

INTERIOR BOARD OF LAND APPEALS

William J. Thoman

v.

Bureau of Land Management
GZ Livestock, et al. (Intervenors)

152 IBLA 97 (March 30, 2000)

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WILLIAM J. THOMAN
v.
BUREAU OF LAND MANAGEMENT

GZ LIVESTOCK, ET AL. (Intervenors)

IBLA 90-411

Decided March 30, 2000

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., affirming decisions by the Area Manager, Green River Resource Area, Bureau of Land Management, suspending grazing permits and preferences, assessing fees for grazing trespass, and denying a grazing permit application. WY-04-88-1 and WY-04-89-2.

Reversed in part, affirmed in part.

1. Grazing and Grazing Lands—Grazing Permits and Licenses: Generally

When the terms and conditions of a settlement agreement do not support an interpretation of one of the parties to the agreement we will not read language into the agreement or interpret the agreement in a manner that an administrative law judge has found does not conform to the intent of the parties.

2. Grazing and Grazing Lands—Grazing Permits and Licenses: Trespass

When the evidence shows (1) unauthorized grazing use; (2) prior trespass; and (3) willfulness as to each, a BLM decision finding repeated, willful trespass will be upheld.

3. Grazing and Grazing Lands—Grazing Permits and Licenses: Generally

Allotment management plans are incorporated into grazing permits in accordance with 43 C.F.R. § 4120.2.

APPEARANCES: William F. Schroeder, Esq., Vale, Oregon, and W. Alan Schroeder, Esq., Boise, Idaho, for appellant; Glen F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; Calvin E. Ragsdale, Esq., Green River, Wyoming, for intervenors. 1/

OPINION BY ADMINISTRATIVE JUDGE IRWIN

I. Procedural Background

In William J. Thoman v. Bureau of Land Management (BLM), 120 IBLA 302 (1991), we addressed a request by the BLM to place a May 10, 1990, decision of Administrative Law Judge John R. Rampton, Jr., into full force and effect under 43 C.F.R. § 4.477(b) (1990) pending our decision on Thoman's appeal. 2/ Judge Rampton's decision affirmed two decisions issued by the Green River (Wyoming) Resource Area, BLM, imposing sanctions on Thoman for grazing trespasses and denying, in part, his application for grazing in the Highway Gasson and Eighteenmile Allotments. BLM argued there was an emergency need to place Judge Rampton's decision in immediate effect to stop resource deterioration in the riparian zone of the Big Sandy River where it passes through these two allotments. After review, we found the record was not adequate to determine whether an emergency existed and referred the matter to Judge Rampton for a hearing. Later, citing an "abrupt change in climactic conditions" that had reduced the threat of resource deterioration, BLM withdrew its request, and Judge Rampton returned the appeal to us.

In May 1988, Thoman applied for a permit to use the Highway Gasson and Eighteenmile Allotments as well as the Lombard Allotment for lambing. BLM denied the application for the Highway Gasson and Eighteenmile Allotments, but Thoman's sheep were subsequently observed along the Big Sandy River in those allotments. As a result, BLM issued two trespass notices, a July 1 offer of settlement, and a July 20 proposed decision that demanded payment by Thoman of \$5,390.70 in fees for two repeated willful trespasses, suspended his use of the two allotments beginning May 1, 1989, pending settlement of the trespasses, and suspended his grazing preferences in those allotments for 5 years, beginning on the same date. Thoman protested the proposed decision and BLM's August 17, 1988, final decision confirmed the terms of the proposed decision. Thoman appealed this decision. 3/

In May 1989, Thoman again applied for a permit to use the three allotments for lambing. BLM's May 12, 1989, decision denied Thoman's application for spring use of the Eighteenmile Allotment and the Big Sandy River portion of the Highway Gasson Allotment for lambing purposes and

1/ The intervenors are GZ Livestock, Julian Land and Livestock Company, Leland Grandy, Little Sandy Grazing Association, Roberts Ranch, and Thompson Land and Livestock Company.

