

STATE DIRECTOR FOR UTAH  
v.  
CHYNOWETH BROTHERS

IBLA 72-387

Decided September 11, 1974

Appeal by the Bureau of Land Management from decision (Utah 11-71-1(SC) and Utah 11-71-2(SC)) of Administrative Law Judge Robert W. Mesch 1/ in which he refused to penalize respondent for alleged grazing trespasses and declined to order any disciplinary action to reduce respondent's grazing privileges.

Affirmed in part; reversed in part.

Grazing Permits and Licenses: Trespass--Trespass: Generally--Grazing Permits and Licenses: Generally

Where licensee grazed cattle without permission or clearance in a certain pasture as a result of extenuating circumstances, such act is held to constitute technical trespass and licensee is liable for single damages of \$ 2 per AUM and is not otherwise subject to disciplinary action.

APPEARANCES: Reid W. Nielson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for appellant; Milton A. Oman, Esq., Salt Lake City, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Bureau of Land Management State Director for Utah for the District Manager, Kanab, has appealed to the Secretary of the Interior from portions of the Administrative Law Judge's decision dated March 24, 1972, pertaining to alleged grazing trespasses in two locations.

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1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was made by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

The Judge's decision was the result of a hearing held on March 11 and 12, 1971, and on November 3 and 4, 1971, at Kanab, Utah. It concerned two notices issued by the Bureau which cited the respondent, Chynoweth Brothers, to show cause why its "license or base property qualifications should not be reduced or revoked or renewal thereof denied, and satisfaction of damages made," pursuant to 43 CFR 4113.1 and 43 CFR 9239.3-2, for allowing cattle to graze on the Federal range in trespass. The notices alleged that trespasses occurred in designated areas as follows:

Willis Creek Pasture of the Headwater Allotment. The notice charged that the respondent grazed 3 cattle in trespass on September 3, 1970. It alleged the trespass was willful, grossly negligent or repeated, and in accordance with 43 CFR 9239.3-2(c)(2) assessed damages for one animal unit month (AUM) at \$ 4.

West Coyote Pasture of the Cottonwood Management Area (alleged December trespasses). The Bureau charged the respondent with grazing designated numbers of cattle in trespass on various dates in December 1970, for a total of 139 AUMs of forage. Both notices alleged that the trespasses were willful, grossly negligent or repeated, and assessed damages at the rate of \$ 4 per AUM, for a total of \$ 556.

Swallow Park Allotment. The Bureau charged the respondent with trespasses in July and August 1970, totalling 9 AUM's. The notice alleged that the trespasses were willful, grossly negligent or repeated, and assessed damages at the rate of \$ 4 per AUM, for a total of \$ 36.

West Coyote Pasture (alleged November trespass). The Bureau charged the respondent with grazing 2 AUM's in trespass. The notice did not allege that the trespass was willful, grossly negligent or repeated. It assessed damages at \$ 2 per AUM, for a total of \$ 4.

The Judge found that the respondent, as charged, had committed the trespasses in the Swallow Park Allotment and the November trespass in the West Coyote Pasture and, pursuant to 43 CFR 9239.3-2(c)(2), assessed damages at \$ 36 for 9 AUM's, and at \$ 4 for 2 AUMs, respectively, for a total of \$ 40. The respondent did not challenge this determination but paid the assessed damages. The Judge's decision has, therefore, become final as to these portions.

The Bureau's appeal is from those portions of the decision in which the Judge refused to penalize the respondent for the trespass in the Willis Creek Pasture and for grazing its cattle in the West Coyote Pasture in December 1970, and declined to order any disciplinary action to reduce the respondent's grazing privileges as provided for in 43 CFR 9239.3-2(e). Appellant asserts that the Judge erred in these findings.

We concur in the Judge's findings with reference to the alleged trespass in the Willis Creek Pasture, which we quote from page 4 of his decision:

The Alleged Trespass in the  
Willis Creek Pasture

The 1970 notice to show cause charged that the respondent grazed 3 cattle in trespass on September 3, 1970, in the Willis Creek Pasture of the Headwater Allotment. The notice alleged that the trespass was willful, grossly negligent or repeated, and assessed damages for one AUM at \$ 4.

