

**Editor's note: Appealed -- reversed, Civ. No. 5934 (D. Wyo. Dec. 20, 1974), aff'd in part, reversed in part, No. 75-1201 (10th Cir. Feb. 4, 1976), 531 F.2d 1397**

BUREAU OF LAND MANAGEMENT, APPELLANT  
DIAMOND RING RANCH, APPELLEE  
AND  
BUREAU OF SPORTS FISHERIES AND WILDLIFE, AMICUS CURIAE

IBLA 73-48

Decided August 17, 1973

Appeal by the Bureau of Land Management from a decision by Administrative Law Judge L. K. Luoma, which found that the appellee had destroyed vegetative cover on public lands in willful violation of 43 CFR 4112.3-1(e), but deferred the imposition of sanctions.

Affirmed as modified.

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

Evidence offered on appeal by an amicus curiae may not be considered to the extent that it includes new evidence not adduced at the hearing, except for the limited purpose of determining whether a new hearing should be ordered.

Rules of Practice: Evidence

Where the findings of fact by an Administrative Law Judge are supported by the record they will not ordinarily be disturbed on appeal. However, the Board of Land Appeals has authority to reverse the findings of fact even when not clearly erroneous.

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

Where a permit to spray the public land with a chemical sage brush defoliant would only

have been granted subject to a condition that grazing of the treated lands be suspended for a minimum of one year, a grazing licensee who willfully engages in such a spraying program without seeking proper authorization to do so, in violation of a regulation, will not be allowed thereby to avoid the grazing suspension which would otherwise have been imposed.

APPEARANCES: George E. Longstreth, Esq., Office of the Solicitor, Denver Regional Office, for the Bureau of Land Management; William H. Brown, Esq., Brown, Drew, Apostolos, Barton & Massey, Casper, Wyoming, for the Diamond Ring Ranch; Charles H. Vaughn, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Sports Fisheries and Wildlife.

#### OPINION BY MR. STUEBING

This is an appeal by the Bureau of Land Management from the June 8, 1972, decision of Administrative Law Judge L. K. Luoma, following a hearing to allow the Diamond ring Ranch to show cause why its grazing license should not be reduced, revoked, or renewal thereof denied. The Judge found that the respondent had destroyed vegetative cover on public lands in willful violation of federal regulations, but he suspended any denial of grazing privileges against the ranch until such time as it may again commit a similar violation.

The Bureau of Land Management had asked the Judge to find that the respondent had willfully violated 43 CFR 4112.3-1(e) and had asked for substantial reduction in the respondent's grazing rights in accordance with 43 CFR 4113.1, but for no monetary damages. Those regulations prohibit removing vegetative cover from federal range except as authorized by law, and provide that a licensee or permittee may have his license or permit suspended, reduced or revoked for a violation of the regulations.

This case arose out of the June 1971 spraying of approximately 3,600 acres of federal range land with a chemical called 2,4-D <sup>1/</sup> by a contractor hired by the ranch. The land lies in the Lander Grazing District in Wyoming, in an area known as Horse Heaven Pasture. The spraying was done to defoliate sagebrush and thereby allow the growth of more native grasses which would provide more

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<sup>1/</sup> Also written 2-4D.

forage for the cattle and sheep owned by the respondent. Permission to spray had not been obtained from the Bureau of Land Management as required by regulation. The ranch foreman allegedly instructed the contractor who was to do the aerial spraying to apply the chemical to 5,000 deeded acres which are interspersed in the pasture with the public lands. While on a preliminary reconnaissance flight in April 1971, the foreman pointed out the lands to be sprayed to the contractor and provided him with three township plats which showed the deeded lands.

The testimony of the ranch foreman, Lee Irvine, as to what instructions he gave the contractor on the occasion of their reconnaissance flight indicates that he told the contractor to spray in Horse Heaven Pasture where the brush was heaviest; that he is aware that most of that land "probably is" Federal; that he did not point out from the air every piece of privately owned or controlled land; that he did point out what he thought was deeded land, saying, "I think this is it, and I think that is it, that brush is the thickest, let's spray that." He conceded that he apparently couldn't tell where the private lands were from the air by map reference, and admitted that he didn't feel that the contractor was adequately advised so that he could go out there and find the private lands. They did not discuss flagging the property to identify the land to be treated. (Tr. 23, 24, 25). In summary he stated:

I more or less told him to spray just what was the worst, and we looked at the whole country and we thought we were in mostly deeded land. (Tr. 28).

Asked if he had pointed out the little, isolated tracts of private land, Irvine replied:

Well, I don't think -- if I did, I said whatever he thought was right if he had a little juice left over. (Tr. 30).

No other instructions were given. About two months later the pilot-contractor, Doyle Vaughn, was ready to proceed with the spraying, and he came by in a helicopter and asked Irvine to go up with him again to show him, as he wasn't too sure about the land, but Irvine was busy getting sheep ready for docking and could not go, so Irvine just told Vaughn to go ahead, and Vaughn proceeded with the spraying. (Tr. 37, 38).

