

Editor's note: Appealed -- dismissed, Civ.No. C78-0377 (D.Utah Mar. 3, 1981)

CALVIN C. JOHNSON

IBLA 76-720

Decided June 2, 1978

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., ordering sanctions for grazing trespass in a disciplinary show cause proceeding. U-110-75-2 (SC); U-110-75-3 (SC).

Affirmed in part and reversed in part.

1. Grazing Permits and Licenses: Cancellation or Reduction -- Grazing Permits and Licenses: Trespass -- Trespass: Generally

Under 43 CFR 9239.3-2(e), the repetitive nature of grazing trespasses coupled with a negligent failure of licensee to take corrective action supports a finding of willful trespass.

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

On appeal from a show cause proceeding under 43 CFR 9239.3-2(e), a requirement for ear-tagging of cattle recommended by a District Manager and imposed by an Administrative Law Judge will be set aside where the grazer objected thereto and was not accorded proper opportunity to offer evidence thereon. 43 CFR 4112.3-2(a)(4).

APPEARANCES: Norman H. Jackson, Esq., Mattsson, Jackson & McIff, Richfield, Utah, for Appellant (Respondent); Reid W. Nielson, Esq., Assistant Regional Solicitor, United States Department of the Interior, Salt Lake City, Utah, for Appellee (Complainant).

OPINION BY ADMINISTRATIVE JUDGE GOSS

This appeal is brought by Calvin C. Johnson from a decision of Administrative Law Judge John R. Rampton, Jr., rendered in a disciplinary proceeding for grazing trespass held pursuant to 43 CFR

9239.3-2(e). Appellant is the holder of a grazing license issued under the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. §§ 315-315r (1970). ^{1/} The decision below was reached after an evidentiary hearing held pursuant to two orders to show cause (Violation and Hearing Notice, U-110-75-2, 3 (SC)), which the State Director, Utah State Office, Bureau of Land Management (BLM), served upon appellant. The notices directed appellant to show cause why his grazing privileges should not be reduced or revoked, or renewal thereof denied, and damages assessed, as a result of grazing trespasses.

The principal issue on appeal is the extent of sanctions to be levied against appellant for the unlawful trespass of his cattle in violation of the terms of his grazing license and 43 CFR 9239.3-2(b). ^{2/} During the months of January, February, March, and May 1975, employees of the BLM found many of Johnson's cattle in pastures not authorized for grazing use at those times. After a hearing on August 13, 14, and 15, 1975, Judge Rampton found that the trespass of Johnson's cattle was repeated under 43 CFR 9239.3-2(b), (e). Accordingly, he levied a fine of \$630 for forage consumed, reduced Johnson's grazing privileges by 10 percent for 3 years, and ordered Johnson to attach highly visible ear tags to his cattle to aid the BLM in controlling future trespasses.

Johnson appeals from that decision asserting that his cattle were not in trespass to the extent charged, that in any event the penalties are too severe, and that Judge Rampton did not have the authority to order him to ear-tag his cattle.

Reduction in Grazing Privileges and Assessment of Damages

[1] The land where the trespasses occurred is known as the Mollie's Nipple Allotment and is situated approximately 25 miles east of Kanab, Utah, and 10 to 15 miles south of Bryce Canyon National Park. From north to south the allotment is approximately 25 miles in length and from east to west ranges in width from 4 to 11 miles. The allotment is comprised of 94,688 acres, of which 84,003 acres are Federal land. There are three distinct "bench" areas; the two with which we are concerned are the southernmost two. Those two bench areas are divided by an east-west highway, U.S. 89. North of the highway are several pastures which have been reseeded, the Jenny Clay Hole, Telegraph Flat, Blue Springs, and Rock House. South of the

^{1/} Certain sections of the Taylor Act were further amended by the Federal Land Policy and Management Act of 1976, P.L. No. 94-579, 90 Stat. 2743 (October 21, 1976). None of the statutory changes are material to the issues in this case.

^{2/} A "grazing trespass" exists where livestock are grazed on Federal lands without an appropriate license or permit or in violation of the terms and conditions of a license or permit. Eldon Brinkerhoff, 24 IBLA 324, 329, 83 I.D. 185, 186 (1976); 43 CFR 4112.3-1(b).

highway there is only one large pasture, the Buckskin, composed largely of native grasses and sagebrush.

The agreement ^{3/} between appellant and BLM provides that the various pastures are to be used in rotation. From approximately January 1, 1975, to approximately March 15, 1975, the cattle were to be grazed in the Buckskin pasture south of the highway, U.S. 89. From approximately March 15, 1975, to May 31, 1975, the cattle were to be grazed in the Jenny Clay Hole pasture north of the highway. All of the trespasses alleged to have occurred in January, February, and March were due to cattle from the Buckskin pasture being in the various pastures on the north side of the highway in violation of the rotation plan. Conversely, the trespasses alleged in May were due to cattle from the pastures north of the highway being in the Buckskin pasture on the south side of the highway, again in violation of the rotation plan. In every trespass the cattle went from pastures on one side of the highway to the other through four large drainage culverts, frequently referred to in the testimony as underpasses, and through one large underpass beneath a bridge over Buckskin Gulch (Exhs. 2, 3-8). Buckskin Gulch contains an intermittent stream which only has flowing water as a result of spring runoff or thermal thunderstorms.

The first charge in the show cause order alleges the trespass of 16 cattle from January 7, 1975, to February 26, 1975. Bob Douglas, an employee of the BLM, testified that he and another BLM employee were checking erosion control structures on January 7 and discovered the cattle in Blue Springs pasture (Tr. 93-95, Exh. 2a). The appellant does not seriously dispute that there were 16 cattle in the Blue Springs pasture on January 7, 1975. Instead, he points out that the Allotment Management Plan (AMP) allowed him to graze his cattle in the Blue Springs pasture until either December 30, 1974, or until such time as 70 percent of the forage in that pasture had been consumed. He contends that the BLM never notified him to move the cattle.

The BLM Area Manager, Larry Sip, conceded that BLM did not give appellant written notice of the move date; BLM was not required to do so under the terms of the AMP (Tr. 72). However, the reason BLM did not notify appellant of the appropriate move date in writing is clear. The appellant decided to move "around Christmastime" because "the water froze up and I couldn't get water for my cattle" (Tr. 512). Either he or his son, Jeff, told BLM that they were going to begin moving the cattle at that time (Tr. 512). Consequently, there was no reason for the BLM to formally notify appellant to begin his move.

^{3/} The agreement, more formally known as the Allotment Management Plan, was referred to throughout the hearing by its acronym, AMP. It is set forth with its amendments in Exhibit 21.

The AMP (Exh. 21) provides on page 10 that Johnson has 5 days to complete a move from one pasture to another. In accordance with that provision the move from Blue Springs pasture to the Buckskin pasture should have been completed by either December 31, 1974, or January 1, 1975. Even so, Larry Sip, the BLM Area Manager, testified that the move could have started as late as January 5, 1975 (Tr. 53-54). In appellant's favor it should also be noted that Larry Sip stated the Johnsons had never been held to 5 days in making their moves (Tr. 81).

In sum, the evidence shows that both the BLM and appellant were aware of the move beginning on December 27, 1974. Appellant should have been aware of the terms of the AMP providing 5 days to make a move from one pasture to another and should have completed his move by December 31, 1974.

Additional trespasses during the period were admitted by appellant's employees. Jeff Johnson, a son of the appellant, testified that he observed 20 to 30 cattle in the Telegraph Flat Pasture on January 22 or 23, and removed them on January 25 (Tr. 368-369). In a letter to the District Office, Jeff Johnson said the number was 32 (Exh. 16, Tr. 19-20). Again, in the same letter, appellant admitted that 15 to 20 cattle were in trespass on the Telegraph Flat seeded area on February 17 (Exh. 16). We also note the testimony of a United States' witness that Jeff Johnson had told him that there could be 100 cattle north of the highway because they did not check Buckskin pasture in the winter time (Tr. 197). Therefore, the record supports the finding of Judge Rampton of a grazing trespass during this period.

The next series of trespasses involves six separate charges of trespass occurring over a period of 2 weeks, February 27 to March 12. The number of cattle charged in trespass ranges from 142 on March 4 to 12 on March 12. There is little question that the continuing series of trespasses actually occurred, though there was some testimony critical of the BLM counts. ^{4/} But the principal thrust of the testimony given by the Johnsons and their witnesses was that the fences beneath Buckskin Bridge and those blocking the other underpasses had been washed out by floodwaters and that they had taken prompt action to repair them, considering the circumstances.

Sterling Johnson, an official weather observer in Kanab, Utah, testified that the spring of 1975 was probably twice as wet as normal

^{4/} The identity question concerned the BLM's method of determining the age of the cattle. If the cattle were less than 6 months old, they were not counted in trespass. As to the difficulty of determination of age, BLM personnel, properly shown to be qualified experts in livestock or range management, are fully capable of distinguishing younger cattle from older cattle and those stunted in growth from those merely immature.

and that temperatures averaged 3 to 4 degrees lower than normal (Tr. 291). However, he offered no statistical support for that conclusion, nor did he offer any evidence showing the likelihood of a flood for either the entire period or for any date in particular.

Nick Wright, a ranch hand, testified that he had seen evidence of two floods in March. There had been approximately 1-1/2 to 2 feet of water running under Buckskin Bridge (Tr. 347-50). Kane County Sheriff Norman Swapp testified that he checked the fences under Buckskin Bridge on March 4 and found that there had been some evidence of high water coming down Buckskin Gulch, perhaps 18 to 20 inches deep (Tr. 307). Dale Clarkson, a local businessman with cattle near the Johnson property testified that the runoff in 1975 was heavier than normal and did cause some damage. He hypothesized that because the ground was still frozen around the first part of March, the moisture ran off instead of being absorbed into the soil (Tr. 353).