The respondent was not licensed to graze livestock in the Willis Creek Pasture (Tr. 29, 118). The District Manager identified three cattle belonging to the respondent grazing in this pasture on September 3, 1970 (Tr. 112-114). At that time the District Manager noted that a gate across a road into the pasture was open (Tr. 118). The Bureau did not present any other evidence with respect to this trespass.

A representative of the respondent testified that some unknown party had left the gate open, and the cattle had wandered into the pasture; that it would be impossible to maintain a continual watch "to be certain a cow wouldn't go through an open gate"; and that he found the cattle and removed them from the pasture the very day that the District Manager saw them (Tr. 415-416).

I find that the respondent grazed three cattle in trespass on September 3, 1970, in the Willis Creek Pasture. The trespass cannot, in my opinion, properly be classed as a willful, grossly negligent or repeated trespass.

Appellant contends that the Judge committed error in not finding that the trespass of the respondent in the Willis Creek Pasture was willful, grossly negligent or repeated. It states

respondent was licensed to graze cattle in the Deer Range Allotment and did not have a license to graze in the adjacent Upper Bull Valley Allotment; that respondent had put its cattle in the Upper Bull Valley Allotment at Indian Springs because there was no water on the Deer Range Allotment, left the cattle there throughout the summer, and moved the cattle to its private land within the Deer Range Allotment after receipt of trespass notices. Appellant further states that the open gate mentioned by the Judge is located between the Upper Bull Valley Allotment and the Willis Creek Pasture and not between the latter pasture and the Deer Range Allotment and argues, in effect, that since the cattle were trespassing in Upper Bull Valley, the 3 cattle found to have wandered into the Willis Creek Pasture should have been found willful, grossly negligent or repeated trespass.

Although the evidence indicates that the 3 cattle found in the Willis Creek Pasture on September 3, 1970, came from the same herd that was put in the Upper Bull Valley Allotment by respondent, we observe that neither of the orders to show cause, which are the subject of this proceeding, charged respondent with trespass in the Upper Bull Valley Allotment. Therefore, we confine our consideration and remarks only to the trespass as charged in the Willis Creek Pasture. Mr. Jack Chynoweth testified for the respondent that he found the 3 head of cattle and removed them from the pasture on the same day that the Bureau's District Manager had seen them, which was before he received the trespass notice from the Bureau concerning them (Tr. 415). Under the circumstances, we agree with the Judge's opinion that this should not be classed as a willful, grossly negligent or repeated trespass, and hold that respondent should not be penalized.

We now turn to the alleged December trespasses in the West Coyote Pasture. In this connection, we quote the Judge's summary of the evidence, findings and conclusions contained on pages 5 through 8 of his decision, as follows:

The Alleged December Trespasses in  
the West Coyote Pasture

The 1970 notice to show cause charged that the respondent grazed the following numbers of cattle for the following periods of time in trespass in the West Coyote Pasture of the Cottonwood Management Area:

130 cattle on December 1, 1970

105 cattle from December 2, 1970, through December 6, 1970

159 cattle on December 7, 1970  
149 cattle from December 8, 1970, through December 14, 1970  
178 cattle on December 15, 1970

The second notice to show cause charged that the respondent grazed 134 cattle from December 16, 1970, through December 29, 1970, and 151 cattle on December 30, 1970, in trespass in the West Coyote Pasture. Both notices alleged that the trespasses were willful, grossly negligent or repeated. The notices assessed damages at the rate of \$ 4 per AUM for a total of \$ 556.

The respondent admitted at the hearing that it grazed 238 head of cattle for the entire month of December in the West Coyote Pasture (Tr. 427, 428). The respondent, however, contends that because of arbitrary and capricious actions on the part of the District Office, it had no reasonable alternative other than to graze all of its licensed livestock in the West Coyote Pasture during December. The respondent further asserts that under the circumstances it should not suffer the consequences of even a technical or innocent trespass.

The respondent's license for the 1970-1971 grazing season provided that its use in the Cottonwood Management Area would be "according to the attached operational plan" (Ex. 3). The operational plan showed that the respondent would use the Gravelly Hills Pasture from November 1, 1970, to November 30, 1970, and the Brigham Plains Pasture from December 1, 1970, to February 28, 1971 (Ex. 3). The operational plan contained a notation that:

Dates to move to Brigham plains will depend on available water in the area. This will be decided during the latter part of November by an inspection including BLM personnel and Chynoweth Brothers . . .  
(Ex. 3)

On November 24, 1970, the Area Manager inspected the water situation in the Brigham Plains Pasture (Tr. 324). He concluded that there was sufficient water for the respondent to move to Brigham Plains on December 1 (Tr. 347, 376). On November 25, 1970, the respondent was advised, by telephone, of the determination made by the Area Manager (Tr. 357, 363). The respondent did not agree with the conclusions

reached by the Area Manager, and refused to move its livestock to the Brigham Plains Pasture. On December 1, the respondent moved its livestock from the Gravely Hills Pasture to the West Coyote Pasture (Tr. 427). The respondent's cattle remained in the West Coyote Pasture until approximately the first of January (Tr. 428). When the first snow reached the area, the respondent moved its livestock to the Brigham Plains Pasture (Tr. 428).

The license and the operational plan did not contain any contingency provision as to where the respondent's livestock would graze in the event it was determined during the latter part of November that the cattle should not move to Brigham Plains on December 1 because of the lack of available water. The District Manager did, however, indicate in his testimony that they would not have considered the respondent a trespasser for grazing its livestock in the West Coyote Pasture if, in fact, there had not been available water in the Brigham Plains area (Tr. 270).

The testimony of the Area Manager, who made the decision that there was sufficient water for the respondent to move to the Brigham Plains Pasture on December 1, can be summarized as follows:

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2. He went into the Brigham Plains area on November 24, 1970, to make an inspection of the water situation (Tr. 324). He found that one reservoir was approximately one-fourth to one-third full as a result of summer thunderstorms (Tr. 164, 330, 331); that another reservoir was dry (Tr. 164, 348); and that there was water flowing from Coyote Springs, which is a year-round source of water (Tr. 348, 377).

3. He concluded that there was not enough water for the respondent to run all of its licensed livestock for the full period of authorized use unless water conditions changed as a result of precipitation (Tr. 376). He estimated that in the absence of additional precipitation, there would "probably" be enough water in the one reservoir, and in Coyote Springs, for the

respondent to run all of its licensed livestock (238 head of cattle) for one month (Tr. 379, 381, 383).

4. He does not have an opinion as to how many head of cattle or for how long a period of time the cattle could water at the one reservoir (Tr. 349). He does not know whether ten or twenty head of cattle would so pollute the water in the reservoir within a few days that the cattle would not thereafter drink the water (Tr. 353).

5. It is approximately a mile by trail from the top of the mesa, where the cattle graze, to Coyote Springs at the bottom of a canyon (Tr. 353). The difference in elevation between the two locations is from 600 to 1,000 feet (Tr. 354). He does not know what would happen to the flesh condition of cattle over a 30-day period if they were required to trail to and from the water at Coyote Springs (Tr. 354).

6. It would probably take four or five men an equal number of days to move the cattle up to Brigham Plains, and then if snow did not come within the month there would be two or three days' riding to gather the cattle and bring them down (Tr. 381, 382, 385). He does not know whether it would cost the cattle flesh, and cost in the calf crop the following spring, to gather the cattle, drive them to Brigham Plains and then gather them again and bring them out (Tr. 382, 383).

