

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

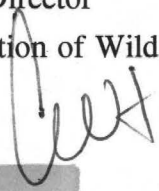
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M E M O R A N D U M

DATE: April 6, 1995
TO: Cathy Barcomb, Executive Director
Commission on the Preservation of Wild Horses
FROM: C. Wayne Howle
Deputy Attorney General
SUBJECT: Paiute Meadows Allotment



I have attached a copy of RESPONDENT'S NOTICE OF APPEARANCE, RESPONDENT'S OPPOSITION TO MOTIONS FFROM IRV AND SANDY BROWN, RESPONDENT'S MOTION TO DISMISS THE APPEALS OF WILLIAM CUMMINGS AND DAN RUSSELL for your information.

CWH/pw
Attachment

RECEIVED

MAR 28 1995

OFFICE OF ATTORNEY GENERAL
DEPUTY ATTORNEY GENERAL

1 DAVID NAWI
 Regional Solicitor
 2 Pacific Southwest Region
 JOHN R. PAYNE
 3 Assistant Regional Solicitor
 Office of the Regional Solicitor
 4 U.S. Department of the Interior
 2800 Cottage Way, Rm. E-2753
 5 Sacramento, CA 95825
 Telephone: (916) 979-2157
 6
 Attorney for the Bureau of Land Management
 7

8 UNITED STATES DEPARTMENT OF THE INTERIOR
 OFFICE OF HEARINGS AND APPEALS
 9 HEARINGS DIVISION

10	William C. Cummings and)	N2-93-8, IBLA 93-481
	Dan Russell,)	
11)	
	Appellants,)	
12)	
	v.)	
13)	
	Bureau of Land Management,)	
14)	
	Respondent,)	
15)	
<hr/>			
16	Nevada Division of Wildlife,)	N2-93-9, IBLA 93-482
)	
17	Appellant,)	
)	
18	v.)	
)	
19	Bureau of Land Management,)	
)	
20	Respondent,)	
)	
<hr/>			
21	Commission for the Preservation)	N2-93-10, IBLA 93-484
	of Wild Horses,)	
22)	
	Appellant,)	
23)	
	v.)	
24)	
	Bureau of Land Management,)	
25)	
	Respondent,)	
26)	

27 / / /
 28 / / /

1 Wild Horse Organized Assistance,) N2-93-11, IBLA 93-483
2 Appellant,)
3 v.)
4 Bureau of Land Management,)
5 Respondent.)
6

7 RESPONDENT'S NOTICE OF APPEARANCE, RESPONDENT'S
8 OPPOSITION TO MOTIONS FROM IRV AND SANDY BROWN,
9 RESPONDENT'S MOTION TO DISMISS THE APPEALS OF
10 WILLIAM CUMMINGS AND DAN RUSSELL

11 Notice of Appearance

12 Respondent Bureau of Land Management (BLM) wishes to advise
13 the Administrative Law Judge and the parties in the above-
14 mentioned appeals that John R. Payne, Assistant Regional
15 Solicitor, U.S. Department of the Interior, 2800 Cottage Way,
16 Room E-2753, Sacramento, California, 95825-1980, has replaced
17 Burton J. Stanley as the BLM's representative in these appeals.
18 Please direct all correspondence and communications relating to
19 these appeals to Mr. Payne.

20 Opposition to Motions from Irv and Sandy Brown

21 Irv and Sandy Brown, who are not parties to any of the
22 above-captioned appeals, submitted three motions concerning these
23 appeals on March 8, 1995. First, they seek to substitute
24 themselves as the "real party in interest" for William C.
25 Cummings and Daniel Russell, because they have purchased the base
26 property for the grazing preference to the Paiute Meadows
27 Allotment. Second, they seek to consolidate the appeals, and
28 third, they seek to continue the appeals. As set forth below,
BLM opposes all three motions.

1 First, a brief summary of relevant facts is in order. The
2 Decision at issue in these appeals is the Final Full Force and
3 Effect Multiple Use Decision for the Paiute Meadows Allotment
4 (the 1993 Decision), dated April 12, 1993. At the time the
5 Decision was issued, William Cummings was the owner of the base
6 property to which the grazing permit for the Paiute Meadows
7 Allotment was attached. (Ex A p 1). Dan Russell leased the base
8 property from William Cummings and was the permittee at that
9 time. (Ex A p 1). Both Cummings and Russell timely appealed the
10 1993 Decision. (Ex A p 1). However, on October 12, 1993, the
11 grazing lease between Cummings and Russell was terminated by a
12 bankruptcy court. (Ex A p 1). At that time, Russell's grazing
13 permit automatically terminated. 43 C.F.R. § 4110.2-1(d). On
14 April 5, 1994, Cummings sold the base property to the Browns.
15 (Ex A p 2). On May 31, 1994, the Browns applied to have the
16 grazing permit transferred to their name, pursuant to 43 C.F.R. §
17 4110.2-3. (Ex A p 2). The BLM issued a proposed decision
18 approving this transfer on February 6, 1995. (Ex A p 2).

19 The Browns' motion for substitution is apparently based on
20 the notion that once an individual purchases base property, and
21 applies for a transfer of the grazing permit attached to the base
22 property, that person has standing to retroactively take over the
23 prior permittee's grazing appeals. The Browns cite to no
24 statute, regulation, case, or other authority as support for this
25 notion.

26 The Bureau of Land Management opposes any substitution by
27 the Browns in the above-captioned appeals. The Decision at issue
28 in these appeals is the Final Full Force and Effect Multiple Use

1 Decision for the Paiute Meadows Allotment, dated April 12, 1993.
2 (Ex A). Those who wish to appeal a Bureau of Land Management
3 grazing decision have thirty days from receipt of the decision to
4 file an appeal. 43 C.F.R. § 4.470(a); 43 C.F.R. § 4160.4.

5 However:

6 Any applicant, permittee, lessee, or any other person
7 who, after proper notification, fails to appeal a final
8 decision of the authorized officer within the period
9 prescribed in the decision, shall be barred thereafter
10 from challenging the matters adjudicated in that final
11 decision.

12 43 C.F.R. § 4.470(b).

13 Although the Browns were not sent copies of the Decision
14 when it was issued, they were not at that time an "affected
15 interest" under 43 C.F.R. § 4100.0-5. The BLM is only required
16 to send copies of proposed and final decisions to those who have
17 identified themselves as affected interests. 43 C.F.R. § 4160.1-
18 1; 43 C.F.R. § 4160.3(b). At any rate, the Browns did receive a
19 copy of the 1993 Decision in January, 1993. (Ex A p 1). Under
20 any reasonable interpretation of the regulations, the time period
21 for the Browns to appeal the 1993 Decision is long past. See
22 Galen B. Brazington, 59 IBLA 255, 255-56 (1981) (the 30-day time
23 limit for filing appeals is jurisdictional, and an appeal filed
24 after that time must be dismissed for lack of jurisdiction).

25 This does not leave the Browns without a remedy, however.
26 They have applied for a transfer of grazing preference as
27 required under 43 C.F.R. § 4110.2-3(b). They must accept the
28 terms and conditions of the terminating grazing permit unless the
authorized officer approves modifications of the permit. 43
C.F.R. § 4110.2-3(c). However, once the BLM issues a final
decision approving or denying that transfer, the Browns will have

1 an opportunity to appeal that decision. 43 C.F.R. § 4.470; 43
2 C.F.R. Subpart 4160.

3 Because the Browns are not parties to this appeal, their
4 other motions are improper and should be denied as a matter of
5 course. However, if the Administrative Law Judge decides to hear
6 these motions, BLM is certainly opposed to consolidating the
7 Browns' "appeal" of the February 6, 1995 proposed decision with
8 the appeals of the 1993 Decision, for two reasons. First, the
9 February 6, 1995 proposed decision is not a final decision, and
10 is not appealable. (Ex A p 2; 43 C.F.R. Subpart 4160). BLM is
11 treating the Browns "appeal" of this decision as a protest. (Ex
12 A p 2; See 43 C.F.R. Subpart 4160).

13 Furthermore, the BLM will oppose any motion to consolidate
14 an appeal of the final decision approving or denying a transfer
15 with the 1993 Decision. The two decisions will be nearly two
16 years apart and will have entirely separate purposes. The 1993
17 Decision set forth general management objectives for the
18 allotment and specific actions to meet those objectives. The
19 decision approving or denying the transfer, however, will deal
20 specifically with the application for transfer of the grazing
21 permit, and the terms and conditions of that transfer. BLM
22 asserts that consolidating appeals in the two decisions would
23 only make for a very confusing hearing. The BLM wishes to note,
24 however, that it would not be opposed to consolidating the above-
25 captioned appeals in a single hearing, as the Administrative Law
26 Judge has proposed in his February 2, 1995 Notice of Hearing.

27 If the Administrative Law Judge decides to hear the Browns'
28 motions, BLM is also opposed to the motion to continue the

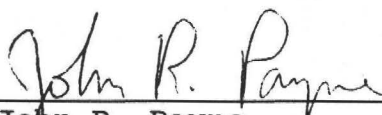
1 hearing. BLM is ready to proceed and believes that any
2 interested parties have had plenty of time to prepare for a
3 hearing.

4 Motion to Dismiss the Appeal of William Cummings and Dan Russell

5 Respondent BLM also at this time moves to dismiss the
6 appeals of William Cummings and Dan Russell (N2-93-8, IBLA 93-
7 481). As stated above, since their original appeals, Cummings
8 and Russell have both lost their interest in the Paiute Meadows
9 allotment. Russell had his lease and grazing permit terminated,
10 and Cummings sold the base property for the allotment.
11 Therefore, neither have standing to continue to press their
12 appeals. See Colorado Open Space Council, 109 IBLA 274, 280
13 (1989) ("[T]he Board has expressly held that in order to maintain
14 an appeal, 'the record must show that appellants have a legally
15 recognizable interest'") (citations omitted).

16 For the reasons set forth above, the motions of Irv and
17 Sandy Brown should be denied, and the appeals of William Cummings
18 and Dan Russell should be dismissed.

19 Respectfully submitted,

20 
21 _____
22 John R. Payne
23 Assistant Regional Solicitor
24 Attorney for Respondent
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DECLARATION OF BOB HOPPER

COMES NOW BOB HOPPER and deposes and says:

1. I have personal knowledge of the following facts.
2. I am employed by the United States Department of the Interior, Bureau of Land Management, as the Supervisory Range Conservationist for the Paradise-Denio Resource Area in Nevada. I have been employed in that capacity since January 12, 1992.
3. The Full Force and Effect Multiple Use Decision (the 1993 Decision) for the Paiute Meadows Allotment was issued on April 12, 1993.
4. At the time the 1993 Decision was issued, William Cummings owned the base property to which the grazing permit for the Paiute Meadows Allotment (the grazing permit) was attached. Dan Russell leased the base property from William Cummings and was the actual permittee for the allotment.
5. Cummings and Russell both filed timely appeals of the 1993 Decision.
6. According to a March 16, 1994 letter from Cummings' attorney, the lease between Russell and Cummings was terminated by a bankruptcy court on October 12, 1993. Pursuant to 43 C.F.R. § 4110.2-1(d), as soon as Russell's lease was terminated his grazing permit was also immediately terminated.
7. In January, 1994, Irv and Sandy Brown came to the BLM Winnemucca office and inquired about the Paiute Meadows allotment. At that time, they were given a copy of the 1993 Decision. The Browns also came in on February 8, 1994 to discuss the 1993 Decision.

8. On April 5, 1994, Cummings sold the base property to the Browns.

9. On May 31, 1994, the Browns applied to have the grazing pemrit transferred to their name pursuant to 43 C.F.R. § 4110.2-3. On February 6, 1995, the BLM issued a proposed decision approving the transfer.

10. The Browns have attempted to appeal the February 6, 1995 proposed decision, but the BLM is treating this attempted appeal as a protest pursuant to 43 C.F.R. § 4160.2.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20 day of March, 1995, at Winnemucca, Nevada.



Bob Hopper

1 CERTIFICATE OF SERVICE

2 The original of the foregoing "Respondent's Notice of
3 Appearance, Respondent's Opposition to Motions From Irv and Sandy
4 Brown, Respondent's Motion to Dismiss the Appeals of William
5 Cummings and Dan Russell" was sent via Certified Mail-Return
6 Receipt Requested, on March 25, 1995, to:

7 Office of Hearings and Appeals
8 Hearings Division
9 6432 Federal Building
10 Salt Lake City, UT 84138

11 Copies of the foregoing "Respondent's Notice of Appearance,
12 Respondent's Opposition to Motions From Irv and Sandy Brown,
13 Respondent's Motion to Dismiss the Appeals of William Cummings
14 and Dan Russell" were sent via "Certified Mail-Return Receipt
15 Requested" on March 24, 1995, to:

16 C. Wayne Howle
17 Deputy Attorney General
18 198 South Carson St., No. 311
19 Carson City, NV 89710

20 Richard P. Bernstein, Esq.
21 Brodovsky and Brodovsky
22 8800 Cal Center Drive, Suite 300
23 Sacramento, CA 95826-3225

24 Thomas S. Van Horne, Esq.
25 2991-B Gold Canal Drive
26 Rancho Cordova, CA 95670

27 Dawn Lappin, Director
28 Wild Horse Organized Assistance
15640 Sylvester Road
Reno, NV 89511

Irv and Sandy Brown
P.O. Box 478
Winnemucca, NV 89446

William C. Cummings
7700 College Town Dr., Suite 208
Sacramento, CA 95826

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Dan Russell
P.O. Box 339
Folsom, CA 95670

Copies of the foregoing "Respondent's Notice of Appearance,
Respondent's Opposition to Motions From Irv and Sandy Brown,
Respondent's Motion to Dismiss the Appeals of William Cummings
and Dan Russell" were sent via regular mail on March 25, 1995,
to:

State Director
Bureau of Land Management
P.O. Box 12000
Reno, NV 89520-0006

Area Manager
Sonoma-Gerlach Resource Area
Bureau of Land Management
705 East 4th Street
Winnemucca, NV 89445

I certify that the foregoing is true under penalty of
perjury.

Executed this 24th day of March, 1995 at Sacramento,
California.


Barbara L. Johnson