

INTERIOR BOARD OF LAND APPEALS

James D. Wilcox

v.

Bureau of Land Management

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JAMES D. WILCOX

v.

BUREAU OF LAND MANAGEMENT

IBLA 91-354

Decided October 5, 1995

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., reversing a decision of the Moab District Manager, Bureau of Land Management, requiring the ear-tagging of cattle on the Green River Allotment UT-06-90-2.

Affirmed.

1. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Administrative Law Judges—Grazing Permits and Licenses: Appeals

An Administrative Law Judge's determination that a BLM ear-tagging decision was arbitrary and capricious will be affirmed where the record does not demonstrate that, under the extant circumstances, ear-tagging would promote proper management of the public range.

APPEARANCES: Grant L. Vaughn, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Nick Sampinos, Esq., Price, Utah, for James D. Wilcox.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Bureau of Land Management (BLM) has appealed from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., dated May 28, 1991, reversing a decision of the Moab, Utah, District Manager, BLM, issued on November 6, 1989, which had affirmed the Price River Resource Area Manager's August 23, 1989, proposed decision requiring James D. Wilcox to ear-tag his cattle on the Green River Allotment in southeastern Utah. Wilcox uses the Green River Allotment (also referred to as the Green River North Allotment), which includes approximately 120,000 acres of Federal land (Tr. 260) in Carbon, Duchesne, and Uintah Counties, Utah, in conjunction with his operation of the old Preston Nutter Ranch (Nutter Ranch) which also embraces approximately 56,000 acres of private land and 11,000 acres of Utah State land (Tr. 20).

Wilcox began leasing the Nutter Ranch in February 1988. On January 15, 1988, before Wilcox leased the ranch, BLM sent Wilcox a letter outlining the number of cattle and seasons of use authorized for the Green River Allotment and identifying additional stipulations which would be incorporated into any permit issued to Wilcox for that allotment. The letter further informed Wilcox that "[w]ith fluctuating cattle numbers, we may require some sort of additional marking, such as ear-tagging or paint marking" (Exh. D).

On January 17, 1989, BLM offered Wilcox a grazing permit for the Green River Allotment for the period February 1, 1988, through January 31, 1991. The permit entitled Wilcox to graze 200 cattle from November 1 through April 15 on 90-percent public land, 500 cattle from April 16 through June 15 on 90-percent public land, and 900 cattle from June 16 through October 31 on 10-percent public land, thus allowing year-round use of a total of 2,292 animal unit months (AUM's) out of Wilcox's active preference of 8,584 AUM's. The permit's terms and conditions contained, in addition to other provisions, a 3-year rotation system among the different pastures within the allotment and a statement that "ear-tagging or paint marking may be required due to fluctuating cattle numbers." Wilcox accepted and signed the permit on January 17, 1989, and the Price River Resource Area Manager issued the permit 2 days later.

Thereafter, in a proposed decision dated August 23, 1989, the Area Manager notified Wilcox that, in accordance with the stipulation contained in his grazing permit, effective March 1, 1990, with respect to all cattle 6 months of age and older, only cattle bearing BLM-issued ear tags would be permitted to graze within the Green River Allotment. Ear-tagging was necessary, BLM explained, to:

1 - Detect and deter unauthorized use.

2 - Evaluate how much drift there is between allotments and where drift is most significant. This will then aid in the development of allotment management plans and range improvement projects.

3 - Properly evaluate range condition and trend under the present grazing system. Unauthorized use within the allotment may negatively affect range trend and result in an overall lowering of range condition.

4 - Improve supervision of grazing use.

(Proposed Decision at 1). BLM found additional justification for the ear-tagging requirement in Green River Allotment's large size, rugged terrain, and severe topography, the lack of adequate fencing along much of the allotment's exterior boundary which had led to problems with drifting cattle and subsequent unauthorized use in several adjacent areas, Wilcox's

year-round use of the allotment with fluctuating numbers of cattle, and the presence of leased cattle on the allotment.

Wilcox protested the proposed decision, arguing, *inter alia*, that no evidence existed of unauthorized use by him and that, despite his being a responsible and conscientious permit holder, he was being improperly singled out for special treatment, an assertion which he based on his understanding that no other lessee or permit holder in the district had been required to use ear tags. He complained that ear-tagging in early March would cause serious problems with pregnant cows since the trauma and stress associated with rounding up the cattle, running them through chutes, and tagging them would precipitate some miscarriages and calf loss, creating economic loss and hardship. He further alleged that since ear tags were easily lost in brush conditions, cattle would be classified as trespassing cattle even though they had been properly tagged but had subsequently lost those tags. He acknowledged that he, like most ranchers, had experienced some trespass of his cattle, but stressed that very few trespasses had been recorded in his files and none of these had been considered willful.

Even assuming that the objectives listed in the proposed decision were valid, Wilcox suggested that they could be accomplished by less restrictive means, noting that he had never denied BLM access to his property to count his cattle and that his cattle carried easily identifiable approved brands and earmarks. Wilcox insisted that, in light of his history of cooperation with BLM and his efforts to comply with all its rules and regulations, the imposition of the ear-tagging requirement was not justified and improperly treated him differently than other lessees and permittees in the area, and requested that the ear-tagging decision be reconsidered and a less restrictive and fairer system such as counting cattle as they were moved be utilized.