2/ 43 C.F.R. § 4.477(b) was amended in 1995. See 60 Fed. Reg. 9909, 9958 (Feb. 22, 1995). See also 43 C.F.R. § 4160.3(c).

3/ Docketed by the Hearings Division as WY-04-88-1.

granted a permit for spring use of the Lombard Allotment. Thoman filed a motion for a temporary restraining order with the U.S. District Court for the District of Wyoming. The Court ordered the Department to refrain from confining Thoman's use to the Lombard Allotment and remanded the case to an administrative law judge for proceedings under 43 C.F.R. § 4.470; directed BLM to refrain from claiming that Thoman's use of the river during the 1989 lambing season was a willful trespass; and retained jurisdiction "pending the outcome of the administrative hearing procedure of the Department of the Interior." ^{4/} On June 8, 1989, Thoman filed a notice of appeal from BLM's May 12, 1989, decision. ^{5/} On June 20, 1989, the Area Manager issued a trespass notice to Thoman and on July 11 he assessed Thoman \$4,652.52 for nonwillful trespass on the two allotments.

Judge Rampton consolidated Thoman's appeal of BLM's August 1988 decision with the remand of the case from the U.S. District Court, and conducted a hearing during the period July 17-22 and September 26-28, 1989.

II. History of Lombard Allotment

In 1936, the Rock Springs Grazing District was created and subdivided into several large common pasture units. The area of importance to this case, the Little Colorado Unit, was one of these large common pastures. In 1968, the Rock Springs District Manager attempted to create separate grazing allotments and assign specific allotments to the various ranchers holding grazing rights in the Little Colorado Unit. On October 3, 1968, the Lombard Allotment was assigned to Thoman. Thoman appealed that decision, and on November 5, 1968, he and BLM entered into a Stipulation and Agreement (1968 Agreement) in settlement of his appeal.

G & E Livestock (G & E) also appealed BLM's October 3, 1968, decision, contending G & E was not assigned an equitable share of the Little Colorado unit's grazing capacity. (Exh. G-55.) Following a hearing, the administrative law judge remanded the case for redetermination of wildlife use and apportionment of wildlife animal unit months (AUM's) within the various allotments. We affirmed the remand decision in United States v. G & E Livestock Co., 7 IBLA 180 (1972). On remand, the District Manager issued a decision on April 29, 1974, vacating the October 3, 1968, decision, establishing a 1,317-AUM allowance for wildlife, and eliminating the allotments. (Exh. G-49.) Thoman appealed the April 29, 1974, decision, contending that the 1968 Agreement could not be vacated by eliminating the Lombard Allotment. A hearing was held and, on March 17, 1977, a decision was issued recognizing the existence of the Lombard Allotment, and remanding the matter with instructions to develop and implement alternate management plans before eliminating allotments. (Exh. G-55.)

^{4/} William J. Thoman v. Manu[e]l Lujan, Jr., No. C89-0124 (D. Wyo., June 6, 1989), Order at 2. "This does not preclude plaintiff from any later applications to this Court pertaining to the 1990 (and later) lambing season(s)," the Court stated.

^{5/} Docketed by the Hearings Division as WY-04-89-2.

On April 19, 1980, the District Manager issued a final decision partitioning the Little Colorado Unit into seven allotments, designating authorized users for each allotment, and providing for livestock trailing within certain of the allotments. His decision was to be effective at the beginning of the 1980 grazing season. (Exh. G-56.) Thoman was named as an authorized livestock user in the Lombard Allotment, but he was not listed as an authorized user in either the Eighteenmile or Highway-Gasson Allotments. ^{6/} The decision stated: "Beginning with the 1980 Grazing Season, your grazing use in the Little Colorado Administrative Unit will be confined to the allotments and trails stipulated in this decision." Thoman did not appeal this decision.

On March 25, 1981, BLM issued a proposed decision modifying Thoman's grazing permit, effective March 1, 1983, by incorporating the Lombard Allotment Management Plan (AMP) and conforming his grazing use to that AMP, commencing with the 1983 season. (Exh. G-57.) Thoman protested, BLM issued its final decision on May 5, 1982, and Thoman appealed, asserting that the decision failed to recognize and incorporate the 1968 Agreement. (Exh. G-60.)

On June 24, 1981, BLM issued a trespass notice, citing Thoman for willful trespass in the Eighteenmile and Highway-Gasson Allotments. (Exh. G-61.) On February 1, 1982, a second willful trespass notice was issued, citing Thoman for unauthorized use of the same allotments. (Exh. G-64.) The notices were followed by a proposed decision, dated April 16, 1982, suspending his permit in the Lombard Allotment pending resolution of the two trespass charges. (Exh. G-65.) Thoman protested, contending BLM failed to comply with the 1968 Agreement. The June 1981 and February 1982 trespass disputes were settled, the willful trespass allegations were dropped, and Thoman paid BLM damages for nonwillful trespass.

On June 1, 1982, BLM once again issued a notice of trespass, citing Thoman for willful trespass in Eighteenmile and Highway-Gasson Allotments (Exh G-67), and, on July 7, 1982, BLM assessed \$3,567.32 for willful trespass. (Exh. G-68.) In an August 26, 1982, decision BLM suspended Thoman's Lombard Allotment permit, pending satisfactory resolution of the trespass charges. (Exh. G-69.) Thoman appealed, again asserting that BLM failed to recognize the 1968 Agreement. (Exh. G-70.)

On November 4, 1982, BLM issued a proposed decision suspending 319 AUM's in the Lombard Allotment for 5 years beginning May 1, 1983. (Exh. G-71.) Thoman protested again, citing the 1968 Agreement as the basis for his appeal. (Exh. G-72.) The disputes regarding Thoman's trespasses and his appeal of the AMP decision were compromised and settled on April 19, 1983. This trespass settlement called for a 3-year suspension of 319 AUM's, \$1,000 in trespass fees, and payment of \$3,400 to a special

^{6/} He did acquire AUM's in those allotments at a later date. (I Tr. 132-35.)

account to be used for Lombard Wash water development. (Exh. G-73.) Two weeks after the settlement, BLM gave Thoman \$5,400 under a cooperative agreement (\$3,400 + \$2,000), which was to be used for the purchase of materials to expand the trough on the Chimney Butte pipeline. (Exh. G-74.)

The subsequent action leading to the 1989 hearing has been set out above in the discussion of the procedural background.

III. Administrative Law Judge Rampton's Decision

In his May 10, 1990, decision Judge Rampton reviewed the background of the two appeals summarized above and related in detail the history of the Little Colorado Unit, the Rock Springs Grazing District, and the Lombard Allotment. Noting that Thoman "did not deny that his sheep were found in areas not authorized under his license," Judge Rampton stated the central issue was whether, under the agreement between Thoman and BLM made in November 1968 in settlement of an appeal by Thoman, Thoman "cannot be confined to the Lombard Allotment until the BLM develops sufficient water within it to accommodate his spring lambing operation." (Decision at 8.) ^{7/}

^{7/} The 1968 Agreement contained eight provisions and five conditions. The provisions were: (1) Thoman agreed to withdraw his appeal; (2) BLM agreed to amend the Lombard Allotment, giving Thoman additional acreage to compensate for grazing privileges acquired from Arthur C. Robinson and trail use of the Lombard Allotment; (3) BLM would furnish fencing material and erect boundary fences on the north, east, and west side of the Lombard Allotment; (4) BLM would furnish the materials and BLM and Thoman would construct additional fences at points identified on an attached exhibit; (5) a portion of the Lombard unit would be administered in conjunction with the adjoining wildlife refuge until the refuge lands are fenced or disposed of; (6) the part of the Lombard Allotment lying southwest of the Green River would be administered in common with the Slate Creek Unit Allotment; (7) "The parties agree that adequate watering facilities including, ponds, reservoirs, wells and troughs, will be installed by the Bureau of Land Management to facilitate proper livestock distribution and utilization of the forage. a. Facilities for livestock and forage management installed, constructed or developed on public lands by the allottee will be authorized by appropriate documentation (Range Improvement Permit - Section 4 of the Taylor Grazing Act)[;]" and (8) a described livestock trail would be allocated north of the road to the east exterior boundary of the Lombard Allotment, with designated watering places. (Exh. G-47.)

The five conditions of the agreement were: (1) all obligations of the Government were made expressly contingent upon Congress making the necessary appropriations for expenditures, and if the appropriations are not made, the Government is released from any liability; (2) the agreement was subject to any rights which might exist of persons not parties to the agreement; (3) the agreement was specifically made subject to all laws and

Judge Rampton noted the language of the 1968 Agreement "does not refer to spring lambing." (Decision at 9.) He held the agreement never went into effect because it was suspended by the G & E appeal. (Decision at 9.) He stated that Thoman's interpretation of the 1968 Agreement that he could allow his sheep to graze where he will on adjoining allotments until water was made available in the Lombard Allotment "ignores paragraph number 2 under the Conditions." (Decision at 10.)

Judge Rampton noted that 43 C.F.R. § 4120.2(c) provided that "[c]ompleted allotment management plans [AMP's] shall be incorporated into the terms and conditions of the affected permits and leases;" that Thoman and the neighboring allottees had signed such plans (see Exh. 31, 32, and 33); and that none of those plans allowed for lambing use in the Eighteenmile or Highway Gasson Allotments if there was not sufficient water for that purpose on the Lombard Allotment. (Decision at 11.) Thus, these AMP's supersede the 1968 Agreement and control the present permitting process, Judge Rampton held. (Decision at 12.)

Judge Rampton found that Thoman had not shown he would be irreparably harmed if he could not use the Eighteenmile and Highway Gasson Allotments for spring lambing (Decision at 13-14), and that he was not prejudiced by the failure of BLM's decisions to specifically identify the previous trespasses that served as the basis for BLM's finding of repeated willful trespass "because he was well aware of his 1981 and 1982 trespasses." (Decision at 14-15.)

Judge Rampton found that BLM had carried its burden of proving repeated willful trespass by substantial evidence. (Decision at 15-16.)

Judge Rampton concluded:

The evidence is clear that trespass occurred and that it was repeated. Mr. Thoman admitted that he applied for spring lambing use in the Highway-Gasson and Eighteenmile Allotments in 1988; his applications were denied and he made the use he applied for anyway. He admitted he applied for essentially the same use in the same allotments in 1989; his application [was] denied; he obtained a temporary restraining order prohibiting the Secretary from preventing him from making the use he applied for and he made the use. In that aspect, the court order has only limited application to the appeals before me. Having heard and considered all of the evidence, I conclude

fn. 7 (continued)

regulations of the United States, and if any of the terms are found to be in conflict with a law or regulation the law or regulation was to prevail; (4) Thoman warranted that no person or agency had been employed to secure the agreement for a commission or contingent fee; and (5) no member of Congress or Resident commissioner could gain a share of the agreement or the benefits derived from the agreement. Id.

that the trespasses, as alleged, occurred and that Mr. Thoman has a past history of trespasses, settled either on a nominal basis or on a willful rate which justifies the imposition of a repeated willful penalty by any definition of the word. It was his intent, plainly expressed, to graze his sheep where he pleased under his exclusive interpretation of his 1968 contract and agreement. His actions were not innocent mistakes or in good faith. He has made no effort to cooperate with the BLM or the other permittees, and the penalties imposed are quite reasonable under the facts adduced and the history presented.

(Decision at 16.) Judge Rampton affirmed both the August 1988 BLM decision and the July 11, 1989, assessment of fees for nonwillful trespass in accordance with the U.S. District Court order.

IV. Arguments on Appeal

On appeal, Thoman contends that the 1968 Agreement constitutes an "other grazing use authorization" for his use of the Eighteenmile and Highway Gasson Allotments under 43 C.F.R. § 4140.1(b)(1)(i) and because there was no testimony contradicting Thoman's testimony that he "agreed to exercise all of his grazing preference within * * * the Lombard [Allotment] when the [BLM] developed sufficient livestock watering facilities within it to permit the use," BLM failed to prove his use was in trespass. (Statement of Reasons (SOR) at 2, 4-6.) ^{8/} Thoman contests Judge Rampton's conclusion that the 1968 Agreement never became effective. (SOR at 7, 11-17.) Thoman argues that the April 1983 settlement (Exh. G-73) reaffirmed the authorization in the 1968 Agreement and confirmed that the necessary facilities had not been provided. (SOR at 19-21.) Thoman argues that the Eighteenmile and Highway Gasson AMP's are not in effect and therefore Judge Rampton erred in concluding they superseded the 1968 Agreement. Thoman concludes:

The Bureau of Land Management broke its contract of April 19, 1983, and its contract of November 5, 1968 remains in place; a contract by which Thoman continues to have access to the adjacent Big Bend area of the Sandy River and the water which it provides for the spring lambing of his sheep, unless and until the Bureau performs.

(SOR at 22.) Thoman included his briefs to Judge Rampton in his SOR.

V. Discussion

We agree with Thoman that Judge Rampton's finding that the 1968 Agreement was never effective is in error. Thoman entered into the 1968

^{8/} Thoman also describes his testimony as "his grazing use was not to be confined to the limited area of the Little Colorado Unit until the Bureau of Land Management had performed on its part so as to permit him to use it for the grazing of livestock." (SOR at 10.)

Agreement with BLM and withdrew his appeal pursuant to that agreement. G & E had also appealed the October 3, 1968, decision, and G & E maintained its appeal, which eventually culminated with this Board's decision in United States v. G & E Livestock Co., 7 IBLA 180 (1972), affirming the hearing examiner's decision directing BLM to reassess wildlife use in the Little Colorado Unit and make necessary adjustments to the apportionment of the allowable wildlife AUM's within the various allotments.

On remand from G & E Livestock Co., the Rock Springs District Manager issued a decision vacating the allotments created in 1968. Thoman appealed that decision, a hearing was held, and Judge Sweitzer issued a decision on March 17, 1977, finding that, although the 1968 decision creating the allotments was technically suspended pending final resolution of the appeals, BLM had effectively ignored the suspension and recognized the Lombard Allotment. Judge Sweitzer held that the Lombard Allotment had been established within the Little Colorado Unit, and that Thoman and one other party jointly held the exclusive grazing privileges in the Lombard Allotment. (Exh. G-55 at 9.) Judge Sweitzer's decision was never appealed. In all ways and for all practical purposes, BLM has managed the Little Colorado Unit as having been allotted rather than as open range since the issuance of the 1968 decision, by issuing licenses, conducting surveys, and referring to the allotments in its billings and to Thoman as the allottee of the Lombard Allotment in correspondence with him.

BLM has the discretion to determine the areas of grazing use on the public lands and thus may amend an allotment if there is a rational basis for amending it and BLM's action is neither arbitrary nor capricious. Calvin Yardley, et al. v. BLM, 123 IBLA 80, 90 (1992). The action BLM was directed to take on remand of the G & E appeal might have required amendment of the allotments in the Little Colorado Unit. The United States v. G & E Livestock Co. decision recognized the existence of the allotments, however, and during the period necessary to determine the wildlife use, the proper apportionment of that use among the allotments, and issue an appealable decision reflecting those findings, the allotments and the 1968 Agreement remained in effect, and unchanged. That portion of Judge Rampton's decision finding that the 1968 Agreement never became effective and binding is reversed.

The 1968 Agreement is a contract and the normal rules of contract construction govern the interpretation of such agreements. Anthony v. United States, 987 F.2d 670, 673 (10th Cir. 1993); Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d 781, 784 (8th Cir. 1984). The primary function of contract interpretation is to ascertain the intent of the contracting parties as revealed by the language they chose to use. Sayers v. Rochester Telephone Corp. Supplemental Management Pension Plan, 7 F.3d 1091, 1094 (2d Cir. 1993), Seiden Assocs. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992). If the contract language is clear and unambiguous, the terms of the agreement are given plain meaning and the intent of the parties and the interpretation of the agreement will be determined from

the four corners of the document alone. Anthony v. United States, 987 F.2d at 673; Georgia-Pacific Corp. v. Lieberam, 959 F.2d 901, 905 (11th Cir. 1992); Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d at 784. Contractual language will be deemed ambiguous only when it is reasonably susceptible to different constructions. WH Smith Hotel Services v. Wendy's Int'l, Inc., 25 F.3d 422, 427 (7th Cir. 1994). However, a contract is not ambiguous merely because the parties disagree on the correct interpretation. Pollock v. Federal Deposit Insurance Corp., 17 F.3d 798, 803 (5th Cir. 1994); Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc., 917 F.2d 1239, 1247 (10th Cir. 1990).

[1] Thoman and BLM entered into the 1968 Agreement to settle Thoman's appeal of the October 3, 1968, decision to establish and assign grazing allotments. Thoman interprets the 1968 Agreement as granting the right to use the Lombard Allotment and BLM-managed land along the Big Sandy River outside the Lombard Allotment for spring lambing operations until sufficient water is developed in the Lombard Allotment to permit spring lambing operations entirely within the Lombard Allotment. Thoman points specifically to Item 7 of the 1968 Agreement, which is set out in full in footnote 7 above, as the contract provision granting that right. Item 7 in the 1968 Agreement does contemplate BLM's installation of facilities "to facilitate the proper livestock distribution and utilization of the forage," and expresses a general need for additional watering facilities within the Lombard Allotment. However, we find no language expressing the intent urged by Thoman in Item 7 or anywhere else in the 1968 Agreement. Indeed, there is no reference to spring lambing or to any use outside the Lombard Allotment during the period that water is being developed or otherwise. We will not read language into the 1968 Agreement where no such language appears, especially when that language contravenes the language of Item 2 of the agreement. See James E. Briggs v. BLM, John F. Gross, Jr., 99 IBLA 137, 146 (1987); BLM, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4, 10 (1987). Judge Rampton did not find Thoman's testimony that his interpretation of the 1968 Agreement represented the intent of the parties credible and, after our review of the record, we are not persuaded that his conclusion is incorrect. See United States v. Deirdre Higgins, 134 IBLA 307, 316 (1996).

In his brief before Judge Rampton, Thoman contended that BLM's August 17, 1988, decision failed to reasonably apprise him of what he must prove and disprove, and failed to allege any prior trespass, which must be alleged and proved to support a finding of repeated trespass. (Thoman's Brief at 8). Quoting Cloverleaf Land and Livestock Co., 34 IBLA 113, 120 (1978), that "a party who may be adversely affected by the administrative action has a right to be 'reasonably apprised of the issues in controversy,'" he complains that the August 17, 1988, decision failed to allege any prior trespass. He also cites Eldon Brinkerhoff, 24 IBLA 324, 333, 83 I.D. 185, 189 (1976) in support of this argument.

Thoman cannot reasonably contend that he was unaware of previous willful trespasses or prejudiced by the failure of BLM's August 1988

decision to recite them. We observe that in Brinkerhoff the evidence of repeated trespass was found in the record. 24 IBLA at 333-334, 83 I.D. at 188-189. In this case Thoman did not object to the introduction of Government Exhibits G-67 through G-73, described above, which include copies of the willful trespass notices, correspondence specifying the numbers of sheep in trespass, the dates the trespasses occurred, and the levy of fines at the willful trespass rates, and the transcript of the hearing at which settlement was agreed upon. Any defect that may have existed in the pleadings was cured by the introduction of those exhibits. In Cloverleaf, the appellant "could not possibly have explained or disproven the allegations," 34 IBLA at 120, because the appellant did not know what they were. Thoman was, or should have been, fully aware of the basis for the allegation of repeated willful trespass. He was not prejudiced when the prior trespasses were not specifically cited. The record shows that he understood the charges and responded to them.

[2] BLM has the burden of proving trespass by "reliable, probative, and substantial evidence." BLM v. Ericsson, 88 IBLA 248, 257 (1985). Substantial evidence is defined as that "kind of evidence a reasonable mind might accept as adequate to support a conclusion." BLM v. Holland Livestock Ranch and John J. Casey, 54 IBLA 247, 251 (1981). In a charge of nonwillful trespass, the BLM must prove unauthorized grazing use. In a charge of repeated, willful trespass, the BLM must prove: (1) unauthorized grazing use; (2) prior trespass; and (3) willfulness as to each. Thoman contends that BLM failed to prove these elements, and the charges should be dismissed. (Thoman's Brief at 12-16.)

As to the first requirement, unauthorized grazing use, 43 C.F.R. § 4150.1 provides that a violation of 43 C.F.R. § 4140.1(b)(1) constitutes unauthorized grazing use. 43 C.F.R. § 4140.1(b)(1) provides in pertinent part as follows:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

- (i) Without a permit, lease or other grazing use authorization;
- (ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized;
- (iii) In an area or at a time different from that authorized * * *.

BLM contends that Thoman violated this regulation when he used the Highway Gasson and Eighteenmile Allotments after BLM had denied his grazing application. Thoman argues that the 1968 Agreement authorized use of those allotments for lambing operations even if BLM denied his application. As

discussed above, there is nothing in the 1968 Agreement authorizing use of those allotments for spring lambing operations. It does not constitute an "other grazing use authorization."

BLM must also show that the person has previously committed grazing trespass. Prior trespasses and trespass damages are considered when determining whether trespasses are repeated. See BLM v. Harris Brothers, 42 IBLA 48, 49 (1979); Eldon Brinkerhoff, 24 IBLA at 333-334, 88 I.D. at 188-189.

[T]he mere fact that a settlement was reached does not, ipso facto, constitute an admission of culpability on the part of the [grazing] licensee. [However,] the documents of settlement are properly admitted to determine the nature of the agreement. Thus, to the extent that an agreement expressly admits liability it is properly considered as probative of the "repeated" nature of subsequent violations. On the other hand, to the extent that the documents expressly deny liability, they may not be utilized as probative of the issue of "repeated" violations.

Holland Livestock Ranch and John J. Casey, 52 IBLA 326, 355, 88 I.D. 275, 291 (1981). Exhibit G-73 indicates Thoman acceded to the charges of trespass.

As to the third element, there is no doubt Thoman intended to conduct lambing use on the Eighteenmile and Highway Glasson Allotments. His letters accompanying his application in May 1988 stated that it was a necessity that he do so. See Exhs. G-1 and G-2. Having applied and been denied, his intent was clear, his action was willful, not an innocent mistake or in good faith. See John L. Falen v. BLM, 143 IBLA 1, 4-6 (1998); cf. Baltzor Cattle Co. v. BLM, 141 IBLA 10, 22-23 (1997).

[3] Finally, Thoman's argument that the AMP's are not in effect and do not supersede the 1968 Agreement cannot be accepted. The AMP's for the three allotments involved were signed in 1983. See Exhs. 30, 31, and 32. The fact they may not have been fully implemented does not mean they are not in effect. By statute and by regulation they are incorporated into the grazing authorizations of persons who use those allotments. 43 U.S.C. § 1752(d) (1994); 43 C.F.R. § 4120.2; see Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 858-61 (E.D. Cal. 1985).

In sum, except as noted above, we find Judge Rampton's decision is amply supported by the record, is reasonable, and complies with the grazing regulations in 43 C.F.R. Part 4100. Appellant has not shown otherwise by a preponderance of the evidence. See Jerry Kelly v. BLM, Sheldon W. Lamb, 131 IBLA 146, 151 (1994). To the extent we have not specifically addressed them, Thoman's reasons for appeal have been considered and rejected as contrary to the facts or the law or immaterial. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Rampton's decision is reversed in part and affirmed in part.

Will A. Irwin
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge