notice)

On September 12, 1967, the BLM personnel identified by brand and counted 24 cattle belonging to the Respondent (Tr. 13, 20, 21). Because of adverse weather conditions, they left the area and returned on September 18, when they counted 25 of Respondent's cattle (Tr. 14). On September 19, Mr. Peterson informed Respondent of the cattle counts and on September 23, Respondent removed 24 cattle from the pasture and put them into the Dunn-McNabb pasture. This was done in company with the BLM personnel (Tr. 16).

From this uncontroverted evidence, I find the following trespass violation to have occurred.

24 Cattle September 12 through September 23, 1967

Alleged Trespass in Bartch Pasture

On September 19, 1967, the BLM personnel inspected the Bartch pasture and tallied 37 cattle belonging to the Respondent (Tr. 15, 21). That afternoon, Mr. Peterson informed Respondent of the cattle counts and told him to have them removed. On September 23, Respondent, accompanied by the BLM personnel, removed 35 of his cattle from this pasture and put them into the West Fork pasture (Tr. 16).

The BLM personnel returned to the Bartch pasture on October 4, and counted 28 cattle belonging to Respondent (Tr. 17, 22). On October 5 and 10, they reported 5 cattle there belonging to Respondent (Tr. 17, 22).

Respondent testified that on October 4, he found 23 cattle belonging to him in the pasture and he removed them immediately (Tr. 82). He stated that to his knowledge, none of his cattle remained there after that date (Tr. 82).

From this evidence, I find trespass violations to have occurred, as follows:

35 Cattle	September 19 through September 23, 1967
23 Cattle	October 4, 1967
5 Cattle	October 5 through October 10, 1967

Alleged Trespass in Pete Bartch's Hungry Creek Pasture

In this pasture, the BLM personnel, on October 12, identified and counted 25 cattle belonging to Respondent (Tr. 17, 22). Respondent testified that that day or the next, he found 25 cattle in this pasture of which 12 belonged to him and the rest belonged to other ranchers (Tr. 77). He immediately removed his cattle (Tr. 78). In his post hearing brief,

counsel for Respondent states that Respondent admits to 12 of his cattle being in trespass from October 12 through October 14, 1967.

From this evidence, I find the following trespass violation to have occurred:

12 Cattle October 12 through October 14, 1967

Alleged Trespass in Remuda Creek Pasture

On September 11, 1968, the BLM personnel identified and counted 12 cattle belonging to Respondent in the Remuda Creek pasture (Tr. 19, 23). According to the testimony of Respondent, he was served notice of this count on September 12, immediately after which he enlisted the aid of several neighbors and rode the pasture on horseback for the purpose of rounding up the cattle and removing them. They rode the pasture for three successive days and found no cattle owned by Respondent. This testimony is corroborated by the affidavits of two of the neighbors taking part in the search.

While Respondent denies that a trespass violation occurred in this pasture, it is virtually impossible to doubt the accuracy of the identification and count of cattle made by experienced BLM personnel on September 11. It would seem to be well within the realm of possibility that the cattle were simply not found in this large area during Respondent's search on the days following the BLM count, or that they in fact had left this pasture by September 12.

Accordingly, I see no alternative but to find that the following trespass violation occurred:

12 Cattle September 11, 1968

The Nature of the Trespasses

The trespass regulations, 43 CFR, Subpart 9239, make a distinction between violations which are (1) "not clearly wilful" and those which are (2) "clearly wilful, grossly negligent, or repeated". In the first instance, damages for forage consumed are computed at \$2 per animal unit month (AUM) or at the commercial rate if such rate is higher, whereas, in the second instance, damages are computed at \$4 per AUM, or at twice the commercial rate if such amount is the higher (43 CFR 9239.3-2(c)(2)).

In addition to having to pay this considerable difference in damages, a trespass violator in the second category is subjected to having his license or permit suspended, reduced or revoked, or renewal thereof denied (43 CFR 9239.3-2(e)(2)).

There is no evidence in this case that Respondent deliberately or wilfully drove his livestock into the pastures in which he was not licensed. Moreover, in each instance of trespass, he appears to have acted conscientiously and diligently in returning the errant livestock to their proper place. The main reason given for why the trespasses occurred is that most of the allotment fences are in poor condition and generally are not cattle-proof. Mr. Peterson agreed that a majority of the trespass problems in the area would be eliminated if the fences were made cattle-proof (Tr. 41, 42). A number of other operators licensed in these allotments were also cited for trespass violations during the same period as involved here (Tr. 23). This would indicate that the generally poor condition of the fences has created a problem whereby trespasses occur more or less regularly between the allotments.

The BLM introduced evidence of past trespasses charged to Respondent (Ex. G-13), showing a total of eleven violations between 1956 and 1962. The assessed damages for these violations range from a low of \$.33 to a high, back in 1956, of \$54. They amount in total to \$108.80.

Considering all the circumstances, what is the correct label to apply to the several trespass violations herein found to have been committed? A ready-made answer appears to be provided by a recent decision of the Department, Edmund and Jessie Walton, A-31066 (May 27, 1969). Edmund Walton was one of the other ranchers cited for wilful trespass as a result of the same range compliance check which gave rise to the charges against Respondent herein. The circumstances surrounding the trespass violations in Walton appear to have been very similar to those in this case. Walton was shown to have a record of ten previous relatively minor violations over a period from 1949 to 1965, not too different from Respondent's past record. While Walton was charged with wilful trespasses (similar to the charges against Respondent), the Department held that the evidence did not sustain a finding that the trespasses were wilful or grossly negligent, but that the history of trespasses plainly justified a finding of repeated trespasses.

Noting the similarity in the two cases, I find that Respondent committed repeated trespasses, but that his conduct in this regard was neither wilful nor grossly negligent.

Damages and Penalties

With the finding that the trespass violations constitute repeated trespasses, the damages must be assessed at \$4 per AUM or twice the commercial rate, whichever is higher (43 CFR 9239.3-2(c)(2)). The undisputed testimony is that the commercial rate for grazing in the area is \$4 per AUM. Accordingly, damages will be calculated on the basis of \$8 per AUM, as follows:

South Hungry Creek Pasture
(100% Federal Range) 2/

24 Cattle x .4 Mo. (9/12-9/23) x 100% F.R.= 9.6 AUMs x \$8.00 = \$76.80

Bartch Pasture
(46% Federal Range)

35 Cattle x .167 Mo. (9/19-9/23) x 46% F.R.= 2.69 AUMs x \$8.00 = 21.52 23 Cattle x
.032 Mo. (10/4) x 46% F.R.=.34 AUMs x \$8.00 = 2.72

5 Cattle x .19 Mo. (10/5-10/10) x 46% F.R. = .44 AUMs x \$8.00 = 3.52

Pete Bartch's Hungry Creek Pasture
(58% Federal Range)

12 Cattle x .1 Mo. (10/12-10/14) x 58% F.R.= .7 AUMs x \$8.00 = 5.60

Remuda Creek Pasture
(43% Federal Range)

12 Cattle x .033 Mo. (9/11) x 43% F.R. = .17 AUMs x \$8.00 = 1.36

Total Damages \$111.52

The BLM recommended a 30 percent reduction in Respondent's grazing license for a period of three years. This is the same recommendation that was made in the Edmund Walton case. (See Hearing Examiner's Decision, May 27, 1968, Montana 2-68-2(SC)). On final appeal in that case, the Department determined the appropriate penalty to be a reduction in grazing privileges of 10% for a period of one year. Edmund and Jessie Walton, supra. Noting again the great similarity between the two cases, I believe a like penalty should be imposed upon Respondent.

ORDER

The District Manager is directed to refuse to issue Respondent any license or permit authorizing the grazing of livestock upon the Federal range until the damages herein found to be due are paid, and thereafter to issue a

2/ The Federal range percentages are taken from Ex. G-12.

license or permit to the Respondent for no more than 90 percent of his base property qualifications for a period of one year.

L. K. Luoma
Hearing Examiner

Enclosure:
Statement of Appeal Procedure

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