This resulted in 3,600 acres of federal range and 300 acres of state land being sprayed, while only 370 acres of deeded lands were treated. The Judge held that such a flagrant disregard of property lines constituted an intentional and willful act, but he found no actual damage resulted, and therefore he imposed only a

suspended penalty. It is from this suspension of penalty that the Bureau of Land Management takes its appeal.

The Bureau of Land Management had asked:

1. To deny Diamond Ring Ranch all grazing privileges in the Horse Heaven Pasture designated as pasture No. 17 on Exhibit G-1 in the proceeding, for a minimum period of three consecutive years to commence on the first day of March immediately following the service of the final decision of this proceeding upon the respondent.
2. To impose upon Diamond Ring Ranch a 25% suspension of grazing privileges on the balance of all its Section 3 grazing privileges in the Lander district for a period of two consecutive years to commence on the first day of March immediately following service of the final decision in this proceeding upon the respondent.

The Judge, while finding the violation had been committed, held that a more realistic sanction would be to deny respondent all grazing privileges in the Horse Heaven Pasture for a period of three years to commence on March 1, 1973, provided however, that the sanction would remain suspended until such time as a verified showing would be made by the Bureau of Land Management to the satisfaction of the Judge's office that the respondent had again committed a similar violation.

In his decision, the Judge enumerated the following findings of fact:

- (1) Respondent willfully sprayed approximately the 3,600 acres of public land described in the violation notice with 2,4-D. Since this was done without first obtaining a permit from the Bureau of Land Management, it constitutes a violation of Departmental regulations and is, therefore, a trespass.
- (2) Approximately 80% of the big sagebrush treated is killed. The remaining 20% continues to live and reproduce and will fully restore the sagebrush cover within approximately 10 years. The grass and other ground cover was not affected.
- (3) The chemical used is not a poison and is not harmful to animals.
- (4) The spraying will benefit the public lands in that the production of forage utilized by domestic and game

animals will increase and watershed conditions will improve.

(5) The wildlife habitat suffered no damage.

(6) No further deferral of grazing is necessary in order to protect the range.

The Bureau of Land Management bases its appeal upon the assertion that the Judge erred in suspending the first recommended sanction and in not imposing its second recommended sanction. It now asks that they be fully imposed. It is the Bureau's position that the real issue in this case is whether the respondent willfully violated the regulations by spraying 2,4-D on federal lands in the Horse Heaven Pasture, and that any evidence injected into the hearing by the respondent supporting its contention that the range would benefit by the spraying is without merit and should not be considered as a real issue or serve to mitigate disciplinary action against the respondent. To allow the suspension of penalty, it argues, is to effectively vitiate the Bureau of Land Management's responsibility for the public land, because enforcement of the regulation is necessary to proper management. It is the Bureau's contention that the "illusory" sanction imposed by the Judge may not be tolerated since it would violate the intent of 43 CFR 9239.3-2(e)(2), which provides in part:

\* \* \* If the alleged violation is established to the satisfaction of the examiner, or upon the failure, without proper excuse satisfactory to the examiner, of the person named in the notice or his representative to appear at the hearing, the examiner will render a written decision assessing the amount of damages, including the value of any forage consumed, as determined in accordance with paragraph (c) (2) of this section, and directing the district manager to suspend, reduce, or revoke the license, permit, or base property qualifications or to deny renewal, if the facts so warrant.

Here, the Bureau sees the facts as warranting more than a suspended sanction.

The Bureau points out that the appellee's spraying of the land without permission violated an agreement which the Bureau of Land Management had entered with the Wyoming Game and Fish Department pursuant to a Bureau of Land Management Manual directive, BLM Manual § 7311.23(e), by which the State's Game and Fish Department was to have an opportunity to comment on any sagebrush spraying which the Bureau was considering. In addition, the Bureau notes that

under the Judge's decision the appellee would be allowed to run stock on the sprayed land immediately. This violates a directive set out in the Bureau of Land Management Manual at section 7311.2(c)(2) under the heading "Brush and Weed Control":

5. Management of Livestock. Livestock grazing must be deferred on areas treated by chemicals for a minimum of 12 months, and preferably for three growing seasons.

The Bureau of Land Management sees the Judge's finding that the range was not in any way damaged by the spray as acceptance of the testimony of the respondent's witness, Dr. Alley, who is not a game biologist and who has written and works for the control of big sage brush. The BLM also contends that the Judge, in the specific finding cited earlier, held that the spray will benefit both domestic and game animals and therefore he did not give appropriate weight to Bureau witnesses, who were game biologists.

Appellee, respondent below, in its appeal brief raises several of the contentions which it raised both at the hearing and in its post-hearing brief. First, it asserts that a fatal variance exists between the allegations in the hearing notice and the proof tendered. By using the word "destroyed" instead of one of the words used in the regulation, either "cutting, burning, or removing" vegetative cover, appellee insists that the charge is made fatally defective. The Judge did not rule directly on this contention; however, by implication he found no substance in it. The first time respondent raised the point at the hearing the Judge asked, "Have you been misled by the notice? Have you been put on notice what the charge was?" To this respondent's counsel replied, "It was our understanding that they were charging spraying the sage brush without a permit." To which the Judge queried, "Are you prepared to defend that charge?" Counsel answered, "Yes, Sir." (Tr. 8). The respondent understood the charge and we can find no prejudicial defect in the complaint. Therefore, we hold the complaint to be adequate. From the proof tendered thereon, the Judge found that 80% of the sagebrush was killed.

Appellee next argues that the proof failed to show a clearly established violation or that the violation was willful. On the charge of a clearly established violation, appellee merely states that "\* \* \* the proof in this case falls short of this standard." The Judge found that the evidence did show a clearly established violation, and we will not disturb the Judge's finding where supported by substantial evidence adduced at the hearing. State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971). On the question of a "willful violation" appellee quotes part of 43 CFR 9239.3-2(e)(1), which states:

Whenever it appears to the State Director that disciplinary action is advisable because of a grossly negligent, or repeated violation, he shall cause a written notice to be served upon the licensee or permittee. (Emphasis supplied)

Appellee points out that the Bureau of Land Management charged it only with the "willfulness" part of the regulation, and no other, in destroying vegetative cover. Appellee states that its officers did not know that any range other than its own would be sprayed, or, in any event, that the regulations require prior consent to spray federal range. In holding that the Diamond Ring Ranch willfully violated the regulation relating to destroying the vegetative cover, the Judge said:

Such a lack of preparation for and control over the spraying program exhibits such a flagrant disregard of property lines as to constitute an intentional and willful act of spraying the public lands involved. Accordingly, it is found that respondent, without permission, willfully applied 2,4-D upon the approximate 3,600 acres of public land described in the notice.

We find that the evidence is sufficient to support the Judge's holding, and we concur in it.

On August 11, 1972, the Bureau of Sports Fisheries and Wildlife, United States Department of the Interior, filed a brief objecting to certain facts found in the decision from which this appeal is taken. Diamond Ring Ranch filed a brief in opposition, pointing out that the Bureau of Sports Fisheries and Wildlife was not a party below and so has no standing to appeal and, in any event, that Bureau filed no notice of appeal or motion to intervene, but only an appeal brief. The brief was filed after the 30-day time limit was set for filing notices of appeal. 43 CFR 4.411. While we agree that the filing did not comport with the rules of practice as they relate to the taking of appeals, the appearance of the Bureau of Sports Fisheries and Wildlife may be allowed *amicus curiae*. 43 CFR 4.3(c). The material offered by BSFW, to the extent that it includes new evidence not adduced at the hearing and so not subject to cross examination, does not constitute a part of the record. United States v. Abilene & So. Ry. 265 U.S. 274, 289 (1924). It may only be considered to determine if a new hearing should be held. United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971). In this instance no further hearing is required.

Appellee's final point on appeal is that the publications and authorities quoted in the Bureau of Land Management's post-hearing

brief may not be considered since they were not part of the record. It is the rule that evidence not offered at the hearing may not be considered on appeal. United States v. Winters, supra. However, the record contains sufficient probative evidence to support our findings.

The Bureau of Sports Fisheries and Wildlife argues that the Judge's findings of fact Numbers 4, 5, and 6, supra, should be vacated. As noted above, we cannot consider the evidence supplied by BSWF to make a determination on these points. However, the arguments advanced by amicus curiae seek basically the same result as does the appellant, and find support in the record which shows a dependency by certain wildlife on sagebrush as forage and protective habitat. (Tr. 246, 257, 259, 324). While the extent of this dependency is in question, as is the offsetting benefit of other forage increased by elimination of sagebrush (Tr. 209, 318, 320-321, 323, 325, 334) the Judge's findings must be modified to reflect the use of sage brush by wildlife. Therefore, finding No. 5 will be deleted, as will No. 4 to the extent that it speaks of forage for game animals. We find that the parties did not dispute the fact that watershed conditions are improved by sagebrush spraying, and we will not modify that finding.

As stated in the Judge's decision, the public land involved is under the management of the BLM, and that agency has the authority to decide if, when, where, and how sage brush should be controlled. The decision also notes that the BLM Manual section 7311.22C5 requires that livestock grazing was to be deferred on areas treated by chemicals for a minimum of 12 months, and preferably for three growing seasons.

If the appellee had complied with the regulations and made a proper application for permission to conduct this spraying operation on public lands, there is no assurance that it would have received a permit. Assuming, however, that a permit were issued for this purpose, it is undeniable that it would have included a provision for at least a one-year suspension of grazing on the treated lands. While the decision below found that the appellee willfully violated the regulations, it imposed a penalty which would be less onerous than the terms of any lawful permit which might have been obtained from the Bureau had it complied with them, in effect rewarding the violation. This is error.

The circumstances of this case warrant the imposition of an actual penalty. Accordingly, the Diamond Ring Ranch will be denied all grazing privileges on public lands in the Horse Heaven Pasture for a period of 3 years from March 1, 1973, with the first year suspended until such a time as a verified showing is made that the appellee has again committed a similar violation. The two years of

actual, enforced denial of grazing privileges will begin on March 1, 1974.

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 herein modified.

Edward W. Stuebing, Member

We concur:

Joseph W. Goss, Member

Frederick Fishman, Member

