

HOUGHLAND FARMS, INC.
v.
BUREAU OF LAND MANAGEMENT

IBLA 83-576

Decided November 30, 1983

Appeal from decision of Administrative Law Judge Michael L. Morehouse, setting aside decision of Idaho Falls District Manager, which reduced appellant's grazing privileges. Idaho 3-82-1.

Affirmed as modified.

1. Agency--Torts: Scope of Employment

Under the doctrine of respondeat superior a corporation is liable for the wrongful acts or omissions of its officers, agents, or employees acting within the scope of their authority or in the course of their employment.

2. Regulations: Generally--Regulations: Interpretation

The provisions of 43 CFR 4170.1-3 are clearly punitive in nature. Punitive damages have for their purpose the punishment of the defendant in a civil action for wrongful and aggravated conduct and to serve as a warning to others to deter.

3. Agency--Torts: Scope of Employment

The master/servant relationship and the liability of the master for the acts of the servant are determined by the law of the state in which the act took place. In Idaho, a principal or master can be held liable for exemplary or punitive damages based on the wrongful acts of its agent only when the agent's acts were authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment, or when the acts have subsequently been ratified with full knowledge of the facts.

4. Regulations: Applicability--Regulations: Interpretation

Penalties in civil cases should not be imposed except in cases that are clear and free from doubt. In application of penalties, all questions in doubt must be resolved in favor of the party from whom the penalty is sought.

5. Grazing Permits and Licenses: Cancellation or Reduction

In order to impose the provisions of 43 CFR 4170.1-3 the permittee or lessee must have been convicted or otherwise be found to have been in violation of State or Federal laws or regulations concerning conservation or protection of natural or cultural resources or the environment. Finding the officer, agent, or employee in violation of said laws or regulations will not support an action under this section against the principal.

APPEARANCES: Robert S. Burr, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for appellant; R. M. Whittier, Esq., Pocatello, Idaho, for appellee.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Bureau of Land Management (BLM) has appealed the March 25, 1983, decision of Administrative Law Judge Michael L. Morehouse setting aside a determination by the Idaho Falls, Idaho, District Manager (DM) reducing the grazing privileges of Houghland Farms, Inc., from 2,499 animal unit months (AUM's) to 457 AUM's.

Appellee, Houghland Farms, Inc. (HFI), was incorporated in 1967 and operates farms and ranches in eastern Idaho. The corporation has 12 shareholders, all of whom are "affiliated with the [Houghland] family" (Tr. 197). As part of its assets, the corporation holds fee land and a 10-year grazing permit (1979-89) on adjacent BLM managed lands in the Arco Desert south of Arco, Idaho. Porter Houghland (Houghland) is the president of HFI and a minority shareholder in the company (Tr. 197).

Southeastern Idaho experienced a hot, dry, and windy summer in 1981, and as a result of these and other contributing factors, fire danger was extreme. In fact, during the 3-day period preceding the action which led to the District Manager's decision initially appealed by HFI, three serious range fires were fought by BLM and other Governmental and private concerns on and near the HFI fee land and allotment. At some time before 1 p.m. on the 28th of August 1981 Houghland drove to an airstrip a short distance west of the HFI allotment. At the time the airstrip was being used by BLM as a temporary fire camp. When Houghland arrived, three Government employees who were identified and one or two other persons were on the site (Tr. 46, 104-08, 186). Houghland entered into a conversation with George Trenkle (BLM fire control officer in charge of the firefighting activities in the area), Paul Martindale (firefighter employed by the Department of Energy), and Thomas Gooch (BLM conservationist) (Tr. 186). The record contains conflicting

testimony about what was said by whom, but it was undisputed that the topic of range improvement through burning was discussed (Tr. 25, 47, 105, 187). Trenkle returned to his duties which, at the time, consisted of aerial reconnaissance of the fire area (Tr. 106). Martindale returned to his water tanker truck to seek shade, and Gooch remained in his truck and continued his conversation with Houghland. About 1 p.m. Houghland walked away from the BLM pickup in which Gooch was sitting, went a short distance to his pickup and then crossed the Arco-Minidoka road. He then lit a fire with a lighter, crossed back to the Gooch pickup and resumed his conversation. Gooch noted smoke from across the road. However, his direct vision to the fire was initially blocked by a firefighting tanker truck owned by BLM (Tr. 48-49).

Houghland testified emphatically that he was told to start the fire, and that Gooch had suggested he do so (Tr. 187-89, 201). Martindale saw Houghland set the fire in the Goddard permit lands (Tr. 26). According to Gooch, Houghland, at the time, made the comment that he was doing Goddard a favor (Tr. 49). Both Martindale and Gooch testified that when the fire was first seen by them, it could have been easily extinguished (Tr. 83). Martindale explained that he hesitated because he did not know whether BLM had told Houghland to start the fire "because they had been joking around about it earlier" (Tr. 28). Gooch testified that he did not attempt to control the fire when it could have been easily extinguished because, at the time, he was not "authorized" to do so, and because "I am not a qualified fire fighter. I haven't taken a physical and so I technically am not allowed to go on an active fire" (Tr. 84). Gooch testified that he did not alert Martindale because he did not know Martindale's qualifications as a firefighter (Tr. 85). In fact, Gooch made no effort to call Martindale for assistance even though Martindale was only a few yards from where Gooch was sitting (Tr. 84, 89-90; Exh. G-3). Gooch contacted Trenkle by two-way radio. Trenkle then flew back to the airstrip and directed the firefighting activities (Tr. 109-15). Gooch subsequently joined in the firefighting activities (Tr. 87). The fire was suppressed using equipment which was either on the site or en route to the site at the time that the fire was started (Tr. 109-15). The fire was declared under control about 2 hours after it started (Tr. 115).

Houghland was subsequently indicted for a violation of 18 U.S.C. § 1855 (1976), willfully and without authority setting a fire on the public domain. On January 20, 1982, in the U.S. District Court for the District of Idaho, Houghland entered into a plea bargaining agreement and pleaded guilty to a violation of 18 U.S.C. § 1856 (1976), a misdemeanor (leaving a fire unattended and unextinguished). ^{1/} Houghland was placed on probation for 2 years and ordered to pay \$870.59 in fire suppression costs.

^{1/} 18 U.S.C. § 1856 (1976) provides:

"§ 1856. Fires left unattended and unextinguished

"Whoever, having kindled or caused to be kindled, a fire in or near any forest, timber, or other inflammable material upon any lands owned, controlled or leased by, or under the partial, concurrent, or exclusive jurisdiction of the United States, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted, and including any Indian reservation or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same is held in trust by the United States,

On May 27, 1982, the District Manager issued his proposed decision reducing the HFI grazing privileges. The decision provides:

Dear Mr. Houghland:

On August 28, 1981, you intentionally started an unauthorized range fire in the NE 1/4 SE 1/4, Section 30, T. 2 S., R. 27 E., Boise Meridian on public land in the Big Butte Resource Area. A civil case (CR81-40024) was tried in U.S. District Court where you pleaded guilty to a misdemeanor. The deliberate setting of this fire was in violation of 43 CFR 4140.1(b)(3) and 43 CFR 4140.1(b)(8). Therefore, in accordance with 43 CFR 4170.1-3, [2/] it is my proposed decision to cancel part of your grazing privileges. Specifically this will be as follows:

1. Effective March 1, 1983, your grazing privileges shall be reduced from 2499 AUMs to 457 AUMs for a period of 5 years.

fn. 1 (continued)

or while the same shall remain inalienable by the allottee without the consent of the United States, leaves said fire without totally extinguishing the same, or permits or suffers said fire to burn or spread beyond his control, or leaves or suffers said fire to burn unattended, shall be fined not more than \$500 or imprisoned not more than six months, or both."

2/ The cited regulations provide:

"§ 4140.1 Acts prohibited on public lands.

"The following acts are prohibited on public lands and other lands administered by the Bureau of Land Management:

* * * * *

"(b) Persons performing the following prohibited acts may be subject to civil and criminal penalties under §§ 4170.1 and 4170.2:

* * * * *

"(3) Cutting, burning, spraying, destroying, or removing vegetation without authorization;

* * * * *

"(8) Violating any Federal or State laws or regulations concerning conservation or protection of natural and cultural resources or the environment including, but not limited to, those relating to air and water quality, protection of fish and wildlife, plants, and the use of chemical toxicants;

* * * * *

"§ 4170.1-3 Federal or State laws or regulations.

"Violation of § 4140.1(b)(8) may result in a penalty under § 4170.1-1 where:

"(a) Public land administered by the Bureau of Land Management is involved or affected;

"(b) Such violation is related to grazing use authorized by permit or lease; and

"(c) The permittee or lessee has been convicted of or otherwise found to be in violation of any of these laws or regulations by a court or by final determination of any agency charged with the administration of the conservation or environmental laws where no further appeals are outstanding."

2. The north and southwest pastures, which are primarily public lands, (see attached map) will be removed from the Houghland Allotment and the forage production from these pastures will not be available for your use for the 5 years.

3. You will be authorized to use 457 AUMs in the three pastures in the southeast portion of the allotment. These pastures are primarily private land and will be licensed at 29 percent federal land.

4. We will consider an exchange of use agreement to give you credit for the 835 AUMs produced on your private and State leased land within the north and southwest pastures. These exchange of use AUMs would have to be used in the north and southwest pastures with the class of livestock and season assigned to the pastures at that time.

Appellee protested, and, on June 22, 1982, the District Manager finalized his decision. An appeal followed and an evidentiary hearing was held before Judge Morehouse in Idaho Falls, Idaho.

The evidence shows that Houghland was generally cooperative and that HFI had provided water used by BLM in firefighting, without charge (Tr. 63, 121). Both the area manager and the District Manager testified that, in their experience, Houghland was a good manager of the public lands (Tr. 169, 208, 209). The District Manager held his action of reducing grazing privileges in abeyance until Houghland's sentencing on the Federal charges had occurred. Asked what alternatives he was prepared to consider, the DM stated: "There was no other alternative. It was that we would find him guilty and if he was guilty of a crime that we were going to reduce his grazing privileges" (Tr. 178). The District Manager explained that his purpose for reducing the HFI grazing privileges was to show people that BLM will not tolerate flagrant violations of law and regulations or the endangering of natural resources and human health and safety (Tr. 141, 178). He admitted that the reduction of grazing privileges would have an adverse economic impact on the HFI operations (Tr. 177).

In his decision the Judge found that at the time that the fire was started Houghland "may have thought that he had some type of authorization or used what sounded like proper authorization to do an act which he knew was foolish because he was angry, upset, or confused. At best, considering all of the circumstances surrounding appellant's [sic] 3/ actions, the starting of the fire was an irrational act." Next, the Judge found that HFI could not be charged with responsibility for Houghland's impulsive and irrational act. Further, the Judge found that 43 CFR 4170.1-3 (supra note 2) was not applicable because Houghland's violation of the criminal code was in no way related to the grazing use authorized by HFI's permit. The Judge concluded his decision as follows:

3/ The appeal was properly taken by HFI, not Porter Houghland, who was an officer and shareholder of appellant HFI, but not an appellant.

Finally, even if Mr. Houghland's actions can be imputed to the corporation and 43 CFR 4170.1-3 is deemed to be applicable, I believe the sanctions imposed to be too harsh. The evidence shows that a reduction from 2,499 AUMs to 457 AUMs over a period of five years would severely impair the corporation's grazing operation and, in fact, would in all probability be impossible to implement because of the topographical intermixing of private, public and state land. This is not to criticize the actions of the District Manager. He is charged with the responsibility of the proper care and maintenance of the public lands and under the conditions of extreme fire danger that existed during the summer of 1981, he felt that it was his responsibility to make an example of any individual who started a fire on the public domain. However, I believe under these particular circumstances that Mr. Houghland as an individual has been punished enough. He has pleaded guilty to a criminal offense and has made restitution to the government for expenses incurred in putting out the fire he started.

Accordingly, the District Manager's decision is set aside.

Appellant BLM asserts in the statement of reasons that Houghland started the fire to get rid of rabbit and coyote habitat as a service to HFI. Appellant further contends that the fire destroyed forage and wildlife habitat and was started in violation of 43 CFR 4140.1(b)(3) (supra note 2).

Appellee's answer points out that no charges were ever filed against the corporation, only against Porter Houghland as an individual. Appellee contends that Houghland was not the permittee but a minority shareholder of the permittee corporation, and therefore 43 CFR 4170.1-3 does not apply.

The proposed decision by the District Manager, BLM, dated May 27, 1983, has previously been set out in full. It is clear that the action taken is "in accordance with 43 CFR 4170.1-3." As this is clearly a penalty provision its applicability against the appellant must be analyzed carefully. Under the terms of this regulation, it must be applied as a sanction only for a violation of 43 CFR 4140.1(b)(8). Therefore, the imposition of this sanction for the violation of 43 CFR 4140.1(b)(3) is improper. Any attempt to apply the provisions of 43 CFR 4170.1-3 for a violation of section 4140.1(b)(3) must necessarily be dismissed. 4/

The language of 43 CFR 4140.1(b)(8) is as follows:

4/ While the application of the provisions of 43 CFR 4140.1(b)(3) are not applicable for the reason that the actions of the Area Manager were brought only under 43 CFR 4170.1-3, we note that the provisions of 43 CFR 4170.1-1(b) are also not applicable as there is no allegation of "repeated willful violation of § 4140.1(b)(1)." Section 4170.1-1(c) is also not applicable as it applies only to a nonlessee or nonpermittee. The only possible action under 43 CFR 4170.1 for violation of 43 CFR 4140.1(b)(3) would be pursuant to 43 CFR 4170.1-1(a).

Violating any Federal or State laws or regulations concerning conservation or protection of natural and cultural resources or the environment including, but not limited to, those relating to air and water quality, protection of fish and wildlife, plants, and the use of chemical toxicants * * * [.]

We believe that the record provides sufficient evidence that there was a violation of 43 CFR 4140.1(b)(8) by Houghland. Houghland admitted that he violated the provisions of 18 U.S.C. § 1856 (1976) by leaving a fire unattended and unextinguished. There is little doubt that this code provision concerns "conservation or protection of natural and cultural resources." Therefore this provision is applicable against Houghland, and if the record demonstrates that Houghland performed the act on the corporation's behalf, it would be applicable against the corporation. However, the provisions of 43 CFR 4170.1-3 contain additional requirements for imposition.

The first additional requirement is that "[s]uch violation is related to grazing use authorized by permit or lease" (43 CFR 4170.1-3(b)). The Government case is based on the contention that the act of starting the fire and later leaving it unattended and unextinguished was for the benefit of the allotment by reason of the fact that the fire was set to rid the allotment of coyotes and rabbit. The following reason for starting the fire was advanced by the BLM in its statement of reasons: "Testimony reveals that the reason for Mr. Houghland being so interested in burning brush on federal lands was undoubtedly connected with his desire to protect the corporate livestock from coyotes and to eliminate habitat for rabbits." In order to assess the soundness of this statement, the record with respect to the presence of rabbits and coyotes must be examined.

Gooch gave the following testimony:

Q. Did you engage in conversation with Mr. Houghland?

A. Yes.

Q. What was the conversation, the nature of that; if you recall?

A. Well, as I recall, we discussed the fire.

Q. Now, the fire. Is this the one that burned Mr. Houghland's private allotment to some extent?

A. Yeah. We discussed how it had gone through his allotment, how it had burned very rapidly, how it was sort of spotty. That sort of stuff.

Q. Did Mr. Houghland inquire as to what affect that fire might have on his grazing license out there the next year?

A. No. I don't believe we talked about that.

Q. Did you speak of anything else at the time?

A. Well, we did -- we discussed how the fire had burned through there, and I talked with him how that would have been better for cattle if it had burned more cleanly through there instead of leaving some islands.

THE COURT: Islands of -- was this brush?

THE WITNESS: Yes. Island of unburned vegetation.

THE COURT: And it was your feeling that it would have been better for the range if the fire had more thoroughly burned these areas; is that correct?

THE WITNESS: No. That's not correct.

THE COURT: Excuse me. What did you mean?

THE WITNESS: What I discussed with Mr. Houghland was that strictly considering livestock, cattle, that it probably would have been better had it burned clean, but we managed for other animals and cattle.

Q. BY MR. BURR: What other animals are out on the desert?

A. Well, there are antelope and sage grouse. Are the primary species.

Q. And do they utilize sagebrush for cover or any other purpose?

A. Yes. In fact at this time, we had had so many burns that I was on the fire as a resource advisor, and I had the fire crews use cats, caterpillar tractors, to make fire lines instead of back-firing because I was concerned about so much brush had been consumed that I felt wildlife might have a difficult time that following winter if we burned up any more brush.

Q. What purpose does the brush serve for wildlife in the winter, if you know?

A. Well, they use it both for forage and cover.

Q. Now, was that the extent of your conversation at that time with Mr. Houghland before he left the first time?

A. Well, he was there awhile -- oh, forty-five minutes.

Q. I see.

A. Possibly an hour. I'm not sure about the length of time.

Q. Okay.

A. And, you know, we discussed various things wherever, whatever, I suppose.

(Tr. 46-48).

Q. What type of material was the fire started, that you claim Mr. Houghland started. Was it tumbleweeds, was it sunflower, was it -- what?

A. Well, I never went and looked right at it. I would assume judging by the vegetation in the area that there was probably a little cheat grass right along the edge of the road and probably native grasses.

Q. When the discussion went on about the possible burning of islands of brush, is it your testimony that you discussed with Mr. Houghland the wildlife, that it was needed to preserve the wildlife? I think you mentioned in your initial testimony you didn't agree that the burning of the islands of brush would improve the range because of the possibility of sagehens and antelope being in the area. Did you ever discuss that with Mr. Houghland, did you mention it when it was being discussed?

A. What I specifically remember discussing with Mr. Houghland was that -- as I said earlier, had the fire burned cleanly it would have made a better range for cattle, but I believe at that time I indicated it wouldn't have been good for wildlife, and I don't know just how much we developed that particular topic.

(Tr. 80-81).

Houghland gave the following testimony with respect to coyotes and jack rabbits.

Q. What is the reason that there was a discussion about burning that brush along that north-south Arco-Minidoka Road, do you know what brought the subject up?

A. This brush was approximately anywhere from six to eight feet tall, maybe some a little shorter, some taller. This -- all this does is harbor coyotes and jack rabbits, this tall brush. Your antelope won't go in it unless they are chased into it. Your sage grouse they don't nest in it or anything because the coyotes will get them. All it is is a harbor for jack rabbits and coyotes.

Q. And was this matter discussed with Gooch?

A. Yes.

Q. When you walked over there and set the fire and you came back, did Mr. Gooch say anything to you?

A. No. He just sit there.

Q. Did he ever get out of the vehicle even after the fire started?

A. Not until after Mr. Trenkle come down.

(Tr. 190-91).

Against this lone statement given by Houghland with respect to the presence of jack rabbits and coyotes in the area burned we must weigh the testimony given directly with respect to the reason for starting the fire. The following testimony was given.

Testimony by Martindale who was at the scene:

Q. Then, I gather you saw Mr. Houghland come back and talk with Tommy again?

A. At the time Tommy was on the radio to Mr. Trenkle, I believe.

Q. Did you go over then, again?

A. No. I sat there because like I said I didn't know whether they had told him to go ahead and do it or not because they had been joking around about it earlier.

(Tr. 27-28).

Q. And when they were joking about the -- you say they were joking about burning the brush there, was it in the context that these fires had cleared a very substantial area of brush and that it would make seeding a lot easier if the brush was burned?

A. That I really don't know, but there was no fires or burnt area that I could see with the naked eye other than the smoke, and the joking was done by Mr. Houghland saying, "We ought to burn this because it would make better grazing in the future."

Q. What did anybody else say, did anybody else say, no let's not?

A. They said probably -- it's my recollection, I don't know the exact words, but my impression was that it probably would make better grazing but they didn't need another fire at this time.

(Tr. 31-32).

The following testimony was given by Gooch:

Q. Did you speak of anything else at the time?

A. Well, we did -- we discussed how the fire had burned through there, and I talked with him how that would have been better for cattle if it had burned more cleanly through there instead of leaving some islands.

THE COURT: Islands of -- was this brush?

THE WITNESS: Yes. Island of unburned vegetation.

THE COURT: And it was your feeling that it would have been better for the range if the fire had more thoroughly burned these areas; is that correct?

THE WITNESS: No. That's not correct.

THE COURT: Excuse me. What did you mean?

THE WITNESS: What I discussed with Mr. Houghland was that strictly considering livestock, cattle, that it probably would have been better had it burned clean, but we managed for other animals and cattle.

(Tr. 47).

A. Well, then the next thing I recollect was Mr. Houghland came back into my view from around the parked tanker, and right before this time I noticed smoke coming up.

Q. Okay.

A. Although I couldn't see plainly because of the tanker blocking my view, and then Mr. Houghland approached where I was at.

Q. What did you say to Mr. Houghland?

A. Well, I turned to him and said, "You lit that fire, didn't you," and he said, "Yes. I'm doing Marvin Goddard a favor."

Q. Who is Marvin Goddard, if you know?

A. Marvin Goddard's the permittee who uses the allotment where the fire was lit.

(Tr. 49).

Q. Did you ever ask Mr. Houghland why he set the fire?

A. I didn't ask him why. We had a conversation about it.

Q. Is that the conversation you have recited already?

A. No. We had further -- he had come up and I indicated -- I asked him if he had lit the fire and he said, "Yes." Then I talked on the radio to George and then after I got done with that I turned to Mr. Houghland and said, "You might be in big trouble for doing this, and he said, "That's okay. I like trouble. I have a lawyer who I hire to get me out of these things."

Q. Did you make -- Well, I'll just wait and see if all the conversations that you had with him -- do you remember anything, any further conversation?

A. At that time I didn't. I don't recall that I talked further to him. He was quite excited then. I didn't know --

Q. Do you remember making conversation with Mr. Houghland after the fire had been started to the effect that I'm going to notify my boss?

A. No. I think I just picked up the radio and called.

(Tr. 71-72).

Trenkle gave the following testimony:

Q. I see. And what was the nature of the conversation, if you recall?

A. Well, well, the first thing he said, it is very easy to remember because it shocked me at the time, is "I have got a box of wood matches. Let's burn the rest of this off."

Q. And who replied to that statement?

A. I replied to him with the simple statement first of all "we had enough fires, and we didn't need anymore."

Q. Now, was there a subsequent conversation?

A. Yeah. As Tom related, the discussion filtered in and out of the fact that by burning off the brush, there was going to be better grazing, and I could see as the conversation went on that -- at first I didn't take the fellow seriously. I could see as the conversation went on that, you know, the subject didn't drop, in other words. I asked him trying not to put a fellow on defense, but I asked him if he had a pretty strong pickup. He said, "Well, yeah, it is a pretty good pickup." He said, "Why?" and I said, "Because you better not light a fire, or I'll drop a load of retardant on it."

(Tr. 105-06).

Q. You never said to Mr. Houghland about "you shouldn't have started it"?

A. No. Not prior to that, not prior to working on the fire. Afterwards, I asked Mr. -- after we got the fire calmed down, the crews had arrived from Burns and Shoshone, I talked to Mr. Houghland. In fact, I started getting statements from Mr. Martindale, Mr. Howeley (phonetic) who worked for the State of Idaho who is the person that people have been referring to earlier as a BLM employee, and I also talked to Mr. Houghland. I asked Mr. Houghland, "How did the fire get started?" I didn't accuse him of anything, and his reply was that "Some things are best not known."

(Tr. 122).

Q. I was referring to the testimony of Mr. Martindale that there was some discussion about what would incur to the land if the brush was burnt off for grazing purposes.

A. Uh-huh.

Q. Was there any conversations to that effect?

A. Yeah. I already stated there was after his initial contact with us, yes.

(Tr. 127).

Houghland gave the following testimony:

THE COURT: Was this at your well, is this the Houghland Well?

THE WITNESS: Yes. This is the Houghland Well.

Q. By Mr. Whittier: Is that when you saw Mr. Gooch?

A. No. I saw him at the end of the airstrip.

Q. Now, I'm asking you what was the conversation that you had with him?

A. We were talking about burning off some of the isolated area through the burn in my allotment, and he says, "Why don't you go over there and light that one?" I said, "Okay," so I did. There was guys standing right there watching me for fifteen minutes. All they had to do was say it wasn't right. Anybody could put it out. I had two shovels in the back of my pickup, simple. I don't deny lighting the fire, but I don't deny being told to be -- lighting, being used. I'm getting tired of it.

(Tr. 187-88).

Q. When was there any indication the fire probably should be extinguished?

A. Not until Mr. Trenkle called on the -- says, "I see smoke from up here," and Tommy Gooch said, "Well Porter lit it," and he came down and started to threaten me and everything else and so I says, "Well, I guess I've got an attorney that will get me out of this then." I didn't blame it on Tommy Gooch or anybody at that time because I figured that Tommy had guts enough to straighten it out, but I found out he didn't.

Q. Did they ever ask you why you lit the fire?

A. No.

(Tr. 189).

Q. Your not in the habit of doing everything people tell you, are you?

A. If I think I have good advice, I try a lot of things I shouldn't.

Q. Well, why did you think you had good advice to set this fire on someone else's allotment?

A. (No audible response.)

Q. Had you ever discussed burning that man's private allotment with him?

A. No.

Q. So, why did you think it was good advice to burn that particular area that day, if you can tell us?

A. Any time you get rid of big brush the grass will grow.

Q. I see.

MR. BURR: I have no further questions.

(Tr. 202).

[1] Judge Morehouse held that the corporation could not be held responsible for the impulsive or irrational acts of its president which occurred off the permit lands. Judge Morehouse erred in his determination. The applicable test is not whether the act was rational and is not whether the act occurred on or off of the allotment. Under the doctrine of respondeat superior a corporation is liable for the wrongful acts or omissions of its officers, agents, or employees acting within the scope of their authority or the course of their employment. See 19 Am Jur. 2d Corporations § 1434 (1970). Therefore, if the act was within the scope of the authority of the president it can be found that the corporation is liable for his actions.

Notwithstanding the error in Judge Morehouse's decision this relationship and the liability of the corporation for the acts of Houghland must be established in order for 43 CFR 4170.1-3(b) to be applicable to the corporation. This relationship is one of master-servant, *i.e.*, is the master (corporation) liable for the acts of its servant (employee). The nature of the action by BLM has a direct bearing on the extent of HFI's liability for Houghland's acts.

[2] The provisions of 43 CFR 4170.1-3 are clearly punitive in nature. This section of the Federal regulations was imposed upon HFI by the BLM Area Manager for clearly stated reasons. The reason stated by the District Manager was to "impress upon people that they cannot flagrantly go out and set fires, disobey the laws and regulations that jeopardizes natural resources and the human health and safety" (Tr. 141). "The punishment was in effect to show people that BLM will not tolerate flagrant violations of law and regulations" (Tr. 178). There is no question that the action taken by BLM was punitive in nature. The heading for subpart 4170 is "Penalties." Punitive damages have for their purpose the punishment of a defendant in a civil action for wrongful and aggravated conduct and to serve as a warning to others to deter. Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977).

[3] The master/servant relationship and the liability of the master for the act of the servant are determined by the law of the state in which the act took place. Williams v. United States, 350 U.S. 857, 76 S. Ct. 100, 100 L.Ed. 761 (1955). The law of the State of Idaho with respect to the imposition of punitive or exemplary damages is stated in State v. Adjustment Department Credit Bureau, Inc., 483 P.2d 687 (Idaho 1971). In that case the Idaho Supreme Court found that a corporation could not be bound by the actions of its agent unless the agent's acts were authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. In this case, the act was committed by the president of the corporation. The only question which remains is whether the act was on behalf of the corporation. The evidence is not entirely clear in this respect. It could be argued that the act was to rid the corporate lands of rabbits and coyotes. It can also be argued that the act was not on the behalf of the corporation because Houghland had left the corporate sphere and acted on his own for purposes other than the corporate purposes: *i.e.*, he lit the fire as a favor to another. In that the determination of this Board turns on a more basic question, we do not find it necessary to resolve this question other than to overturn the clear error committed by Judge Morehouse when he determined that the act of Houghland could not be binding on the corporation.

The third and final requirement for the imposition of 43 CFR 4170.1-3 on a grazing permittee is the requirement that the permittee has been convicted or otherwise found to be in violation of any of the laws or regulations contemplated by section 4140.1(b)(8) by a court or by final determination of an agency charged with the administration of the conservation or environmental laws. 43 CFR 4170.1-3(c). It is clear that if the Government had chosen to do so, the same charges that were filed against Houghland could have been filed against HFI as the principal under the doctrine of respondent superior. The Government did not file charges against HFI, and the record gives no clue as to why this course of action was not chosen. However, having elected not

to bring charges against HFI, we must examine the consequences of this choice. Houghland was convicted of a crime (misdemeanor) for having violated the provisions of 18 U.S.C. § 1856 (1976). This finding was the result of a plea bargaining agreement. HFI could not have influenced the outcome of this agreement as it was strictly between Houghland and the court. The corporation was never charged with or found to have committed a criminal act.

[4] In order to impose the provision of 43 CFR 4170.1-3 on HFI this regulation must be interpreted in a strained manner. Penalties in civil actions should not be imposed except in cases that are clear and free from doubt. World Insurance of Omaha, Nebraska v. Pipes, 255 F.2d 464 (5th Cir. 1958). In application of penalties, all questions in doubt must be resolved in favor of the party from whom the penalty is sought. Acker v. Commissioner of Internal Revenue, 258 F.2d 568 (6th Cir. 1958), cert. denied, 79 S. Ct. 346, 358 U.S. 940, 3 L.Ed.2d 348, aff'd, 80 S. Ct. 144, 361 U.S. 87, 4 L.Ed.2d 127 (1959).

The question raised by the facts of this case is: Can 43 CFR 4170.1-3 be imposed upon a corporation which has not been found to be in violation of any conservation or environmental law, based upon the fact that its agent has been found to have violated such law?

[5] We believe that to impose the provisions of 43 CFR 4170.1-3 against HFI would require an interpretation of subparagraph (c) of that section not clearly contemplated, and to do so would require an obviously strained interpretation of a punitive regulation. This should not be done.

Accordingly, 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 modified.

R. W. Mullen
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