Jeff Johnson testified that he had found the fence under Buckskin Bridge washed out on February 16, 1975, and had repaired it (Tr. 326). He stated that on March 1, 1975, he had seen enough water coming down a gulch to take out any fences that might be in the way (Tr. 327-329). He put up a temporary "bluff" on March 1, 1975, to replace the fence blocking underpass number 2 (Exh. 2) that had been washed out by the flood (Tr. 330). Permanent repairs were not made on the fence until March 6 and 7, apparently because Johnson wanted to remove the cattle in trespass before doing so (Tr. 331). Permanent repairs to the fence under Buckskin Bridge were made on March 8, 1975, by erection of a wooden fence (Tr. 331).

Calvin Johnson believes that the trespasses that occurred at this time are evidence of a recurring problem -- floods that wash out underpass fences and allow cattle to move easily from one pasture to another (Tr. 510-511). He testified that the floods have been a problem since the construction of the highway. Jeff Johnson concurred and pointed out that due to recurring flood conditions in the underpasses, breakaway fences were the only practical alternative (Tr. 471).

The witnesses for the BLM were largely skeptical of appellant's claim of fences being washed away by floods. For example, Larry Sip, the BLM Area Manager for this allotment, inspected all four of the underpasses as well as Buckskin Bridge on March 11, 1975. He found a wooden panel leaning against the opening of underpass number 1; the panel was not attached to the underpass (Tr. 75, Exh. 10). There was no water flowing through the underpass at that time. There was another wooden panel attached to underpass number 2. It was fastened by a wire on one side to keep it from falling over (Tr. 76). There was no water flowing through the underpass at that time. Sip found no barrier of any kind blocking underpass number 3 (Tr. 76). There was a wooden panel blocking underpass number 4 and a similar wooden fence

blocking the underpass beneath Buckskin Bridge (Tr. 76, 77). Therefore, out of five possible passageways between the pastures, only two of them were secure enough to hold in cattle.

Moreover, we note that Sip testified that on his inspection of March 11, 1975, he found no evidence of recent flooding or even of floods that year, though there was some evidence of floods in past years (Tr. 81, 88). That conclusion is in agreement with that of Bob Douglas, another BLM employee, who was in the area during this series of trespasses and who checked all of the underpasses at least once. He stated that he saw no evidence of recent high runoff (Tr. 165, 166).

While the Johnsons' witnesses stated that there were floods and high runoffs, it is important to note that this amount of water was not an unusual occurrence. For example, Jeff Johnson testified that the water flow during the spring of 1975 was only "a little more" than in previous years (Tr. 459). He also stated that as a normal matter there could be a good deal more water in Buckskin Gulch than that shown in Exh. O (Tr. 459). While the evidence does show some signs of high runoff which did cause some problems with fences washing out, see e.g., Exhs. E, F, G, I, and Z, the evidence also shows that, for the most part, the fences in the underpasses were either in poor condition or nonexistent. Thus, the finding of the Administrative Law Judge that this series of trespasses occurred is supported by the record.

The Administrative Law Judge in his decision properly noted the terms of paragraph D.4.(e) of the AMP:

It is possible that livestock may at times, drift into pastures within the allotment other than those designated by the grazing system, due to causes beyond the [licensee's] control, such as:

- (1) Fences being cut and gates left open by third parties.
- (2) Fences down because of floods, weather and other natural causes.
- (3) [Stragglers], ill and lame livestock that cannot be handled, gathered or moved at the normal time.

As long as the total numbers of livestock in the allotment do not exceed the numbers licensed and those in unauthorized pastures do not exceed 10 head, the licensees will not be served with trespass notices. However, the licensee will, either when notified by BLM or if the licensee sees livestock in unauthorized pastures, make every reasonable effort to gather and move

such livestock into the designated pasture at once and will keep the BLM advised of his efforts and progress in handling these livestock. If reasonable efforts as determined by BLM, are not made to remove the livestock and the BLM is not kept advised of these situations, the cattle will be considered in trespass and trespass action will be necessary.

Judge Rampton found "no evidence in the record that respondent failed to inform BLM when he became aware of the trespasses or that he failed to remove the trespassing cattle promptly when notified" (Decision, p. 11). Therefore, on the basis of this finding and the provision of the AMP quoted above, the Judge granted respondent's motion to dismiss the trespass charge with respect to the two counts involving less than 10 head of cattle.