The respondent presented the testimony of seven livestock operators in the area in support of its position that there was not sufficient water in the Brigham Plains area prior to the latter part of December, when it snowed, to warrant a prudent operator in moving 238 head of cattle into the Brigham Plains Pasture. I am particularly impressed with the testimony of one of the respondent's witnesses who appeared to be completely trustworthy and free from bias or prejudice. This witness, who has been in the livestock business in the area for the past 31 years, and who is familiar with the Brigham Plains Pasture and the sources of water in the area, testified (1) that on the basis of an enlarged photograph

taken by the Area Manager on November 24, 1970, showing the water in the one reservoir he "wouldn't want to put over 25 head there for ten days" (Tr. 658); (2) that he would not even consider having cattle water at Coyote Springs and attempt to utilize the forage on top of the mesa -- "we can't operate under that kind of conditions" (Tr. 659); and (3) that if there was no snow on Brigham Plains and the reservoir was as indicated in the photograph, he would not consider taking his cattle into the area under those conditions (Tr. 660).

I conclude that there was not sufficient water available within the Brigham Plains Pasture prior to the latter part of December, when it snowed, to warrant the movement of 238 head of cattle into the area. I also conclude that the respondent should not have been directed to move to Brigham Plains prior to the latter part of December. Under the circumstances, I do not believe that the respondent should be penalized in any way for grazing its livestock in the West Coyote Pasture during the month of December.

This decision should not be considered by the parties as a precedent for actions in subsequent years. In this case I have simply concluded that the respondent's evidence concerning the water situation is entitled to more weight, and is more convincing than the evidence presented by the Bureau. If the problem should arise again, the Bureau might present more convincing evidence and the respondent might be subject to drastic disciplinary action.

The threshold question presented by appellant pertains to the kinds of evidence that may be received in this type of proceeding in accordance with regulation 43 CFR 9239.3-2(e)(2), which reads:

The hearing upon the order to show cause will be conducted so far as practicable in the same manner as other hearings before an administrative law judge. The evidence shall be confined to the commission of the acts charged and the amount of damages, including the value of any forage consumed, due the United States. If the alleged violation is established to the satisfaction of the administrative law judge \* \* \* the administrative law judge 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. [Emphasis supplied.]

Appellant contends that the sole issue on the Orders to Show Cause under this regulation was whether respondent's cattle were trespassing upon the federal range and if so, whether such trespass was willful, grossly negligent or repeated. We disagree. While, at first blush, the phrase "confined to the commission of the acts charged" appears to mean that the evidence presented must address itself only to the question of whether or not trespasses were actually committed, we believe that a broader meaning is implicit in the language. It would be manifestly unfair to adopt such a restrictive interpretation as the appellant would have us do. Cases may arise where trespasses occur due to conditions or events beyond the control of the grazing licensee or because of extenuating circumstances, which might mitigate an offense committed by a grazing licensee. We believe this to be the situation in the instant case. The case is a novel one for which we have found no precedents.

In substance, appellant alleges that it was error for the Administrative Law Judge to consider and base his opinion upon matters outside of the issues in this case, such as his interpretation of the requirements of the Cottonwood Management Area Operational Plan in which he allegedly invaded the administrative prerogative of the Bureau in concluding that respondent should not have been directed to move to the Brigham Plains Pasture as required in the operational plan, and in not finding that an administrative determination was made that there was sufficient water on Brigham Plains for the respondent to move from the Gravelly Hills Pasture to Brigham Plains in accordance with the operational plan.

Following is the full text of the operational plan:

Dates to move to Brigham Plains will depend on available water in the area. This will be decided during the latter part of November by an inspection including BLM personnel and Chynoweth Brothers. If it is necessary to move cattle from Brigham Plains Pasture to East Coyote or West Coyote Pastures dates for moving cattle will be determined jointly by the BLM and Chynoweth Brothers. Dates for moving cattle must be approved by BLM prior to moving cattle. Any cattle

on pastures # 6 & #7 2/ prior to BLM approval will be considered trespass (Ex. 3).  
[Emphasis supplied.]

We hold that the Judge was justified in his interpretation of the operational plan as it is an integral part of respondent's license. First, the plan called for a joint inspection by the Bureau and the respondent to determine the availability of water in Brigham Plains. There was merely a unilateral inspection by the Bureau's Area Manager who made the determination that there was sufficient water for respondent to move its cattle on December 1. Respondent disagreed with this determination and refused to move its cattle to Brigham Plains. Instead it moved its cattle from Gravelly Hills Pasture to the West Coyote Pasture on December 1. Respondent moved its 238 head of cattle to Brigham Plains on January 1 when the first snow fell in the area. Respondent has used Brigham Plains in previous years when it has snowed because snow is necessary to utilize the forage there (Tr. 404). Witnesses for respondent, all experienced cattlemen in the general area, testified that snow was necessary to permit grazing the pasture (Tr. 491-492, 588, 615-616, 660). Respondent moved 150 of its 238 head from Brigham Plains starting on January 24, 1971, to the East Coyote Pasture after obtaining permission from the Bureau because the water situation on Brigham Plains had deteriorated (Tr. 420, 440-441). The remainder of the cattle remained in Brigham Plains until April 1, at which time their flesh condition was poor (Tr. 420). This evidence tends to bear out, at least to some degree, the contentions of the respondent that it should not have been ordered to move to Brigham Plains on December 1.

Appellant objects to the Judge's observation that the operational plan did not contain any contingent provision as to where the respondent's cattle would graze in the event it was determined during the latter part of November that the cattle should not move to Brigham Plains on December 1 because of the lack of available water. We agree with the Judge, as we feel that such a plan should contain some specific provision in the event of a contingency in order to avoid leaving a licensee's grazing rights in a vacuum.

In sum, we note that, contrary to the agreement with respondent for a joint decision, the Bureau of Land Management unilaterally made a determination as to the availability of water in the Brigham

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2/ Pastures Nos. 6 and 7 are the Last Coyote and West Coyote Pastures, respectively (Ex. 3).

Plains Pasture. It is further observed that the District Manager in his testimony indicated the Bureau would not have considered respondent a trespasser for grazing its livestock in the West Coyote Pasture if, in fact, there had not been available water in the Brigham Plains area (Tr. 270). However, respondent did in fact graze its cattle in the West Coyote Pasture for the month of December without clearance or permission by the Bureau for such use. In these circumstances, in spite of the extenuating circumstances, we are constrained to find respondent committed a technical trespass.

Therefore, pursuant to the applicable regulation at 43 CFR 9239.3-2(c)(2), which requires single damages for a technical trespass, we find respondent must pay damages for 139 AUMs at the rate of \$ 2 per AUM for a total of \$ 278. The decision below is reversed to this extent. Because of the peculiar and extenuating circumstances involving the use of the West Coyote Pasture, which are discussed above, we find respondent should not be required to pay double damages of \$ 4 per AUM as requested by the Bureau, nor should any disciplinary action be imposed upon it.

In ruling that the evidence in the case does not warrant disciplinary action, the Judge said:

#### Disciplinary Action

43 CFR § 9239.3-2(e) provides for the suspension, reduction or revocation of a license, permit or base property qualifications as disciplinary action because of a willful, grossly negligent or repeated violation of the Taylor Grazing Act or the Regulations.

The Bureau presented a tabulation showing that the respondent had been charged with ten separate trespasses between 1963 and 1968 and that the respondent had made a payment to the Bureau in connection with each of the alleged trespasses. There is no way to determine whether the respondent actually committed any one of the charged trespasses. There is nothing to indicate whether the payments by the respondent were an admission of a fact or simply part of a compromise or offer to buy peace.

I do not believe that the evidence in this case warrants disciplinary action.

Although appellant contends that the Judge committed error in declining to consider the evidence of prior trespasses committed by the respondent, we agree with the Judge's refusal to impose any disciplinary action and, therefore, adopt his findings and conclusions in this respect.

Accordingly, the respondent must pay the additional damages of \$ 278 to the Kanab District Office, Bureau of Land Management, within 15 days from the date of this decision. The District Manager is directed to refuse to issue to the respondent any grazing license or permit on the Federal range until such time as the additional damages of \$ 278 are paid.

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 in part and reversed in part.

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Anne Poindexter Lewis  
Administrative Judge

I concur:

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Frederick Fishman  
Administrative Judge

I concur in the result:

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Joseph W. Goss  
Administrative Judge

