

Editor's note: 86 LD. 133; Appealed – aff'd, Civ. No. R-79-BRT (D. Nev. Aug. 3, 1979), aff'd, No. 79-4681 (9th Cir. Sept. 8, 1981) 655 F.2d 1002

BUREAU OF LAND MANAGEMENT

v.

HOLLAND LIVESTOCK RANCH ET AL.

IBLA 78-563

Decided February 15, 1979

78-613

Appeals from decisions by Chief Administrative Law Judge L. K. Luoma (California 2-77-1(SC)) and Administrative Law Judge Harvey C. Sweitzer (California 2-75-2(SC)) finding appellants liable for willful and repeated grazing trespasses and reducing appellants' grazing privileges.

California 2-77-1(SC) is affirmed as modified; California 2-75-2(SC) is affirmed as modified.

1. Administrative Procedure: Burden of Proof–Administrative Procedure: Decisions–Administrative Procedure: Hearings–Administrative Procedure: Substantial Evidence–Evidence: Burden of proof–Evidence: Sufficiency

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative, and substantial evidence.

2. Evidence: Generally—Grazing Permits and Licenses: Trespass—Rules of Practice:
Evidence—Trespass: Measure of Damages

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

3. Estoppel—Federal Employees and Officers: Authority to Bind Government—Grazing Permits and Licenses: Generally

Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts.

4. Estoppel—Federal Employees and Officers: Authority to Bind Government—Grazing Permits and Licenses: Generally

The grazing regulations (43 CFR 4140.1(b)(1), inter alia) (formerly 43 CFR 4112.3-1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.

5. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses:
Cancellation or Reduction—Grazing Permits and Licenses: Trespass

An administrative law judge's finding that trespasses were willful, grossly negligent,

and repeated will not be disturbed on appeal where the record amply supports such finding.

6. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses:
Cancellation or Reduction—Grazing Permits and Licenses: Trespass

Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district.

APPEARANCES: Jack D. Dwosh, Esq., and Robert R. Lee, Esq., Covey and Covey, P.C., Los Angeles, California, for appellants; Bryce Rhodes, Esq., Hawkins, Rhodes, Sharp & Barbagelata, Reno, Nevada, for intervenor John Hancock Mutual Life Insurance Company; Burton J. Stanley, Esq., and James E. Turner, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

These are consolidated appeals from separate decisions by Chief Administrative Law Judge L. K. Luoma (California 2-77-1, June 13, 1978), and Administrative Law Judge Harvey C. Sweitzer (California 2-75-2, August 4, 1978), finding appellants liable for monetary damages for willful and repeated grazing trespasses, and reducing appellants' grazing privileges.

The decision in 2-75-2 involves the Susanville and Winnemucca grazing districts. The Susanville District is mostly in California but extends into Nevada, abutting on the Winnemucca District in Nevada. A fence with several gates partially divides these two areas. The trespasses in 2-75-2 were alleged to occur in both grazing districts within the Cal-Neva Unit in the Susanville District, and the Buffalo Hills Resource Area of the Winnemucca District. Appellants 1/ own, lease or control areas of private land in both districts which are intermingled with public lands. John J. Casey, appellants' controlling owner, held a license to graze cattle in the Cal-Neva Unit (Susanville) through February 28, 1975. At times pertinent to the decision in 2-77-1, Mr. Casey held no license in the Cal-Neva Unit. At all times relevant to the proceeding in 2-75-2, Casey held a license to graze cattle in the Buffalo Hills Resource Area (Winnemucca).

The proceeding in 2-75-2 involves 15 alleged trespasses in the Susanville District and 10 alleged trespasses in the Winnemucca District. The trespasses, as to number of cattle involved, periods of time, AUMs consumed, and location are summarized in a table on pp. 2-5 of Judge Sweitzer's decision.

1/ Holland Livestock Ranch is a co-partnership composed of three corporations: Bright-Holland Co., Maremont-Holland Co., and Nemeroff-Holland Co. John J. Casey owns controlling interest in all three.

The proceeding in 2-77-1 concerns three trespasses, all alleged to have occurred in the Susanville District.

In both proceedings, the commercial rate for forage used (both grazing districts) was \$3.50 per AUM.

The issues, as stated by appellants in their opening briefs and acknowledged by the Bureau of Land Management (BLM), are essentially as follows:

- A. Whether the evidence was sufficient to show the physical location of the cattle allegedly in trespass;
- B. Whether cattle may be considered to be in trespass while located on private, unfenced land because of unrestrained access to public lands;
- C. Whether BLM should be estopped to allege trespass because it failed to construct and maintain certain fences, and because of its management policies on the Federal range;
- D. Whether the element of willfulness was proved; and
- E. An additional suggestion made by BLM in its brief is that one of the sanctions (reduction of grazing privileges) imposed by Judge Sweitzer in 2-75-2 was not sufficiently severe.

Each of these issues will be discussed in turn having reference to the findings and conclusions of the decisions appealed from and to the arguments made in the parties' briefs.

A.

Appellants contend that the methods employed by BLM to determine that cattle were trespassing were fraught with errors and irregularities; as a result it was not accurately shown that cattle were in fact trespassing in any specific instance. Appellants do not enumerate specific instances. They base this general argument on the testimony of Mr. Simpson, a licensed land surveyor who stated that the planning unit maps used by BLM to ascertain the locations of cattle were not accurate. However, Mr. Simpson also testified that no better maps were available and that if a survey were not available he would use the maps to determine trespass. Moreover, he could identify no specific inaccuracies in the maps.

As stated in Judge Luoma's decision, BLM employees also observed trespassing cattle from an airplane and from horseback. They ascertained the location of the animals by sighting geographical features of the terrain; used U.S. Geological Survey (USGS) topographic maps and planning unit maps, checking land status against master title plats. In addition cattle were identified by brand. Judge Luoma found that BLM's methods "entailed more than a cursory inspection

of the animals" and that the "aerial surveys supplemented by ground counts and brand inspections were sufficient to establish the fact and duration of the trespasses" (2-77-1, p. 6).

Judge Sweitzer made the following findings as to this issue at p. 16 of his decision in 2-75-2:

Although it may very well be that these agents of the BLM can and do make mistakes in estimating distances on the ground, I find from their testimony that they are experienced map readers and I accept their estimation as sufficient in determining the cattle's approximate locations. Respondents have failed to prove or even introduce evidence to show that the cattle were not, in fact, found where agents of the Bureau of Land Management testified that they were found.

Judge Sweitzer gave the following summary and evaluation of Mr. Simpson's testimony:

[He] testified that to determine whether a particular parcel of land was, in fact, private or public land, he would initially consult the deeds at the local courthouse of the county in which the land is located. Apparently this information would give Mr. Simpson a sufficient legal description of the area concerned. Then he would utilize local maps of the area, including U.S. Geological Survey maps, county maps, road maps, and other maps of record, to commence actual search for original section corners established by the U.S. Government Land Office surveys of the late 1800s. Then, through surveys, he would lay out the actual boundaries of the land in question. He also testified that master title plats are useless in determining actual locations on the ground. Apparently, this is because the master title plats may give indications of ownership on the public domain in terms of sections; however, knowing the ownership of a particular section does not assist in determining where

that section is located. He explained the physical location of any given section can only be affirmatively established by a survey working from well-established section corners. He stated that the location of sections on the planning unit maps could be as much as a mile off from their true locations. Despite this, Mr. Simpson did not testify as to whether any given section boundary on the Susanville and Winnemucca maps is, in fact, as much as a mile off from its true location. The most he would say about the accuracy of these maps for determining section boundaries were that they provided "a general indication of the areas distinction between private and public lands."

2-75-2, p. 16.

Judge Sweitzer's conclusion is as follows:

Although I do not question Mr. Simpson's testimony regarding the procedures that a professional surveyor would undertake to establish boundaries on private lands, I do question the necessity for such a procedure in order to determine the location of trespassing animals. I find that such a procedure as he described to be unwarranted and unnecessarily expensive and time-consuming for purposes of proper range management, and that the method described by agents of the Bureau of Land Management is sufficient to establish a prima facie case as to whether cattle are found on public or private lands. Although respondents have attempted to cast doubt upon the accuracy of such a method, no evidence was introduced which shows, in fact that the agents of the Bureau of Land Management had erred in their determinations. Therefore, absent contrary probative evidence, I accept the government testimony as to whether cattle were found on public or private lands. The results of this finding with respect to each trespass is shown in the Conclusions section of this decision.

2-75-2, p. 17.

[1] The decisions appealed from set forth in detail the evidence relied upon to substantiate the individual trespasses found by the administrative law judges to have occurred. The contentions presented to the Board by appellants were fully considered by the judges. On appeal, appellants suggest in addition that the quantum of evidence adduced to support the alleged trespasses may not have been "substantial" as required by the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976) which reads in part: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Substantial evidence has been described as the kind of evidence a reasonable mind might accept as adequate to support a conclusion. John W. McGrath Corp. v. Hughes, C.A.N.Y. (1959), 264 F.2d 314 cert. denied, 360 U.S. 931 (1959). In Bureau of Land Management v. Ross Babcock, 32 IBLA 174, 183-4, 84 I.D. 475, 479-80 (1977), the Board stated with respect to sufficiency of evidence:

In a hearing held pursuant to the Administrative Procedure Act, a decision must be in accordance with and supported by reliable, probative, and substantial evidence, but the decision need not be supported by so much evidence as would dispel all reasonable doubt. 5 U.S.C. § 556(d) (1970). Therefore, an Administrative Law Judge may properly find a grazing trespass has been committed where there is reliable, probative and substantial evidence of the trespass.

Both decisions below more than meet this test and appellants' challenges fall short of demonstrating error therein.

Accordingly,

we find no reason to disturb the findings and conclusions of either decision with respect to the issue of sufficiency of evidence to prove cattle in trespass.

B.

We turn now to the second issue which is whether cattle may be considered to be in trespass when they have unrestrained access to the public lands. Judge Luoma so ruled in 2-77-1. However, Judge Sweitzer in 2-75-2 distinguished Babcock, supra, where the Board held that in some cases cattle found and counted on unfenced private lands may be presumed to obtain portions of their forage from the public lands, as follows:

First, Babcock's lands were totally unfenced, thereby allowing more freedom for cattle to drift across private land boundaries. In the present case, the evidence shows some fencing, albeit with gaps, which would tend to decrease the chances of drifting. Secondly, the facts in Babcock suggest that appellant there could utilize his lands only in conjunction with a federal license, whose terms he violated by turning the cattle out early without effective restraint. Here, respondents have no license in the areas of the alleged trespasses within the Susanville District, and it is not apparent that federal lands must be utilized in order for them to utilize their own lands. This factor was an important consideration in Nick Choumos, A-29040 (November 2, [6] 1962), a case cited by the Board to support its holding in Babcock. Moreover, although there is no indication in the decision of the size of the parcels of land in Babcock, the areas of land involved could have a bearing on the validity of the presumption that cattle considered as a whole, would obtain a percentage of their forage from the public lands. In the instant case, respondents control extensive holdings in the Cal-Neva Common Allotment and the effect of a strict

application of the rule in Babcock could conceivably have a devastating impact on the use of respondents' private lands. For example, if but one cow of a herd of several hundred should stray through a break in a fence surrounding a large private ranch, the government might consider the fence as ineffective and trespass the entire herd. There is no evidence in the record as to the total number of Casey cattle grazing on private lands, hence the reasonableness of the use of the presumption is difficult to assess in this case.

Many factors other than fences (such as the quality and quantity of forage, salt licks, availability of water, and terrain features) may limit the movement of cattle from private to public lands. In this case, the government has generally failed to present any evidence other than the poor fence conditions to show trespasses of those cattle counted on private lands. Presumptions against the respondents in a case of alleged trespass should be used with care and I am unwilling to apply so strict a presumption on the basis of the evidence presented here. Thus, as applied to this case, I find that only cattle observed on the federal range may be counted as in trespass absent reliable, probative and substantial evidence that cattle found on private land would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. A review of the record on the whole does not provide such evidence.

2-75-2, pp. 10-11.

BLM has appealed Judge Sweitzer's holding, contending that the facts adduced in 2-75-2 fit squarely within the Babcock rule. BLM asserts that in virtually every case where cattle were counted on private lands, there were no fences or barriers, artificial or natural, which would in any way impede the cattle from entering the public land. BLM cites several transcript references where the question was asked whether there was any physical barrier which would in any way inhibit "the cow that you observed" from walking onto land owned

by the United States. In each case, the answer was in the negative. ^{2/} BLM concedes that appellants did have certain fences which were not in "excellent shape" but asserts that it did not trespass cattle found within such fenced areas. It states that the trespasses for which it sought damages were for cattle uniformly located on private intermingled lands where no barrier whatsoever, either natural or artificial, would have prevented the cows from entering the public lands.

Judge Sweitzer (2-75-2, p. 17) accepted the Government's testimony as to whether cattle were found on public or private lands, and this finding is reflected in the conclusory section of his decision with respect to each trespass litigated. On p. 23, the judge stated: "Cattle counted on private lands have been deducted from the numbers testified to by government employees."

[2] We believe that Judge Sweitzer's refusal to count cattle located on private lands, but with access to public lands, is in error, and we modify his decision with respect to each of five trespasses in which he deducted cattle found on private lands. We have correlated each of these trespasses to the transcript citations given by BLM and we base our modification of the decision on the unrefuted testimony that in each instance nothing would have prevented the animals from going onto the public land. The Board stated in Midland

^{2/} The transcript references are: 2-75-2 pp. 1-571, 1-640, 1-704, 2-27, 2-60.

Livestock Co., 10 IBLA 389, 402 (1973), "[A]s the boundaries between the federal range and private lands were of a legal rather than a physical nature it strains credibility to believe that the animals grazing would respect the same."

The five trespasses in question are Nos. 142, 173, 176, 177, and 178, all in the Susanville grazing district. The judge's disposition of these trespasses is found on pp. 25-27 of his decision (2-75-2). We adopt herein the judge's method of calculating damages which is as follows (p. 23): The animal unit months of forage consumed is the product of the number of cattle found in trespass and the number of days of trespass. This product is divided by 30 (number of days per month). The number of cattle designated as in trespass during a term of days in which a count is not made is the lesser number of either the beginning count or the ending count when the trespass was terminated by a subsequent count. The amount of forage consumed is further adjusted by multiplying the total AUMs by the ratio which the forage on public lands bears to the total available forage in the two separate districts. The result is then multiplied by twice the stipulated commercial rate for forage, \$7 per AUM. A fractional AUM is rounded up to the next whole number.

Trespass No. 142 (Tr. 1-522, 571). The judge deducted 13 cattle from a total of 55 because 13 were found on private land. He found 42 cattle in trespass for 7 days. In the second portion of this trespass, he found 15 cattle in trespass for 6 days having deducted one

animal which was counted on private land. The judge's result is a total of 11 AUMs amounting to \$77 in damages. Including the cattle counted on private land, we reach a result of 16 AUMs amounting to \$112 in damages.

Trespass No. 173 (Tr. 1-640). The judge deducted 22 cattle from a total of 67 because 22 were found on private land. Thus he calculated that 45 head were in trespass for 4 days resulting in 6 AUMs and damages of \$42. Including the 22 head counted on private land, we reach a result of 9 AUMs and \$63 in damages.

Trespass No. 176 (Tr. 1-704). The judge deducted 4 cattle from a total of 46 because 4 were found on private land. The judge found 42 cattle in trespass for 14 days. Of these 42, 5 were removed by appellants and 37 remained in trespass for 31 days. He calculated 50 AUMs for damages of \$350. Including the cattle counted on private lands gives 64 AUMs for \$448 in damages.

Trespass No. 177 (Tr. 2-27). The judge deducted 4 cattle from a total of 10 because 4 were counted on private lands. He found that 6 head were in trespass for 2 days. He also deducted 4 cattle from 30 because 4 were counted on private lands, finding that 26 were in trespass for 14 days. He calculated 11 AUMs and damages of \$77. Adjusting for the cattle found on private lands we obtain 15 AUMs for \$105 in damages.

Trespass No. 178 (Tr. 2-60). The judge deducted 13 cattle from 120 finding that 107 were in trespass for 1 day. He also found that 91 were in trespass for 11 days. The judge calculated 32 AUMs and damages at \$224. We calculate 38 AUMs for damages of \$266.

For violations in the Susanville grazing district, Judge Sweitzer assessed a total of \$1,239. We add \$224 (additional damages, as hereinabove calculated for cattle counted on private lands) for a total of \$1,463.

Judge Luoma in 2-77-1, page 6, stated with respect to the access trespass issue: "I find that the trespass notices for animals found on unfenced private land were valid because the animals were free to drift and graze onto the Federal range, Bureau of Land Management v. Ross Babcock, 32 IBLA 175 (1977)." Cf. Midland Livestock Co., supra.

C.

Appellants assert that BLM should be estopped from alleging the occurrence of trespasses because BLM failed to construct and/or maintain certain fences. One fence in question is the Susanville/Winnemucca grazing district division line fence which was incomplete so that the two districts were not in fact separated. Appellants assert that because the fence was incomplete it had no maintenance responsibility, no division line existed, and any license to graze upon one district constituted a license to graze both districts.

Appellants proffer the same arguments with respect to two other fences, which, because of their states of completion or repair, were ineffective to restrain cattle. Appellants also suggest that BLM's range management practices had the effect of increasing the population of wild horses and burros which in turn caused a loss of forage and destruction of cattle control devices.

Judge Sweitzer's disposition of these arguments (pp. 12-13, 2-75-2) is as follows:

The short answer to these contentions is that estoppel is generally not applicable against the government. See Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947). Despite the Merrill case, however, many circuit court cases have applied the doctrine of equitable estoppel against the government where "justice and right require it." See Davis, Administrative Law of the Seventies, § 17.01 (1976). However, in those cases which have held the government estopped, certain elements have been proved to invoke the defense. The Supreme Court has held that:

As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest * * * Utah Power & Light Co. v. U.S., 243 U.S. 389, 409 (1917).

The court has since left open the question of whether affirmative misconduct (rather than neglect) on the part of the government might estop it. Montana v. Kennedy, 366 U.S. 308 (1961). There is no allegation in the argument of respondents that the acts here complained of are a result of affirmative misconduct and the estoppel claim must fail on that ground alone.

Additionally, the Ninth Circuit in U.S. v. Wharton has outlined the elements of estoppel [3/] that must be proved to establish the defense.

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.
514 F.2d 406, 412 (9th Cir. 1975).

Even if the facts alleged are true, respondents' conduct in allowing their cattle to graze on the federal range can in no way be said to be based on ignorance of the true facts, i.e. that the fences were not constructed or properly maintained or that wild horses and burros were tearing down fences. Respondents knew or should have known the conditions complained of at the time cattle were placed on the range and cannot be said to have justifiably relied on any promise of action on the part of the government. The government may be in some small part responsible for conditions which would tend to make prevention of trespasses by respondents more difficult, but the allegations of respondents do not approach the requirements for invoking estoppel as a defense.

Responding particularly to the judge's statement of the law on estoppel, appellants concede that they "knew the facts surrounding the failure to construct the division fences" but assert that BLM "adduced no evidence whatsoever suggesting that at the time the agreements were entered into that appellants had any knowledge whatsoever of the true course of conduct that would be followed by [BLM]" (Brief pp. 15-16). Appellants state that their reliance and injury are amply demonstrated.

3/ Cf. Union Oil Co. of Calif. v. Morton, 512 F.2d 743, 748 (9th Cir. 1975).

In its brief BLM states that no trespasses were cited because of inadequate fences, that it is the responsibility of the cattle operator to keep his cattle where they belong, and that the record contains no evidence of the "agreements" referred to by appellants. BLM further states that the United States is not obligated to fence the public lands for proper range management and that wild horses are on the public range because of an act of Congress, 16 U.S.C. §§ 1331-1340 (1976).

[3, 4] It is our view that all of appellants' contentions concerning estoppel lack merit and were properly disposed of by Judge Sweitzer.

A grazing trespass exists where livestock are grazed on Federal public land in excess of the authorized permit use or without an appropriate permit or license. Eldon Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976); Eldon L. Smith, 8 IBLA 86 (1972). Government range management policies as carried out under the "Federal Range Code" (Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. § 315 (1976), and regulations promulgated thereunder) cannot be asserted to bar the implementation of prescribed sanctions where trespasses have been proved.

43 CFR 4112.3-1, 4/ in force and effect at all times pertinent to this decision, provides that:

4/ The new regulation, 43 CFR 4140.1(b)(1) (Circular No. 2433), provides that:

(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

(b) Grazing livestock upon or driving livestock across the Federal range, including stock driveway, in violation of the terms of a license or a permit, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner.

are prohibited acts. The regulation places the responsibility of controlling cattle squarely on the cattle operator and the case law is to the same effect. Cesar and Robert Siard, 26 IBLA 29 (1976); O. R. Britain, A-25962 (Jan. 24, 1951).

Appellants point out that Judge Luoma did not comment on estoppel in 2-77-1. Our discussion of the nonapplicability of estoppel to the facts herein involved needs no further emendation.

D.

Appellants contend that both judges erred in finding the trespass to be willful. They assert that trespasses were beyond their control because there were broken fences and because gates were

fn. 4 (continued)

"Allowing livestock on or driving livestock across these lands without a permit or lease or in violation of the terms and conditions of a permit or lease, either by exceeding the number of livestock authorized, or by allowing livestock to be on these lands in an area or at a time different from that designated;" are prohibited acts.

opened by others. Appellants state that they made efforts to round up cattle which had crossed division lines to rebuild damaged fences, and to add new fences. They further state that they acted to remove cattle when notice of trespass was actually received. Appellants also appear to argue that they, as grazing licensees, were somehow deprived of a property right without due process of law.

As appellants themselves point out, Judge Sweitzer, in 2-75-2, considered mitigating circumstances but was compelled to conclude that they were outweighed by evidence demonstrating willfulness. We quote Judge Sweitzer's thorough analysis of this issue (pp. 19-22):

The Interior Board of Land Appeals has formulated the following standard regarding "willfulness" in the context of 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. (citations omitted) Eldon Brinkerhoff, *supra* at 191.

Mr. Casey's state of mind reflecting on the willful nature of the actions involved is disclosed by several factors. First, despite his extensive land holdings and large number of cattle, he employed only two persons during the period of time involved to control the cattle in the Susanville and Winnemucca Districts. Mr. Brunson worked for Casey for approximately six months and Mr. Syriac's duties were unspecified and the length of time in which he

worked for Mr. Casey is not disclosed on the record. Further, Mr. Casey's testimony indicates that he spent only minimal time on his properties involved in this proceeding. It is thus apparent that Mr. Casey has willfully failed to provide sufficient manpower to control cattle on his ranch. This factor is compounded by the poor conditions of the fences surrounding his private lands in the Susanville District. The record is replete with testimony and photographs that detail the extent of the poor fence conditions. Further, it is apparent from Mr. Casey's testimony that he was aware of the poor conditions in several of the areas concerned. Despite knowledge of the conditions of the fence, he testified that he managed to ride parts of the fences every six months (with some parts more often (Tr. p. 4-307)). Although he testified that the condition of the fences were, in part, caused by factors beyond his control, that is, depredation by either wild horses or by hunters or tourists in the area, such mitigating factors are of little help to respondents absent specific evidence as to the time and place of the depredation leading to specific trespasses involved (see John Gribble, 4 IBLA 134, 137 (1971)).

Mr. David E. Iveson, a rancher in the Winnemucca District, testified that in the latter part of July of 1975, he observed a Mr. Lawson open a gate and lead cattle onto the public range within the closure area. He surmised that Mr. Lawson did so to prevent the approximately 40 head from breaking through a fence surrounding his private lands to obtain water (Tr. p. 4-244). He testified that a fence served as a boundary of the closure area and that it had the effect of preventing cattle access to water (Tr. p. 4-247). Mr. Iveson also testified that he personally opened the gate to allow cattle to get water in mid-August, 1975 (Tr. p. 4-253).

Although both of these incidents might, in an applicable case, be sufficient to mitigate an otherwise willful trespass, neither incident helps respondents in this case. The gate was described as being on the east side of the closure area and the cattle would get their water south of the drift fence and on the eastern side of the closure area. The only cattle counted as being in trespass in July and August, 1975, on the closure area, were three to six miles west of the gate. Thus, from Mr. Iveson's testimony, the cattle counted in trespass were not likely to be the same cattle as those led through the closure area fence.

Further evidence of Mr. Casey's willingness to allow his cattle to trespass is his testimony as to his operation

regarding the placement of cattle on the western boundary of the Winnemucca District (where he had a license) with apparent knowledge that the cattle would drift across the District boundary to the Susanville District (where he had no license). (See Tr. pp. 4-181, 182 and 4-307).

Another indication of Mr. Casey's mental state is reflected in his apparent disregard of the conditions of his licensed use on the federal range. He evidently could not remember whether or not he had a license to graze in the Cal-Neva planning unit of the Susanville District in 1975 (Tr. p. 4-300). Another more blatant example of his cavalier attitude toward public land management policy is his apparent disregard of the terms of his licensed use in the Winnemucca District. In defense of the trespasses within the closure area, Mr. Casey claimed that cattle drifted from an area licensed to his use west of the closure area. That area was licensed for winter use only (District Manager's decision dated May 17, 1968), yet most of the trespasses occurred during the summer and fall of 1975. When questioned about grazing west of the closure during a time not authorized by the license, the following dialogue occurred:

Q (by Mr. Stanley). Isn't is [sic] true that the area is restricted to winter use only?

A (by Mr. Casey). No, it is not. It is the intention of the Bureau of Land Management that it is, but is the contention of me that it isn't.

Q. You are aware of a 1968 decision—

A. Yes, I am, which has never been followed, enforced or had anything else to do with this deal. (Tr. p. 4-325).

Mr. Casey's proclivity is shown to be one of ignoring range practices or rules not comporting with his personal concepts. He has either willfully permitted his cattle to trespass or has willfully failed to restrain them from trespassing, or both.

In addition to being willful in nature, the trespasses are clearly "repeated." As I have previously held, past settlements or trespass damages may be considered in determining the repeated nature of respondents' acts. The record shows that Mr. Casey has a long history of trespass violations commencing in 1956 (Ex. 2) extending through the present case. These actions resulted in decisions being

rendered after hearing, and monetary settlement without hearing, involving 74 citations or warning letters against respondents. (Exs. 2-6, 6a). Moreover, even if the previous actions were not considered, I find that facts of the instant case considered alone would more than meet this requirement of being repeated. Brinkerhoff's third requirement, that the trespasses occur over a fairly long period of time is also met by these numerous trespasses.

Brinkerhoff's second requirement to justify severe sanctions is that the trespasses involve "fairly large numbers of animals". The Brinkerhoff case itself concerned 4 violations involving a total of 88 cattle in 1973 and 3 violations involving 17 cattle in 1974, (plus some violations involving failure to comply with ear tagging requirements) totalling 21 AUMs (Brinkerhoff, supra, at 186, 191) which was characterized as constituting "fairly large numbers." Examining the trespasses set out in the Conclusions section of this opinion, I have found 21 violations totaling 351 animal unit months. This very clearly establishes that this requirement of Brinkerhoff has been met.

Concerning Brinkerhoff's mention regarding failure to take prompt remedial action, I observe the following. Testimony disclosed that Mr. Casey used 2905 Virginia Street., Reno, Nevada, as his official address for correspondence from BLM. His employees at that address were instructed to hold the correspondence until Mr. Casey picked it up (Tr. pp. 4-178, 353). Mr. Casey testified that he runs ranching operations in Montana and consequently returns to Nevada only on a periodic basis. Accordingly, it may be several days or weeks until actual notice of trespass is received by respondents (Tr. p. 4-177). Thus, under this mode of operation, prompt remedial action to remove cattle from the range is impossible. Mr. Casey testified to the use of two employees over unspecified periods of time but their duties were vague (Tr. pp. 4-205 through 207). The two employees were not called as witnesses and hence their responsiveness in taking prompt remedial action is left in considerable doubt. Positive evidence of lack of prompt remedial action is shown by the length and frequency of the trespasses shown in the complaint. Some trespasses extended over a period of several weeks and were terminated upon recounts of cattle and not upon notification or removal. (See, e.g., Trespass Nos. 86A, 86B, 85). I find from these circumstances that respondents have generally failed to take prompt remedial action concerning abatement of the trespasses.

I therefore find that the trespasses, where proven, are willful in nature, and repeated, and are shown to contain all the elements necessary to justify sanctions,

including severe reductions, as permitted by 43 CFR 9239.3-2 as contemplated by the Brinkerhoff decision.

Judge Luoma's summation of the evidence leading him to conclude that the trespasses were willful, is as follows

(2-77-1, pp. 6-8):

Respondent employed three persons, some of whom worked part time, to supervise operations in the Susanville and Winnemucca Districts (Tr. 311, 314). When served with notice No. 195, Respondent called an employee and told him to rectify the problem, however, nothing was done to abate the trespass (Tr. 319-322). Others who had received trespass notices rode with Complainant and claimed their cattle. All those involved, including Respondent, were invited to accompany Complainant when the cattle were rounded up (Tr. 148). Respondent's cattle, alone, were impounded.

The fences along the north side of the Rush Creek Ranch were in bad shape, were down in many spots, and Respondent's cattle wandered in and out of the fenced area (Tr. 180-181). Notwithstanding, [sic] Respondent left livestock in the Rush Creek Ranch and did not repair the fence. The cattle which were involved in the trespass for which notice No. 203 was issued came from the Rush Creek Ranch (Tr. 326).

The three trespasses which are the subject of this decision were first noticed by Complainant in April 1976. The trespass for which notice No. 180 was issued was terminated because of the turnouts by users, and the trespass for which notice No. 195 was issued was initiated at the end of the summer grazing season when all users were to be off the range (Tr. 96, 97, 159). In fact, Respondent stated that November 1 was a fair date to start the trespass investigation for which notice No. 195 was issued (Tr. 159). In all, 238 cattle were in trespass at times relevant to this proceeding.

Respondent checked some gates in the Winnemucca District fence two or three times a year, however, Respondent did not check all gates. This was notwithstanding that maintenance of the fence is the responsibility of the users (Tr. 29, 327). Respondent concedes that some cattle were found out of fenced fields at various times during the year (Tr. 304, 306).

Respondent did not alleviate the trespass for which notice No. 180 was written (Tr. 318). The trespass for which notice No. 203 was written was terminated because Respondent promised that the cattle in trespass would be rounded up, yet Respondent introduced no evidence that such a roundup was conducted. In general, Respondent took little action to alleviate the subject trespasses once notified of them (Tr. 316).

Although a subjective determination of intent, willfulness may be shown by evidence that the trespasser did not act in good faith or through innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent, Eldon Brinkerhoff, 24 IBLA 324 [83 I.D. 185] (1976).

I find that the subject trespasses were willful because Respondent exercised little control over his cattle and a large number of cattle were in trespass. Upon notification of the trespasses, Respondent did nothing to abate the condition. Respondent's cattle had been found in trespass repeatedly since 1956, many times in the Susanville District. The Rush Creek fence was in disrepair, and gates in the Winnemucca fence were left open, even though it is the duty of the users in those areas surrounding the Susanville Grazing District, of which Respondent was one, to maintain the fences. In effect, Respondent did not act in good faith in maintaining fences or in managing his cattle and the trespasses were the result of Respondent's negligence.

[5] Appellants' arguments fail to demonstrate error in either decision, and we perceive none therein, concerning the issue of willfulness. Appellants' contention with respect to being deprived of a property right without due process is diaphanous, at best. In any event, it has been held that grazing permits issued under section 3 of the Taylor Grazing Act do not create property rights. United States v. Fuller, 409 U.S. 488 (1973). Cf. 43 U.S.C. § 1752(a) (1976).

Judge Sweitzer's final order in 2-75-2 reads as follows:

The District Manager of the Susanville District is directed to issue no authorization to Respondents to graze livestock in said District until money damages of \$1,239.00 are paid.

The District Manager of the Winnemucca District is directed to issue no authorization to Respondents to graze livestock in said District until money damages of \$4,159.05 (\$1,218.00 for trespass and \$2,941.05 for impoundment costs) are paid.

Each District Manager is directed to thereafter issue no license or permit to graze more than sixty percent (60%) of the authorized active use attached to Respondents' base properties in each District.

The concluding portions of Judge Luoma's decision (2-77-1) are as follows:

PAST HISTORY OF THE TRESPASSES

On January 13, 1956, Respondent's grazing license in the Nevada Grazing District No. 3 was suspended for 3 months (Exh. 22). On November 23, 1960, Respondent's licenses were again revoked and future licenses were denied to Respondent in that district (Exh. 23). A continuous series of 14 trespass citations and warning letters issued to Respondent for the Susanville District, beginning with 1960 and extending into 1968, were noted and itemized in a decision issued on September 4, 1969 (Exh. 24). Nine trespass citations, issued in 1969 for the Susanville District, resulted in a suspension of Respondent's grazing privileges for 5 years. Thirty-five additional trespass citations resulted in additional show cause orders which were either closed through offer of settlement or by a November 17, 1971, agreement between Complainant and Respondent (Exh. 25). Three trespass citations, issued to Respondent in December 1972 and January 1973, were closed through a monetary settlement at twice the commercial rate. Four trespass citations resulted in a decision issued on January 7, 1974, which assessed monetary settlement against Respondent at twice the commercial

rate (Exh. 26, 28). Nineteen trespass citations were issued from January 17, 1975, through March 19, 1976 in the Susanville and Winnemucca Districts, and one impoundment action was initiated in the Winnemucca District which resulted in a hearing on May 4, 1976. These facts were alleged in Complainant's show cause order and I find that they constitute the record of Respondent's past trespasses.

DAMAGES AND PENALTIES

Where a grazing trespass is not clearly willful, damages are computed at the rate of \$2 per AUM of Federal forage consumed, or the commercial rate, whichever is greater. Where a trespasser commits repeated grazing trespasses, a fine of twice the commercial rate is warranted. Where a grazing trespass is willful, or grossly negligent, suspension, reduction, revocation, or denial of renewal of a grazing license may be warranted. Regulatory factors, together with any mitigating circumstances, however, are to be considered in determining the extent of disciplinary action, 43 CFR 9239.3-2.

To justify a complete revocation of Respondent's grazing privileges the trespasses must be both willful and repeated, involve fairly large numbers of animals, and the trespasses must occur over a fairly long period of time. Finally, Respondent must have failed to take prompt remedial action upon notification of the trespasses.

Since the trespass violations were repeated, the damages must be assessed at twice the commercial rate. The parties established by stipulation that the commercial rate for grazing in the area is \$3.50 per AUM (Tr. 156). Accordingly, damages will be calculated on the basis of \$7 per AUM, as follows:

[For the sake of consistency, we have rounded off fractional AUMs to the next highest AUM and adjusted Judge Luoma's figures accordingly.]

Trespass No. 180

51 cattle x .467 mo. (4/8-4/21) x 90% F.R. =
[22] AUMs x \$7 = [\$154]

Trespass No. 195

35 cattle x .533 mo. (11/1-11/16) x 90% F.R. =
[17] AUMs x \$7 = [\$119]
80 cattle x .566 mo. (11/1-11/17) x 90% F.R. =
[41] AUMs x \$7 = [287]

29 cattle x .600 mo. (11/1-11/18) x 90% F.R. =
[16] AUMs x \$7 = [112]
4 cattle x .633 mo. (11/1-11/19) x 90% F.R. =
[3] AUMs x \$7 = [21]
[\$539]

Trespass No. 203

39 cattle x .233 mo. (1/28-2/3) x 90% F.R. =
[9] AUMs x \$7 = [\$63]

Total damages = [\$756]

Respondent's cattle comprised 93 percent of the cattle which were rounded up. I find, therefore, that 93 percent of the total impoundment costs should be paid by Respondent. Total impoundment charges were \$5,992.74 and covered the costs for trucking, auction yard expenses, brand inspections, horse rental, per diem and salaries for the employees who went on the roundup, and advertisement costs. Accordingly, the appropriate proportion chargeable to Respondent is \$5,573.25 (Exh. 20).

Finally, I must conclude with full recognition of the severity of such sanction, that Respondent's grazing privileges attached to each of the base properties in the Susanville Grazing District should be permanently revoked. The trespasses were both willful and repeated, involved large numbers of animals, and the trespasses occurred over a long period of time. Respondent's actions evidence no mitigating circumstances upon which a lesser sanction can be based.

ORDER

The District Manager is directed to permanently refuse to issue Respondent any license or permit authorizing the grazing of livestock upon the Federal range in the Susanville Grazing District. Respondent is directed to pay to Complainant, within 30 days from the date of this decision, total damages of [\$756] for forage consumed while Respondent's cattle were in trespass. Respondent is further directed to pay to Complainant, within 30 days, \$5,573.25 as the proportionate share of impoundment charges.

[6] It is obvious that with respect to the Susanville grazing district the penalties imposed by the two judges conflict.

The decision in 2-77-1 directs the permanent revocation of grazing privileges

in that district, whereas 2-75-2 directs a 40 percent reduction of such privileges. In order to resolve the conflict, we affirm Judge Luoma's order and set aside so much of Judge Sweitzer's order as concerns appellants' reduction of grazing privileges in the Susanville grazing district. We believe this result is warranted in light of appellants' conduct as demonstrated by both proceedings and the many, many other trespass proceedings involving Casey.

The situation is different with respect to the Winnemucca District. Here, BLM has urged that Judge Sweitzer "did not go far enough" in that he reduced rather than revoked appellants' grazing privileges. The applicable regulation, 43 CFR 9239.3-2 states in relevant part as follows:

A grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the license or permit, or for a violation of the act or of any of the provisions of this part, or of any approved special rule.

In Brinkerhoff, *supra*, at 337, the Board stated with respect to the imposition of sanctions:

Generally, the Department has limited severe reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a

failure to take prompt remedial action upon notification of the trespass. United States v. Casey, 22 IBLA 358, 369, 82 I.D. 546 (1975); see John E. Walton, 8 IBLA 237 (1972); Eldon L. Smith, 8 IBLA 86 (1972); Alton Morrell and Sons, *supra* [72 I.D. 100 (1965)]; L. W. Roberts, A-29860 (April 23, 1964); Clarence S. Miller, 67 I.D. 145 (1960); Eugene Miller, 67 I.D. 116 (1960); J. Leonard Neal, 66 I.D. 215 (1959). A severe reduction may be a permanent loss of grazing privileges or a temporary loss of a significant privileges for a period of years. [Emphasis in original.]

In our view, the regulation and the case law are so flexible as to permit alternative sanctions of varying degrees of severity. We have previously quoted that portion of Judge Sweitzer's decision in which he set forth his rationale (referring to Brinkerhoff) for imposing his sanctions. We believe that the reduction, rather than revocation of grazing privileges ordered by him was well within his discretion under the circumstances and comports with the regulation. We point out again that the regulation offers alternatives; it does not mandate revocation rather than reduction of privileges under a particular set of facts. BLM's urging that Judge Sweitzer's decision "did not go far enough" in this respect, is, in the absence of specific error, insufficient reason for the Board to substitute its judgment for that of Judge Sweitzer as far as the Winnemucca grazing district is concerned.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43

CFR 4.1:

a) The chief administrative law judge's decision in 2-77-1 is affirmed, except that the damages figure for trespasses is modified from \$735.70 to \$756.

b) The administrative law judge's decision in 2-75-2 is modified, with respect to the Susanville grazing district in that the district manager of said district is directed to permanently refuse to issue appellants any license or permit authorizing the grazing of livestock in said district.

c) The administrative law judge's decision in 2-75-2 is further modified to reflect a total of \$1,463 in monetary damages due for trespasses in the Susanville District.

d) The remaining portions of Judge Sweitzer's order in 2-75-2 are affirmed.

Frederick Fishman
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While I concur fully in the majority opinion, including the modification of Judge Sweitzer's decision insofar as he allowed a deduction for those cattle which were observed on private lands with access to nearby public land, I would like to comment further on this point.

Judge Sweitzer noted:

[T]he areas of land involved could have a bearing on the validity of the presumption that cattle considered as a whole, would obtain a percentage of their forage from the public lands. In the instant case, respondents control extensive holdings in the Cal-Neva Common Allotment and the effect of a strict application of the rule in Babcock could conceivably have a devastating impact on the use of respondents' private lands. For example, if but one cow of a herd of several hundred should stray through a break in a fence surrounding a large private ranch, the government might consider the fence as ineffective and trespass the entire herd. * * *

Many factors other than fences (such as the quality and quantity of forage, salt licks, availability of water, and terrain features) may limit the movement of cattle from private to public lands.

I regard this as a cogent observation, and an important consideration to be taken into account in all such cases.

Certainly it is not our intention to interdict or inhibit the legitimate use of private land for grazing.

When cattle are turned out on private land with access to public land, the question of whether they do or do not derive some of their

sustenance from foraging in trespass on the public land becomes a question of probabilities, as revealed by the evidence. Cattle seem unable to comprehend even the rudimentary concepts of the laws relating to real property, and have a notorious penchant for preferring their neighbor's grass. ^{1/} So, if the evidence does not show that there are factors which make it unlikely that they range beyond their own boundaries, it must be presumed that they do.

The same factors might be considered in evaluating what proportion of their monthly forage is consumed in trespass. For example, if there is a terrain barrier a short distance beyond the boundary of the Federal land, it should not be presumed that the trespass extends beyond it. Or, if there is water in the center of a large tract of private land, and none on the adjacent Federal land, the ranging radius of cattle around their water source, as established by the evidence, should indicate whether, or to what extent, the cattle could be expected to intrude on the Federal land. The same factors might also be considered in determining whether a trespass was willful. For example, if despite the presence of physical impediments, large numbers of cattle are found deep in Federal land, far beyond where they would normally range of their own accord, a presumption arises that they were probably driven there.

^{1/} "The grass is always greener on the other side of the fence." Anon.

The purpose of this dissertation is to dispel any notion that the mere presence of cattle on a parcel of unfenced or poorly fenced private land is, of itself, conclusive evidence that those cattle derive a portion of their sustenance by grazing in trespass on adjacent land.

However, in this instance, I am not persuaded by the evidence that the Casey cattle observed on private land were effectively limited to their own private range, and that the overwhelming probability is that they did in fact derive some of their sustenance by grazing in trespass. For this reason, with full respect for Judge Sweitzer's rationale, I concur in the majority's modification of his holding on this point.

Edward W. Stuebing
Administrative Judge