We believe that this decision was proper in light of the Judge's finding on the evidence. However, it appears that this same rationale applies to the charge that 10 head of cattle trespassed from March 13, 1975, to March 20, 1975. Paragraph D.4.(e) provides that, subject to certain exceptions, the licensee will not be served with trespass notice where the number of livestock in unauthorized pastures does "not exceed 10 head." Accordingly, the decision of the Administrative Law Judge with respect to this specific charge of trespass is reversed.

With respect to the grazing trespass alleged to have occurred from May 7, 1975, to May 21, 1975, the Judge's finding is supported by the evidence. See United States v. Casey, 22 IBLA 358, 371 (1975) (Stuebing, J., dissenting). Accordingly, the findings of the Administrative Law Judge with respect to the existence of grazing trespasses and the assessments of damages are affirmed with the exception of 10 head of cattle allegedly in trespass from March 13, 1975, to March 20, 1975, as noted above.

As to the repeated nature of appellant's grazing trespasses, Johnson's trespass difficulties go back a long way. In a decision dated February 9, 1973, an Administrative Law Judge found Johnson to have been in trespass for 84 AUM's in 1972, for both grazing cattle in excess of the numbers permitted him in a pasture and for grazing in pastures where he was not licensed. There was offered and admitted in evidence Johnson's trespass file, running back to 1961. In almost every year (1962, 1966, 1969, 1970 excepted) there had been one to four trespass charges filed against him. In commenting on Johnson's record, the Administrative Law Judge stated:

Repeated Trespass

This history of trespass in the Mollie's Nipple Allotment by Calvin Johnson was contained in BLM Exhibit 25, which consisted of seven pages and contained

a receipt for the amount of \$28.00 dated July 9, 1973. (Tr. 235) Judicial notice was requested of a prior decision entitled Utah 11-72-1(SC), Utah 11-72-1(SC), and the decision dated February 9, 1973, by Administrative Law Judge Graydon Holt, involving Calvin Johnson, respondent. The decisions contain findings of trespasses beginning in 1961 and continued to the date of that hearing.

This evidence was un rebutted and I, therefore, find that respondent has a previous history of repeated trespass in the Mollie's Nipple Allotment.

(Decision, p. 7).

The appellant would have us disregard many of the early trespasses on the ground that the charges were dropped. But the appellant did not offer evidence at the 1973 hearing that the trespasses had not been committed. Judge Holt, in 1973, found that they established a repeated trespass over the past years, and, as a penalty, reduced Johnson's licensed AUMs by 793 a year for 2 years. Johnson did not appeal from that decision, a more severe penalty than the decision now on appeal imposes. At any rate, the multiple incidents of trespass in 1975 established by the evidence in this case constitute "repeated" trespasses. Eldon Brinkerhoff, supra at 334, 83 I.D. at 189. The record clearly establishes the existence of repeated trespasses.

Repeated trespasses are sufficient to justify the sanction of reduction of a licensee's grazing privileges under 43 CFR 9239.3-2(e). However, the other factors identified in the regulation, willfulness and gross negligence, should be considered along with any mitigating circumstances to determine the extent of the reduction in grazing privileges or other sanction. Eldon Brinkerhoff, supra at 336, 83 I.D. at 189-190.

This Board has had occasion to define the term "willful" as applied to grazing trespasses:

Although "willfulness" is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. Lawrence F. Bradbury [2 IBLA 116 (1971)]; Clarence S. Miller [67 I.D. 145 (1960)].

Eldon Brinkerhoff, supra at 338, 83 I.D. at 191.

In the present case, the Administrative Law Judge found the appellant negligent in not taking positive steps to prevent trespass which he well knew to be a problem, stating:

The conditions described do not, however, absolve the respondent from the responsibility of abiding by his grazing permit and the AMP. There had been floods in previous years, and the respondent was well aware of problems caused by the inevitable occurrences of washed out fences and barriers. The evidence shows that repairs were not always made to the fences and blocks when observed and that, in some instances, there were undue delays in making the repairs. Although Calvin and Jeffrey Johnson claimed that they were observing the situation almost continuously, had they done so and made prompt repairs, the trespasses would either not have occurred or would have been confined to smaller numbers.

The AMP makes provisions for those instances of trespass beyond Mr. Johnson's control. As a responsible operator in the cattle business, he must exhibit, at the minimum, a reasonable effort to keep the fences up and his cattle in the proper pastures in accordance with his permit. Provision 5(e) [D.4.(e)] of the AMP cannot be used as an excuse for failure to check for washouts on a regular basis or after a heavy rainfall.

There is no evidence that any of the trespasses involved in these proceedings occurred by virtue of gates left open or fences being cut by third parties. The only evidence relating to breachy cattle concerns one bull, and a stipulation that cattle can break down fences. However, none of this relates to any of the cattle in trespass herein, except the one black bull.

From the evidence presented, I find that the trespasses cited and established were caused by a negligent lack of positive action by the respondent. The inherent continuing problem of reoccurring washouts, coupled with the unusually heavy or abnormal precipitation during the spring of 1975, precludes a finding of gross negligence, and this latter mitigating factor will be considered in evaluating the sanctions as proposed by the District Manager.

(Decision, p. 10). Thus, Johnson's trespasses must be considered willful as well as repeated.

This is consistent with another recent case, John E. Walton, 8 IBLA 237 (1972), in which the permittee was found to have committed six relatively minor trespasses from 1950 to 1953, 10 similar ones from 1965 to 1967 and about 11 AUM's of trespass in several 1968 trespasses.

The Administrative Law Judge found that Walton had committed repeated trespasses and that "the repetitive nature [of the trespasses], coupled with a demonstrated lack of diligence in taking corrective action, warrants a finding of wilfulness in [Walton's] conduct. Clarence S. Miller, 67 I.D. 145 (1960)." He then imposed a reduction in grazing privileges of 20 percent for 2 years which the Board affirmed.

Similarly, in the present case, the appellant has committed repeated trespasses, which, in themselves and by reason of his negligence, are willful within the meaning of the regulation and decisions. These trespasses have involved a substantial number of animals for long periods of time. Accordingly, the penalty imposed by the Administrative Law Judge is fully in accordance with those imposed and affirmed by this Board in other cases. The reduction in grazing privileges of 10 percent for 3 years should be affirmed.

Ear Tags

[2] The appeal also raises the issue of whether the Administrative Law Judge properly imposed an ear-tagging requirement in a disciplinary show cause proceeding under 43 CFR 9239.3-2(e). Under that regulation, the licensee is ordered to show cause why his license "should not be reduced or revoked or renewal thereof denied and satisfaction of damages made." The evidence at such show cause hearings is restricted to commission of the acts charged and the amount of trespass damages. ^{5/} Despite the Department's general authority to

^{5/} 43 CFR 9239.3-2(e)(2) provides:

"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, or upon the failure, without proper excuse satisfactory to the administrative law judge, of the person named in the notice or his representative to appear at the hearing, 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."

require ear-tagging, the authority of the Judge is limited by the regulation. The need for ear-tagging is beyond the scope of the proceeding unless joined with an appeal from an ear-tagging order made by the District Manager pursuant to 43 CFR 4112.3-2(a)(4). Under that section the District Manager retains discretionary authority to require ear-tagging to abate trespass and promote range administration. Andrew H. L. Anderson, 32 IBLA 123, 126 (1977).

Here the ear-tagging requirement was imposed by the Judge on recommendation of the District Manager (Tr. 522-28). The recommendation for the requirement was first made after the evidentiary portion of the hearing had been concluded. Counsel for appellant objected that there was no testimony in the record on the matter. The Judge expressed a similar concern, and stated he did not have information as to what problems ear-tagging may cause (Tr. 528). Even assuming, *arguendo*, that the procedure followed was tantamount to action by the District Manager and, because the matter was argued at the hearing, that the violation and hearing notices should be deemed amended to include the ear-tagging as a part of the appeal proceedings, it is clear that Johnson desired to appeal imposition of the ear tag requirement. He therefore should have been given a clear opportunity to present any evidence he desired to present as to why in the discretion of the Manager and Judge, the requirement should not be imposed. On appeal to the Board, substantive arguments have been presented as to such matters as the possibility of infection, freezing ears, and defacement of earmarks. Without evaluating these arguments, we conclude that imposition of the requirement should be set aside, to permit further review by the District Manager and a more formal approach to any prospective requirement. If the requirement is imposed, appellant would then have the right to a formal appeal. 43 CFR 4115.2-3.

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 to the reduction in appellant's grazing privileges and as to the assessment of damages for grazing trespass, with the exception of the trespass of 10 head of cattle alleged to have occurred from March 13, 1975, to March 20, 1975. The decision is reversed as to the requirement of ear tags.

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE RITVO CONCURRING IN PART, DISSENTING IN PART:

I concur with the majority except insofar as it finds that the Administrative Law Judge has no authority to impose the requirement that the licensee ear-tag his cattle.

To begin with it may be well to recall that an administrative agency has wide discretion in devising remedies to prevent repetition of violations of an act committed to it to enforce. As was said in a leading case:

We do not believe that the [Federal Trade] Commission abused the "wide discretion" that it has in a choice of a remedy "deemed adequate to cope with the unlawful practices" disclosed by the record. Jacob Siegel Co. v. Federal Trade Comm'n., 327 U.S. 608, 611. It is not limited to prohibiting "the illegal practice in the precise form" existing in the past, Federal Trade Comm'n. v. Ruberoral Co., 343 U.S. 470, 473. This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." Labor Board v. Express Pub. Co., 312 U.S. 426, 436. F.T.C. v. Mandel Brothers, 359 U.S. 385, 392 (1959).

I note that ear-tagging is recognized as a proper method of abating trespass. The pertinent regulation, 43 CFR 4112.3-2(a)(4) provides:

The District Manager shall retain discretionary authority to require ear-tagging and other marking of livestock in order to abate trespass and promote the orderly administration of the range.

In a recent case the Board has remarked without further comment the existence of a requirement for ear-tagging. Eldon Brinkerhoff, 24 IBLA 324 (1976). In Andrew H. L. Anderson, 32 IBLA 123 (1977), the Board again upheld the imposition of a similar requirement. Thus, ear-tagging is an accepted procedure used in the administration of grazing on the public domain. The majority points to the regulation that restricts evidence at the hearing only to the acts charged and the amount of damages. 43 CFR 9239.3-2(e)(2). That regulation, however, does not control the sanctions the administrative law judge may impose when trespass has been established. The sanctions are found in the last sentence of the same paragraph:

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 the damages * * * 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.

The administrative law judge, then, has the authority to put a trespasser completely out of the grazing business. Having so great a scope of possible sanctions to choose from, he has authority to impose the relatively minor, but quite permissible one, of requiring ear tags. The authority to impose the greater of necessity encompasses the authority to impose the lesser. Since ear-tagging is a rational, acceptable method of controlling trespass, I would find it to be one of the sanctions - like requiring a trespasser to erect a fence - that the administrative law judge may impose as part of his disposition of the trespass proceedings.

The majority comments on appellant's desire to introduce evidence as to some possible difficulties which ear-tagging might cause. This evidence, I submit, is directed to ear-tagging as a concept, as a general remedy, not to its particular application here. The facts in this case are prototypical of those which led to the use of ear tags. The Administrative Law Judge found:

The testimony given amply illustrates the difficulty of making errorless head counts of cattle in unauthorized pastures unless easily identifiable markings are required which can be seen from the air or from a reasonable distance on the ground. The problem of repeated trespasses in the Mollie's Nipple Allotment can be better controlled by both the respondent and by Bureau personnel if ear tagging is required. This recommendation is accepted.

In Anderson v. Kleppe, cited in Anderson, supra, the District Court held that ear-tagging fell within the discretionary authority granted by the Taylor Grazing Act, 43 U.S.C. § 315 et seq., and that the Secretary's action in requiring it did not constitute an abuse of discretion.

This Board held in Anderson, supra, an aspect of that litigation, that:

[1] Where the implementation of a statute is committed to the discretion of an administrative agency, a decision made in the exercise of that discretion must contain a statement of reasons supporting the decision such as will enable a reviewing court to determine whether the discretion has been exercised in a manner that is neither arbitrary nor capricious. See Dunlop v. Bachowski, 421 U.S. 560, 571 (1975). The court's review should be confined to examination of the reasons and determination whether the statement of reasons

itself indicates that the decision is so irrational as to be arbitrary and capricious. Dunlop v. Bachowski, *supra* at 571, 573.

Substantial reasons were recited by the BLM for the decision below. Included in the reasons were the geographic size of the grazing area involved making tagging necessary to allow verification of the number of cattle grazing, the need to control grazing use carefully to evaluate range condition and trend, and the risk of range deterioration from unauthorized use and the consequent need to prevent unauthorized grazing. The reasons cited are relevant to and consistent with the purpose of the regulation authorizing eartagging. The reasons given establish a rational and substantial basis for requiring eartagging. Accordingly, we cannot conclude that the decision constitutes an abuse of discretion.

Similarly, the Judge's finding that the circumstances of grazing in the Mollie's Nipple Allotment warrant the imposition of ear-tagging provides the rational and substantial basis for such a requirement. A separate proceeding is no more required than is one to establish the percent or duration of a reduction in grazing capacity. None was required in Anderson, *supra*; nor should one be necessary here.

I would also like to point out, even assuming *arguendo*, that the Administrative Law Judge lacked such authority, it may well be that this Board itself has the authority to impose the requirement. Under a wide reading of this Board's authority, it has all the power upon review of a case that the Secretary himself has. See A. W. Schunk, 16 IBLA 191, 198 (1974); 81 I.D. 401, 406 (Administrative Judge Stuebing concurring opinion). If the Secretary could impose such a requirement, then the Board can.

In reviewing decisions of an Administrative Law Judge, the Board acts *de novo*. Eldon Brinkerhoff, 24 IBLA 324; 83 I.D. 1205 (1974); United States v. Rigg, 16 IBLA 385 (1974). Of course, if it wishes to limit its review to merely finding whether there is a compelling reason to reverse the decision below, it may do so, as it did in Anderson, *supra*. But if it is acting under the conclusion that its authority is limited, it should say so.

Under either standard, either on our own initiative or on a limited review of the Administrative Law Judge's determination, I would find the imposition of ear-tagging justified and reasonable.

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING IN PART, DISSENTING IN PART:

All of the trespass charges are summarized as follows. During the move 16 cattle were in trespass from January 7 to January 16 in violation of the terms of appellant's license. While appellant is responsible for knowing and abiding by the terms of his license, it must be conceded that he had not been held strictly to those terms at previous times. Nevertheless, the cattle were in trespass on those dates.

Varying numbers of cattle were in trespass from February 28 to March 12. Most of these trespasses were the result of fences having been washed out. While it is true that the testimony supports a finding of some high water, it is also true that the testimony taken as a whole reveals that the fences blocking the underpasses were not always found in good condition, and, in some cases, were nonexistent. Again, there is some evidence of high water as the cause of the trespass of 11 cattle on March 20.

The testimony of BLM employees as to the alleged trespass of 16 cattle on May 7 is sufficient to establish a prima facie case of trespass. However, the other evidence, while certainly not overwhelming, does overcome the prima facie case. There is no doubt that the May 21 trespass occurred as alleged. No explanation has been offered for the inadequacy of the fences on that date.

The total amount of forage consumed and the monetary damages are set forth below.

<u>Dates</u>	<u>No. Cattle</u>	<u>Forage, AUMs</u>
January 7 to 16	16	5.33
February 27	40	1.33
February 28 to March 3	89	11.87
March 4	142	4.73
March 5	92	3.07
March 7	37	1.23
March 8 to 12	12	<u>2.00</u>
	Total	29.56

Rounding up to the next whole number (30) and multiplying by twice the commercial rate for like forage (\$5.00/AUM) yields a result of \$300.00.

May 21	16	.53
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Rounding up to the next whole number (1) and multiplying by twice the commercial rate for like forage (\$3.50/AUM) yields a result of \$7.00.

Therefore, the total monetary damages are \$307.00.

Appellant argues that his grazing privileges may not be reduced, because the BLM elected to proceed under 43 CFR 9239.3-2(a) instead of 43 CFR 9239.3-2(b). Appellant asserts that section (a) provides the sole method of proceeding once the BLM has determined that the trespass is not clearly willful. Further, appellant argues, section (b) can only be utilized if the trespass is clearly willful.

Appellant's arguments can only be accepted if one reads the labels on the regulations and skips the substantive content. It is true that section (a) provides a method of procedure in cases of trespass not clearly willful. It is true that section (b) provides a method of procedure for trespass clearly willful. But section (a) also provides that if a satisfactory showing is not made within the time allowed in the trespass notice, the trespass will be deemed willful, and must be referred to the State Director for further action. In this case the first formal trespass notice received by appellant was the notice of March 7, 1975. That notice specified that the trespasses must cease within 3 days of receipt of notice or the matter would be referred to the BLM State Director for further action. Employees of the BLM found cattle in trespass through March 12, on March 19, March 30, and March 24. Therefore, they had reason to believe that the trespasses were not only willful, but in violation of the terms of the notice of March 7. The same could be said of the notice of May 7. Again the appellant was allowed 3 days to cease any trespasses. Again it appeared to the BLM that there had been willful trespass from May 7 to May 21.

Therefore, the fact that the local BLM office begins a trespass proceeding, pursuant to section (a) does not preclude a show cause hearing where the BLM reasonably believes that remedial action, if any, is not in compliance with the terms of the notice. The fact that the trespasses are later found to be other than willful does not mean that the show cause hearing is vitiated or that disciplinary penalties may not be imposed. Nor is the Administrative Law Judge bound by the initial findings of the local BLM officials. Lawrence F. Bradbury, 2 IBLA 116, 121 (1971).

Appellant argues that he should not be held to have a "history" of trespass or be held to have committed "repeated" trespasses simply because he had been charged with trespass before.

Judge Rampton alluded in his opinion to an earlier decision of Administrative Law Judge Graydon Hold finding that appellant's cattle had trespassed several times in 1972. Judge Holt listed on page 6 of his decision all charges that had been brought against appellant between 1961 and 1972. Appellant points out in his brief that most of those charges were dropped. There was, however, partial collection for a 1961 trespass, full collection for a 1964 trespass, and

full collection for a 1968 trespass. Even if we were to exclude those trespasses from consideration, Johnson's cattle were found to have been in trespass by Judge Holt to the extent of 84 AUMs in 1972. Moreover, it is clear that the trespasses charged in this case deal with repeated trespasses in and of themselves. Eldon Brinkerhoff, 24 IBLA 324, 334, 83 I.D. 185, 189 (1976). While appellant is clearly correct that a finding of repeated trespass of "history" of trespass based on charges later dropped would be incorrect, his concern in this case is academic as a number of the charges have actually been admitted or proven in another hearing.

Appellant argues that his grazing privileges should not be revoked as the trespasses were due to an act of God, viz. the fences were washed out by floods. As noted earlier, there does appear to be some support for that argument. But also, as noted earlier, there were times when the fences blocking the passes under U.S. 89 were down for no apparent reason. To recapitulate briefly, Jeff Johnson testified that on January 25 he had found cattle in trespass that had come through underpass number 4 (Ex. 2). The fence was not down due to water or any other apparent reason (Tr. 368-370). While the Johnsons were never charged with that trespass, his testimony does bear on the adequacy of the fences. On February 16 and 17 Johnson found fences washed out by floods and repaired them. On March 1 he found more fences washed out, set up temporary "bluffs" and made more permanent repairs on March 6, 7, and 8. Larry Sip of the BLM inspected all five of the fences March 11 and found two of them clearly inadequate, and one missing for no apparent reason. The March 20 trespasses were due to fences washed out by floods. There is no explanation for the failure of the fence causing the May 21 trespass. Moreover, an adjoining allottee when asked if the Johnsons maintained their portion of an adjoining fence replied, "Well, not that I know of, too much" (Tr. 314). In sum, there is both evidence of fences washed out by floods and some evidence of fences in poor condition.

The preceding review of the facts make it clear that a severe reduction of grazing privileges is not warranted. Before a severe reduction will be imposed several factors should be present. The trespasses must (1) be either deliberate or the result of gross neglect, (2) involve large numbers of animals, (3) occur for fairly lengthy periods, and there is usually a failure to take prompt remedial action. Eldon Brinkerhoff, *supra*; United States v. Casey, 22 IBLA 358, 369, 82 I.D. 546, 551 (1975). In this case the trespasses (1) were not deliberate or grossly negligent, (2) at times involved large numbers of cattle, (3) were short in duration, and there was usually prompt remedial action.

The two cases most similar to this one are Edmund Walton, A-31066 (May 27, 1969) and John Gribble, 4 IBLA 134 (1971). Both cases arose in an area where the problems of trespass were due in

part to poor fences. Grazing privileges in both cases were reduced 10 percent for a period of 1 year. In the present case, while the trespasses may have been due in some part to high water, poor fences were a substantial and contributing factor. Accordingly, appellant's grazing privileges should be reduced 10 percent for a period of 1 year, and he should pay \$307 as double damages.

I agree that eartagging may not be imposed in the manner that was employed in this instance. The applicable regulation, 43 CFR 9239.3-2(e)(2), provides in part that "[t]he 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." Moreover, another regulation, 43 CFR 4112.3-2(a)(4), provides:

The District Manager shall retain the discretionary authority to require eartagging and other marking of livestock in order to abate trespass and promote the orderly administration of the range.

Nowhere is this authority delegated to anyone else. In addition, it is apparent that the District Manager is the one official most likely to be cognizant of the need for eartagging and of the concomitant difficulties facing the individual grazier. Had the District Manager ordered appellant to eartag his cattle in the first instance, appellant would have been entitled to take an appeal from such order and present evidence concerning the matter, just as would any grazing licensee. He cannot be denied this opportunity simply by shortcutting the procedure.

The District Manager did not issue any such order. The show cause order only required appellant to appear and "show cause why your license or base property qualifications should not be reduced, revoked, or renewal thereof denied, and satisfaction of damages made."

No mention of eartagging was made prior to or during the hearing until, after 3 days of hearing, when the evidentiary portion of the hearing was concluded, counsel for BLM recommended various penalties and sanctions be imposed against appellant, and then added:

In addition, there is a recommendation that future licensing be required to impose upon Calvin Johnson the attachment of a florescent type visible ear tag for all animals over six months of age upon the Mollie's Nipple Allotment. The ear tags to be furnished by the Bureau of Land Management and installed by the grazing permittee.

(Tr. 522).

Mr. Jackson (counsel for appellant) and Judge Rampton then stated, respectively, as follows:

MR. JACKSON: The thing I am concerned about is the ear tagging situation has come up as a recommendation. The statements by myself and Mr. Nielson are in the record, but no testimony --

JUDGE RAMPTON: Well, that does concern me, too, because I know nothing about ear tagging situations. I have no idea what problems it may cause. And I don't even know what the size and style of the ear tag may be.

But without testimony on it, I would just have to, I suppose, make some assumptions. I'm not sure that those assumptions will be correct. I have no way of knowing.

(Tr. 528).

Notwithstanding that no evidence was taken on the question, or that the matter was never properly put into issue in these proceedings so that appellant could have notice of it, and despite his declaration that he knew nothing about ear-tagging situations and the problems ear-tagging may cause, the Judge, in his decision found:

- (1) That ear tags are "easily identifiable markings."
- (2) That they can be "seen from the air."
- (3) That they can be seen from a "reasonable distance on the ground."
- (4) That trespasses "can be better controlled" by ear tags.

The decision then ordered appellant to ear-tag his cattle.

I conclude that the foregoing findings are not based upon evidence contained in the record, and that the entire issue was not within the proper scope of the proceeding.

Edward W. Stuebing
Administrative Judge