In a final decision dated November 6, 1989, the Moab District Manager summarily rejected Wilcox's protest, finding "no justification that shows that the Proposed Decision was in error, specially since you accepted the terms and conditions specified in the Term Grazing permit which you signed as accepting on January 17, 1989. ((Condition #3) Eartagging or Paint Marking may be required due to fluctuating cattle numbers.)" (Final Decision at 1). Accordingly, he affirmed the Area Manager's proposed decision.

Wilcox appealed the final decision pursuant to 43 CFR 4.470, reiterating the points raised in his protest and criticizing the District Manager's failure to either address these issues or provide any rationale for upholding the proposed decision. Wilcox requested a hearing before an Administrative Law Judge. Although BLM moved for dismissal of the appeal, its motion to dismiss was denied on June 13, 1990, by Administrative Law Judge Harvey C. Sweitzer, who framed the issue raised by the appeal as whether or not the District Manager's decision was arbitrary or capricious, the resolution of which depended upon facts to be determined at the hearing.

A hearing was held before Judge Rampton on November 27 and 28, 1990, in Price, Utah. A synopsis of the testimony adduced at the hearing will facilitate an understanding of the issues raised in this appeal.

At the hearing, Wilcox described his cow-calf operation on the Nutter Ranch, which he had leased with an option to buy, and his use of the Green River Allotment as an individual allotment.^{1/} He testified that the approximately 650 mother cows he grazed on the allotment consisted of 80-percent Brahma cross cattle with horns and some Herefords, Short Horn crosses, and Black Bawlies, all of which also had horns except for a few muleys which were born without horns. He allowed the cattle to retain their horns as a management tool, he explained, because horned cattle would hook each other and string out rather than bunch up when trailing and were better able to protect their calves from predators. He identified the four different brands which he used (all of which were registered with the State of Utah and had been submitted to BLM) and noted that the brands on his adult cattle reached approximately 18 inches in size. He contended that, in any event, as the only operator in the area running Brahma crosses and other horned cattle, his cattle were easily identified without even looking at the brands, especially since he also earmarked all his cattle (Tr. 64-72).

Wilcox acknowledged that he had leased cattle in the past when he did not have enough cattle of his own to stock the ranch, including 500 head from Dennis Weston and Orsen Comia from November 18, 1988, through November 18, 1989. Wilcox testified that he had informed BLM that 250 cattle leased from Weston and Comia would be grazed on the Green River Allotment and obtained authorization from BLM to graze those branded cattle, which BLM paintmarked, on the allotment; the remaining leased cattle were kept either on an allotment in the Vernal District, BLM, or on private pastures (Tr. 58-60; see Exh. A). Due to various problems encountered with leased cattle generally and with the Weston and Comia cattle specifically, Wilcox indicated that he no longer intended to graze leased cattle (Tr. 54-58, 61-62).

Wilcox also described the grazing rotation system utilized on the allotment. He delineated the various pastures within the allotment, both Federal and private (Exh. 4), and discussed the natural and man-made boundaries around the allotment and between the various pastures which prevented cattle from drifting onto another allotment or between pastures

^{1/} We note that, throughout the proceeding below, all sides have generally referred to the Green River Allotment as a "private" allotment. This terminology, however, is not technically correct. As we noted in our recent decision in McLean v. BLM, 133 IBLA 225, 237 (1995), the correct term for an allotment which is used by only one grazer is an "individual" allotment. We will use that term throughout this decision.

(Tr. 23-40). Wilcox acknowledged that drift did sometimes occur when hunters and others neglected to close the gates between the pastures or when elk herds trampled the fencing during migration, but stated that most of the drift involved cattle moving from Federal range to private land and that his employees constantly monitored the cattle and promptly corrected any drifting problems (Tr. 32-38).

Wilcox asserted that he had signed the permit with the ear-tagging stipulation despite his disagreement with that provision because he felt that he had no other option and had been told by a BLM employee that the provision would not be implemented. According to Wilcox, not only would ear-tagging serve no useful purpose, but a myriad of problems surrounded the actual implementation of such a requirement. Wilcox claimed that he had no facilities on the Nutter Ranch adequate to enable him to ear-tag his cattle, noting that the series of corrals in Nine Mile Canyon, which were located on BLM land within the Vernal District, were old, did not have the necessary chutes, and could not be improved since the Vernal District would not authorize any improvements (Tr. 75-76, 126). He estimated that it would cost at least \$20,000 to build appropriate corrals and chutes on private land within the Green River Allotment. While acknowledging that he did have a good set of corrals on his family ranch, Wilcox minimized their usefulness for ear-tagging the cattle on the allotment since utilizing those corrals would necessitate transporting the cattle by truck for almost 100 miles from the allotment to the family ranch (Tr. 74-77).

Wilcox then discussed the difficulties entailed in ear-tagging horned cattle, explaining that such cattle could get their horns and legs caught and broken in the chute, that cattle caught in the chute could be crippled and their calves aborted, and that people working with the cattle in close quarters could be seriously injured or possibly killed in the process (Tr. 78). Wilcox delineated additional difficulties which would arise if he were required to ear-tag his cattle, since existing earmarks in the left ears of his cattle removed significant portions of the bottom of those ears, leaving an insufficient amount of ear in which to securely place a tag, and the right ears of his cattle contained Bangs tattoos signifying that the cattle had been vaccinated against brucellosis. Fastening ear tags in the right ears of his cattle would obliterate the tattoo, Wilcox explained, thus eliminating the option of selling the cattle for breeding purposes and reducing the value of each cow by at least \$300 (Tr. 79-82).

