

INTERIOR BOARD OF LAND APPEALS

James Ross

v.

Bureau of Land Management;
Bert Jenks, Intervenor

152 IBLA 273 (May 26, 2000)

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JAMES ROSS
v.
BUREAU OF LAND MANAGEMENT;
BERT JENKS, INTERVENOR

IBLA 96-405, 96-406

Decided May 26, 2000

Consolidated appeals from a decision of Administrative Law Judge Ramon Child setting aside a determination of the Royal Gorge Resource Area Manager, Bureau of Land Management, establishing grazing privileges on the Kaufman Ridge Allotment. CO-05-95-1.

Reversed.

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

BLM enjoys broad discretion to determine how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations. A BLM decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper. The determination establishing a grazing allotment's carrying capacity will not be disturbed in the absence of positive evidence of error. Where a party offers no contrary analysis of the carrying capacity of the public lands to demonstrate that BLM's method of determining the carrying capacity is in error, BLM's determination is properly adopted. The determination to issue a 100-percent public land use permit rather than a percentage public land use permit will be affirmed where the record supports BLM's determination and no rebuttal is presented.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

Where a private landowner asserts that he is being damaged by another party's unauthorized grazing on his land, his remedy lies in State court, and the Department is without authority to intervene in the matter. A finding that issuance of a grazing permit by BLM for Federally-owned lands aggravated or exacerbated unauthorized use of neighboring private lands by the permittee will be vacated where unsupported by evidence of record.

APPEARANCES: Michael R. Bromley, Esq., Colorado Springs, Colorado, for Bert Jenks and Oldrich and Katherine Sipal; Jennifer E. Rigg, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Bureau of Land Management (BLM) and Bert Jenks, d/b/a Rollin' High Jenks Ranch, 1/ have appealed from the April 26, 1996, decision of Administrative Law Judge Ramon Child setting aside the May 15, 1995, determination of the Area Manager, Royal Gorge Resource Area, BLM, authorizing Jenks' grazing use on the Kaufman Ridge Allotment, Canon City Grazing District, Park County, Colorado. These appeals have been previously consolidated.

Bert Jenks, who operates the Rollin' High Jenks Ranch, is the permittee for the Kaufman Ridge Allotment, located near Antero Junction, Colorado. (Tr. 16-17.) The allotment (consisting of Federally-owned lands exclusively) 2/ consists of approximately 4,600 acres (in seven separate parcels) of the approximately 34,600 acres enclosed within the Rollin' High Jenks Ranch perimeter fence (Tr. 136), or about 13 percent of all lands within that perimeter fence. The rest of the acreage within the perimeter fence consists of: (1) lands owned by Bert Jenks (approximately 8,000 acres or about 23 percent of all lands within the perimeter fence); (2) lands leased by Bert Jenks from the State (approximately 12,000 acres

1/ Oldrich and Katherine Sipal have requested that they be substituted for Jenks as Appellant herein. The Sipals have purchased the base property and are the new permittees. (Motion for Substitution of Parties at 1.) That motion is granted. 2/ The use of the term "allotment" engendered substantial confusion in the hearing. It is ultimately clear that where, as here, BLM has established a "100-percent use" allotment, the term "allotment" refers only to the Federal lands included in the grazing area.

or about 35 percent); (3) lands leased by Bert Jenks from private parties (approximately 5,000 acres or about 14 percent); and (4) private lands not owned by Jenks and for which Jenks has no lease agreement (approximately 5,000 acres or about 14 percent). Thus, Jenks owns or leases approximately 86 percent of the grazing acreage within the perimeter fence.

The Rosses, including James Ross (the protestant herein), own approximately 600 acres of land within the perimeter fence. (Tr. 17, 43.) Jenks has no lease agreement with the Rosses.

The perimeter fence was not erected by BLM and is not maintained by BLM. (Tr. 165 and 176-77.) Lands located within the perimeter fence are divided by cross-fencing into four pastures: north, south, east, and west. There are no other interior fences. The fences do not generally delineate ownership boundaries. As a result, the north, west, and east pastures contain a patchwork of unfenced State, private, and BLM lands.

The Rosses' property is located in the east pasture, which also contains lands owned by the State, BLM, Jenks, and other private individuals. The Rosses' property is bordered on the north and south by State lands (Ex. A-7 and G-13), on the west by approximately $\frac{1}{4}$ mile of BLM lands and $\frac{3}{4}$ mile of Jenks' land (Ex. A-7; Tr. 160) and on the east by approximately $\frac{1}{2}$ mile of public lands and $\frac{1}{2}$ mile of private lands owned by someone other than Jenks. (Ex. A-7; Tr. 160.)

Keith Berger, Range Conservationist for BLM, Royal Gorge Resource Area, testified that BLM has historically administered the seven scattered Federal parcels within the perimeter fence as one "allotment." (Tr. 215-16.) However, it is evident from the record that, except for 1994, ^{3/} BLM has not actively managed grazing in the area surrounded by the perimeter fence. That is, apart from occasionally determining the carrying capacity of the Federal lands in that area and collecting annual fees for grazing, BLM has made no effort to restrict the time and location of grazing. It simply determined the carrying capacity of its lands and charged Jenks, the sole grazer in the area, at prevailing rates.

Prior to the early 1980's, the authorized grazing use on the allotment had been 722 animal unit months (AUM's). (Tr. 107.) That authorized use was reduced to 204 AUM's by suspending 518 AUMS as a result of the Royal Gorge Grazing Environmental Impact Statement, issued in 1981. (Ex. G-9 at 15-16; Tr. 106-08.) This reduction was not, however, the result of any specific monitoring or utilization studies on the allotment. (Ex. G-9 at 16; Tr. 107-08, 239-40.)

^{3/} As a result of the discussions in 1993, the parties agreed to an allotment management plan, developed by the Soil Conservation Service (SCS) (Tr. 144-45) that Jenks was to follow for the 1994 grazing season. (Tr. 142.) Jenks was also issued a percentage public land use permit for the 1994 grazing season. (Tr. 142-43.)

In the fall of 1992, BLM became concerned about utilization levels on the allotment. (Tr. 119-20.) Berger testified that it appeared that Jenks' grazing use was exceeding 50-percent utilization of key species (Tr. 120), if the active use was only 204 AUM's. That is, in the fall of 1992, BLM noted that Jenks was using much more forage from the Federal lands than he was paying for. BLM was aware (1) that the carrying capacity of the Federal lands had, until the early 1980's, been rated at more than three times higher than it was in 1992; (2) that the capacity had been summarily lowered in 1992 without the benefit of any measurement of the capacity; and (3) that Soil Conservation Service measurements of the capacity on nearby private lands indicated much greater capacity. (Tr. 121-22, 124.) As a result, instead of attempting to prevent Jenks' use of forage in excess of what was strictly authorized, it elected to reevaluate and increase the carrying capacity, effectively legitimatizing Jenks' use and charging him for it. (Tr. 127.)^{4/}

Although Jenks had desired to run 2,500 head of cattle for 4 months during the 1994 grazing season (Tr. 301 and 335), BLM limited his use to 2,000 head of cattle. (Ex. G-9 at 1; Tr. 240-42.) In September 1994, BLM collected actual clipping data on the lands grazed by Jenks for the first time. (Tr. 144, 225, and 239.) That data indicated utilization levels below 50 percent of key species (Ex. G-9 at Appendix 2-3; Tr. 240-41), thus indicating that there was, in fact, more forage on the Federal lands than had been previously believed, so that Jenks could run more cattle without exceeding the carrying capacity of the Federal lands. (Tr. 298.)

In 1994, BLM and SCS did a series of utilization clippings and collected utilization data on the area grazed by Jenks' livestock. (Tr. 112-14.) At the time, BLM was working closely with SCS, which has responsibility for determining carrying capacities and making recommendations as to grazing use on private lands, by agreement and cooperation with the landowner. Consequently, the forage utilization cages used in the study were placed on private land. (Tr. 111-12.) At the end of 1994, SCS reported the results of the utilization study. ^{5/} Based on this study,

^{4/} BLM's action was part of a larger initiative to improve grazing on Jenks' ranch from an environmental standpoint. In 1992, Jenks was a participant in the Badger Creek Project, an Environmental Protection Agency-sponsored coalition of private and Governmental entities concerned with reducing the amount of sediment in Badger Creek. (Tr. 121.) At that time, BLM contacted SCS of the United States Department of Agriculture, as well as other Governmental entities involved in the Badger Creek Project, including the State Land Board and the Sangre de Cristo Resource Conservation and Development Corporation, to discuss grazing management practices at the Rollin' High Jenks Ranch. (Tr. 121.) The various Governmental entities began discussions in 1993 with Jenks in an effort to initiate improved grazing practices on the public and private lands within the perimeter fence. (Tr. 121-22.)

^{5/} At the end of 1994, Jenks chose not to continue with the cooperative effort.

BLM updated its estimate of the carrying capacity concluding that there were more than 204 AUM's available for use.

Prior to the start of the 1995 grazing season, Jenks applied to increase his permanent active grazing use on the allotment from 204 AUM's (340 Yearling Months (YM's)) to 777 AUM's (1295 YM's). (Ex. G-10; Tr. 114 and 125.) BLM prepared an Environmental Assessment (EA) (Ex. G-9) to analyze Jenks' request (Tr. 111), which stated:

Review of the 1994 forage utilization data indicates that the carrying capacity of public lands within the allotment may be higher than the current authorized level of 204 AUMs [(340 YM's)]. The purpose of this assessment is to properly allocate grazing use based on an updated estimation of the livestock carrying capacity of public land within the Kaufman Ridge Allotment.

(Ex. G-9 at 1.) The EA analyzed, but rejected, Jenks' request to increase the grazing use to 777 AUM's (1295 YM's). BLM found, among other things, that establishing a permanent, long-term carrying capacity on the allotment, based on a 1-year utilization study was inadvisable in the Royal Gorge Resource Area, where annual precipitation and forage production can vary a great deal. (Ex. G-9 at 4; Tr. 138-39.) BLM was aware, however, from the utilization data collected in 1994 that more forage was available on the allotment than would be used by the previously authorized 204 AUM's (340 YM's). (Tr. 239.) BLM accordingly adopted the EA's "preferred alternative," under which it would continue to monitor utilization levels on the allotment, while gradually increasing the permittee's permanent active grazing use over a 5-year period so that the authorized grazing use would eventually correspond with the true carrying capacity of the allotment. (Tr. 138-39, 171-72.)

The 5-year phase-in period was to start with the 1995 grazing season and continue at least through 1999. (Tr. 139-40.) For the 1995 grazing season, BLM proposed to authorize 775 AUM's (1,295 YM's) of grazing use on the allotment by a combination of 458 AUM's (765 YM's) of temporary, nonrenewable, grazing use, and an increase in Jenks' permanent active grazing preference from 204 AUM's (340 YM's) to 317 AUM's (530 YM's). (Tr. 171-73.) BLM thus decided that some increase in Jenks' permanent active grazing preference was supported by the 1994 forage utilization data and the forage production data developed by SCS in 1990. (Ex. G-9 at 7; Tr. 178-80.) By using temporary, nonrenewable grazing use, BLM retained the flexibility to adjust Jenks' authorized grazing use on a year-by-year basis in the event additional monitoring data indicated that such adjustments were appropriate. (Tr. 172-73.)

Mitigation measures for the preferred alternative included collecting additional grazing use data during the next 4 years. (Ex. G-9 at 7; Tr. 178, 191-92.) Jenks was also required to supply actual use information each year to assist BLM in assessing the carrying capacity. (Ex. G-9 at 20; Tr. 183-84.)

In response to BLM's request for input from all "affected interests," James Ross submitted to BLM written comments on the EA. (Ex. G-9, App. 5.) Ross' comments related almost exclusively to what he referred to as the "trespass situation," that is, to the fact that Jenks' cattle were grazing the Rosses' private property even though they and Jenks had never reached an agreement regarding lease of the Rosses' property. BLM attempted to address those concerns in the EA. (Ex. G-9 at 16-17; Tr. 186-90.) Although BLM believed the trespass situation was not within its jurisdiction, it (even prior to Ross raising the issue) had contacted the Colorado Brand Commissioner, a State official with authority over grazing disputes, to obtain his opinion regarding possible trespass issues in an effort to ensure that BLM did not cause or exacerbate any trespass. (Tr. 157.) The Brand Commissioner's response was that, although a trespass may occur in a situation where a stock owner runs more cattle than his land can support, the complaining party had to bring suit in State court, where he would bear the burden of establishing that a trespass had occurred. (Ex. G-9, App. 4; Tr. 161-63.)

BLM issued a proposed decision on March 20, 1995 (Ex. G-15), in which it proposed to implement the "preferred alternative" set out in the EA. (Tr. 247.) In the proposed decision, BLM warned Jenks about the possibility of trespass on Federal lands: "Stocking livestock at a rate greater [than] 2365 yearlings for 4 months over the entire allotment will exceed [the authorized 777 AUM (1,298 YM) usage] on public land and will be considered grazing trespass on public land." BLM also expressly warned Jenks that exceeding the prescribed grazing rate might constitute a trespass on the Rosses' land:

However, it appears that, based on the 1994 utilization data, grazing 2365 yearlings for 4 months would exceed the carrying capacity of land under your control. The [EA] indicates that, based on last year's utilization levels, the carrying capacity of land under your control is approximately 2013 yearling[s] for 4 months. Although BLM's authority regarding your stocking rates is limited to whether these rates exceed the amount of grazing use authorized on public land, BLM considers it inadvisable to stock the allotment at rates greater than land under your legal control can properly support. According to the Colorado State Board of Stock Inspection Commissioners, stocking levels that exceed the carrying capacity of lands under your control could result in grazing trespass on uncontrolled, neighboring land. The owners of neighboring land could take civil action against you or the owners of the livestock should these rates be exceeded.

(Ex. G-15 at 2-3.)

Both James Ross and Jenks filed protests to BLM's proposed decision. (Tr. 253.) However, Jenks did not appeal BLM's final decision, so that the

specifics of his protest were not under review at the hearing or in these appeals. After consideration of both protests, BLM issued its final decision on May 15, 1995 (Ex. G-18; Tr. 272), ruling on Ross' protest:

As to your concern regarding impacts to uncontrolled land, the EA determined the numbers proposed by Mr. Jenks (approximately 2400 yearling cattle for 4 months) would most likely cause his cattle to graze upon uncontrolled private lands within the allotment. However, based upon the correspondence received from the Colorado State Board of Stock Inspection Commissioners, the EA determined that this is a civil matter involving Mr. Jenks and the affected landowners and not under the jurisdiction of [BLM]. * * * [BLM's] involvement with Mr. Jenks' stocking rate is limited as to whether it will exceed the estimated carrying capacity of public land within the allotment.

(Ex. G-18 at 1.)

By letter dated June 14, 1995, James Ross appealed BLM's final decision. (Ex. G-19; Tr. 274-75.) Ross argued that the Area Manager's decision was in error because he failed to address Ross' concerns about the "erroneous assumptions" in the EA regarding utilization cage locations and wells or other water impoundments. Ross also assailed BLM's "evasion of responsibility for [its] action as impacting affected interests like" himself concerning "trespass issues."

A hearing was conducted by Judge Child on January 9 and 10, 1996, in Canon City, Colorado. Jenks' motion to intervene was granted, and he was represented by counsel at the hearing. Most of the hearing involved testimony from BLM's Range Management Specialist for the Royal Gorge Resource Area, who described BLM's management of the Federal lands. He explained that the Kaufman Ridge Allotment is a "C" category (or "custodial") allotment, which "may either have very low resource potential" or "may be producing at or near its potential, and the range held or range production is really not an issue." (Tr. 101-102.) He also explained the difference between a 100-percent public land use permit and a percent public land use permit. (Tr. 141-42.)

In a percent public land use permit, BLM specifies the exact number of livestock that can be grazed on the public land. (Tr. 141, 145.) The "allotment," for determination of carrying capacity of the public land, consists of all the land, including State, public, and private, located within the perimeter boundary.

In a 100-percent public land use permit, the "allotment" consists only of the public lands. (Tr. 208.) BLM does not specify an exact number of cattle or the dates of authorized use, as long as the estimated carrying capacity of public land is not exceeded. (Tr. 146.)

Three witnesses testified on the Rosses' behalf: Norman K. Ross, Keith Berger, and protestant James Ross. They testified about their property and conflicts with Jenks' operations. Ross' concerns on appeal may be discerned from his opening statement at the hearing. They relate to: Jenks' refusal to offer what the Ross family considers a fair rate for an agreement to graze on their private lands (Tr. 30-31); Jenks' alleged mismanagement of the range (Tr. 28); the fact that Jenks refers to unleased land, such as the Rosses', as "free use" lands (Tr. 29-30, 33); the fact that allegedly Jenks does not follow the advice of Governmental authorities regarding prudent range management practices (Tr. 33-34); and the fact that Jenks is not really in the ranching business. (Tr. 32-34.) Ross also presented evidence of improvements the Ross family has made to its property and of damage caused to the Ross property by cattle either owned or pastured by Jenks. (Tr. 42, 46-47, 52, 54, 64, and 407-11.)

Following the hearing, Judge Child issued his decision setting aside the Area Manager's grazing determination because BLM failed to follow established standards in collecting utilization data when it established the carrying capacity of the public lands in question. Judge Child found that BLM's determination to issue a 100-percent public land use permit was not reasonable, noting the small amount of public lands involved in contrast to the acreage encompassed by the perimeter fence and grazed by Jenks' cattle. Judge Child ruled that the Kaufman Ridge Allotment should be "set aside and held for naught." (Administrative Law Judge (ALJ) Decision at 6.) He further determined that BLM should protect the seven scattered BLM-managed parcels either by enforcing the trespass laws or by fencing each parcel as a separate allotment. (ALJ Decision at 7.)

Judge Child held that the seven parcels are not collectively an allotment and that it was unreasonable for BLM to construe them as such. (ALJ Decision at 5.) Holding that BLM could have proceeded in this instance against Jenks because his cattle had trespassed on public lands through overgrazing, Judge Child opined that Jenks should have fenced the lands under his control, reduced his herd, prevented straying, or paid trespass damages. (ALJ Decision at 4.) Judge Child embraced the following statement attributed to Ross: "[F]ailure (by BLM) to act decisively against the permittee has encouraged same to further abuse and damage of the resource and the luckless landowners locked within the perimeter." (ALJ Decision at 2.) According to Judge Child, BLM's May 15, 1995, decision unequivocally rendered Ross powerless to enforce his property rights without first fencing his land with a "legal" fence. (ALJ Decision at 4.)

With respect to the grazing allotment itself, Judge Child observed that BLM's forage data for the public lands was seemingly compiled in 1994 from six test sites located throughout the perimeter-fenced area and in 1995 from those six sites plus two additional sites located that year on Federal lands. Noting that only three of the eight sites used in 1995 were on BLM lands, Judge Child concluded that BLM's determination of the carrying capacity of the seven scattered parcels was unreasonably based on very little data actually derived from the public lands. (ALJ Decision at 4.)

In its statement of reasons (SOR), BLM asserts that Judge Child's decision was not based upon arguments raised by the parties, but on arguments apparently created by the Judge himself. Specifically, BLM points out that Judge Child set aside BLM's carrying capacity determination because BLM did not place all the utilization cages on the public lands. BLM states that the only argument raised by Ross concerning utilization cage locations concerned their proximity to water. In addition, BLM alleges that evidence presented at the hearing demonstrated unequivocally that BLM did follow established standards in determining carrying capacity by using techniques sanctioned by BLM's technical reference internal guidance documents.

BLM contends that Judge Child's reasons for setting aside BLM's determination to issue a 100-percent public lands permit are unclear. It explains that, with a 100-percent public land use permit, BLM would not dictate the number of cattle, as long as the carrying capacity of the public lands was not exceeded. BLM points out that, to the extent more forage is available (and used by Jenks' cattle) in excess of the authorized 204 AUM's, a situation arises where Jenks would underpay BLM for the actual forage removed from the public lands. BLM avers that its grazing determination for the 1995 season was designed to ensure that the authorized grazing use was commensurate with the actual carrying capacity of the public lands, thereby assuring that Jenks would pay for what he had used.

BLM admits that the term "allotment" was used quite loosely at times, but argues that BLM's witness at the hearing clarified that the "allotment" consists only of the seven small parcels of public lands subject to the 100-percent public land use permit.

BLM states that it does not know how to interpret Judge Child's holding that "[t]he Kaufman Ridge Allotment should be set aside and held for naught." It speculates that Judge Child may be saying that BLM should refuse to allow Jenks to graze any cattle on the seven parcels of public lands and issue trespass notices on a continuing basis. Citing 43 C.F.R. § 4.478(a), BLM contends that Judge Child ignored the requirements of the regulations when he ruled against BLM, not on the basis of the record or arguments made by Ross, but on the basis of arguments raised only by himself. BLM requests that the Board set aside the Decision and affirm BLM's determination regarding Jenks' grazing preference.

In his SOR, Jenks also expresses concern with Judge Child's holding setting aside and negating the Kaufman Ridge Allotment, and his holding that BLM should either "enforce the trespass laws" or arrange for "fencing thereof." Jenks contends that these holdings deprive him of the use of property he owns or leases and prevent him from grazing cattle on his property.

James Ross, the protestant and original appellant, did not enter an appearance.

We stayed the effectiveness of Judge Child's decision pending our review of the merits of the appeal, reinstating the status prevailing prior to issuance of the Area Manager's decision.

[1] Implementation of the Act of June 28, 1934 (the Taylor Grazing Act), as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior. Yardley v. BLM, 123 IBLA 80, 89 (1992); Clyde L. Dorius, 83 IBLA 29, 37 (1984); Ruskin Lines, Jr. v. BLM, 76 IBLA 170, 172 (1983). Section 2 of the Taylor Grazing Act charges the Secretary to "make such rules and regulations" with respect to grazing districts on public lands and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315a (1994). The Federal Land Policy and Management Act of 1976, in amending the Taylor Grazing Act, reiterated the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1994).

BLM enjoys broad discretion in determining how to manage and adjudicate grazing privileges. Under 43 C.F.R. § 4.478(b), BLM's adjudication of grazing preference will be upheld on appeal "if it appears that it is reasonable and that it represents a substantial compliance with the provisions of" 43 C.F.R. Part 4100. Where BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis," and the burden is on the objecting party to show that the decision was improper. Wayne D. Klump v. BLM, 124 IBLA 176, 182 (1992); Lewis M. Webster v. BLM, 97 IBLA 1, 4 (1987); George Fasselin v. BLM, 102 IBLA 9, 14 (1988); Bert N. Smith v. BLM, 48 IBLA 385, 393 (1980). Thus, the issue here is whether BLM's May 15, 1995, determination regarding Jenks' authorized grazing use for the 1995 grazing season was supported by a rational basis. 6/

Judge Child recognized that Ross failed to show error in BLM's decision: "Appellant's presentation at the hearing and the briefs which he filed are of little merit. The results here found are in spite of Appellant's efforts, not because of them." (ALJ Decision at 2.) Despite that fact, Judge Child vacated BLM's decision, based on his independent conclusion that the "evidence shows that BLM failed to follow established standards in collecting utilization data in order to establish the carrying capacity of the public lands," and that "BLM's decision to issue a 100 percent public land use permit was not reasonable, given the small acreage amounts of the public lands when compared to the acreage encompassed by the perimeter fence and grazed by Mr. Jenks' cattle and treated as the allotment in its entirety by all parties." (ALJ Decision at 6.) We reverse those holdings.

6/ Judge Child's decision properly sets out the issue presented in the appeal. (ALJ Decision at 2.)

BLM based its decision regarding the carrying capacity on its EA. The preferred alternative in the EA updated the estimated carrying capacity of the public lands within the fenced area based on the utilization data collected throughout that area. (Tr. 132.) One alternative considered in the EA was to grant Jenks' request to increase active grazing levels to 777 AUM's. BLM rejected this action because it was based on limited utilization data. BLM explained that precipitation and weather patterns vary greatly from year to year in this area, and that such variation affects the amount of forage produced. BLM noted that the preferred alternative provided for the use of the data to be collected during the 5-year period, thus tending to even out forage production and ensuring a more accurate figure. (Tr. 137-39.)

Judge Child ruled as follows concerning the carrying capacity of the Federal lands:

However, that "forage" was seemingly established in 1994 from six plots placed throughout the perimeter fenced area, i.e., the "allotment." Two additional plots were created on Federal public lands in 1995. (Tr. 179) The eight established plots are identified in Exhibit A-3. Only three of the eight plots, so identified in 1995 are on BLM land. It cannot be said that Respondent's determination of the carrying capacity of the "allotment", i.e., the seven scattered public land parcels was reasonable.

At page 8 of Respondent's post-hearing brief, we are told that "... BLM was aware, however, from the utilization data collected in the fall of 1994 that much more forage was available on the allotment" Obviously this "utilization data" refers to the entire 34,600 acre perimeter fenced area. See such utilization data for 1995. (Exhibit A-3)

(ALJ Decision at 4.)

A BLM determination of a grazing unit's carrying capacity will not be disturbed in the absence of positive evidence of error. Calvin Yardley, *supra* at 92; James E. Briggs v. BLM, 75 IBLA 301, 302 (1983); Midland Livestock Co., 10 IBLA 389, 400-01 (1973). As BLM points out on appeal, its determination of the carrying capacity of the range was based on data gathered using approved methods. The 1995 Monitoring Analysis (Ex. A-3) employed formulas derived from BLM technical references to analyze the utilization levels of the subject public lands during 1995. (Tr. 232.) Applying this utilization data, BLM adjusted its estimates of the carrying capacity of the unit. BLM asserts that the utilization cages monitored by BLM were properly located in "key areas" in accordance with BLM's internal guidance for rangeland monitoring, such as its Technical Reference 4400-1 "Rangeland Monitoring--Planning for Monitoring." BLM states that topography, vegetation, distance from water, etc., are appropriate factors for determining key areas, but that land ownership is not.

The evidence presented by Ross at the hearing focused on the fact that Jenks' cattle were trespassing on his land and overgrazing the area near Agate Creek. His only complaint regarding BLM's method of determining carrying capacity was the fact that the utilization cages were not placed near water. However, the record shows that they were, in fact, placed near water sources. (Ex. A-7; Tr. 260-62.) Ross admitted that he is not a rancher and has no formal education in grazing. (Tr. 421-22.) He presented no written analysis of the carrying capacity of the public lands to demonstrate that BLM's method of determining the carrying capacity was in error. (Tr. 420.) The evidence and arguments presented by Ross do not support a conclusion that BLM's determination regarding the carrying capacity of the public lands is not supportable on any reasonable basis. Further, we find nothing in Ross' presentation proving error in BLM's judgment.

The evidence does not, as Judge Child held, show that BLM "failed to follow established standards in collecting utilization data." BLM plainly did not monitor the amount of forage on each and every one of the seven scattered Federal parcels. Instead, it relied on evidence of forage found on nearby lands. There is no positive evidence that this method resulted in error: Nothing in the record shows that the Federal lands were so different that these samples were not representative of the forage levels there. Further, Judge Child overlooked the fact that BLM's decision required the reporting in future years by Jenks of the actual forage levels on Federal lands, in order to ensure that BLM's assessment of the forage levels was correct.

The record also supports BLM's decision to issue a 100-percent public land use permit. Prior to 1994, BLM had issued 100-percent public land use permits to Jenks. (Tr. 142.) In 1994, SCS initiated a livestock management plan for Jenks' operation. Specific data dictated how Jenks should use each pasture within his operation boundaries, and Jenks agreed to comply. (Tr. 142.) Accordingly, BLM complied with the management guidelines of SCS and issued a percent public land use permit in 1994 instead of a 100-percent land use permit. However, two factors arose at the end of 1994 which prevented further use of a percent public land use permit. The utilization data showed more additional forage on the Federal lands than anticipated, and SCS was no longer advising Jenks or collecting data on the surrounding private lands. (Tr. 153, 223.) As BLM no longer had input from SCS regarding grazing on private lands, it could no longer specify the amount of cattle and dates. Further, it would have been in the position of having a large impact upon the private lands in the area but controlling a very small amount of the land within Jenks' operation. (Tr. 153-54, 246.) Moreover, BLM customarily uses a 100-percent public land use permit where "C" Category allotments and scattered parcels are involved. (Tr. 147, 215, 218.) Nothing in the record indicates that BLM's determination to use the 100-percent public land use permit was in error.

We note that Judge Child cited no evidence to support his holding that BLM's decision to treat the Federal lands as a 100-percent allotment was unreasonable. He held that

[s]even scattered unfenced parcels of public land comprising 13 or 14 percent of a fenced in 34,600 acre area made up of separate and privately owned unfenced lands, State owned unfenced lands and Federally owned unfenced public lands, do not an allotment make. BLM must manage those seven separate parcels as what they are and like any owner enforce the trespass laws in protection of them. They are not collectively an allotment; it is unreasonable to construe them as such.

(ALJ Decision at 5.) It is clear to us that, by designating the Federally-owned lands as a 100-percent allotment, BLM was in fact managing "those seven separate parcels as what they are." BLM repeatedly correctly explained that, owing to its ownership of a small percentage of the total lands and the scattered nature of its holdings, it lacked authority to control Jenks' grazing activities. ^{7/} By the same token, BLM, by making an annually-updated determination of the amount of forage on the Federally-owned lands, was managing the Federally-owned parcels and ensuring that Jenks would pay for the forage he removed. BLM thus was "enforcing the trespass laws in protection of" the Federally-owned lands.

Judge Child's comments at the hearing suggest that he believed that BLM would not be protecting the Federally-owned lands from trespass unless it fenced Jenks out or proceeded against him for trespass. BLM's decision not to take that action was entirely reasonable. Fencing the seven scattered parcels would obviously have been prohibitively expensive and counterproductive. As to proceeding against Jenks for trespass, it must be remembered that BLM was still assembling information about the capacity of its lands. If that data revealed that Jenks was using more forage than authorized, BLM could then make a convincing case against him for trespass. However, it was not unreasonable for BLM to develop a 5-year review plan that ensures both that Jenks was paying for the forage he removed and that he was not exceeding the authorized use.

^{7/} Judge Child forcefully recognized that restriction on BLM's authority:

"JUDGE CHILD: * * * I think it's very unusual that [BLM is] managing properties off the allotment that are not even Federal land[. * * * BLM's] only responsibility is for Federal lands. No wonder Congress takes away our moneys. My gosh. * * * If the only Federal land is the land in yellow, we're in trouble. * * * Yeah, you are taking awful lot of responsibility for very little governing power. * * * Whew. Somebody's toes are getting stepped on, aren't they?" (Tr. 95-96.)

Of course, the record actually shows that BLM was not "managing properties off the allotment." However, Judge Child was aware that, absent a cooperative agreement between BLM and private interest holders, BLM lacks authority to engage in such management.

We conclude that BLM's decision to treat the seven small, scattered parcels of Federally-owned lands in the area grazed by Jenks as a 100-percent allotment was reasonable. BLM had no authority to regulate grazing on Jenks' other landholdings, and the scattered nature and small size of the Federal holdings in the area rendered it impractical for BLM to expend its resources in enforcement actions. It was accordingly reasonable for BLM to adopt the practice of accurately assessing the capacity of the Federally-owned lands, charging Jenks accordingly, and monitoring his use over a period of years to ensure that trespass action could be taken against him if necessary.

[2] As noted above, Ross focused at the hearing on Jenks' alleged unauthorized grazing on the Rosses' private property. In his decision, Judge Child was plainly swayed by the fact that Jenks' cattle could graze on Ross' land without any challenge from BLM and actually ruled that BLM was somehow responsible for that unauthorized use:

[A]ppellant makes one statement which illustrates his plight: "... [F]ailure (by BLM) to act decisively against the permittee has encouraged same to further abuse and damage of the resource and the luckless landowners locked within the perimeter."

* * * * *

For [BLM] to take the action which it took in the Final Decision, dated May 15, 1995 (Exhibit G-18) possibly enabled it to collect more grazing fees, but rendered [the Rosses] and like situated persons powerless to enforce their property rights without first fencing their land with a "legal" fence. If BLM can be required to consider the rights of Desert Tortoises and Spotted Owls, surely it can be expected to avoid those actions which adversely affect the citizenry.

(ALJ Decision at 2 and 4.) This concern is reflected in his participation at the hearing as well:

THE COURT: Doesn't BLM generally have the responsibility of fencing the allotment perimeters?

THE WITNESS: No, sir, your Honor.

THE COURT: We'll see.

(Tr. 165.)

THE COURT: Then why do you call this an allotment? I am just stunned to think that you would call this an allotment, forcing the private landowner in the middle of it to fence his land * * *.

(Tr. 175.)

THE COURT: And by calling this an allotment, you allow Mr. Jenks to graze all through the area, including on Mr. Ross's parcel, thus forcing him to fence if he wants to keep the cattle off?

(Tr. 217.)

THE COURT: You [(BLM)] could fence the common boundary at your own cost, couldn't you, entirely your own cost?

THE WITNESS: I'm not sure, your Honor, that BLM is authorized to spend Federal money on private land.

THE COURT: Well, if they are intending to have an allotment, you may be forced to.

(Tr. 281.)

THE COURT [(addressing BLM's witness)]: Doesn't it occur to you that if he herds 2,000 yearlings for four months, that they are going to encroach onto other people's property?

THE WITNESS: Because there is —

THE COURT [(apparently interrupting)]: But you don't care.

(Tr. 187-88.) Judge Child was fully aware of the fact that, under the law of the State of Colorado, the burden was on the Rosses to fence Jenks' cattle out of their property. §/ Indeed, he expressly acknowledged that in

§/ In this situation, the fact that Jenks' cattle may be using the Rosses' property (even if in trespass) is not BLM's responsibility. By the terms of the "Colorado Fence Law," Colo. Rev. Stat. §§ 35-45-101 through 35-46-114 (1995), a person whose property has been damaged apparently cannot recover for a trespass by livestock unless, at the time of the trespass, the complaining party has maintained in good repair a lawful fence to protect his property. If no lawful fence exists, the owner of the livestock is not responsible for nonwillful trespass causing damage to vegetation except where cattle are stocked in numbers that exceed the carrying capacity of a person's land to support those cattle, and such cattle drift onto a neighbor's land. Col. Rev. Stat. § 35-46-102(2); SaBell's, Inc. v. Flens, 599 P.2d 950, 951 (Colo. App. 1979), aff'd 627 P.2d 750 (Colo. 1981); Bolten v. Gates, 100 P.2d 145 (Colo. 1940). Further, it appears that the owner of livestock is under no statutory duty to fence them in even if he knows that they will enter the unfenced property of another. Colo. Rev. Stat. § 35-46-102 (1995); SaBell's, Inc. v. Flens, supra; see also Williamson v. Fleming, 178 P. 11 (Colo. 1919).

BLM considered how that law applied in the instant case (Tr. 155), consulting the Colorado State Brand Commissioner (Tr. 157-62), who stressed that, "according to the statute, the injured party must bring a

his decision. (ALJ Decision at 6.) He was, however, unwilling to accept that situation, finding instead that BLM was somehow culpable because its actions had, according to Judge Child, "aggravated" the situation faced by the Rosses:

THE COURT: You say the burden is on the Rosses to fence their own property?

MR. BROMLEY: Yes, sir, that's correct. I will be happy —

THE COURT: If that burden [to fence private property] is aggravated by the BLM creating an allotment, what's that statement, "He drew a circle that shut us out, we drew a circle that fenced him in." Now what BLM has done, has drawn a circle that fence[s] in Ross. Oh, what a lot of love you have shown.

(Tr. 151.)

Judge Child improperly ruled that, by "failing to act decisively," BLM was responsible for the fact that Jenks' cattle grazed all through the area, including on the Rosses' private land. Although Judge Child appeared to recognize the principle that BLM may not restrict parties' grazing activities on non-Federal lands (in the absence of a cooperative agreement between the party and BLM), he plainly failed to apply that principle to reach the conclusion that neither he nor BLM has authority to restrict Jenks' grazing activities on non-Federal lands. Any trespass on the Rosses' land is strictly a private dispute between Jenks and the Rosses which they must resolve and is governed by State law. As such, it is not within the jurisdiction of the Department of the Interior. See, e.g., David J. Bartoli, 123 IBLA 27, 41 (1992), and cases cited.

Judge Child also seemed to presume that there is a nexus between permitting Jenks to graze on Federal land and the alleged trespass on the Rosses' property. Nothing in the record supports that conclusion. The undisputed testimony of BLM's witnesses was that Jenks' cattle were attracted to the Rosses' property because water could be found there. (Tr. 166-67.) That would be true even if BLM fenced all of the Federally-owned lands in the area. Thus, the record shows that the unauthorized use of the Rosses' lands would continue until the Rosses constructed a boundary fence, regardless of whether or not BLM authorized grazing on the Federally-owned lands elsewhere in the pasture area. ^{9/}

fn. 8 (continued)

civil action against the owner of the livestock for 'willful trespass.' (Tr. 162.) By so doing, BLM appears to have specifically been attempting to avoid causing or aggravating unauthorized use of the Rosses' property by Jenks. ^{9/} If anything, the fact that BLM authorized grazing on Federally-owned lands actually made more forage available to Jenks' cattle, thus rendering it less likely that they would graze on the Rosses' land.

It should also be noted that, by establishing the carrying capacity of the Federally-owned lands, BLM was actually making it possible for the Rosses to bring a willful trespass action under State law. Determination of the capacity of the Federal range and Jenks' entitlement would be necessary for a showing that Jenks' cattle were stocked in numbers that exceeded the total carrying capacity of his land to support those cattle. See n.8, supra. Once BLM determines the carrying capacity of the Federal lands leased to Jenks, the way is clear for the Rosses to make their best case in State court that Jenks is committing trespass under State law by exceeding the total capacity of grazing lands owned or controlled by Jenks.

We find no justification for Judge Child's conclusion that BLM should "arrange for fencing" the seven parcels that make up the allotment. (ALJ Decision at 7.) As noted above, the construction of a fence around Federally-owned property would not prevent the alleged trespass of Jenks' cattle on the Rosses' property. (Tr. 166.)

Judge Child's decision to set aside BLM's decision is not supported by the record. It is accordingly reversed. BLM's decision is hereby affirmed.

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 reversed.

David L. Hughes
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge