

TABOR CREEK CATTLE COMPANY  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 2002-11

Decided August 29, 2006

Appeal from a decision of Administrative Law Judge James H. Heffernan affirming a decision by the Elko (Nevada) Field Office, Bureau of Land Management, finding that the grazing permittee committed willful trespass. NV-010-00-02.

Affirmed in part, reversed in part, and remanded.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals

BLM enjoys broad discretion in determining how to manage and adjudicate grazing privileges. BLM's adjudication of a grazing trespass will be upheld on appeal if it appears reasonable and substantially complies with the provisions of 43 CFR Part 4100. Reversal of a grazing decision by an administrative law judge or the Board of Land Appeals as arbitrary, capricious, or inequitable is proper only if the decision is not supportable on any rational basis, and the burden is on the objecting party to show by a preponderance of the evidence that the decision was improper. A BLM holding that a cooperative agreement required the grazer to repair and maintain fencing and works making up an enclosure and that failure to maintain and repair constituted grazing trespass will be affirmed on appeal where BLM had a rational factual basis for its decision.

2. Rights-of-Way: Revised Statutes Sec. 2477

Where there is no evidence that an area covered by a fence that is part of a grazing enclosure has ever been adjudicated to be a “road” under R.S. 2477, either administratively within the Department or in a court of competent jurisdiction, there is no basis to upset the requirement that a grazer maintain the enclosure. Unsupported assertions of rights under R. S. 2477, particularly by non-Governmental persons or entities, do not prevent BLM from taking steps to manage the public lands.

3. Evidence: Generally--Evidence: Sufficiency--Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Trespass

Although “willfulness” is basically a subjective standard of the trespasser’s intent, it may be proved by objective facts. Thus, in determining whether the actions of grazing trespassers 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. A finding that a trespass was willful or knowing may be negated by a good faith belief that the requirement did not apply in the circumstances of a given case. Where a decision by an administrative law judge holds that a permittee may have had a good faith belief that it was not required to maintain or repair the fence and workings of an enclosure, and such conclusion is supported by substantial evidence in the record, his holding affirming BLM’s determination that the failure to repair or maintain the site was willful negligence is properly reversed.

APPEARANCES: Julian C. Smith, Jr., Esq., Carson City, Nevada, for appellant; Elaine England, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

Tabor Creek Cattle Company (TCCC) appeals from the August 13, 2001, decision of Administrative Law Judge James H. Heffernan affirming a decision and demand for payment by the Elko (Nevada) Field Office, Bureau of Land Management (BLM). TCCC objects to BLM's decision ordering TCCC to pay for damages resulting from its failure to maintain spring improvements required by a cooperative agreement between it and BLM. We affirm in part, reverse in part, and remand.

This dispute involves a water diversion from a spring to a cattle watering trough situated in an area some distance from the spring. To further protect the riparian resources, the area immediately around the spring is fenced, creating a so-called "exclosure," an area where cattle are excluded ("fenced out") from grazing around the spring source. (Exs. 11 and 12; Tr. 70, 73, 170-71.) The purpose of this arrangement is to keep cattle from watering at the spring creek itself and thus to prevent damage to the banks of the creek and riparian areas. See Tr. 69-70, 73, 170. Exclosures are a common grazing management tool; BLM's rangeland management specialist testified that there are a hundred exclosures in the area she administers (Tr. 115), involving about 12 allotments concerning nine permittees. (Tr. 46.)

The water diversion consists of a "spring box" within the exclosure at the spring head. The spring box is made of "culvert-like material"; water from the stream is collected in it. An outlet from the spring box hooks up to a pipeline that runs downhill nearly a mile outside the exclosure to the area where cattle are watered at a trough. A float valve in the trough cuts off water when the trough is full (Tr. 76-78), and there is an overflow system that drains water into a natural drainage away from the trough. (Tr. 77.) There is also an overflow in the spring box area which returns water to the "permanent water" in the exclosure, presumably to the natural drainage of the stream, which water maintains the riparian area inside the exclosure as well as along the stream itself. (Tr. 78.)

The record shows that, prior to 1992, a water diversion sending water from Badger Spring <sup>1/</sup> to several cattle watering troughs was in place, although the facility seems to have been in general disrepair as of August 1992. (Exs. 28 and X at 1-2; Tr. 31, 66-67.) On August 31, 1993, having flagged and marked water supply projects on the ground in the Deeth Allotment without TCCC's representatives being present (Tr. 70, 122-23, 366-67), BLM met with them to discuss those projects. <sup>2/</sup> (Ex. 4; Tr. 122, 370.) In a letter to TCCC dated September 27, 1993, BLM indicated

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<sup>1/</sup> The site is interchangeably referred to as "Badger Spring" or "Badger Springs."

<sup>2/</sup> BLM's range specialist testified that she recalled flagging the developments with TCCC but could not recall a specific date. (Tr. 367.)

that the proposed project at Badger Springs (among others in the Hanks Creek Basin Field) <sup>3/</sup> was acceptable to TCCC as proposed, the “only concern [being] to set the troughs out as far away from the spring as the terrain allows.” (Ex. 4.)

On January 6, 1994, BLM provided TCCC with final survey and design and cooperative agreements for proposed projects in the Deeth Allotment, including a new cooperative agreement for development of the replacement water diversion at Badger Spring. (Ex. 5; Tr. 124-26.) Attached to the letter was a map depicting the project for Badger Spring showing three troughs, located at 880 feet, 2,370 feet, and 5,277 feet from the spring; and a water tank, located at 880 feet. (Ex. 5.) A seven-sided enclosure with a perimeter of approximately 250 feet was depicted surrounding Badger Spring. (Ex. 5.) The decision to enclose the particular area chosen was made in part to protect a cultural resources site. (Tr. 72-73, 119.) The area of the enclosure as proposed closely matches the area of the enclosure as actually built. Compare Exs. 2 and 5. However, as discussed below, only one watering trough was eventually built, and no tank was built.

On January 14, 1994, a cooperative agreement appears to have been signed by BLM as “the United States of America” and TCCC as “cooperator.” (Ex. A.) The agreement documentation contains a map showing three troughs and refers repeatedly to the construction of “troughs.” Id. Significantly to the present dispute, the agreement provides at 4(a) that

the cooperator(s) shall be liable, jointly and severally, for the repair and maintenance of the improvements following completion, in good and serviceable condition. The cooperator(s), without further notice from the authorized officer shall do the necessary work promptly. If work is not performed as necessary, the authorized officer shall notify the cooperator(s) and specify a period in which to complete the work as required.

Id. Although the cooperative agreement for Badger Spring was apparently amended on March 31, 1994 (Ex. B; Tr. 91), that amendment continued to refer to the project providing three troughs. (Ex. B at 2.) The Deeth Springs environmental assessment (EA) prepared by BLM for the project, among others, indicated that three troughs were included. (Ex. Y, EA at 2.)

In early May 1995, BLM issued TCCC its grazing permit for the Deeth Allotment for the term May 4, 1995, to February 28, 2001. Relevantly, the permit stated the following in its terms and conditions, inter alia: “All riparian enclosures,

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<sup>3/</sup> The Deeth Allotment encompasses the Hanks Creek Basin Field. (Tr. 179.)

including spring development enclosures, are closed to livestock use unless specifically authorized in writing by the area manager.” (Ex. 11.) In July 1996, TCCC wrote to BLM concerning a number of issues affecting grazing in the Deeth Allotment. The letter indicates that construction of spring developments at Badger Spring (among others) had not been completed and stated TCCC’s understanding that BLM would complete construction in FY 1996. (Ex. AA at 2.)

BLM’s range improvement technician testified that she could not remember the exact date the Badger Spring project was completed, but that it was in September 1997. (Tr. 168-69.) She took three pictures in October 1997 showing some of the project. (Ex. 9.)

Judge Heffernan found that, “[a]s actually constructed, the Badger Spring development did not, in fact, include the 3800 gallon storage tank, did not include two of the three watering troughs, and did not include as much pipeline as originally specified in the Cooperative Agreement.” (ALJ Decision at 2.) He found that BLM had encountered changed circumstances (uphill topography) making it hydrologically impossible to complete the project as originally planned, and that BLM made the decision to delete two troughs and the storage tank from the project unilaterally without attempting to negotiate an amendment or modification of the cooperative agreement to reflect the engineering changes. <sup>4/</sup> Id. at 4-5.

The enclosure as completed enclosed 17 acres. (Ex. 2.) The fencing included one gate, allowing access to the enclosure from the south, but no gate exiting the enclosure to the north. The single watering trough is situated downstream to the southwest about 3/8 mile from the southernmost fence line and about 1/2 mile from Badger Spring itself. Id. When the project was completed with the diversion and the single trough, it was functional in diverting water as needed from the spring area to the trough. (Tr. 80.)

On December 8, 1997, BLM sent TCCC a letter notifying it that the “Badger Spring Development and Enclosure” (among other spring developments and enclosures) had been “completed,” and that “[m]aintenance of the developments and enclosures is the responsibility of [TCCC] as per the cooperative agreements.”

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<sup>4/</sup> BLM’s range specialist testified that when BLM’s “crew got out [t]here and they started actually developing the project they determined that there was no way that they could get the water from the spring over the saddle when the pipeline would have to go over a small saddle and down the drainage on the other side.” (Tr. 79.) The range specialist agreed that the project was built as it was “because of problems with the physical layout of the land and the problem of trying to get water to flow uphill.” (Tr. 80.)

(Ex. 8.) Judge Heffernan described that letter as an “important evidentiary item,” because BLM contended that it provided notice to TCCC that the project was sufficiently completed to trigger maintenance support by TCCC, a conclusion disputed by TCCC. (ALJ Decision at 3.)

The BLM range management specialist testified that no one from TCCC complained about the amount of water supplied by the project as built (Tr. 142) or that the enclosure blocked a road (Tr. 142-43), and that she did not recall TCCC “coming back to BLM and saying ‘We can’t use this development because it’s not completed.’” (ALJ Decision at 3; Tr. 425.) TCCC responded that it did complain about the completeness and functionality of the project in a letter to BLM dated August 11, 1998, alleging several “design defects” with the development. (ALJ Decision at 4; Ex. E; Tr. 425.)

On July 30, 1998, BLM prepared grazing trespass report NV-015-1034 noting the presence on July 28, 1998, of 75 cows/bulls owned by TCCC in the Badger Spring enclosure area that was closed to grazing:

The gate into the spring enclosure was busted. There is water inside and outside the enclosure but no water is being piped into the trough outside the enclosure. Routine checks would have discovered the problem and trespass would have been avoided. Based on the use inside the enclosure, it was evident that livestock have been in for a while.

(Ex. 21; see also Ex. 24; Tr. 280-82.) The report noted that the unauthorized use was observed only for 1 day, but the BLM range specialist testified that “it was obvious by the heavy use that it had been \* \* \* days.” (Tr. 282.) The range specialist testified that the conditions in the enclosure were “terrible” and “denude[d] of vegetation.” (Tr. 288.)

The range specialist testified that the water diversion from the spring in the enclosure to the trough had effectively been disabled by closing the valve in the spring box (Tr. 282-84), allowing water to come out of the spring into the enclosure and down the natural drainage, leaving the trough empty. (Tr. 282.) The inspector’s testimony suggested that, since the trough was empty, the cattle had followed the water back to the enclosure and knocked the gate down to get into the enclosure for the water. See Tr. 281-82.

In a notice of unauthorized use and order to remove, also dated July 30, 1998, BLM notified TCCC that it had both failed “to comply with terms and conditions of cooperative range improvement agreements” and allowed “privately owned livestock

to graze on public lands without authorization.” (Ex. 21-1.) The range specialist testified that she toured the area with TCCC’s representatives and explained the operation of the spring developments. (Tr. 285.)

BLM, evidently as part of routine procedure, prepared an offer of settlement concerning the alleged violation, but TCCC returned BLM’s offer of settlement form back uncompleted on August 10, 1998, offering the following explanation of circumstances that resulted in the alleged unauthorized use:

The exclusive reason there were cows in the Badger Spring enclosure is because the cable gate latch failed. This was a new fence and a new latch [was] installed by the BLM Contractor. None of these cable type gate latches hold together after 2 or 3 uses. The new latch installed by the BLM failed virtually without use allowing the gate to fall. There was no pressure on the fence as there is a live stream outside the fence for water and ample feed outside the fence.

We do not feel we should be required to pay \$81.00 or more importantly have a trespass on our record because of the BLM using known faulty gate latches on new construction. We do not know how many total cows [] were in the enclosure or for how long. We appreciate [the BLM employee] driving the cows out of the enclosure and putting the gate up with wire in place of the failed latch. Had we been notified we would have immediately responded. We will tie all existing gates with wire where the faulty latches have not yet failed as a compromise of this matter.

(Ex. 21-2 at 2.) BLM’s rangeland management specialist confirmed in a memorandum dated August 14, 1998, that the latch in use on the enclosure fence was faulty, recommending that BLM “discontinue the use of these gray gate latches” because they “are faulty and have created a lot of problems, i.e., livestock getting in areas not authorized.” (Ex. U-2; see also Tr. 282.)

The record indicates that BLM assessed damages in the amount of \$81.00 against TCCC for unauthorized livestock use in the Badger Spring Enclosure (NV-010-98-11-010) by bill dated August 20, 1998, and that TCCC paid said amount on August 28, 1998. (Ex. 21-3.)

On September 8, 1998, BLM wrote to TCCC, expressly warning it that, “[a]lthough further evidence may indicate faulty gate latches to be the cause of open gates, it still does not abrogate [TCCC] of its responsibility to inspect these enclosures/spring developments prior to livestock turnout and during the grazing

season to ensure proper maintenance and operation.” Noting problems with another enclosure in the Deeth Allotment, <sup>5/</sup> BLM advised that “[a]ny future unauthorized use determined to be the result of improper spring development/exclosure fence maintenance or negligence by [TCCC] will be considered a willful violation.” (Ex. 21-4.) <sup>6/</sup>

On September 9, 1999, BLM reported the alleged violation that is the subject of this appeal. The report, by a BLM range technician who visited the site on September 8, 1999, notes that “[s]omeone had cut the fence on the north end of the [Badger Spring enclosure] quite some time ago from the looks of the conditions, and the gate was open on the west or lower end of the enclosure”; and that “[c]attle had been in the enclosure for quite some time and had eaten it all out.” (Ex. 13.) He later testified that “cattle had been in there for, I would say, anywhere from \* \* \* a month to six weeks, because that, the manure there was, was faded in color, a lot of it, and was hard.” (Tr. 864.) The range technician noted that he “spliced the wires & [tightened] them up on the north end of the enclosure and repaired and closed the gate on the west end.” *Id.* The report also noted that “normal maintenance” was recommended, *viz.*, “Repair[ing] float on the trough, because the float system was broken, and the drain pipe was plugged up and was not draining.” *Id.*

A BLM memorandum dated September 9, 1999, documents the BLM technician’s statements concerning what he found there. (Ex. 14.) It indicates that he actually learned about the condition of the Badger Spring enclosure from an employee of TCCC, who told the technician that, “about a week and a half” prior to September 8, the TCCC employee was “driving steers” and “looked up and found them getting into the enclosure through a break in the fence.” TCCC’s employee “said that the steers had not been in there very long before that.” *Id.* at 1. The memorandum provides a more complete description of the conditions the technician found at the enclosure:

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<sup>5/</sup> BLM cited Black Feather Creek, noting that the problems found there were “inexcusable.”

<sup>6/</sup> In November 1998, BLM also issued a notice of trespass (T-NV-010-99-11-002) against TCCC for unauthorized use for allowing livestock to graze without a permit or lease or an annual grazing authorization. This violation arose because TCCC’s authorizations for the South Cross Field and for Winter Creek had expired, respectively, on Oct. 31 and Nov. 15, 1998, because TCCC did not submit timely renewal applications. (Exs. 22 and U-6; Tr. 292-98.) That trespass notice was settled on Jan. 5, 1999, in the amount of \$1,305. It appears that TCCC subsequently renewed its grazing authorization for those areas. *See* Ex. 12.

- [The technician] indicated that all 4 wires had been cut right next to the green steel post and were pulled back. There is an old road inside the enclosure that goes through the area where it was cut and no gate was constructed here because the road does not go much further up the drainage.
- The gate on the south end was knarled [sic] as if livestock had been walking over it for some time. [The technician] said that he observed no livestock in the enclosure but that there was an obvious livestock trail from the place where the fence was cut through the gate. Also, the use in the enclosure was indicative of livestock being inside the enclosure for some time.
- The float valve on the trough was broken and water was overflowing from the trough[,] creating a boggy area around the trough. [The technician] said it appeared like the overflow pipe was plugged with debris.
- Inside the enclosure, there was no water, all the water was flowing out. \* \* \* .

(Ex. 14 at 1-2.)

These conditions are amply documented by photographs (Ex. 18) and testimony (Tr. 182-93) showing conditions at the enclosure and trough on September 13, 1999. The float valve was broken, there was no drain plug, and the overflow was clogged, allowing water to go over the top of the trough. (Tr. 184-85.) BLM's range improvement technician offered her opinion, based on the conditions she observed there on September 13 ("conditions of the water and the livestock use and \* \* \* mud") that "it had been like that for awhile." She variously stated that "it could have been three, four weeks" or "a month" or "more than a few days" (Tr. 184) or "two months." (Tr. 192.) The broken float valve resulted in all the water from the stream flowing to the trough, leaving none to back up at the source and feed the natural drainage. See Tr. 187, 189. The technician found that there was no water near the spring box (Tr. 188), resulting in almost total loss of vegetation, with whatever vegetation there having been grazed by the cattle. (Tr. 192-93.) Tracks going through the gate from the south into the site looked "almost like a livestock trail where livestock had moved through" (Tr. 188-89), exiting through the hole in the fence on the north side of the enclosure. (Tr. 190.) Signs indicated that

“livestock had been moving through that area for quite, quite some time.” (Tr. 190-91.) From hoof prints and the area of use and the trails that had developed, the technician felt that there had been “quite a few head moving through there.” (Tr. 192.)

On September 14, 1999, BLM prepared a grazing trespass report noting TCCC’s previous record of trespasses and noting: “No livestock were found inside the Badger Creek Exclosure[;] however, there were signs of livestock observed. Also, the trough/float valve were not in proper operation.” The report states that, “[b]ecause no livestock were involved, trespass is based on lack of maintenance of spring development/exclosure.” As to whether the trespass was committed innocently or willfully, BLM stated that “[t]he ranch manager had found the problem with the exclosure, i.e. gate open & fence cut[;] livestock were removed but fence was not fixed.” The damages were set at \$247.08. The technician testified that by “simply replacing the float valve, not only would you not have the \* \* \* muddy area where the spring or the trough is, but the water would have been backing properly \* \* \* inside the exclosure, maintaining your riparian area.” (Tr. 205.) “[I]t was part of normal maintenance to make sure that the fence was up and make sure that the water development was operating properly.” (Tr. 205-06.) In addition to replacing the float valve, placing a drain plug and clearing the clogged drain was maintenance that should have been done. (Tr. 206.)

In a September 14, 1999, memorandum accompanying the trespass report, BLM stated that it would consider the trespass a “willful trespass” because TCCC’s employee did not fix the fence when he noted the problem. The memorandum set out the basis for the damages, being the administrative costs (worker hours and vehicle mileage) of two BLM employees for inspection of the exclosure, fixing the fence/gate, inspection of work completed, and assessing damages. (Tr. 203-05.) The memorandum indicates that the TCCC employee had stated on September 13, 1999, that “hunters had cut the fence” surrounding the exclosure. <sup>7/</sup>

On September 14, 1999, BLM issued its unauthorized use notice and order to remove (T-NV-010-99-11-014) specifically charging TCCC with “[f]ailure to comply with terms and conditions of cooperative range improvement agreements and allowing privately owned livestock to graze on public lands without authorization,” namely, the Badger Spring exclosure. BLM stated that TCCC was in violation of Section 2 of the Taylor Grazing Act, 43 U.S.C. § 315a (2000), and sections 303

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<sup>7/</sup> The memorandum also addressed whether and how to impose a requirement on TCCC to conduct both annual and periodic inspections of spring developments/exclosures within the Deeth Allotment and to submit written records of when the inspections were completed and what work was accomplished.

and 402 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1733 and 1752 (2000), as well as 43 CFR 4140.1.

BLM's unauthorized use notice does not set out the details of TCCC's alleged violation. Indeed, reading it without knowledge of the background set out above would provide no understanding of what BLM felt TCCC had done wrong. The notice is also confusing as to what TCCC was required to do. Thus, although BLM was aware that no livestock remained there, BLM ordered TCCC "to remove all unauthorized livestock from the [Badger Spring] enclosure immediately." BLM did not specifically direct TCCC to repair the enclosure. The only other indication in the notice of what action TCCC had to take was the general admonitions that "[v]iolations, if continuing, must stop immediately" and that TCCC "must permanently cease and desist from the violations charged." (Ex. F.)

The record does show that BLM explained the situation to TCCC's representatives by telephone on September 14, 1999. See Exs. G and H. On September 15, 1999, TCCC faxed a letter to BLM asserting that its employee had only noticed that the enclosure fence had been cut late in the day on September 7, 1999, not a week and a half prior as BLM had believed. The letter stated TCCC's view that it should not "be held accountable for BLM errors in judgment in the original construction of the enclosure, then accountable for acts of vandals in cutting the fence at the existing roadway." (Ex. G.)

After receiving BLM's unauthorized use notice, TCCC was naturally confused as to what it was being required to do, stressing in a letter to BLM dated September 20, 1999, that it had no livestock in the enclosure at Badger Spring and that there were no livestock in the area. In the September 20, 1999, letter, TCCC also claimed that it had not agreed to the location of the fence in the location chosen, where it "block[ed] a long established road." (Ex. H.) TCCC also argued that the cooperative agreement obligated TCCC only to conduct "'annual maintenance' of the spring and does not indicate that any daily maintenance is required or that policing is required to prevent vandals from destroying the fence." TCCC concluded by stating that it was "not in violation of any law whatsoever or regulation." By another letter dated September 24, 1999, TCCC advised BLM of its belief that, "[i]n addition to the fence having been cut, the float in the water trough was struck with a hard object[,] denting the metal float and breaking it off from the valve," and that "[t]his was done intentionally and not by animals." (Ex. 25.)

On September 30, 1999, representatives of TCCC (including the employee who first reported the damage to the enclosure to the BLM range inspector on September 8, 1999) met with representatives of BLM to discuss settlement of the situation. TCCC refused settlement, since it maintained that it was not in trespass.

As to when TCCC's employee noticed the damage to the enclosure, he stated that "[h]e had not been up there a week and [a] half prior to us finding the problem. He had gone up there three weeks before and everything was fine." He also said that the float valve on the trough was operational "when he was up there." (Ex. 26.)

By letter to BLM dated October 5, 1999, TCCC confirmed that it would not settle the dispute, insisting that BLM rescind the unauthorized use notice and order to remove. In that letter, TCCC first set out what has become a central argument:

The Cooperative Agreement referred to in the Notice is Project No. 5776 which has never been completed by the BLM, and therefore the obligation to maintain the project has not yet fallen on [TCCC]. The Cooperative Agreement signed by [TCCC] called for the construction of three water troughs and a modest fence surrounding the spring area only. The project was to replace water storage and spring development with three troughs that would collectively hold approximately the amount of storage replaced. Only one of those troughs has been constructed, and it has totally inadequate storage for the number of livestock depending on it for water.

(Ex. I.) By letter dated October 25, 1999, TCCC formally requested "to abandon the enclosure at Badger Springs until Project No. 5776 can be satisfactorily completed" (Ex. L), apparently a reference to the failure to provide three watering troughs.

TCCC also asserted in its October 5, 1999, letter that the cooperative agreement "did not provide for the obstruction of a traveled road" and that TCCC "would not have consented to maintain the obstruction of a road which would be a violation of 43 CFR 4140.1(b)(7)." <sup>8/</sup> In its October 25, 1999, letter, TCCC stated that it would "not rebuild the fence that blocks the road on the north side of the enclosure unless [BLM] can obtain for [it] immunity from prosecution." (Ex. L.) TCCC did offer BLM the opportunity to avoid this problem by constructing "a gate where the road exits the north side of the enclosure so that the enclosure can be maintained without a violation of the law." In that letter, TCCC's representative indicated that on October 13, 1999, he observed that the fence had "been broken again and thrown back in the same place where" the BLM range technician "had

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<sup>8/</sup> Evidently sure of its position that placing the fence there violated the law, TCCC inquired whether "the person constructing the fence that obstructed the Badger Creek road" (presumably a BLM employee) had been "cited." (Ex. I.) In the same vein, by letter dated Oct. 21, 1999, TCCC purported to report that the construction of the fence was a "crime" and a "possible infraction," citing both 43 CFR 4140.1(b)(7) and Nevada Revised Statute 405.230. TCCC has maintained that argument on appeal.

repaired it,” presumably referring to his actions on September 8, 1999. The letter noted that there “were ATV tracks through the opening” (Ex. L), a photograph of which is in the record. (Ex. K.)

On November 19, 1999, BLM issued a Proposed Decision, Order to Remove, and Demand for Payment. This document cured the deficiencies of the earlier trespass notice, setting out in detail the background to the dispute. BLM specified that the “unauthorized use consisted of allowing privately owned livestock to graze inside the Badger Spring Exclosure and failing to comply with the terms and conditions of cooperative range improvement agreements”; that “[f]ailure to maintain the range improvement project resulted in cattle grazing in the exclosure in violation of the terms and conditions of the grazing permit”; and that “lack of maintenance resulted in the project not operating in good and serviceable condition to protect the riparian resources as intended by the project.” (Ex. M at 1.) BLM also noted that there was “substantial documentation showing a pattern of concern in reference to [TCCC’s] lack of responsibility in maintaining range improvements for which maintenance is assigned.” Citing a notice of unauthorized use, BLM concluded that TCCC “was warned about using spring exclosures without authorization and [was] notified that BLM would take action against the grazing permit if use was continued”; citing to a notice of unauthorized use in July 1998, BLM concluded that TCCC knew that it was responsible “to inspect exclosure/spring developments prior to livestock turnout and during the grazing season to ensure proper maintenance and operation”; and citing to an August 1998 field inspection, BLM concluded that TCCC “was fully aware of the operation and maintenance responsibilities of the spring developments and exclosures.” Id. at 2. BLM concluded in its Proposed Decision that the unauthorized use was willful in nature and ordered TCCC to pay \$247.08 in damages, those “charges reflect[ing] the detection and investigation of this trespass by BLM employees.” Id. at 2-3.

BLM also denied TCCC’s application for livestock grazing use throughout the Deeth Allotment until that amount was paid. Id. at 3. BLM also ordered TCCC to remove all unauthorized livestock from the public lands within the Deeth Allotment by November 17, 1999, although there was no indication that there were any as a result of the asserted trespass. BLM was thus evidently referring to cattle grazing under authority of permits then in effect, applications for renewal of which BLM purported to deny later in its decision.

BLM advised TCCC that BLM would “make available the necessary materials to construct a gate on the north end of the exclosure” and held that the “gate must be constructed by [TCCC] prior to turnout in the 2000 grazing season.” Id. BLM held that TCCC would “continue to be responsible for the repair and maintenance of all spring developments/exclosures within the Deeth Allotment to ensure the projects are

in good and serviceable condition.” BLM cited paragraph 4(c) of the cooperative agreements, defining “repair and maintenance of the projects” as meaning “normal upkeep and maintenance necessary to preserve, protect, and prolong the useful life of the improvements.” BLM also held that “[m]aintenance of the spring enclosures and developments and assurance that the gates are closed when livestock are in the area will remain the responsibility of” TCCC, and that TCCC was “being required to conduct more frequent inspections of the spring enclosures/developments within the Deeth Allotment to prevent further unauthorized use.” BLM concluded by holding that “[a]ny future unauthorized use determined to be the result of improper spring development/enclosure fence maintenance or negligence by Tabor Creek [would] be considered a repeated willful violation and [would] result in action taken against the grazing permit.” *Id.* at 3.

On December 2, 1999, TCCC faxed its protest of the proposed decision to BLM. (Ex. N.) TCCC noted that there was no documentation of any unauthorized use by TCCC on September 8, 1999, and asserted that the proposed decision did not detail the exact conduct by TCCC that was in fact willful. TCCC asserted that BLM had previously agreed to build the gate in the enclosure at BLM expense, including labor. TCCC argued that the cooperative agreement for Badger Spring, No. 5776, required only annual maintenance and that “normal upkeep and maintenance” does not include repairing acts of vandalism. Along these lines, TCCC questioned whether intentional vandalism of fences and spring developments was a result of “improper spring development/enclosure fence maintenance by” TCCC.

On December 14, 1999, BLM issued its Final Decision in this trespass essentially imposing the terms of its Proposed Decision. Further, BLM issued a Final Decision Demand for Payment on January 12, 2000. (Response to Petition for Stay, filed on Feb. 2, 2000, in TCCC v. BLM, IBLA 2000-117, at 2.) On January 18, 2000, TCCC filed its notice of appeal and request for stay of that decision.

TCCC had argued in its December 2, 1999, protest that denial of applications was allowed under 43 CFR 4150.3(e) only when a violation had been established. As the decision was proposed and would not become final until its appeal rights had expired, TCCC asserted that it was premature to deny its November 1999 application for livestock grazing use on the Deeth Allotment until the \$247.08 was paid and to order removal of livestock from the Deeth Allotment. (Ex. N.) Nevertheless, TCCC indicated that it was removing all of its cattle from the allotment, a fact later confirmed by BLM in its Final Decision. *Id.* Further, TCCC paid \$247.08 to BLM under protest when it filed its notice of appeal. (Response to Petition for Stay, filed on Feb. 2, 2000, in TCCC v. BLM, IBLA 2000-117, at 2.) Those actions presumably mooted the question of whether BLM properly required compliance and payment as a condition to approval of the application as those requirements were assertedly

suspended by TCCC's protest and appeal. Further, by Order dated February 23, 2000, this Board denied TCCC's motion for stay of the effectiveness of BLM's decision pending consideration by the administrative law judge to whom the appeal was assigned. Tabor Creek Cattle Company, IBLA 2000-117 (Order Denying Motion for Stay, Feb. 23, 2000). That action removed any question as to the effectiveness of BLM's final decision during the pendency of TCCC's appeal.

A hearing was held on this appeal on November 2 and 3, 2000, and on January 17 and 18, 2001, in Elko, Nevada, before Administrative Law Judge Heffernan. In his decision, Judge Heffernan affirmed BLM, ruling both that BLM had proven that TCCC was in violation of its grazing permit by failing to maintain the Badger Creek exclosure, thereby allowing cattle to enter and graze within the exclosure (ALJ Decision at 6), and that such violation was willful. Id. at 5.

On appeal, TCCC argues that it had no responsibility to maintain the range improvements under paragraph 4a of the cooperative agreement until they were completed. (SOR at 1; Appeal Brief at 1.) It asserts that any trespass was a result of BLM's failure to complete the project's improvements. It argues that it was entitled to notice of work that had not been completed and an opportunity to perform that work. It complains that the original notice to TCCC of the alleged infraction did not indicate that it was willful and, in fact, cited the non-willful regulation at 43 CFR 4170.1-1(a). TCCC asserts that Judge Heffernan erred in finding that its cattle were in trespass when none of its cattle were seen by any official of the United States within the forbidden area and disregarded an affidavit (Tr. 1073, Ex. 11 at 8-16) unequivocally stating that TCCC's cattle were not in trespass.

[1] The standard for reviewing BLM decisions concerning grazing matters is well established. BLM enjoys broad discretion in determining how to manage and adjudicate grazing privileges. Under 43 CFR 4.478(b) (2001), BLM's adjudication of grazing preference will be upheld on appeal if it appears reasonable and substantially complies with the provisions of 43 CFR Part 4100. That language has consistently and repeatedly been interpreted as considerably narrowing the scope of review of BLM grazing decisions by both an ALJ and this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis, and the burden is on the objecting party to show by a preponderance of the evidence that the decision was improper. Ross v. BLM, 152 IBLA 273, 282 (2000); West Cow Creek Permittees v. BLM, 142 IBLA 224, 235-36 (1998). Where BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis," and the burden is on the objecting party to show that the decision was improper. Wayne D. Klump v. BLM, 124 IBLA 176, 182

(1992); Lewis M. Webster v. BLM, 97 IBLA 1, 4 (1987); George Fasselin v. BLM, 102 IBLA 9, 14 (1988); Bert N. Smith v. BLM, 48 IBLA 385, 393 (1980).

We have reviewed the case record and conclude that appellant has failed to establish error in Judge Heffernan's decision affirming BLM's decision that TCCC had to maintain and repair the site in question under the cooperative agreement and that, by failing to meet that obligation, had committed grazing trespass. We agree with Judge Heffernan that TCCC's violation was established by evidence proving that cattle entered the Badger Spring enclosure because of TCCC's failure to maintain the surrounding fence and to keep the gate in place. (ALJ Decision at 5.)

[2] We also specifically affirm Judge Heffernan's ruling rejecting TCCC's argument that it was not required to maintain the enclosure fence because it blocks a public road. (ALJ Decision at 8-9.) Appellant pointed out that the area in question had been determined to be a "road" by Elko County officials under the provisions of R. S. 2477. <sup>9/</sup> (Ex. DD.) The area covered by the fence is Federally-owned, and there is no evidence that it has ever been adjudicated to be a "road" under R. S. 2477 or other authority. The presumption concerning right-of-way status is in favor of the landowner, in this case the United States. The burden of proof lies on those parties seeking to enforce rights-of-way against the Federal government. SUWA v. BLM, 425 F.3d 735, 768. Unsupported assertions of rights under R. S. 2477, particularly by non-Governmental persons or entities, are not a talisman preventing BLM from taking steps to manage the public lands. See Charles W. Nolen, 168 IBLA 352, 363 n.12 (2006). Nor, in the absence of either an administrative determination by BLM (425 F.3d at 757-58) or by a court of competent jurisdiction (425 F.3d at 750-57) that the requirements for an R. S. 2477 right-of-way have been met, is any action by County officials to declare the area a "road" controlling.. <sup>10/</sup> Rainer Huck, 168 IBLA

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<sup>9/</sup> R. S. 2477 is formally known as the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, Revised Statutes 2477, formerly codified at 43 U.S.C. § 932 (1970) (repealed by FLPMA, 90 Stat. 2793 (1976)).

<sup>10/</sup> A clear reading of the decision in SUWA v. BLM, *supra*, refutes the position that the ruling by the County Commissioners controls. First, any route that did not exist in 1976 could not qualify as an R. S. 2477 route. Second, the Tenth Circuit made clear that R. S. 2477 routes are "rights-of-way" over Federally-owned lands; they are not fee interests owned by the local government entity. Third, the Court made clear that any R. S. 2477 route must be shown to meet two conditions: (1) the Federal landowner must have objectively manifested an intent to dedicate the property to public use as a right-of-way, and (2) the public must have manifestly accepted the use of the route. 425 F.3d at 769. Although the courts enjoy primary jurisdiction over those questions (425 F.3d at 750-57), BLM may determine the validity of an R. S. 2477 right-of-way for its own purposes. 425 F.3d at 757-58.

365, 399 n.17 (2006) Being aware of neither, we find no basis to upset appellant's maintenance responsibility on such grounds.

[3] The following standard for determining whether a grazing trespass is willful was articulated by the Board in Eldon Brinkerhoff, 24 IBLA 324, 338, 83 I.D. 185, 191 (1976):

Although "willfulness" is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespassers 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.

This language was quoted with approval in Holland Livestock Ranch v. United States, 655 F.2d 1002, 1006-07 (9th Cir. 1981). However, significantly to the instant dispute, it is established that a finding that a trespass was willful or knowing may be negated by a good faith belief that the requirement did not apply in the circumstances of a given case. Baltzor Cattle Co. v. BLM, 141 IBLA 10, 18 (1997); see generally Cheek v. United States, 498 U.S. 192, 202-03 (1991); United States v. Murdock, 290 U.S. 389 (1933).

Although the issue of whether TCCC satisfied its obligation to maintain the improvements has been conclusively resolved against it on appeal, Judge Heffernan held that TCCC "may have had a good faith belief that it was not required to perform maintenance on the Badger Spring project" at the time that the violation occurred (ALJ Decision at 5), and the record contains substantial evidence supporting such a conclusion. <sup>11/</sup> Judge Heffernan improperly concluded, we hold, that having "such a

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<sup>11/</sup> In September 1996, a grazing trespass report prepared by BLM stated that a total of 7 cows bearing brands for TCCC had drifted into an area that was closed to grazing for varying lengths of time between Sept. 23 and 27, 1996. It also indicates that "gates [were] open & fences in disrepair," noting that "[p]roblems with gates being left open by hunters have been reported in the area," but that "inspection of fence indicates that maintenance has not been completed." BLM valued damages at 1 animal unit month, or \$17.60 if the trespass was willful and \$8.80 if non-willful; settlement was recommended. (Ex. 19-1.) On Sept. 27, 1996, BLM issued an "unauthorized use notice and order to remove," asserting that TCCC had committed the act of "[a]llowing privately owned livestock to graze on public land without authorization." By letter dated Oct. 2, 1996, TCCC indicated that the offending cattle had been removed and that gates into the Coyote Pasture were being left open by an  
(continued...)

good faith belief does not constitute an adequate legal defense to the instant [willful] trespass decision.” *Id.* In view of the rule set out in *Baltzor*, that conclusion must be reversed, and the matter remanded to BLM to recalculate the damages for a nonwillful trespass.

To the extent not expressly considered herein, TCCC’s arguments have been considered and rejected.

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 in part and reversed in part.

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David L. Hughes  
Administrative Judge

I concur:

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R. Bryan McDaniel  
Administrative Judge

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<sup>11/</sup> (...continued)

unknown offender. (Ex. 19-3.) BLM accepted a settlement of the trespass as non-willful when TCCC tendered payment of \$8.80 on Oct. 2, 1996. (Exs. 19-4 and 19-5.)

On Oct. 22, 1996, BLM wrote TCCC indicating that failure to maintain fences on the Marys River Riparian Pasture in the Deeth allotment constituted a violation of 43 CFR 4140.1(a)(4). On July 17, 1997, BLM sent TCCC an Unauthorized Use Notice and Order to Remove (T-NV-010-97-11-007), notifying TCCC that it had made an investigation and that evidence tended to show that TCCC was making unauthorized use of the public lands and other lands administered by BLM, by “[a]llowing another party to graze livestock on public lands under a pasturing agreement without the approval of the authorized officer.” Although BLM calculated damages totaling \$4,962.14 (\$245.34 in AUM surcharge fees and \$4,716.80 in sublease fees), it offered TCCC a settlement of \$2,603.74, which amount TCCC paid on June 26, 1997. (Exs. 20-2, 20-3, and 20-4.)

We are unpersuaded that those previous violations demonstrate that Judge Heffernan’s conclusion regarding TCCC’s good faith belief was in error because testimony and correspondence of record indicates that TCCC consistently believed that BLM’s failure to complete the improvements as originally planned was a precondition to TCCC’s obligation to maintain the improvements.