Wilcox disputed BLM's justifications for the ear-tagging requirement, denying that drifting was a problem on the allotment and asserting again that an accurate tally of the number of cattle utilizing the allotment could easily be obtained by simply counting the cattle as they were released through the various gates to the pastures (Tr. 72-74). Wilcox testified that he had never been charged with willful trespass although he admitted to a few instances of nonwillful unauthorized use on the Green River Allotment and other BLM allotments he used, each of which had been immediately corrected and resolved without the issuance of formal trespass notices (Tr. 83-85).

On cross-examination, Wilcox expanded upon the circumstances surrounding those nonwillful trespasses, explaining that one instance resulted from his failure to realize that all calves over 6 months of age, whether weaned or not, needed to be licensed by BLM before grazing on the Federal range, while others involved cattle getting through open gates and broken fences or were merely the result of trailing mistakes (Tr. 100-106, 116). ^{2/}

The other witnesses called by Wilcox corroborated much of his testimony. Joseph B. Fallini, Jr., a Nevada cow-calf operator who also claimed he ran horned cattle because they spread out more and protected their calves from predators (Tr. 157), testified that BLM had required him to ear-tag his cattle between 1976 and 1982 (Tr. 169-70). He recounted his experiences ear-tagging his horned cattle at some length. ^{3/} He noted that he had lost a number of cows and estimated that it had cost him approximately \$30,000 to implement the ear-tagging. He concluded that ear-tagging ultimately served no useful purpose since counting the cattle would be equally effective for the purpose of keeping track of the number of cattle on any allotment (Tr. 167-86).

A. C. Ekker, a cow-calf operator running horned cattle on an individual allotment similar in terrain to the Green River Allotment, related the circumstances surrounding his response to a 1987 BLM notice requiring him to ear-tag his cattle, which culminated in his meeting with the BLM State Director where he was successful in his attempts to have the ear-tagging order rescinded. He delineated the problems he had anticipated would occur if he were required to ear-tag his horned cattle, including, in addition to the difficulties related by Fallini, the necessity "to rope and take down every cow to the ground by horseback in order to get an ear tag placed in the ear" occasioned by his lack of adequate corrals. He noted that ear tags were easily lost and suggested other methods to obtain an accurate tally of cattle on the allotment. Ekker stated that his presentation of these concerns to the State Director persuaded the State Director that the costs associated with ear-tagging in his situation vastly outweighed its benefits, leading to the reversal of the ear-tagging decision. Ekker further opined that ear-tagging would similarly serve no beneficial purpose in Wilcox's case (Tr. 195-204).

Henry G. Mills, a coal miner and rancher who ran a 200-head cow-calf operation in Nine Mile Canyon, the operation in closest proximity to the

^{2/} On rebuttal, Wilcox testified that the most recent incident of trailing without a permit involved rounding up and trailing a few stragglers off

the summer range to the ranch headquarters which, he asserted, he had been told would be covered by the existing trailing permit for his 650-head herd (Tr. 371-73).

^{3/} Exhibit 5, a copy of a film which Fallini had made depicting his experiences with ear-tagging horned cattle and reproduced in video format, was admitted into evidence over BLM's objections.

Nutter Ranch, testified that BLM had directed him to ear-tag his cattle in August or September 1989. He explained that, although he opposed the requirement, he did not protest it since his brother-in-law, who held the allotment at the time the order was issued, decided that protest would be futile and, accordingly, he and his brother-in-law complied with the ear-tagging order (Tr. 207-16). Mills agreed that his cattle and Wilcox's horned cattle were readily distinguished from each other and asserted that he had never encountered any problems of drift of cattle from the Wilcox allotment onto his allotment, beyond an occasional stray. He opined that no useful purpose would be served by requiring Wilcox to ear-tag his cattle (Tr. 218-19).

Joseph Bolton, a cowboy who had worked for Wilcox for 15 years, explained the process by which cattle were moved from one area of the allotment to another in accordance with the grazing rotation system established in the grazing permit. He discussed the tally books both he and Wilcox used to keep track of the number of cattle on the allotment and ensure an accurate count and agreed with Wilcox that horned cattle were generally easier to handle than cattle without horns and that the cattle could readily be counted at various places on the allotment. He also asserted that not only would it be difficult to ear-tag the horned cattle, but it would serve no useful purpose (Tr. 221-28).

BLM's witnesses included Gary Weston, a rancher authorized to graze approximately 500 head of cattle on BLM allotments in the Salt Lake District, who testified that he voluntarily uses ear tags as a management tool in his operation, though he subsequently admitted that he did not graze his cattle on the open range, but rather pastured the cattle on farms separated by barbed wire with 17 other permittees and a total of 1,500 cattle (Tr. 233-34, 248-50). He also agreed that horned cattle were more difficult to work with in a chute or corral and that it would be harder to ear-tag horned cattle than his hornless cattle (Tr. 250-52). He also related the circumstances surrounding the leasing of his and Cornia's cattle to Wilcox, describing the leases themselves, the number of cattle leased, and the problems he and Cornia had encountered with Wilcox (Tr. 235-45).

Mark E. Bailey, the Price River Resource Area Manager, discussed the circumstances surrounding the signing of the grazing permit and the prior notice Wilcox had received that ear-tagging was being considered for the allotment (Tr. 253-55). He justified the imposition of ear-tagging as based on concerns which he and his staff had with respect to the number of cattle actually utilizing the allotment, noting that it was virtually impossible to obtain an accurate count once the cattle had been turned out on the range, particularly given the rough terrain and considerable cover. He also suggested that the four different brands which Wilcox utilized increased the difficulties involved in ascertaining usage. When these factors were combined with Wilcox's numerous turnouts (between 6 and 10) every year, Bailey argued that it was difficult for the limited staff of the Area Office to maintain a handle on the situation.

Bailey also stated that, historically, there had been a problem with cattle drifting between allotments and within individual allotments and, given the fact that this was the largest allotment in the resource area and the only one in which year-round use was permitted, the Green River Allotment was difficult to supervise with the limited resources available (Tr. 257-58). ^{4/} Bailey also referred to certain instances of unauthorized use both outside and within the Green River Allotment by Wilcox, including three or four times within the past year when Wilcox had cattle either in unauthorized areas or out without a license, the latest example of which occurred the Friday before the hearing when Wilcox had trailed cattle without a trailing permit (Tr. 258-59). On cross-examination, Bailey detailed the four unauthorized use instances which had occurred within the past year. Bailey acknowledged that Wilcox had quickly corrected the problems once he had been informed of them and conceded that no formal trespass notices had been issued as a result of these incidents since they did not "impose a misuse of the allotment to the point that I would issue a trespass" (Tr. 271). Bailey further admitted that four of those incidents had arisen after his issuance of the proposed decision and that only one unauthorized use episode, Wilcox's grazing of unweaned calves over 6 months old on the allotment without licensing them, had occurred prior to the proposed decision (Tr. 272-73).

Bailey conceded that it would be possible to count the cattle as they were released onto the Federal range if Wilcox informed BLM each time cattle were to be turned out and BLM had the personnel available to make the count at those times (Tr. 265). He also acknowledged that BLM had not imposed any ear-tagging in those allotments in the resource area where permittees ran in common and trespass notices had been issued, that as long as the number of cattle were known, the use of feed on the range could be properly evaluated, that an experienced range rider could identify visible brands, and that even with ear tags, brand identification would be necessary to substantiate unauthorized use (Tr. 276-88).

Bailey confessed that he had not considered the problems associated with ear-tagging as presented at the hearing before rendering his proposed decision and that the ear-tagging process would be more difficult and expensive than he had originally envisioned (Tr. 280). Nevertheless, he maintained that there was sufficient justification for the ear-tagging requirement, reiterating his suspicion that, although he had no compelling evidence, unauthorized use was occurring on the Green River Allotment (Tr. 282-84).

^{4/} Thus, Bailey noted that he had only three staff members and 114 allotments to supervise, of which the Green River Allotment was the largest and hardest to monitor (Tr. 259-61).

Dennis J. Willis, the supervisory range conservationist involved in the decision to require ear-tagging on the Green River Allotment, testified that, during his 11-year tenure with the Price River Resource Area, five operators, including Wilcox, had utilized the Nutter Ranch, and the on-going problem with numbers control and drift throughout this period had led BLM to anticipate implementing an ear-tagging program for the allotment, of which Wilcox had been advised prior to the issuance of his permit. Willis admitted, however, that recent concerns as to drift both within and outside of the allotment and strong suspicions that Wilcox was grazing excess cattle under his present permit had influenced the recommendation that ear-tagging be required on the Green River Allotment (Tr. 293-95). Willis enumerated other concerns animating the ear-tagging decision, including Wilcox's use of multiple brands, his leasing of cattle, the number of activations of cattle during the year, and the nature of the terrain and topography, all of which complicated supervision of the allotment and also justified the disparity of treatment between Wilcox and other cattlemen in the Resource Area (Tr. 295-302).

Willis disputed Wilcox's claim that lost tags were a significant problem in ear-tagging situations and denied that the cattle could be counted at any time, noting that BLM lacked the available personnel to count them once the cattle had been turned out onto the range (Tr. 302-04). While Willis averred that alternative methods of monitoring the numbers on the allotment had been considered, he stated that ear-tagging was the ultimate tool for detecting a numbers control problem on hard to supervise ranges. Willis claimed that, in addition to providing indications of excess usage, it also gave BLM the ability to determine whether instances of drift or of cattle remaining on a pasture after removal of the rest of the herd involved different cattle each time or the same individual cows (Tr. 307, 313). Willis also testified that he had observed the ear-tagging of horned cattle in Nevada and had seen none of the problems portrayed in the Fallini film (Tr. 309-11). He subsequently asserted that he did not believe it would be more expensive to ear-tag horned cattle than hornless cattle based on his own observations of ear-tagging operations in Nevada (Tr. 355).

On cross-examination, Willis admitted that Wilcox's cattle could be counted as they were turned out on the Federal range if BLM knew when the cattle were to be released, but he denied that counting the cattle would meet all of his objectives with respect to the allotment since he was interested in the total numbers of cattle present and free-roaming on the range, not just the number passing through the gate on a given day. He noted that, in any event, BLM had neither the capability of attending every release of cattle nor any assurances that it would be there every time cattle were released, though he acknowledged that he had never discussed with Wilcox the possibility of counting the herd prior to turnout and that such a count could probably be arranged (Tr. 325-36, 345).

In response to questioning by Judge Rampton, Willis explained that his continuing concern with the allotment throughout his tenure in the resource area stemmed from the difficulty in counting the cattle once they were on

the range and a general feeling that more cattle were out there than stocking rates would indicate, adding that "[i]t wasn't something we were able to prove to the point of being able to issue a trespass. It was largely just suspicion and feeling that we were dealing with more livestock than were under permit there" (Tr. 353). Willis testified that he did not consider either the Bangs tattoo or the earmarks found on Wilcox's cattle when he recommended the ear-tagging program (Tr. 356). He also acknowledged that Wilcox was a better operator than his predecessors (Tr. 357-58) and admitted that the decision to ear-tag had been made before BLM issued Wilcox his grazing permit and was merely awaiting funding before implementation (Tr. 358).

In his decision, after summarizing the testimony presented at the hearing, Judge Rampton observed that, while ear-tagging indisputably constituted a proper management tool for the orderly administration of the range and that BLM had broad discretion to require ear-tagging even if that requirement placed a burden on livestock operators, any BLM decision grounded on the orderly administration of the range must, nevertheless, be reasonable and rational and, therefore, Wilcox bore the burden of proving that the decision requiring him to ear-tag his cattle was arbitrary or capricious.

Judge Rampton accepted as unchallenged the fact that ear-tagging would impose substantial economic hardship on Wilcox due to the necessity of conducting a separate roundup of his horned cattle, penning and separating the cows from the calves, and constructing the required special corrals and chutes, the approximate cost of which amounted to \$20,000. The Judge also found that the ear-tagging process would likely cause some damage to the cattle, such as broken horns and legs and, possibly, paralysis and death, discounting BLM's opinion that the problems associated with ear-tagging horned cattle were not as serious as depicted in the Fallini film. Judge Rampton noted that many of BLM's witnesses lacked direct knowledge of the problems of ear-tagging horned cattle and that Bailey had admitted that he was unaware of all the consequences of requiring ear-tagging of horned cattle when he ordered that tagging. Judge Rampton further adopted as fact the un rebutted testimony that placement of the ear tags on the left ears of Wilcox's cattle was not feasible due to the earmarks and that installation of the tags on the right ears would ruin the Bangs tattoos, thus lowering the value of the cattle by \$300 per head. After considering all the problems associated with ear-tagging Wilcox's horned cattle, Judge Rampton ruled that ear-tagging such cattle should not be mandated save for compelling reasons.

Judge Rampton proceeded to evaluate BLM's rationale for directing Wilcox to ear-tag his cattle, *i.e.*, its suspicion that the number of cattle on the allotment exceeded the allowed use and its concern with drift between pastures within the allotment. While acknowledging that BLM personnel encountered management problems due to Wilcox's authorization to turn out differing numbers of cattle at different times of the year, the Judge cited BLM's admission that, with proper notice, a turnout count could

be made since the turnout gates were accessible by vehicle. Although such a count would not fully alleviate BLM concerns about drift of cattle within the allotment, ^{5/} the Judge noted that BLM considered drift only a secondary problem while suspicions that the numbers of cattle on the allotment surpassed the permitted use constituted BLM's primary reason for requiring ear-tagging. Since, however, Wilcox's cattle were distinctive breeds, horned, earmarked, and branded with clearly readable brands, the Judge found that a trespass count would be simple to obtain.

Judge Rampton rejected BLM's attempted reliance on Wilcox's acceptance of the grazing permit which contained the proviso that ear-tagging might be required as forestalling Wilcox's present challenge to the requirement, noting that the acceptance had been made under time constraints, with some assurance that ear-tagging would never be imposed, and at a time when the decision to require ear-tagging had not yet been finalized. Judge Rampton noted that Wilcox had declared that he did not intend to place leased cattle on the allotment in the future so that problem, at least, seemed somewhat resolved. He concluded that "an expensive ear tagging operation which can cause harm to horned cattle is not justified in this instance where the only possible benefit to proper range management is to determine which of [Wilcox's] cows are drifting off the authorized areas within the allotment" (Decision at 13). Judge Rampton continued:

I find that the benefits of the required ear tagging to the proper management of the allotment are meager. In comparison to the multiple problems associated with the requirement and the fact that any trespasses committed by [Wilcox] have not been shown to be serious or to justify issuance of formal trespass action, a conclusion is mandated that the decision of the District Manager is arbitrary and capricious in that it is not necessary to properly manage the Green River North Allotment and is therefore overruled.

(Decision at 13-14).

In its statement of reasons for appeal (SOR), BLM contends that Judge Rampton's decision contains both mistakes of fact and errors of law. Thus, BLM asserts that the Judge imposed a heightened standard of justification for BLM decisions to require ear-tagging of horned, as opposed to hornless, cattle that neither the regulations nor applicable precedent supports. More generally, BLM disputes Judge Rampton's use of a balancing test to determine the appropriateness of the ear-tagging order, insisting that any valid reason or explanation for the requirement satisfies

^{5/} In this regard, moreover, Judge Rampton found that the record was ambiguous as to whether the expensive and difficult ear-tagging requirement would, in any event, materially aid in determining how many of Wilcox's cattle were on their authorized areas within the allotment.

the applicable arbitrary or capricious standard and that, since ear-tagging serves rational range management goals, the expressed reasons for ordering Wilcox to ear-tag his cattle overcome any difficulties or hardships alleged by Wilcox and suffice to validate BLM's decision (SOR at 5).

Moreover, BLM reiterates its contention, contrary to Judge Rampton's (as well as Judge Sweitzer's) conclusion, that Wilcox is bound by the ear-tagging condition in his permit, arguing that his signing of the permit containing the ear-tagging proviso and his payment of grazing fees constitute a binding acceptance of the condition and a waiver of his right to object thereto. BLM challenges the grounds for the Judge's rejection of its reliance on the permit provision, asserting that the plain language of the condition indicates that ear-tagging may be required, that Wilcox had sufficient notice that BLM was contemplating requiring ear-tagging on the allotment, and that Wilcox's statements that he was assured that the condition would not be implemented were self-serving hearsay. BLM submits that failure to uphold the plain language of the permit would render the conditions of a permit meaningless and thwart the ability of BLM managers to rely on permit provisions agreed to by permittees.

Additionally, BLM objects to Judge Rampton's allowance, over its objections, of the testimony of Fallini, including the film he brought to the hearing. BLM suggests that the admission of this evidence was both inappropriate and was clearly prejudicial to BLM as it was overly emphasized in the Judge's decision. BLM challenges the relevancy of Fallini's testimony concerning his ear-tagging operation in Nevada in the 1970's, which BLM characterizes as describing events far removed in time and circumstances from the present appeal, to the present situation. ^{6/} However, BLM's main quarrel with the admission of Fallini's evidence centers on the film shown at the hearing which graphically depicted the harm suffered by Fallini's cattle during his ear-tagging efforts. BLM describes the film as blatant sensationalism and insists that the ear-tagging mandate did not force Fallini to abuse his cattle as shown in the film, observing that Willis testified that he had observed other ear-tagging operations in Nevada during the 1970's which did not create the havoc portrayed in the Fallini film.

BLM also argues that Judge Rampton made erroneous factual findings which improperly influenced his decision. Specifically, BLM suggests that

^{6/} We note, however, that although BLM objected to Fallini's testimony concerning the rationale for and exercise of BLM's discretion in ordering him to ear-tag his cattle (Tr. 162-63, 164-66), it did not object to Fallini's explication on the efforts which he undertook to comply with the order that he ear-tag his cattle. Furthermore, while BLM now seeks to challenge Fallini's testimony concerning other issues, BLM's failure to object to this testimony at the hearing precludes it from contesting the admission of this evidence on appeal.

the Judge's undue emphasis on the Fallini film is evidenced in his mistaken reference to the showing of the film at a meeting between Ekker and the BLM State Director, a showing which was not referenced in Ekker's testimony. The existence of such factual errors, BLM suggests, necessarily discounts the weight which can be accorded to Judge Rampton's conclusions.

BLM concedes that there are difficulties associated with ear-tagging and acknowledges that Bailey admitted that ear-tagging Wilcox's horned cattle would be more difficult than he originally envisioned. BLM maintains, nevertheless, that ear-tagging would not be impossible since the cattle are not so wild or dangerous as to be unmanageable. ^{7/} BLM contends that the Judge ignored the fact that cattle are routinely subjected to "worse indignities than ear-tagging" (SOR at 11), including branding, castration, and pregnancy testing, and that "the ultimate destiny of these cattle is to be butchered and sold as meat" (SOR at 11-12), and asserts that since a competent livestock operator should be able to handle his cattle under all circumstances, the Judge had no grounds upon which to conclude that ear-tagging would place an overly difficult burden on Wilcox or his cattle.

BLM also criticizes what it views as Judge Rampton's failure to note its serious concerns with Wilcox's running of leased cattle on the Federal range and how ear-tagging would help monitor the problem. Moreover, it questions his reliance on Wilcox's expressed intent not to place leased cattle on the allotment in the future, observing that Wilcox could change his mind and, indeed, offers two documents evidencing leases entered into by Wilcox after the hearing; leases which, BLM claims, demonstrate that Wilcox has continued to run leased cattle. Finally, BLM disputes the propriety of the Judge's finding that ear-tagging would interfere with the vaccination tattoos in Wilcox's cattle's ears, arguing that this issue was not raised until the hearing, that BLM articulated valid management reasons for the ear-tagging mandate, and that, at most, the matter should be remanded to BLM for a determination of the potential effect of the possible vaccination tattoo problems on the ear-tagging program. ^{8/}

^{7/} Although BLM cites Wilcox's admission that he had the facilities to ear-tag his cattle at his operations near Green River, Utah, we note that those facilities are 100 miles away from the allotment and that use of those corrals for ear-tagging would necessitate transporting the cattle to the corrals by truck.

^{8/} BLM also lists other alleged factual errors which it contends may have led the Judge to faulty conclusions. Most of these supposed mistakes consist of statements in the Judge's summary of the testimony presented at the hearing, which BLM takes out of context and mischaracterizes in an attempt to weaken the Judge's factual findings. Not only do the challenged statements find support in the testimony when viewed as a whole, but even if they were erroneous, none of them would be sufficient to undermine the soundness of the Judge's decision.

[1] At the outset, we note that certain basic principles of grazing adjudications are well settled. Thus, any party objecting to a grazing decision issued pursuant to BLM's exercise of its administrative discretion has the burden of demonstrating, by a preponderance of the evidence, that the decision is unreasonable or improper. See Kelly v. BLM, 131 IBLA 146, 151 (1994); Klump v. BLM, 124 IBLA 176, 182 (1992). More specifically, the applicable regulation, 43 CFR 4130.5(c), expressly provides that the authorized BLM 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." Under this regulation, BLM is clearly invested with the discretionary authority to require ear-tagging for the purpose of promoting the orderly administration of public lands, and a decision directing the ear-tagging of livestock will be sustained where the record establishes a rational basis for that decision. See Rees Land & Livestock Co. v. BLM, 82 IBLA 265, 266 (1984); C-Punch Corp., 67 IBLA 293, 295 (1982); Andrew H. L. Anderson, 32 IBLA 123, 126-27 (1977). In this case, Judge Rampton essentially determined that Wilcox had met his burden of establishing that BLM's decision ordering him to ear-tag his cattle was arbitrary and capricious because the requirement was not necessary for the proper management of the Green River Allotment. Although BLM vigorously assails the Judge's ruling, we find that his decision is firmly grounded in the law and that the record amply supports his determination.

While BLM contends that a decision to ear-tag is proper so long as BLM has articulated valid reasons for the requirement, the reasonableness of the requirement rests not only on the legitimacy of the relevant range management concerns but also on the efficacy of ear-tagging as a means of fostering the desired results; i.e., if ear-tagging would have no effect on the objectives of a program, then such a requirement would necessarily be arbitrary and capricious regardless of whether or not it might, under other circumstances, be deemed reasonable and prudent. Thus, any determination of the propriety of an ear-tagging order involves an analysis of the particular circumstances surrounding its imposition, including an examination of BLM's stated rationale for its decision and a weighing of the effects which ear-tagging might be expected to achieve against the burdens that ear-tagging imposes on the operator and his cattle. While even severe economic injury to a grazer will not, in and of itself, invalidate a BLM decision, the level of impact is, nevertheless, one factor bearing on the reasonableness of BLM's determination. See Yardley v. BLM, 123 IBLA 80, 93 (1992).

Similarly, while we agree with BLM that the same standard of reasonableness applies regardless whether the livestock to be ear-tagged are horned or hornless, the fact that the cattle have horns and the ramifications of that characteristic on the ear-tagging process comprise factors which are properly considered in determining the reasonableness of the ear-tagging decision. BLM's assumption that the proffer of any valid agency reason for implementing an ear-tagging order automatically outweighs any difficulties or hardships alleged by a livestock operator in complying with

the order is simply a misapprehension of the requirements of the law. In short, we can perceive no error in the legal construct which Judge Rampton utilized in weighing the evidence.

We also reject BLM's contention that Wilcox is bound by the ear-tagging condition in his grazing permit. That condition simply notified Wilcox of the possibility that ear-tagging "may" be required, not that ear-tagging definitely "will" be required. The mere possibility that an action might be required does not invariably mean that it will be required. Forcing grazing permittees to either object to permit provisos advising that certain actions might be ordered in the future or lose their right to challenge a future decision actually implementing those provisos would burden BLM and this Board with protests and appeals of conditions which might never be imposed. Indeed, it is open to question whether or not this Board would ever entertain such an appeal absent an express indication that the conditional proviso was about to be implemented. See, e.g., AMAX Coal Co., 131 IBLA 324, 327-28 (1994). The proper time to contest such a permit provision occurs when the condition is actually activated. And that is what occurred herein.

To the extent that BLM challenges the admissibility of both Fallini's testimony and his film, the record discloses no basis, whatsoever, to reverse Judge Rampton. Thus, we have noted that "decisions of an Administrative Law Judge allowing the introduction of evidence which he deems relevant and probative are generally left to his or her good judgment." United States v. Feezor, 130 IBLA 146, 188-89 (1994). Moreover, as we indicated in United States v. Feezor, supra, where a party challenging the admissibility of evidence fails to avail itself of the opportunity to obtain interlocutory review of that question, the Board will normally not entertain a similar challenge to the admission of evidence in the course of its consideration of an appeal.

To the extent, on the other hand, that BLM objects to the weight which Judge Rampton accorded the Fallini testimony and tape, we must point out that BLM failed to exercise its right to cross-examine Fallini or otherwise undermine his credibility at the hearing. While BLM clearly believes that Judge Rampton should have accorded more weight to the testimony of Willis which downplayed the difficulties of ear-tagging homed cattle rather than that of Fallini which highlighted it, Judge Rampton, who had the opportunity to observe the witnesses, chose to accept Fallini's testimony as the more credible. As we recently reiterated in United States v. Carlo, 133 IBLA 206, 211 (1995), "[W]here the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board." We find that more than ample evidence supports Judge Rampton's findings as to the difficulties and expense of ear-tagging

horned cattle as disclosed in the record developed below.^{9/} Thus, the question devolves into a determination whether the record establishes that anticipated benefits are likely to justify the hardships which ear-tagging Wilcox's cattle would create.

As we noted earlier, BLM articulated four bases in support of its decision to require ear-tagging. The problem, however, is that while each of the proffered justifications implicated a valid range management concern, the record fails to either confirm that some of the problems presently exist on the allotment or, alternatively, that ear-tagging would alleviate those that have been shown to be present.

Thus, BLM principally relies on ear-tagging's ability to aid in the detection and deterrence of unauthorized use as its major objective in requiring ear-tagging. The evidence, however, fails to substantiate that unauthorized use has been a significant problem on the allotment under Wilcox's management. BLM admits that only one incident of unauthorized use, Wilcox's grazing of unweaned calves over 6 months of age on the allotment, assertedly based on his erroneous belief that no license was required for calves which had not been weaned, occurred prior to the issuance of the proposed decision and that this episode was not considered serious enough to warrant a formal trespass notice. Even if the more recent incidents were considered, none of which rose to the level which officials deemed to warrant issuance of a trespass citation, they would still fail to support a pattern of unauthorized use sufficient to sustain an ear-tagging requirement. Mere suspicion of unauthorized use, based on problems with past holders of the allotment and the existence of leased cattle on Wilcox's private land in excess of the number permitted to graze on Federal range, without concrete evidence of range misuse, do not establish the existence of an unauthorized use problem which would justify implementation of the ear-tagging directive.

Nor has BLM shown either that drift is a significant problem on the allotment or, assuming that it is, how ear-tagging would alleviate it. The evidence established that the various areas within the allotment are separated by natural boundaries and fencing, that the minimal drift which occurs is prompted by other users of the land neglecting to close gates and migrating elk herds trampling down fences, and that Wilcox's employees continuously monitor the pastures and fix problems as they occur. Furthermore, Wilcox's cattle are readily distinguishable from other cattle in the area and can be easily identified as belonging to him even without ear-tags. Given that the only BLM-identified benefit which ear-tagging might afford in a drift situation would be to indicate whether the same cattle or different cattle are involved in each episode, a decision to require ear-tagging, with all its attendant difficulties, as a means to evaluate a minimal drift problem is simply not reasonable.

^{9/} In this regard, we believe that Judge Rampton's admittedly erroneous statement in his summarization of Ekker's testimony scarcely establishes error in his ultimate conclusion on this question.

Finally, BLM has not shown how evaluating range conditions or improving supervision of grazing use reasonably requires the imposition of ear-tagging. Both of these goals depend on obtaining accurate numbers of cattle on the range and the evidence was undisputed that, while counting the cattle loose on the range would be difficult, accurate numbers could be obtained by counting the cattle each time they are released onto the range. ^{10/} While the existence of alternative methods of achieving legitimate range management goals does not necessarily mandate revision of a BLM decision reached in the exercise of its discretionary authority (see, *C-Punch Corp.*, *supra* at 295), these less onerous options cannot be totally ignored when evaluating the reasonableness of BLM's decision. We conclude that, based on all the specific circumstances presented by this appeal, Judge Rampton did not err in concluding that, under the facts of record herein, BLM's decision requiring Wilcox to ear-tag his cattle was arbitrary and capricious.

We are fully aware that BLM has included with its SOR copies of lease agreements between Wilcox and both his attorney in the hearing below and a witness (Mills) who appeared in his behalf, entered into after the hearing and which obligate Wilcox to care and maintain approximately 206 head of cattle. We recognize that these arrangements were entered into less than 3 months after Wilcox had declared that he did not intend to continue to take in leased cattle on the Nutter ranch (Tr. 56). While these documents certainly do give us pause, we believe that certain observations relating thereto are in order.

First of all, though there is no express indication that any of these cattle will be turned out on the Federal range, the fact that each lease contains a provision requiring the prompt notification of the Price River Area Office gives rise to at best an inference that they might be. However, we also note that the Mills lease is of relatively short duration (10 months) while the longer (10-year) lease between Wilcox and his attorney is actually in the nature of a sale/lease-back arrangement since it involves 111 head of cattle (all bearing the Diamond W brand) which Wilcox had recently sold to his attorney. Thus, these agreements seem unlikely to exacerbate the exigent situation in the Green River Allotment.

More fundamentally, the applicable regulation, 43 CFR 4.24(a)(1), limits the record subject to review to that developed at the hearing. Pursuant to this regulation, the Board has consistently ruled that evidence tendered on an appeal, regardless of the justification for the late

^{10/} Admittedly, the efficacy of this approach is dependent upon the proper and timely notification of BLM each time cattle are turned out on the Federal range. In the absence, however, of any indication that Wilcox has intentionally turned out cattle and failed to timely notify BLM, there is no basis in the record for presuming he might do so in the future.

proffer, may be considered solely for the purpose of determining whether another hearing should be ordered. See, e.g., United States v. Aiken Builders Products (On Reconsideration), 102 IBLA 70, 79 (1988), and cases cited. We do not believe a further hearing would be warranted herein.

Not only is it unlikely, as we indicated above, that these leases would, by themselves, significantly exacerbate any problems related to the Green River Allotment, but, more importantly, nothing in the instant decision is preclusive of the future imposition of an ear-tagging requirement should BLM establish sufficient justification therefor. Thus, if BLM believes that activities on the Green River Allotment during the pendency of this appeal or subsequent thereto establish a need for such a requirement, BLM may proceed to implement it as it deems appropriate. It goes without saying, of course, that in any appeal from such an order, BLM would need to show more than was established herein. But nothing in our decision precludes it from attempting to make such a showing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rampton's decision is affirmed.

James L. Burski
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge