

INTERIOR BOARD OF LAND APPEALS

Baltzor Cattle Co.

v.

Bureau of Land Management

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BALTZOR CATTLE CO.

v.

BUREAU OF LAND MANAGEMENT

IBLA 94-287

Decided October 20, 1997

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., setting aside the decision of the Owyhee Resource Area Manager finding Baltzor Cattle Company in willful trespass, assessing \$653.13 for forage consumed and expenses incurred, and suspending 21 percent of its active preference for 2 years for knowingly or willfully making a false statement or representation in its Actual Use Report. ID-01-93-04.

Affirmed in part and modified in part.

1. Evidence: Generally—Evidence: Sufficiency—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

In determining whether grazing trespasses 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 by innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

2. Evidence: Generally—Evidence: Sufficiency—Grazing Permits and Licenses: Actual Grazing Use Reports

A finding that a violation of a requirement to report the removal of cattle from an allotment was knowing or willful, may be negated by a good faith belief that the requirement did not apply in the circumstances of a given case. The issue is the reasonableness of the permittee's belief that the cattle had been removed previously and Appellant's understanding of the nature of the reporting obligation imposed by an Actual Grazing Use Report.

3. Grazing Permits and Licenses: Actual Grazing Use Reports

In requiring a grazing permittee to "[u]se a separate line for every day that you either turn livestock in or take livestock out of an allotment or pasture," the Actual Grazing Use Report requires a daily entry for each movement of cattle onto, or off of, the allotment. The Actual Grazing Use Report is designed to establish the amount of forage actually consumed by all of the permittee's cattle present on the Federal range during the reporting period, and it is immaterial whether the forage was consumed by cattle that returned to the allotment after being removed. Given the stated purpose and objective of the report, it is not correct that a permittee whose cattle have returned to the allotment after the end of the grazing season, but before the Actual Grazing Use Report has been filed, has no obligation to report their removal in the Actual Grazing Use Report.

4. Grazing Permits and Licenses: Actual Grazing Use Reports

The Actual Grazing Use Report instructs permittees and lessees to include other information such as death losses, disease, and unauthorized use by strays. This is intended to elicit any information that reasonably bears upon the data and activities elsewhere reported on the form by the permittee.

5. Grazing Permits and Licenses: Actual Grazing Use Reports–Grazing Permits and Licenses: Trespass

Until the Actual Grazing Use Report is submitted, its terms require the permittee or lessee to report the cattle taken into, or gathered from, the allotment each day, without regard to whether they previously had been removed.

6. Grazing Permits and Licenses: Actual Grazing Use Reports

With regard to the information to be reported, the Actual Grazing Use Report requests the permittee's cooperation in providing accurate information. Permittees are also required to certify the completeness and accuracy of their grazing use, as evidenced by signing the report, and further warned of criminal penalties for "any false, fictitious, or fraudulent statements or representations." These instructions or requirements constitute more than adequate notice that a permittee is required to take appropriate steps to ensure that the data reported are accurate and complete, and that BLM deems the information to be important to the conduct of its official duties.

7. Evidence: Generally—Evidence: Sufficiency—Grazing Permits and Licenses: Actual Grazing Use Reports—Grazing Permits and Licenses: Trespass

An accurate tally of cattle turned onto, and removed from, an allotment is necessary to assure not only the accuracy of an Actual Grazing Use Report, but to assure that all of the cattle are removed at the end of the grazing season, and in appropriate circumstances, the failure to report accurate information at the close of the season may be sufficient to establish a violation of 43 C.F.R. § 4140.1(b)(8) (1992). Where BLM has not shown that the permittee's behavior demonstrated recklessness, gross negligence, or indifference to the obligation to report accurate information, BLM has not established a knowing or willful violation of the regulation.

8. Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

Reductions of 21 percent for 2 years have been deemed appropriate in other cases involving willful and repeated trespasses, but not for a first-time, nonwillful, 10-AUM trespass.

APPEARANCES: Kenneth M. Seby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management; John T. Schroeder, Esq., and W. Alan Schroeder, Esq., Boise, Idaho, for Baltzor Cattle Company.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Bureau of Land Management (BLM) has appealed from the December 22, 1993, Decision of Administrative Law Judge John R. Rampton, Jr., setting aside the Owyhee Resource Area Manager's March 15, 1993, Decision finding that Baltzor Cattle Company (Baltzor) engaged in a willful trespass involving 81 cattle from November 5 to November 8, 1992, and assessing \$653.13 for forage consumed and expenses incurred in detecting, investigating, and resolving the violations. The Area Manager also suspended 21 percent of Baltzor's active preference for 2 years for knowingly or willfully making a false statement or representation in its Actual Grazing Use Report (AGUR or Report). In addition, Judge Rampton concluded that Baltzor's errors did not justify the imposition of a sanction.

Baltzor is a small family corporation that includes Allen Baltzor, his father, Frank Baltzor, who was not involved in this matter and did not give evidence, Allen's wife, Virginia Baltzor, and their daughter, Kathleen Wysocki. Allen and Virginia Baltzor live at the Baltzor ranch

in Malheur County, Oregon, and graze cattle on the McBride/Jackson Allotment, most of which is in Owyhee County, Idaho. Baltzor was authorized to graze 263 cattle to the extent of 1,702 animal unit months (AUM's) on the McBride/Jackson Allotment from April 1 through October 31, 1992.

The southwestern boundary of a portion of the allotment, called the Westgate area, is roughly 3 miles from the Baltzor Ranch. Baltzor grazes cattle on this area and on a larger area of the allotment in the Coal Mine Basin to the north. Between the Westgate and Coal Mine Basin areas of the McBride/Jackson Allotment are two fenced allotments that include mostly private land, but some Federal land as well. Baltzor grazes cattle all year on these fenced allotments. Other permittees on the McBride/Jackson Allotment include L.S. Ranch, Hayhurst Ranch, and the Chipmunk Grazing Association, each of which holds private land adjacent to the allotment. All of the permittees, including Baltzor, graze Hereford cattle with red bodies and white faces.

The BLM's Decision cited 43 C.F.R. § 4140.1(b)(1)(iii) (1992), which prohibited grazing "[i]n an area or at a time different from that authorized." The BLM also cited 43 C.F.R. § 4140.1(b)(8) (1992), which prohibited "[k]nowingly or willfully making a false statement or representation in * * * actual use reports." Departmental regulation 43 C.F.R. § 4170.1(a) provides that BLM may suspend grazing use in whole or part for a violation of any of the provisions of Part 4100. The Decision did not, however, state the factual bases for the determination that these regulations had been violated by Appellant.

At the conclusion of 2 days of testimony, Judge Rampton found that the trespass was not willful and had been admitted, and reduced the assessment against Baltzor to \$92.50 for 10 AUM's. He concluded that Baltzor did not knowingly or willfully file a false Report, finding that there was no intent to deceive and thus that the inaccurate information stated in the Report was a simple mistake. (II Tr. 527.) Judge Rampton directed counsel for Baltzor to draft a written Decision, including findings of fact and conclusions of law, which he issued with virtually no editing.

With respect to the reported numbers of cattle removed at the end of October, in the written Decision Judge Rampton found that the AGUR erred only in reporting the removal of 98 head on October 28, when Allen Baltzor was not on the allotment, and 30 to 35 pairs were gathered by the Baltzors' daughter, Wysocki, and Ruby Staples, a neighbor. On that day, Allen Baltzor's wife, Virginia, had cared for Wysocki's infant son "and when Ms. Wysocki arrived at the house of Virginia Baltzor * * *, the discussions pertain[ed] to her son, and not the gathering of livestock." (Decision at 3.) Judge Rampton concluded: "The Baltzor's [sic] actual use report entry of October 28, 1992, was a mistake and was not willful or knowing." Id.

With respect to Baltzor's failure to report the gathering of cattle on November 8, the Decision goes beyond Judge Rampton's ruling from the bench.

Finding No. 23 states in part: "The Baltzor's [sic] actual use report did not report any entry on November 8, 1992, and I find that it was not necessary because it was not required. Baltzor would have only been guessing as to what the actual use was and Baltzor did not count the cattle." (Decision at 5.) Holding that Baltzor was not required to report the cattle is far different from holding that it did not knowingly or willfully fail to report their removal on its AGUR, and we accordingly modify Finding No. 23 in the Decision so that it conforms to the ruling from the bench as it was reported in the transcript. (II Tr. 526-27.) 1/

The BLM does not contest Judge Rampton's determination that the trespass was nonwillful or his assessment of a fee of \$92.50, which we therefore affirm, but instead asserts that "had the Baltzors been candid in their dealing and reports to BLM, BLM may never have sought a willful rate for the trespass." (Statement of Reasons (SOR) at 2, n.1.) However, BLM maintains:

The circumstances surrounding the completion and filing of the Actual Use Report do not objectively comport with the notion that Baltzor acted in good faith through innocent mistake, but rather reflect conduct [so] lacking in reasonableness or responsibility that it is reckless or negligent and constitutes willful or knowing acts by Baltzor under the regulations.

(SOR at 3.)

Allen Baltzor testified that the terrain is rough and includes "many pockets where two or three or four pair of head may be" so that one riding through the area may be unable to see them. (II Tr. 474-75.) Photographs and topographic maps confirm his testimony. He testified that in removing the cattle from the allotment, they gather what they find each day. The record establishes that in Baltzor's practice, the number of cattle gathered each day is not reconciled as they are gathered, and that Appellant's principals "gather the cattle that we find on that day, and whether it's 80 percent, 90 percent or 110 percent of the turn-out numbers is irrelevant until we get them on the home place." (II Tr. 475.) Once there, they are counted "in the gate." Id. Once removed from the McBride/Jackson Allotment to the fenced allotments, cattle can return if the gates are left open.

1/ Judge Rampton stated: "I find that there was no proven intent to trespass, and that the trespass is nonwillful. As far as the [actual use] report that was given, the cattle count, yes, there were errors in there, but I don't find any evidence of willfulness justifying any sanctions." (II Tr. 526.) He restated his ruling: "[W]as a trespass willful? I don't think it was. Was there intent to deceive by filing false documents? I think the filing, if there was any errors in there, was a mistake and not justification for sanctions being taken. Now that leaves a nonwillful trespass, which I think was admitted * * *." (II Tr. 527.) There clearly was no comment on whether Baltzor was required to report the cattle.

At about 2:00 on the afternoon of Thursday, November 5, 1992, BLM Range Conservationists Pat Kane and Jones Amundson spotted 81 cattle on the southwestern corner of the Westgate area of the allotment near the boundary of the Burgess Allotment. (Exs. R-7, R-8.) Except for one black and white Holstein, the cows were all Herefords with red bodies and white faces. Although Amundson and Kane identified Baltzor's brand on only one Hereford, they concluded all the Herefords belonged to Baltzor because of their better physical condition. Kane testified that he assumed the cattle were Baltzor's because the other permittees had removed their cattle earlier, (I Tr. 105), an assumption that never was denied by Baltzor. Amundson also testified that the other operators had removed their cattle from the area. (I Tr. 149.) This testimony indicates their belief that Baltzor's cattle may not have yet been gathered at the close of the season.

The range conservationists did not notify Baltzor of their discovery that afternoon because it was late when they completed their observations. Amundson testified that he called the Baltzors the next morning and two or three times that day, Friday, but left no message on their answering machine. (I Tr. 154-56.) He did not call over the weekend, but called several times each work day afterward, leaving no message on the answering machine until Thursday, November 12, (I Tr. 172-73), because he dislikes talking to machines. (I Tr. 155-56.) This explanation is plainly inadequate, and casts serious doubt on BLM's handling of this matter. Because a trespass can be mitigated by the promptness of the permittee's action to remove the animals after notice of the trespass, BLM should not delay notifying the permittee, particularly for so flimsy a reason.

Meanwhile, Allen Baltzor had observed the cattle at about 9:00 a.m. on Sunday, November 8, and immediately removed them. On November 10, Allen Baltzor completed his AGUR, Form 4130-5, (Ex. R-1), and mailed it to BLM where it was received on November 13. The Report is mistakenly dated December 10, 1992. (I Tr. 36.)

A comparison of the numbers reported on the AGUR of cattle turned onto the allotment and those taken off suggests that there were 190 cattle on the allotment when Allen Baltzor began to gather them on October 27. Baltzor reported that 57 were removed that day, 98 on October 28, and 31 on October 29, which should have left 4 on the allotment as the season ended. However, Baltzor reported the removal of 14 cattle after the season on November 5, and did not report that any cattle were removed on November 8.

On November 12, BLM mailed Appellant a trespass notice dated November 10. Allen Baltzor was not aware that BLM also had seen the cattle until November 13, when he telephoned BLM in response to the message Amundson left on his answering machine the previous day. As discussed above, Amundson had attempted to reach Appellant several times prior to November 12, but did not leave a message. When they finally spoke, Amundson informed Allen Baltzor of his observations of unauthorized use on November 5 and told him that a trespass notice had been issued. According to Amundson's report of that conversation, Allen Baltzor stated that he had

put the cattle on his private ground on October 27 and attributed their presence on the allotment on November 5 to a gate left open by an unknown person. Allen Baltzor told Amundson that he removed them on November 8, and he complained about Amundson's failure to come to his home the day the cattle were observed or to notify him earlier that the cattle had been seen. (Ex. R-11.)

The Baltzors met with BLM to discuss the trespass on December 4, and again on December 7, 1992. The December 4 meeting is memorialized in a memorandum prepared by Bill Reimers, (Ex. R-14), and a typewritten summary, (Ex. R-17), that was prepared by Jay Carlson, the Area Manager. (II Tr. 277.) The December 7 meeting is memorialized in another memorandum prepared by Bill Reimers. (Ex. R-15.)

According to Reimer's first memorandum, (Ex. R-14), Allen Baltzor said that all the cattle were put on his private land on October 27 and 28, and that he was not present on the allotment on October 28. Allen Baltzor stated that his daughter and the neighbor, Ruby Staples, helped with gathering the cattle, and that Staples rode the Westgate area with him on November 4. Allen Baltzor said he was in the Coal Mine Basin area around 10:00 a.m. on November 5 and had no trouble driving, despite having heard of Kane's difficulty with slick roads in the Westgate area that afternoon. According to Reimer's memorandum, Allen Baltzor again stated that he had not been on the allotment from October 28 through November 5, but Mrs. Baltzor corrected him by pointing out that he had visited with Staples on November 4.

In his memorandum of the December 7 meeting, Reimers reported that "Jay [Carlson] had doubt as to the trespass being willful or nonwillful." (Ex. R-15.) He stated his concern about the filing of a false AGUR and various discrepancies concerning the trespass, such as Allen Baltzor's statements as to when the cattle were gathered and when they might have gotten out. (Ex. R-15.)

On December 16, 1992, BLM obtained a report from Staples, (Ex. R-12), who stated that she rode with Wysocki on October 28 and gathered cattle into the Succor Creek Field, one of the fenced allotments. She did not "know how many, but there was a bunch (approximately 20 head)." Id. ^{2/} She reported riding with Allen Baltzor on November 4, unloading some horses, "moving a cow and calf," and looking for animals that they may have missed, but they did not see any.

^{2/} On cross-examination, Staples testified that while she did not know how many head had been gathered, she knew it was not 30 or 40, but guessed it could have been 20 or 30, which estimate was reduced to "approximately 20 head" in the report. (II Tr. 247.)

On December 18, 1992, BLM obtained a report from Wysocki, (Ex. R-13), that described her efforts to find and remove cattle with her father on October 27. She was not sure how many cattle were removed from the Westgate area, but roughly estimated "40-50 head of pairs." (Ex. R-13, at 1.) Also, 30-35 pairs were gathered from the north and south forks of the Tom Hall. (Ex. R-13, at 2.) Wysocki then described her gathering activity with Staples on October 28, when "35 pair and 2 black strays" were gathered. (Ex. R-13, at 3.) She stated that her father went out to the Coal Mine area on October 29. Id.

From Wysocki's evidence, it appears 70-85 pairs were removed on October 27, and an additional 35 pairs were taken on October 28, for a total of 105 to 120 pairs. It further appears, based on Wysocki's testimony, that 70-85 head or pairs must have remained on the allotment, compared to the 35 indicated by Baltzor's entries on the AGUR. There obviously is a significant variance between Baltzor's entries and Wysocki's testimony as to the status of the cattle at the conclusion of the gathering activity on October 29: according to Baltzor, 186 head had been gathered, leaving 4 on the allotment, Wysocki's testimony suggested that 70-85 pairs remained, yet a total of 95 more cattle were removed on November 5 and 8.

It was not until March 15, 1993, that the Area Manager issued his Notice of Proposed Decision determining that the trespass of 81 cattle from November 5 to 11 was willful and assessing damages of \$653.13 for the value of forage and costs of labor and vehicle mileage. He further determined that Allen Baltzor had knowingly or willfully made a false statement in his AGUR, and proposed to suspend 21 percent of Baltzor's active preference on the McBride/Jackson Allotment. As we previously noted, the Proposed Decision did not provide any facts or reasoning to support the Area Manager's determinations.

Carlson testified that his finding of willfulness was based on his belief that the Baltzors "knew of the livestock and that they didn't convey that information to us." (II Tr. 309.) He further explained: "I guess I'm basing my judgment on the willfulness of that act on the basis * * * that Baltzors knowingly provided false information about their activities on the allotment during that period of time. And that by so doing that clearly indicated to me that they were knowing of the trespass." (II Tr. 310.) Although these perceptions would explain Carlson's decision with respect to the allegedly false information in the AGUR, Carlson admitted that he had no direct evidence that the Baltzors knew the 81 head of livestock were out on November 5. (II Tr. 311.)

As we noted above, BLM does not contest Judge Rampton's determination that the trespass was nonwillful or his assessment of a fee of \$92.50. Instead, BLM takes issue with Judge Rampton's characterization of the errors in the AGUR as "mistakes" to provide the basis for his rejection of the charge of filing a false AGUR. (SOR at 1-2.) Although BLM takes exception to many specific findings contained in Judge Rampton's written Decision, the central issue is whether Baltzor knowingly or willfully

made a false statement or representation in the AGUR when it (1) failed to report the removal of 81 cattle on November 8; (2) stated that 98 head were removed on October 28; and even accepting Baltzor's version of events, (3) failed to account for the 53-67 head of cattle that must have remained on the allotment as of October 29. ^{3/}

[1] In contending that Baltzor knowingly or willfully submitted a false AGUR, BLM refers to our decision in Eldon Brinkerhoff, 24 IBLA 324, 338, 83 Interior Dec. 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 trespasses 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). Thus, while BLM initiated these proceedings on the basis of its belief that Allen Baltzor harbored an intent to deceive, it is clear that BLM's position now is that even if he did not actually intend to deceive, his lack of reasonableness and responsibility in completing the Report should be deemed to constitute a knowing or willful violation.

[2] However, a finding that a violation of a requirement was knowing or willful may be negated by a good faith belief that the requirement did not apply in the circumstances of a given case. See generally Cheek v. United States, 498 U.S. 192, 202-03 (1991); United States v. Murdock, 290 U.S. 389 (1933). The issue thus becomes the reasonableness of Allen Baltzor's belief, however honest, that he had actually removed those cattle previously, and his understanding of the nature of the reporting obligation imposed by the AGUR.

The record shows that Appellant understood that if it failed to gather all of the cattle by the last day of the season, it was obliged to report them when they were gathered later, if gathered before the AGUR was due, as Appellant did in reporting the removal of 14 cattle from the allotment on November 5. (I Tr. 52; Answer at 8.) The BLM contends that the AGUR requires the use of a separate line for "every day" that a grazier turns

^{3/} If the Oct. 28 entry on the AGUR is corrected to reflect 35 head instead of 98, 67 head remained (133 head on Oct. 27, less 35 removed on Oct. 28, less 31 gathered on Oct. 29).

livestock onto, or takes livestock out of, a pasture. Allen Baltzor testified that he believed that if cattle that had been gathered at the end of the season later escaped into the allotment and were removed again, Appellant was not required to report their removal on the form. (I Tr. 39, 52; Answer at 11, 12.) As we noted above, Judge Rampton's written Decision adopts this construction by holding that Baltzor was not required to report the number of cattle removed on November 8.

[3] We agree with BLM that the following language of the AGUR requires a daily entry for each movement of cattle onto, or off of, the allotment: "Use a separate line for every day that you either turn livestock in or take livestock out of an allotment or pasture." Since the Report is intended to capture actual use during the reporting period, we cannot sustain the construction urged by Baltzor and adopted by Judge Rampton. The AGUR is designed to establish the amount of forage actually consumed by all of the permittee's cattle present on the Federal range during the reporting period, and it is immaterial whether the forage was consumed by cattle that returned to the allotment after being removed. Given the stated purpose and objective of the AGUR, it is incorrect that a permittee whose cattle have returned to the allotment after the end of the grazing season but before the AGUR has been filed has no obligation to report their removal in the AGUR.

[4] We observe, moreover, that the AGUR provides space in which to record remarks. Specifically, the Report instructs permittees and lessees to "[i]nclude other information such as death losses, disease, and unauthorized use by strays." Although the parties did not raise or explore their understanding of this part of the AGUR during the hearing before Judge Rampton, it seems clear that it is intended to elicit any information that reasonably bears upon the data and activities elsewhere reported on the form by the permittee. Allen Baltzor did not include any other information about the two strays his daughter gathered on October 28 or the status of any cattle that were still on the allotment as of the date the Report was transmitted to BLM.

[5] In so ruling, we acknowledge limitations on the obligation to report actual grazing use. Thus, if Baltzor's cattle had trespassed on an allotment in which it had no grazing rights, Appellant would not report their removal on an AGUR, because by its terms, it is to be used only by permittees and lessees. Similarly, if the instructions on the form are followed to the letter, a trespass on the McBride/Jackson Allotment after Baltzor had cleared the cattle from the allotment and submitted its Report would not appear on the AGUR. We therefore hold that until the Report is submitted, its terms require the permittee or lessee to report the cattle taken onto, or gathered from, the allotment each day, without regard to whether they previously have been removed. We find nothing in the AGUR that states, suggests, or supports Baltzor's interpretation, and accordingly, to the extent the Decision concluded otherwise, it is modified in accordance herewith. Reaching that conclusion does not, however, answer the central question of whether Baltzor knowingly or willfully filed a false Report.

[6] With regard to the information to be reported, the AGUR states: "Your cooperation in providing accurate information will be appreciated." (Ex. R-1.) Permittees are also required to certify the completeness and accuracy of their grazing use, as evidenced by signing the Report, and are further warned of criminal penalties for "any false, fictitious, or fraudulent statements or representations." We believe that these instructions or requirements constitute more than adequate notice that a permittee is required to take appropriate steps to ensure that the data reported are accurate and complete, and that BLM deems the information to be important to the conduct of its official duties. The quality of the information submitted obviously depends upon a reasonably reliable method of accounting for grazing use.

Although Baltzor testified that it had previously searched the allotment for cattle, the practice was to count the cattle in the gate of the home ranch. As discussed above, had 98 cattle been removed on October 28 and 31 cattle been removed on October 29 as Baltzor stated on its AGUR, only 4 would have remained on the allotment. It is undisputed, however, that at most only 35 cattle were removed on October 28, leaving 53 additional cattle on the allotment after the end of the season, as BLM points out. (SOR at 3, n.2.) Allen Baltzor's testimony was that he must have misunderstood the tally provided by his daughter, that she must have provided the correct figure, and that he simply made a mistake, perhaps due to the lateness of the hour and the distraction of playing with his grandson. (II Tr. 485-86.)

Allen Baltzor also testified, however, that his wife maintains a hard-covered notebook with lined paper to "keep a record of the turn-out and gather during the summer." (II Tr. 498-99.) Allen Baltzor stated that he is responsible for providing the dates and numbers of cattle moved on or off the allotment. (II Tr. 501.) Although the hearing was held almost a year after the events at issue and it appeared that Mrs. Baltzor continued to maintain the log, (II Tr. 500), he suggested that it may not contain the information pertinent to the end of October 1992, and further suggested that he may not have told her or may have written the numbers on a piece of paper at his desk. (II Tr. 500.) We note, however, that Allen Baltzor's testimony falls short of an affirmative statement that such was the case. Moreover, he testified that he had prepared his AGUR from the log entries, at least in part, (II Tr. 501-02), which arguably casts doubt on his testimony that he did not "remember whether the log would record the last two or three entries or not." (II Tr. 502.)

Baltzor did not offer this log into evidence or make it available during the settlement meetings with BLM in December 1992, despite the invitation to present all the evidence and information bearing on the trespass charge, which, it is argued, justifies an inference that the information it contained was not favorable to him. See Gilbert v. Cosco, Inc., 989 F.2d 399, 406 (10th Cir. 1993); Evans v. Robbins, 897 F.2d 966, 970 (8th Cir. 1990); see also Cumberland Reclamation Co. v. Secretary, Department of the Interior, 925 F.2d 164, 168 (6th Cir. 1991) (adopting

this Board's view that an operator's failure to produce evidence of tonnages of other minerals sold to support its claim that the removal of coal did not exceed 16-2/3 percent "speaks volumes").

Lastly, by Baltzor's own account, 53-67 cattle remained on the allotment between October 29 and November 5. The AGUR was not transmitted to BLM until November 10, 1992.

We acknowledge the lingering questions of whether those cattle were found and removed, and if so, whether any were found on or before the date Baltzor mailed the AGUR, such that this information indeed should have been included therein. We observe, however, that the status of these cattle was not the rationale articulated by BLM to support its decision, in either the Proposed Decision or at the hearing. (II Tr. 282-83), and thus this issue was not developed during the hearing. At the hearing, the Area Manager testified that the following discrepancies formed the basis of his decision: whether Allen Baltzor was on the allotment on November 4, 1992, whether the pair gathered by Staples was reported on the AGUR, whether 14 head were gathered on November 5 when Allen Baltzor said he had gathered none, and whether cattle gathered on November 8 were reported in the AGUR. Given the factual issues as they were enumerated at the hearing and Appellant's and Allen Baltzor's admissions that mistakes were made, it is not at all clear that an adverse inference is appropriate in the circumstances of this case.

In ruling from the bench, Judge Rampton found no intent to deceive, and in his written Decision, characterizes the reporting error as a "mistake [that] was not willful or knowing." (Decision at 3.) Nevertheless, we agree with BLM that proof of an actual intent to deceive is not required to sustain a finding of willfulness and conclude that although Judge Rampton reached the correct result, he based his finding of nonwillfulness on an incorrect legal standard.

The U.S. Supreme Court has held that in civil and criminal cases, evidence of knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willfulness in the commission of that violation. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126-27 (1985). In its opinion, the Court cited its earlier decision in United States v. Illinois Central Railroad Co., 303 U.S. 239 (1938), which considered whether the carrier knowingly and willfully ^{4/} confined cattle in a car for an extended period. In that case, the railroad's yardmaster negligently failed to notify the employee who was responsible for unloading, and because he failed to do so, the cattle were continuously confined in the car for 37 hours. In determining that the railroad had "knowingly and willfully" failed to comply with the applicable statute, the Court stated:

^{4/} The BLM correctly notes that 43 C.F.R. § 4140.1(b)(8) (1992) requires a statement made knowingly or willfully. (SOR at 9.)

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is shown "willfully" to have failed. In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in United States v. Murdock, 290 U.S. 389, 394 [(1933)], shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right to so act." The significance of the word "willfully" * * * was carefully considered * * * in St. Louis & S.F.R. Co. v. United States, 169 Fed. 69[, 71 (8th Cir. 1909)]: "Willfully" means something not expressed by "knowingly," else both would not be used conjunctively. . . . But it does not mean with intent to injure the cattle or to inflict loss upon their owner * * *. [W]e are persuaded that [willfully] means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

Id. at 242-43.

Gross negligence also may support a finding that conduct is willful. For example, in Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1405 (10th Cir. 1976), the Court concluded that a rancher's failure to properly instruct a contractor conducting aerial spraying as to the areas of land to be sprayed was negligence "so gross as to be tantamount to willfulness." The Court considered the meaning of willfulness and "reject[ed] the citations of criminal cases because we are here concerned with the civil proceeding and the civil sanction. Thus, neither premeditation nor specific intent to violate the law is essential." Id.

[7] An accurate tally of cattle turned onto, and removed from, an allotment is necessary not only to assure the accuracy of an AGUR, but to assure that all of the cattle are removed at the end of the season, and in appropriate circumstances, the failure to report accurate information at the close of the season may be sufficient to establish a violation of 43 C.F.R. § 4140.1(b)(1)(8) (1992). It may be that Baltzor should reexamine its practice in collecting and recording required information to ensure greater accuracy and reliability, but we are not persuaded that this is a case in which the permittee's behavior demonstrates recklessness, gross negligence or indifference to the reporting obligation, in large measure because BLM's actions in this matter are not above question, as the concurring opinion points out. We therefore find that Baltzor's conduct is not sufficient to establish a violation under United States v. Illinois Central Railroad Co., *supra*. On the other hand, we acknowledge that the information was false when it was submitted, and thus as a technical matter, the Report filed was false to the extent of the incorrect information.

We therefore do not hold that providing false information may never properly support the charge of filing a false Report, only that in this case, it was not shown that the permittee knowingly or willfully filed a false Report. ^{5/}

Baltzor's mistakes admittedly resulted in the concealment of a first-time trespass of short duration involving a large number of cattle, which seemingly must also include the 53-67 cattle for which no information was submitted. Although graziers have been filing AGUR's for at least 30 years ^{6/} on forms that carry a warning that false statements are subject to criminal penalties, and BLM's regulations have specifically prohibited knowingly or willfully filing a false Report since 1982, ^{7/} we found no prior Departmental decision involving a charge of filing a false AGUR, and neither party has cited such a case.

[8] What the decisions do show, however, is that reductions similar to the 21 percent reduction for 2 years sought by BLM in this case have been deemed appropriate in cases involving willful and repeated trespasses, but not for a first-time, nonwillful, 10-AUM trespass. ^{8/} See Eldon Brinkerhoff, *supra*; John E. Walton, 8 IBLA 237, 239 (1972); see also BLM v. Burghardt Co., 138 IBLA 365, 370 (1997) (15-percent reduction for 3 years); Calvin C. Johnson, 35 IBLA 306 (1978) (10 percent for 3 years); Cesar and Robert Siard, 26 IBLA 29 (1976) (10 percent for 3 years).

^{5/} This Board does not take the submission of false statements lightly, and we have raised the issue ourselves where a deceptive intent becomes clear. See Funk Exploration, 73 IBLA 111, 114 (1983); Lee S. Bielski, 39 IBLA 211, 228, 86 Interior Dec. 80, 89 (1979); Charles Stewart, 26 IBLA 160, 163 n.3 (1976). In each of these cases, however, a deceptive intent was more apparent and the economic consequences far more significant than in the instant appeal. In Funk, the appellant falsely stated that there was a well capable of production that would have extended a lease that would otherwise have terminated. In Bielski, the false statement was intended to result in the issuance of a valuable oil and gas lease to a party other than the one who was entitled to it. In Stewart, the false statements enabled an ineligible party to retain grazing privileges that could have been enjoyed by others.

^{6/} See BLM Manual 4412, Illustration 10, Form 4412-8 (July, 1967).

^{7/} See 43 C.F.R. §§ 4100.0-5 and 4140.1 (1982). The phrase "certified actual use report" in 43 C.F.R. §§ 4100.0-5 and 4140.1 (1982) was modified to "actual use report" in 43 C.F.R. §§ 4100.0-5 and 4140.1 (1985).

^{8/} The Area Manager's Decision did not state whether the reduction was imposed as the penalty for the trespass, for filing a false Report, or both. Whatever may have been the Area Manager's actual intention at the time he issued the Decision, it is clear that on appeal, BLM maintains that the 21-percent reduction is an appropriate penalty for the charge of filing a false Report. Although there are no Departmental precedents specifically pertaining to the filing of a false Report, the analyses and reasoning of trespass cases involving penalties are equally applicable here.

The Brinkerhoff test provides that a "severe reduction" in grazing privileges (i.e., a permanent loss of privileges or a temporary loss of significant privileges for a period of years) will be imposed in cases involving the following elements: "(1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass." Eldon Brinkerhoff, supra, at 337, 83 Interior Dec. at 190. In BLM v. Burghardt Co., 138 IBLA 365, 372 (1997), we stated that the objective of imposing a sanction is to reform a permittee's grazing practices, and that a grazer's repetition of a trespass can establish that lesser sanctions were insufficient to reform his behavior. We imposed a suspension in Burghardt, supra, at 374, because the prior threat of such a suspension "clearly was not sufficient to persuade Burghardt to make a diligent effort to keep its cattle from unauthorized grazing on public lands."

The foregoing precedents lead us to conclude that although incorrect information was provided, the circumstances of this case do not warrant a reversal of Judge Rampton's decision. We are confident that this result will encourage Baltzor to reform its conduct and in appropriate circumstances may establish the predicate for a suspension or criminal prosecution, should a violation occur in the future. See Burghardt, supra, at 374; Rogue Excursions Unlimited, Inc., supra.

The BLM has raised numerous other arguments concerning the propriety of other findings contained in Judge Rampton's written Decision and Respondent has presented numerous arguments in response. In view of the disposition of this matter, it is not necessary to address them.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed with respect to the finding that the trespass was not willful and the conclusion that a penalty is not justified; Finding No. 23 is modified to conform to the ruling from the bench and the opinion herein; and the finding that Baltzor did not knowingly or willfully make a false statement or representation in its AGUR within the meaning of 43 C.F.R. § 4140.1(b)(8) (1992) is affirmed.

T. Britt Price
Administrative Judge

DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING SEPARATELY:

I concur separately to express my reservations about the Bureau of Land Management's (BLM's) actions in this case.

After listening to 2 days of testimony in this case, Administrative Law Judge John R. Rampton, Jr., took, for him, the unprecedented step of orally ruling from the bench. He stated: "I guess the important thing is that what I want to do is get this settled once and for all, and I don't see any point in fooling around several months with briefs." (Tr. 526.) In doing so, he ruled "there was no proven intent [on behalf of Baltzor Cattle Company (Baltzor)] to trespass, and that the trespass is nonwillful." *Id.* Regarding the Annual Grazing Use Report (AGUR), he held that while there were errors, "I don't find any evidence of willfulness justifying any sanctions." *Id.* He directed counsel for Baltzor to prepare a proposed Decision, which he adopted and issued on December 22, 1993.

In his Notice of Proposed Decision, dated March 15, 1993, the Owyhee Resource Area Manager, BLM, stated that BLM had observed 81 cattle belonging to Baltzor on the McBride/Jackson allotment on November 5, 1992, and that Baltzor's authorization to graze livestock on that allotment ended on October 31, 1992. ^{1/} The Area Manager found that the cattle had been on the public land from November 5 through 8, 1992; that Baltzor was liable for a willful trespass of 20 animal unit months (AUM's); and that the value of the forage consumed was \$370, which, with reasonable administrative expenses for BLM, required Baltzor to pay BLM a total of \$653.13. ^{2/} He also found: "[A]fter interviews with you and others conducted by Bureau of Land Management (BLM) personnel associated with this trespass, I have concluded that you knowingly or willfully submitted a false statement in your actual use report." (Notice of Proposed Decision at 2.) The Area Manager, however, provided no explanation of what he considered to be the "false statement" in the AGUR. He proposed, as punishment, a 21-percent reduction of Baltzor's active preference on the allotment for a period of 2 years. He established a period of time in which Baltzor could protest his Proposed Decision, failing in which, it would become final and subject to appeal.

^{1/} The case file copy of the Proposed Notice of Decision forwarded to Judge Rampton by BLM as part of the official case file is dated Mar. 15, 1993, with a copy of a certified mail return receipt card showing receipt by Baltzor on Mar. 27, 1993. At the hearing, BLM introduced a copy of the Proposed Notice of Decision as exhibit R-18. That copy bears the date of Mar. 4, 1993. The BLM had no explanation for the discrepancy in the dates.

^{2/} At the commencement of the hearing, counsel for BLM acknowledged that BLM had mistakenly calculated the number of AUM's and that the number should have been 10, rather than 20, resulting in a total amount owing of \$468.13.

Baltzor did not protest the Proposed Decision. It filed a timely appeal, and the case proceeded before Judge Rampton.

In his Decision, Judge Rampton calculated that the value of the forage consumed for a nonwillful trespass of 10 AUM's was \$92.50 and assessed that fee against Baltzor. On appeal, BLM does not challenge that ruling. Instead, its focus is on the Judge's conclusion that "the mistakes made on the actual use report were not knowing or willful." (Decision at 7.)

On appeal, BLM charges that

[t]he circumstances surrounding the completion and filing of the Actual Use Report do not objectively comport with the notion that Baltzor acted in good faith or through innocent mistake, but rather reflect conduct [so] lacking in reasonableness or responsibility that it is reckless or negligent and constitutes willful or knowing acts by Baltzor under the regulations.

(Statement of Reasons at 3.)

The regulation in question is 43 C.F.R. § 4140.1(b)(8) (1992), which subjects persons to civil and criminal penalties for "[k]nowingly or willfully making a false statement or representation in * * * actual use reports and/or amendments thereto."

The chronology of events in this case shows that during the last week of October 1992, Baltzor began to gather its cattle from the McBride/ Jackson allotment. Allen Baltzor testified that when the gather began, he did not know how many cattle were on the allotment and that "[w]hen you go ride you go to gather what cattle you can find." (Tr. 512.) Within the McBride/Jackson allotment are two fenced allotments containing private land owned by Baltzor, designated as allotments 0607 and O638. (Ex. R-3.) Gathered cattle were herded into allotment 0607. (Tr. 355.) On October 27, 1992, Allen Baltzor and his daughter, Kathleen Wysocki, gathered cattle and moved them onto allotment 0607. (Tr. 452-54.) On October 28, 1992, Kathleen Wysocki and an elderly Baltzor neighbor, Ruby Staples, gathered cattle and placed them on allotment 0607. (Tr. 360, 439-40, 456.) On October 29, 1992, Allen Baltzor took cattle off the McBride/ Jackson allotment and placed them on allotment 0607. No gathering activities took place on the McBride/Jackson allotment on October 30 or 31, 1992.

On November 1 and 2, 1992, Allen Baltzor searched areas of the McBride/Jackson allotment for any stray cattle. (Tr. 366, 489-90.) He did not find any. (Tr. 368.) On November 4, 1992, Allen Baltzor and Staples visited the McBride/Jackson allotment. (Tr. 370, 441, 491.) They separated to look for strays. (Tr. 443.) Staples found a cow and a calf and placed them on Baltzor's private land. (Tr. 444.) It was snowing heavily and they returned home. (Tr. 371-73, 443.)

On November 5, 1992, Allen Baltzor returned to the McBride/Jackson allotment because he knew that "if you've got a storm the cattle will bunch. If there's any outside they will drift towards where there isn't any snow." (Tr. 492-93.) He searched such an area and located 14 cattle, which he herded onto allotment 0607. Id. He left the McBride/Jackson allotment at approximately 1 p.m. on that day.

On the same day, in the late afternoon two BLM employees observed 81 head of cattle within the McBride/Jackson allotment near the Westgate area. (Tr. 63-64, 71.) The area in which the cattle were located was approximately 1 to 2 miles southwest of the southwestern boundary of allotment 0607. (Tr. 62; Ex. R-3.) The employees identified a Baltzor brand on one cow and assumed, based on other considerations, that the cattle belonged to Baltzor. (Tr. 71-72, 140.) The employees did not drive to the Baltzor ranch, a distance of about a mile, to tell the Baltzors that they had discovered the cattle. (Tr. 105.) "It was late. We decided we would go back and handle it through a phone call." (Tr. 106; see Tr. 153.) Neither employee called the Baltzors on Thursday, November 5, 1992. (Tr. 106, 153.)

The BLM employee who took responsibility for notifying the Baltzors of the cattle on the allotment testified:

Q. Now, when you completed that, you just testified about you would call them the next morning. Did you call them the next morning [November 6]?

A. I attempted to call the first thing in the morning before I started the cattle count.

Q. Now, you have been working directly with Allen and Virginia Baltzor, who are the owners of Baltzor Cattle Company to the 13 years you've worked with the Owyhee Resource Area, haven't you?

A. Yes.

Q. And you would call them friends, wouldn't you?

A. I get along with them, yes.

Q. You know, in working with them, that they have had, at least during 1992 an answering machine; isn't that correct?

A. Yes, sir.

Q. And did you leave a message on their answering machine on November 6th?

A. No.

Q. And so what did you do? Did you call and then—and not leave a message? You said you called and they've got an answering machine, I'm confused?

A. That's my problem. I don't like to talk to answering machines. And, no, I did not leave a message on the answering machine.

(Tr. 154-55.)

The BLM employee called the Baltzors two or three times on November 6. After the first call, when he listened to the Baltzors' message, he hung up when the answering machine came on. (Tr. 156.) November 7 and 8 were a Saturday and a Sunday, and the employee testified that he made no calls to the Baltzors on those days. ^{3/}

On November 7, 1992, Allen Baltzor went to the McBride/Jackson allotment passing through the area where the BLM employees saw cattle on November 5, 1992. (Tr. 496.) He testified that he did not see any cattle on the allotment, but he did see them on allotment 0607. Id. On November 8, 1992, he went to the McBride/Jackson allotment traveling the same route that he had on November 7 and saw "cattle all over there." Id. He recognized the cattle as his and he "started up the Westgate to see where they had come from and why they were there. And that's when I found the gate [to allotment 0607] down, and I shut the gate and started the cows home." (Tr. 497.)

On Monday, November 9, the BLM employee called the Baltzors two or three times but left no message. (Tr. 173.) Also, on that same day, he and another BLM employee drove to the same area of the McBride/Jackson allotment where cattle had been discovered on November 5, but they did not find any cattle. (Tr. 176.) They then drove past the Baltzor ranch, within 100 yards of the Baltzors' house, and identified on the Baltzors' property the same cattle previously observed on November 5 on the McBride/ Jackson allotment. (Tr. 177-78.) The BLM employees did not stop at the Baltzors' house at that time and discuss the matter because "[w]e felt that the problem had been taken care of, he'd gotten the cattle home. And we were going to go home and **review all the information we had and be in contact** with Allen." (Tr. 179.)

On Tuesday, November 10 the BLM employee called the Baltzors several times but did not leave a message. On the same date, BLM prepared a Trespass Notice for Baltzor notifying it that it had violated the law by allowing cattle to graze in the McBride/Jackson allotment. (Ex. R-9.) Also on

^{3/} Counsel for Baltzor asked the witness whether he ever called permittees from his home on weekends. He responded: "Occasionally I do." (Tr. 172.)

that date, Allen Baltzor prepared the AGUR for the McBride/Jackson allotment. He did not report those cattle taken off the allotment on November 8 on the AGUR because he believed that they had just escaped from the private allotment, and he had immediately removed them. "I did not think that it was involved with our regular operation; that they had just gotten out of the field and I did not honestly feel that they should be on the Actual Use Report." (Tr. 39.)^{4/}

The BLM employee called Baltzor again on November 11, but left no message. Finally, on November 12 he left a message on the Baltzors' answering machine. On the morning of November 13, 1992, Allen Baltzor returned the call. A "Confirmation/Report of Telephone Conversation," introduced as an exhibit at the hearing, (Ex. R-11), prepared by the BLM employee states:

Allen responded to the message I left on his answer machine on 11/12/92 about unauthorized livestock in the Westgate area of the McBride-Jackson allotment.

Allen was concerned because we were issuing a trespass notice. He was upset because I had not taken time to drive [the] one mile distance from where the livestock were to his house to inform him. He also stated that someone had opened his private gate and the cattle got out.

The BLM received the AGUR on November 13, 1992. On the same day, it prepared a Grazing Trespass Report, (Ex. R-8), which included the statement that "[i]t appears cattle were gathered from the majority of the McBride/ Jackson Allotment and moved to this corner of the allotment prior to 11/5. Allotment was closed to grazing beyond 10/31/92."

On December 4, 1992, Allen Baltzor and his wife, Virginia, met with BLM personnel regarding the alleged trespass. At that time, BLM determined that there were discrepancies between Allen Baltzor's recollection regarding his gathering of cattle from the McBride/Jackson allotment and the AGUR. One of the identified discrepancies was the fact that Allen Baltzor told BLM that he had been on the allotment on November 5, but he did not mention removing any cattle. A BLM employee testified: "We told him we had some discrepancy with what he told us versus what we had observed on his Actual Use Report, and we brought that specific point up, the 14 head on November 5th. And then Allen indicated that that was correct, and he had apparently forgotten about that." (Tr. 89.) Another BLM employee admitted that Allen Baltzor was being honest in reporting on the AGUR

^{4/} In explaining why he listed on the AGUR the 14 cattle removed from McBride/Jackson allotment on Nov. 5, Allen Baltzor stated: "Because I found them out there, and I knew they were out there during the season because they had never been put in the field. **They were out behind a field, a place where I knew they hadn't been in there.**" (Tr. 52.)

the removal of 14 cattle on November 5, an action that may have subjected Baltzor to a charge of unauthorized use. (Tr. 160-61.)

The Area Manager summarized at the hearing the information that resulted in his determination that Baltzor had willfully or knowingly provided a false statement in the AGUR, as follows:

Okay. Well, again, with the Actual Use Report the inconsistencies in terms of what was reported on the Actual Use Report versus what other statements have been made about what went on in the allotment, especially the statements by the Baltzors that at one point in time that they weren't on the allotment on November 4th, and then that they were on the allotment, and that I think Ruby Staples' statements indicated that they had gathered a pair off of there. The Actual Use Report doesn't indicate any.

On the 5th of November statements from Mr. Baltzor indicated that he was on the allotment, I believe, in the Coal Mine Basin area, that he got to a high point in the allotment and glassed the whole allotment and saw no cattle. But that the Actual Use Report indicates that 14 cattle were gathered on that day. And again, that Allen had gathered allotment -- or had gathered cattle from the allotment on the 8th of November and that no record of that is provided in the Actual Use Report.

[5/]

5/ Thus, the Area Manager identified three problems relating to the AGUR. First, he indicated a problem with Baltzor's statements regarding activities on the McBride/Jackson allotment on Nov. 4 and the fact that the record showed a pair had been gathered that day and not reported on the AGUR. Allen Baltzor explained that he did not include an entry on the AGUR for Nov. 4, 1992, because Staples did not mention to him that she gathered a pair. (Tr. 492, 504-05.) That fact was confirmed by Staples. (Tr. 444.) If, in fact, the Area Manager were concerned with Allen Baltzor's failure to report on the AGUR a pair gathered on Nov. 4, 1992, he merely could have requested the filing of an amended AGUR, rather than charge Baltzor with submitting a false statement. Second, the Area Manager cited the fact that Allen Baltzor told BLM that he was not on the allotment on Nov. 5, 1992, but that the AGUR listed 14 cattle as removed on that date. The fact that Allen Baltzor may have initially forgotten that he was on the McBride/Jackson allotment on Nov. 5, 1992, does not support BLM's contention that Baltzor made a false statement on the AGUR, because Allen Baltzor correctly reported on the AGUR that 14 cattle were removed on that day. Third, the Area Manager mentioned the failure of Baltzor to report the cattle removed on Nov. 8. However, the record shows that, at the time Allen Baltzor filed the AGUR, he was operating under the reasonable belief that it was not necessary to report those cattle. The only rationale to support the Area Manager's determination that Baltzor willfully or knowingly submitted a false statement on the AGUR was that devised by counsel for BLM subsequent to the hearing and not relied on by the Area Manager.

(Tr. 282-83.) None of these circumstances was identified in the Proposed Notice of Decision as a basis for the charge that Baltzor willfully or knowingly made a false statement on the AGUR. ^{6/}

Allen and Virginia Baltzor again met with BLM personnel on December 7, 1992. Regarding that meeting, Allen Baltzor testified that

we had called specifically to meet with them for certain documents to see the livestock count and the photographs that they had taken. And when we arrived Mr. Reimers told us that there was no file at all in his office of any of our stuff. He could find nothing. So we receive[d] nothing on that day.

(Tr. 511.) A BLM memorandum to the file concerning that meeting, prepared by William A. Reimers, BLM supervisory range conservationist, states:

On Monday, 12/7/92 Allen and Virginia Baltzor came into the BLM office to visit with Pat Kane and me. They wanted to see the trespass report Jones Amundson had written up and they wanted to see the pictures in the trespass file. I told them Jay Carlson [the Area Manager] had the file with him, that Jay was gone to Phoenix Arizona and he often took stuff home with him. I also said both Pat & I looked for the file this morning and were unable to locate it.

(Ex. R-15.)

^{6/} Other discrepancies identified by BLM employees at the hearing, but not mentioned by the Area Manager as a basis for his determination to charge Baltzor with willfully or knowingly submitting a false statement on the AGUR included the fact that in a Dec. 18, 1992, statement to BLM, Kathleen Wysocki estimated the number of cattle removed on Oct. 27, 1992, to be 70-85, while Allen Baltzor listed 57 head on the AGUR for that day. (Tr. 234.) Regarding her estimate, Wysocki testified that "[i]t was not an actual count. I was not concerned with that, and as I stated, I did not do the counting. This is a very rough and approximate count on my behalf. And as this statement was taken six weeks or better after the actual event, this was the best of my recollection." (Tr. 459-60.) Also, there was a difference between the number Allen Baltzor reported on the AGUR and what he told BLM was removed on Oct. 28, 1992. "Q. And, so what you're saying is that during the [December 4] meeting you are contending that Allen said something different? A. That's correct." (Tr. 118-19.) The BLM also identified as a problem the fact that Allen Baltzor stated at the Dec. 4, 1992, meeting that he had not been on the McBride/Jackson allotment on Oct. 29, 1992, but that the AGUR stated that 31 cattle had been removed on that day. When a BLM employee was questioned on whether that discrepancy was brought to Allen Baltzor's attention at the meeting, he stated: "I don't believe we brought that specifically up. We just told him that we had some problems with the actual use versus what he had told us * * *." (Tr. 86.)

Thereafter, Baltzor made a Freedom of Information Act request seeking documents from the BLM Area Office relating to the trespass. (Tr. 298.) Part of the materials requested were provided and some were not. Id. Baltzor appealed that determination to BLM in Washington, D.C., and further documentation was provided to Baltzor a couple of weeks prior to the hearing. (Tr. 319.) One document that BLM had been withholding and provided to Baltzor shortly before the hearing was a copy of the AGUR submitted to BLM by Allen Baltzor. (Tr. 320.)

The issue presented by BLM's appeal is whether Allen Baltzor knowingly or willfully made a false statement on the AGUR. Judge Rampton concluded that he did not. The record in this case clearly supports that conclusion.

I find that the record shows that BLM did not act in good faith in its dealings with Baltzor in this case. The BLM's delay in notifying Baltzor of the cattle discovered on the McBride/Jackson allotment is inexcusable. At the latest, BLM should have left a message on the Baltzors' answering machine on the morning of November 6 regarding the trespassing cattle. The fact that the BLM employee responsible for notifying Baltzor did not like to talk to answering machines is not a defense for his failure to do so. If BLM had immediately notified Baltzor, the record indicates that Baltzor would have removed the cattle without delay. By failing to notify Baltzor, BLM allowed Allen Baltzor to proceed under the apparently mistaken belief that, when he found his cattle on the McBride/Jackson allotment on November 8, they had just escaped through an open gate on his private allotment. The BLM still did not bother to inform Baltzor of the situation when two employees were 100 yards from the Baltzors' home on November 9. Yet, BLM faults Allen Baltzor for not including the cattle gathered on November 8 on the AGUR he prepared on November 10, at a time when he honestly believed the cattle had just escaped from his private allotment, and he had no reason to believe otherwise. His explanation that he did not include those animals on the AGUR because he did not regard it as necessary is entirely believable.

Moreover, to the extent BLM's action was based on any theory regarding an intent to deceive on the part of Baltzor, it must fail. One need only look to Allen Baltzor's disclosure on the AGUR that 14 cattle were removed from the McBride/Jackson allotment on November 5 to realize that he was revealing a fact that could have subjected Baltzor to a claim of unauthorized use of the public lands. Moreover, I find that Baltzor neither intentionally disregarded the requirement to file a correct AGUR nor was plainly indifferent to it.

What this record shows is a livestock operator, who admittedly made some mistakes in recordkeeping, who was not fairly dealt with by BLM personnel. Those BLM personnel appear to have been more interested in pursuing some sort of action against a livestock operator with no prior violations of BLM grazing privileges, than with assisting that operator. Under the circumstances of this case, BLM's actions should not be rewarded by a finding that Allen Baltzor knowingly or willfully made false statements on the AGUR.

Judge Rampton's conclusions in this case were expressly based on his finding that "[t]he reputation of Allen and Virginia Baltzor for truth, honesty and veracity was good," and that they were credible. (Decision at 6.) Although this Board has de novo review authority, we do, in certain circumstances, accord deference to an Administrative Law Judge's findings based on the credibility of witnesses. United States v. Higgins, 134 IBLA 307, 316 (1996). This is a proper case in which to do so.

For the reasons stated above, I concur with Judge Price's opinion in this case.

Bruce R. Harris
Deputy Chief Administrative Judge