

REES LAND & LIVESTOCK CO. ET AL.

v.

BUREAU OF LAND MANAGEMENT

IBLA 84-64

Decided August 29, 1984

Appeal from decision of Administrative Law Judge Michael L. Morehouse, affirming decision of the Kemmerer Resource Area Manager, Bureau of Land Management, requiring ear-tagging of cattle in the Cumberland and Uinta Grazing Allotment. WY 4-82-1.

Affirmed.

1. Grazing Permits and Licenses: Generally

BLM has discretionary authority to require ear-tagging to promote the orderly administration of public lands, and a decision requiring that livestock be ear-tagged will be sustained where the record establishes a rational basis therefor.

APPEARANCES: Edward M. Bown, Esq., Salt Lake City, Utah, for appellants; Marla E. Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Rees Land & Livestock Company and others ^{1/} have appealed from the September 20, 1983, decision of Administrative Law Judge Michael L. Morehouse, which affirmed the April 5, 1982, decision of the Kemmerer Resource Area Manager, Bureau of Land Management (BLM), requiring that all authorized cattle be ear-tagged before entering the Cumberland and Uinta Allotment, and declaring that all untagged cattle found on the allotment would be considered unauthorized. WY 4-82-1.

^{1/} The notice of appeal lists the following appellants:

"Rees Land & Livestock Company, William D. Cornia, Ernest and Reed Kennedy (William D. Kennedy), Dale Hatch (Douglas Hatch), Hatch Land & Livestock Company, Jackson Land & Livestock Company, Loran Jackson and Floyd K. Cornia (Floyd K. Cornia), David L. Jones, Sheldon L. Kennedy, Charles W. Rex and Sterling Rex, Wallace J. Schulthess, Richard Sims, Dean M. Stuart, Roger Telford, Kay Thornock, J. W. Ranching Co., Inc., Diamond W Ranch Co., Inc., John Bell, and Keith Cornia."

[1] The regulation in effect when BLM and Judge Morehouse made their decisions provided as follows: "The authorized officer may require counting and/or additional or special marking or 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." 43 CFR 4120.4(d) (1983). ^{2/} Pursuant to this regulation, BLM has discretionary authority to require ear-tagging to promote the orderly administration of public lands, and a decision to require that livestock be ear-tagged will be sustained where the record establishes a rational basis therefor. C-Punch Corp., 67 IBLA 293 (1982); Andrew H. L. Anderson, 32 IBLA 123 (1977). Appellants' substantive arguments in its appeal to the Board differ little from those made before Judge Morehouse. We have thoroughly reviewed the record of this case and the arguments advanced by appellants. Judge Morehouse's decision accurately summarizes the testimony of the witnesses presented by the Government and appellants. We agree with the Judge's findings and conclusions and adopt his decision, a copy of which is attached as Appendix A.

Appellants have attempted to interject in this proceeding their grievances concerning BLM's failure to issue grazing licenses to them pursuant to a stipulation and agreement of August 25, 1967. ^{3/} Appellants state:

The total cattle authorized to be grazed by Appellants in said Grazing Allotment have been reflected in their grazing licenses, or otherwise corrected until about 1981, and since that year, certain of the grazing licenses have been continuously issued in error, without correction on the part of the Bureau; and, in fact, a great many of the 1983 grazing licenses, including certain grazing licenses with no requested changes through the years, have not been issued as of this date, in order that same can be checked for accuracy and the grazing fees owing can be paid.

Counsel for the Bureau of Land Management stated for the record that "each time any licensee has brought to their [the BLM's] attention an error in the computer billings, they double-checked the records and even if they had to go and write a manual bill, they corrected it." (Tr. page 122). Therefore, the vital issue of the total and correct numbers of cattle was recognized and placed as an issue in these proceedings by the Bureau of Land Management itself. However, Appellant's Exhibits A-3 through A-10, show and prove beyond any reasonable doubt, that grazing

^{2/} This regulation has since been amended and recodified as 43 CFR 4130.5(c), 49 FR 6453 (Feb. 21, 1984), effective Mar. 22, 1984, and reads as follows:

"(c) The authorized officer may require counting and/or additional special marking or tagging of the authorized livestock in order to promote the orderly administration of the public lands." In the preamble to the regulations, the Department noted that the language relating to control of unauthorized grazing use was deleted because that language was redundant. 49 FR at 6447.

^{3/} This agreement was not introduced at the hearing but was attached to a posthearing brief and identified as appellants' exhibit 12.

preference statements issued annually to certain of Appellants by the Bureau of Land Management were corrected by Appellants as requested, and returned to the Bureau, and that the following year the computer print-out again showed the very same errors as in the previous erroneous grazing preference statement, after requested correction was made.

Mr. Gerry Federer, who works for the Bureau of Land Management, in the State Office in Cheyenne, Wyoming, as a Land Range Conservationist on the State Director's staff since 1977, testified that, notwithstanding the problems in connection with computer billings since approximately 1979, the computer does not handle transfers such as those pending in the Kemmerer office (for the past eighteen months), to determine cow numbers at this time, and that if you don't make corrections as to the numbers in the computer, the next year the print-out is in error, exactly the same as it was the previous year. (Tr. pages 187-188).

The above mentioned Appellants' Exhibits and Mr. Federer's testimony indicate that the Bureau has never made any real effort to get the licenses corrected, as agreed and promised.

As a result, the Bureau does not now know, and cannot provide at this time, the proper total number of cattle of each Appellant authorized to graze in the Cumberland-Uinta Grazing Allotment 1206, on the Federal, private and State lands, and also has not completed certain pending transfers, although the documents to complete such transfers were forwarded to the Kemmerer office of the Bureau beginning approximately eighteen months ago (Tr. pages 113-118.) (Mr. Metz, Tr. page 93, lines 14-16.)

Statement of Reasons at 4-5.

It is clear that the proposed ear-tagging could not be implemented if BLM were not able to determine correctly the grazing use for each allottee prior to the issuance of ear tags. While appellants have alleged that BLM has failed to correct the computerized billings, there is no showing that any appellant was actually denied grazing use in any year once the billing errors were brought to the attention of the area office, and we expect that the area office will be able to determine the proper number prior to the issuance of ear tags. Thus, this concern of appellants provides no basis for delaying implementation of the ear-tagging program.

Appellants reiterate their contention that there will be an annual loss of ear tags, greater than the 5 percent predicted by BLM. This argument was made at the hearing and was addressed by Judge Morehouse in his decision.

Appellants note that the decision of April 5, 1982, by the Area Manager was a proposed decision, and contend that his failure to issue a final decision may have precluded interested parties who protested his decision from filing an appeal to a final decision. In making this speculation, appellants

have identified no individuals prejudiced by the alleged procedural error, 4/ and because appellants themselves were not adversely affected by that action, they have no standing to raise this argument. See 43 CFR 4.410. Furthermore, appellants themselves filed a notice of appeal, not a protest, from the April 5, 1982, decision, and specifically requested a hearing before an Administrative Law Judge. Appellants are therefore in no position to complain, having been granted their opportunity for hearing.

Appellants assert that it was error to base the ear-tagging program on unauthorized use in the allotment in the fall of 1982, when appellants had great difficulty gathering and removing their cattle from the allotment, due to favorable feed conditions and miles of new gas pipelines installed above the ground. Judge Morehouse's decision, however, cites other factors which justify imposition of an ear-tagging program on the basis of an orderly administration of the public lands. The recent change in the regulations makes clear that a showing of unauthorized use is not necessary to justify establishment of an ear-tagging program. 5/

Appellants contend they were denied due process when Judge Morehouse refused to let counsel for appellants testify at the hearing. We need not rule on the correctness of Judge Morehouse's action. We only note that the purpose of the testimony was to explain exhibits A-2 through A-10 which were admitted into evidence, and which related to appellants' argument that BLM had failed to correct the numbers of cattle in appellants' licenses, a point which appellants have amply discussed in their statement of reasons. As we have held above, this argument provides no basis for delaying the ear-tagging program; therefore, appellants were not prejudiced by the exclusion of their counsel's testimony.

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.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

4/ The Area Manager, BLM, testified that the proposed decision was considered final when appellants filed an appeal, and that those persons filing a protest were notified of the hearing and provided the opportunity to participate (Tr. 57).

5/ See note 2 supra.

September 20, 1983

REES LAND & LIVESTOCK CO., : WYOMING 4-82-1
et al., :
: Appeals from Area Manager's
: decision dated April 5, :
Headquarters, Rock Springs
: District.
Appellant :
:
v. :
:
BUREAU OF LAND MANAGEMENT, :
:
Respondent :

DECISION

Appearances: Edward M. Bown, Esq., Salt Lake City, Utah, for appellants;
Marla E. Mansfield, Esq., Office of the Solicitor, Department of the
Interior, Denver, Colorado, for respondent.

Before: Administrative Law Judge Morehouse.

This is a proceeding under the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315, et seq., and the grazing regulations in 43 CFR Subchapter D. A proceeding was initiated under 43 CFR 4.470 when appeals were taken from the above decision.

On April 5, 1982, the Area Manager, Kemmerer Resource Area, Kemmerer, Wyoming, issued a notice of proposed decision requiring eartagging in the Cumberland and Unita Allotment to be put into effect by May 1, 1983. Previously, the Area Manager had issued a decision on March 10, 1982, requiring eartagging but withdrew that decision because it was not served pursuant to 43 CFR 4160.1-1 and, in addition, protests were received pointing out that the timing of that decision would create hardship on the operators and adverse impacts on their livestock operations.

Although there is some dispute as to the size of the Cumberland-Unita Allotment, it is a large one consisting of between 450,000 and 500,000 acres. There are 28 cattle operators and six sheep operators within the allotment. Of the 28 cattle operators, 19 appealed the proposed decision on April 26, 1982. Due to the fact that the proposed decision was appealed rather than protested, the proposed decision was treated as a final decision. The appeals were consolidated for hearing which was held on June 28, 1983, at Evanston, Wyoming. Some of the operators who did not appeal protested the proposed decision and they were notified that because of the appeal, the proposed decision was being treated as a final decision and they were given an opportunity to be present at the hearing.

The decision required eartagging of all licensed cattle effective May 1, 1983, and the counting of all licensed sheep effective April 1, 1983. It was felt that due to the large size and broken terrain in the allotment plus the large number of livestock using the allotment, a program should be developed to provide for orderly administration of range use and discourage any unauthorized use that might occur. In addition, it was felt that tagging would aid the Wyoming State livestock inspector's efforts to enforce Wyoming State livestock laws.

The appeal set forth numerous specifications of error:

1. Ineffectiveness due to a large percentage of loss of eartags;
2. Ineffectiveness of other eartagging programs;
3. Numbers of cattle on the allotment can be established by counting prior to the grazing license date, May 1, 1983;
4. Eartagging will be hard on the cattle;
5. Eartagging is not necessary for the orderly administration of the range;
6. The program will not aid the Wyoming State livestock inspector's office;
7. There will be at least 20 percent eartag loss during each season;
8. In the event of eartag loss in excess of 5 percent, the operator will be required to completely re-eartag at his own expense;

9. In the event of sale of cattle following the grazing season, the tags must be removed from those cattle sold which will result in hardship on the livestock;
10. The proposed decision did not set forth the number of cattle each appellant is authorized to graze in the allotment;
11. In holding, generally, that the tagging program will help in the administration of the allotment by increasing the ability to identify cattle at greater distances;
12. In failing to recognize other more desirable alternatives;
13. Finally, in failing to recognize that all the appellants oppose the program.

Mr. Stephen Howard, a BLM natural resource specialist, testified that the allotment is fenced on three sides and part of the fourth with no internal fences. There are approximately 8,600 cattle licensed in the allotment and 20,000 acres of the allotment are in the State of Utah, the remainder being in Wyoming. He testified the primary objective of the eartagging program was identification of livestock as to ownership to enforce unauthorized use. In the past, there have been several reports of unauthorized use and upon going out onto the range, it was impossible to get close enough to the livestock to make proper identification. The BLM is presently starting a monitoring program in the allotment in preparation for an environmental impact statement and in order to do this, it is necessary to know livestock ownership and utilization. In addition, he stated there was a brucellosis scare in 1981 and there was difficulty with identification. Other alternatives were considered. Counting by the operator prior to letting out was rejected due to the number of operators and cattle. Such counting would not preclude other cattle being released into the allotment at a later date. Paint branding was rejected because BLM simply did not have the manpower to assist in this program and, in addition, paint branding would not provide identification as to ownership. The eartags to be used are a bright yellow with the initials BLM and numbers on the tag that would identify the operator and the cow. It was his opinion that a cow could be identified from 120 yards through binoculars, whereas otherwise, it would be impossible to identify an animal except on very close inspection and even then difficulty would be encountered when brands were overgrown by hair. His investigations of the loss percentages of the tags purchased from Ritchie Company indicated percentages far less than 5 percent. He acknowledged that unanticipated difficulties might be encountered, but that these bugs would have to be ironed out as in any system as it progressed. He emphasized that ownership of cows is a major concern of BLM in the allotment and paint branding does not identify by ownership.

Mr. Harley Metts, a BLM supervisory range conservationist, generally agreed with Mr. Howard. He testified that he and seven other BLM employees established a camp within the allotment in June 1979 and attempted a livestock count on horseback. They counted over 1,100 cows that they could not identify either because the brand could not be read or the cow was so wild that they could not get near enough to read the brand. They were able to record brands on another 1,300 head and identified approximately 50 brands. According to BLM records, there were only 39 recorded brands for operators in that allotment. They stayed out there for 10 days attempting to conduct this count, which proved to be very unsuccessful. He stated that when you approach cattle they tend to turn to face you and if an eartag is in place, the letters and numbering on it can be identified. He personally checked in other BLM districts that use Ritchie tags with very small loss percentage. He testified further that Ritchie has developed a new tag which is considerably better than the one used previously. It was his experience that most eartagging operations have a loss of around 2 percent but that they set the loss at 5 percent in order to give the operators more leeway. He acknowledged that there might well be problems in implementing the system, but that these will have to be ironed out as time progresses. He noted that operators have to handle their cattle in chutes for purposes other than eartagging and that this would be a good time to insert the eartag. He did not feel that this would cause undue hardship on the cattle if done at the proper time.

Mr. Paul Breed, Enforcement Officer for the Wyoming Livestock Board, testified that with respect to a brucellosis scare in 1981 he went out onto the allotment and attempted to identify cattle. He had difficulty doing this and stated that eartagging would have helped a great deal. There are approximately 24,000 brands registered in Wyoming, the implication being that in an emergency such as occurred in 1981, identification other than branding would have been desirable.

Mr. Keith Cornia, a rancher who has run approximately 100 head in the allotment for the past 20 years, testified that he uses a metal tag in the ear of his cattle for identification purposes, he has never used a plastic tag but according to information from other neighbors, he believes the Ritchie tag to be inefficient. He thinks the loss percentage would be between 15 and 20 percent and that the best method to account for cattle in the allotment is to have to operators count their cattle before turning them out. He does not think that trespassing has been any real problem in the years he has been in the allotment.

Mr. Max Buck testified that he also eartags his cattle with a metal tag for identification and has no experience with Ritchie plastic tags. He has used All-Flex and Wytex plastic tags and has

sustained approximately an 8 percent loss. He believe that over the years that his plastic tag loss has run between 10 and 15 percent. He generally eartags his cattle when he has them in a chute and believe this puts quite a strain on them. According to information received from his neighbors, they have sustained 15 to 20 percent loss using Ritchie eartags.

Mr. Ross Jackson has used Ritchie tags for 4 or 5 years on his replacement heifers and has had poor success. The cattle do not develop sore ears, he stated, the tags just tend to tear out of the ear.

Mr. Douglas Hatch, a rancher in the allotment, testified that at the end of the 1982 grazing season, he had trouble getting cattle out of the allotment because the feed was still very good.

Throughout the hearing, Mr. Bown expressed considerable concern concerning BLM errors regarding the number of authorized cattle as set out on the operator's yearly billing system. He stated that this has led to considerable confusion and concern on the part of the affected operators and has not been remedied even after considerable efforts by himself and contact with BLM.

Mr. Jerry Federer, the lead range conservationist on the Wyoming State Director's staff, testified that there have been problems with the billing system since BLM implemented a computer billing program in 1977. He stated that the program has worked reasonably well in small allotments with relatively few operators, but problems have developed in large allotments where there tend to be many changes. The method of getting these changes (both as to operators and preference numbers) into the computer and back to the affected party has been cumbersome and time consuming. He stated that for the past year BLM has been preparing a new program to solve the problem and it is hoped that this will prove to be successful when implemented.

Section 4120.4(d) provides:

The authorized officer may require counting and/or additional or special marking or 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 of the authorized officer implementing this regulation will only be disturbed if it is unreasonable or arbitrary and capricious. United States v. Maher, 5 IBLA 209 (1972). Appellants must show this by a preponderance of the evidence. It is my

conclusion that appellants have failed in this regard. It is recognized that the initial implementation of the program will cause the operators some time and expense and that there may well be some problems in the program until the bugs have been ironed out. However, BLM has the responsibility to manage the public lands and the weight of the evidence in this case tends to show that eartagging will help in the management of this allotment.

Accordingly, the decision of the Area Manager is affirmed.

Michael L. Morehouse
Administrative Law Judge

APPEAL INFORMATION

The appellants as the parties adversely affected by this decision, have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken, the adverse party must be served by service upon its attorney at the address listed below.

In addition, the Regional Solicitor must be served at the following address:

Regional Solicitor
Rocky Mountain Region
U.S. Department of the Interior
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Enclosure: Information Pertaining to Appeals Procedures

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