

KENNETH H. EARP
DORIS N. EARP

IBLA 80-28

Decided September 30, 1980

Appeal from the decision of Administrative Law Judge Robert W. Mesch dismissing an appeal from the refusal of the Susanville District, Bureau of Land Management, to issue ear tags for cattle owned by grazing permittees.

Affirmed.

1. Grazing Permits and Licenses: Generally

Implementation of the Taylor Grazing Act of 1934 is committed to the discretion of the Secretary of the Interior. Where under 43 CFR 4120.2-4(d) BLM has discretionary authority to require ear-tagging to control unauthorized grazing use or to promote the orderly administration of public lands, a refusal to issue ear tags reasonably related to the protection of public lands will be sustained.

APPEARANCES: W. F. Schroeder, Esq., Vale, Oregon, and James A. Callahan, Esq., Winnemucca, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Kenneth W. Earp and Doris N. Earp have appealed from a decision of Administrative Law Judge Robert W. Mesch dated September 4, 1979, dismissing their appeal of the decision of the District Manager, Susanville District, Bureau of Land Management (BLM), denying their request for ear tags of the same color as those issued to them by the Winnemucca District.

Appellants are entitled to graze approximately 3,865 head of cattle on the public domain. They are licensed for a grazing demand of 8,282 animal unit months (AUM's) on land in the Susanville District

and 7,827 AUM's in the Winnemucca District. The Winnemucca District issued appellants 2,500 white-black ear tags. Appellants then requested that the Susanville District issue them another 1,300 white-black ear tags because of the difficulty of separating tagged from nontagged cattle for grazing purposes.

In a letter to the Earps, the Susanville District, BLM, denied the request stating: "The primary purpose of the ear tagging program is to control livestock numbers. To issue the same colored ear tags would defeat this purpose in both districts and in effect would negate ear tagging as a tool to simplify the range supervision programs in both Districts." Appellants then appealed the decision to Administrative Law Judge Mesch arguing that their grazing privileges are based on the ownership of a single cattle operation and that "it is impossible to keep the nontagged cattle separate from the tagged cattle as a practical operation."

BLM moved to dismiss the appeal citing 43 CFR 4120.4(d) which provides discretionary authority for ear-tagging. BLM asserted that appellants have no claim of right to the issuance of ear tags and contended that orderly administration of the public lands would not be furthered by issuing ear tags as requested by appellants.

In response to the motion, appellants stated the following:

Believing that it is clearly within the prerogative of the Bureau to require licensed cattle to bear ear tags, the appellant accepts the decision of the Winnemucca District and appeals the decision of the Susanville District which refuses to issue ear tags to the appellant for the numbers of cattle which that District licenses to appellant.

The appeal is not a matter of principle. On May 3, 1979 the Winnemucca District wrote to the appellant informing him that its agents had flown what is the Humboldt-Washoe County line and suggested that some cattle not bearing ear tags were on the Winnemucca (Humboldt) side and inferred the existence of a trespass. Regardless of whether all of the county line is fenced, it is improper for the Bureau to place appellant in the described position.

Appellant conducts one cattle grazing operation, not two. His base property is recognized as exerting one demand, but for the convenience of the Bureau, the Bureau chooses to supervise that demand from two different offices in two different states. * * *

We have no quarrel that the Bureau may supervise a single grazing demand from more than one office for any reason sufficient to it, but we do contend that this does

not permit it to impose contradictory license demands upon that same grazing operation, at least where, as here, there is an operation recognized by the Bureau as dependent upon single Nevada base properties.

[1] We find that Judge Mesch properly dismissed the appeal in this case. Implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1976) is committed to the discretion of the Secretary of the Interior. Andrew H. L. Anderson, 32 IBLA 123 (1977). The regulation appropriate to this case, 43 CFR 4120.2-4(d), gives authorized BLM officials the discretion to require "tagging of the authorized livestock in order to control unauthorized grazing use or in order to otherwise promote the orderly administration of the public lands." A decision made in the exercise of this discretion must be supported by a rational and defensible basis or it will be found arbitrary and capricious. Andrew H. L. Anderson, supra. We find that the BLM decision was reasonably related to the protection of public lands from unauthorized grazing and adopt Judge Mesch's conclusions as follows:

The appellants are not entitled to use ear tags in the Susanville District that are of the same color as the ear tags used in the Winnemucca District simply because it is [sic] difficult to keep the cattle in the two districts separated and the use of identical ear tags would avoid problems created by the movement of cattle from one district to the other.

The appellants are licensed to graze a certain number of cattle for a certain period of time in each of the two districts. If cattle authorized to graze the lands in one district move into the other district, they would be in trespass. The appellants contend they are entitled to use identical ear tags in the two districts in order to avoid trespass problems. The Bureau of Land Management has no obligation, and in fact, would be derelict in its duties, if it agreed to an arrangement that was intended only to hinder or prevent the discovery of trespassing livestock.

The solution to any problem that the appellants might have from the movement of cattle from one district to the other should be sought in a direct manner and not indirectly by requesting action that disregards their actual licensed use in the two districts. If a hearing was held on this appeal and the appellants proved that the cattle should be permitted to move freely between the two districts, they would not be entitled to any relief from the action of the Susanville District Office so long as they are licensed to graze a fixed number of cattle for a fixed period of time in each of the two districts.

The issue presented by this appeal is whether the action of the Susanville Office in refusing to issue the requested ear tags was proper under the circumstances existing at that time. The issue is not whether the appellants should be licensed in such a manner as to permit the free movement of cattle from one district to the other. I could not in this proceeding, under the guise of ruling on the propriety of the refusal to issue identical ear tags, pass upon the propriety of the Bureau's licensing procedure in the two districts.

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.

James L. Burski
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING:

The Administrative Law Judge's finding, sub silentio, suggests that the proper time to question the allocation of livestock in each discrete district is when the permits for such districts are subject to renewal. The refusal to issue identical tags by the Susanville District is consistent with maintenance of trespass control measures and constitutes a rational exercise of discretion. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972).

Frederick Fishman
Administrative Judge

