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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

NEVADA DEPARTMENT OF WILDLIFE, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	IBLA 93-88 Appeal from the Area Manager's Decisions dated June 30 and September 18, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada
NEVADA COMMISSION FOR THE PRESERVATION OF WILD HORSES, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-92-12 Appeal from the Area Manager's Decisions dated September 18 and November 30, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada
WILD HORSE ORGANIZED ASSISTANCE, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-92-13 Appeal from the Area Manager's Decisions dated September 18 and November 30, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada

OPENING BRIEF OF APPELLANTS NEVADA DIVISION OF WILDLIFE AND COMMISSION FOR PRESERVATION OF WILD HORSES

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This brief is submitted in the above-captioned appeals on behalf of the Nevada Division of Wildlife (NDOW), and the Nevada Commission for the Preservation of Wild Horses (Commission), by and through their undersigned counsel, as ordered by the hearing officer on November 7, 1997.

INTRODUCTION

These consolidated appeals concern the Paiute Meadows Allotment (the Allotment) in the Bureau of Land Management's (BLM's) Winnemucca District, located in northern Nevada. The single issue in this appeal is whether a grazing authorization issued by the Bureau of Land Management (BLM) is, in the circumstances, an appealable decision.

When BLM issued a decision for the Allotment in 1991, NDOW and the Commission (collectively the Appellants) identified unaddressed concerns caused by overgrazing on the Allotment. Consequently, BLM withdrew the decision, but proceeded to renew grazing authorizations on a yearly basis at levels of grazing which BLM had, in its Allotment Evaluation, acknowledged caused resource damage. Appellants therefore appealed from these yearly authorizations. BLM refused to entertain the appeals, contending that the grazing authorizations were not appealable decisions. The availability of appeal from the annual authorizations is the disputed issue presented for decision.

The chronology of events which pertain to the appeal is as follows.

LATE 1991:	BLM on November 22 issued a full force and effect decision on the Paiute Meadows Allotment. On December 17 the Commission appealed, and on December 18 NDOW appealed on the grounds of inconsistency with the land use plan, failure to consult with affected interests, inconsistency with the Endangered Species Act, improper procedure under the National Environmental Policy Act, and improperly calculated carrying capacities.
EARLY 1992:	NDOW's Administrator and BLM's Nevada State Director met and agreed that the decision would be withdrawn except for the portion permitting a removal of wild horses.
	The permittee, Dan Russell, appealed the decision to withdraw the decision.
MAY 12, 1992:	The BLM issued a one year permit to the permittee, authorizing livestock numbers equal to those of past years. *See* Exhibit 1.
JUNE 18, 1992:	NDOW appealed the one year permit. *See* Exhibit 2.
JUNE 30, 1992:	The BLM area manager issued a decision that NDOW's appeal of the one year permit was not appealable.
JULY 24, 1992:	Commission appealed the annual permit issued 1992.

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JULY 30, 1992: NDOW appealed the decision that a one year permit is not an appealable decision. This appeal was referred to a hearings officer. *See* Exhibit 3.

AUGUST 6, 1992: The one year permit was reissued with different terms and conditions. *See* Exhibit 4.

SEPTEMBER 11, 1992: NDOW again appealed. *See* Exhibit 5.

SEPTEMBER 18, 1992: The BLM issued another decision that the one year permit is not an appealable decision.

OCTOBER 19, 1992: Commission appealed the change in use approved August 6, 1992.

ARGUMENT

It is the position of NDOW and the Commission that issuance of an annual grazing permit constitutes an appealable final agency action when the BLM knows--as it did in this case--that significant deterioration of the rangeland resource will result from the use which the permit authorizes.

Appellants had long been interested and involved in management on the Allotment. They had, however, been unable to reach the resource issues which concerned them, which were especially acute at the time due to drought and severe overgrazing. A photographic record of the damage caused by the last season of grazing was attached to the July 30, 1992, NDOW appeal. Exhibit 3.

Appellants' attempt to address the resource issues first occurred with their appeals from the 1991 decision, which decision was withdrawn. Dialogue with BLM then ended regarding ongoing grazing, and grazing on the Allotment was carried forward as it always had been.

The BLM position was that resource conditions would eventually be addressed when the Winnemucca BLM District reissued a formal and comprehensive decision. In the interim, BLM contended the permittee could graze at preexisting levels. However, there was no time frame for the BLM to issue its comprehensive decision. At the time when the appeals from yearly authorizations were taken, the BLM solicitor was uncertain whether the District could even issue a new decision while the permittee's appeal was pending. Thus Appellants were faced with the real prospect that the Allotment would be licensed for 1993 and subsequent years at the same harmful level as in past years.

Appellants then faced the question whether they would abide the reauthorization of damaging levels of use for an indefinite period into the future. The only action besides an appeal which would alleviate the damage being done was a lawsuit for an injunction. A lawsuit would, however, involve

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commitment of significant resources by all concerned. It would also unnecessarily heighten the profile of a routine dispute beyond its origins in the administrative domain. Appellants argue here that an appeal in these circumstances would serve the interests of all concerned by affording a less formal method of resolving disputes.

The BLM retains authority to adjust year-to-year grazing authorization based on the condition of the range, 43 U.S.C. § 1752(e),[1] so issuance of the annual permit is not merely a ministerial function. It is a function which rests on the exercise of sound professional judgment and is therefore an appealable agency decision. The failure to properly exercise that judgment is reversible as an arbitrary and capricious agency action not in accordance with the law. It should therefore be appealable.

The BLM *must* reduce active use which is "causing an unacceptable level or pattern of utilization or exceeds the livestock carrying capacity as determined through monitoring." 43 C.F.R. § 4110.3-2. "The authorized livestock grazing use shall not exceed the livestock carrying capacity." 43 C.F.R. § 4130.6-1. Appellants assert the BLM must abide by its own regulations and make adjustments when annually renewing the grazing authorization. Appellants particularly assert that the BLM in the present instance had more than adequate information to require downward adjustment in the authorized grazing, yet arbitrarily and capriciously continued grazing use at a level which it knew would cause resource damage.

The BLM's own documentation proved the grazing authorized exceeded the carrying capacity of the land, as set forth in NDOW's appeal dated June 18, 1992. The adverse effect of overgrazing is candidly depicted in BLM's own Final Allotment Evaluation for the Paiute Meadows Allotment, dated November 22, 1991.[2] In addition, NDOW offered a report containing both text and color photographs as further visual and written evidence of the distressed state of the vegetation even before the onset of livestock grazing. The BLM was aware of these conditions; the affected land is under its charge.

Appellants rely on the legal argument contained in the decision of Administrative Law Judge Rampton in the appeal entitled *Joseph M. Feller v. Bureau of Land Management*, UT-06-89-02 (August

[1]References to sections of the Code of Federal Regulations are to those in effect at the time of the appeals.

[2]Appellants presume the Allotment Evaluation already constitutes part of the administrative record. If this presumption is in error, Appellants will furnish a copy of BLM's document upon request.

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13, 1990), a copy of which is attached as Exhibit 6. The Judge said "the renewal of a 10-year permit clearly is an action both on an application for a permit and relating to its terms and conditions. It is therefore subject to protest and appeal pursuant to 43 C.F.R. Subpart 4160." *Id.* at 4. Appellants believe the same reasoning applies to issuance of an annual permit, especially where the underlying multi-year permit was not subject to review and comment by affected interests, as in the present case.

Appellants acknowledge the hearing officer decision in the case entitled *Defenders of Wildlife et al. v. Bureau of Land Management*, Case no. AZ-020-97-03080 (June 6, 1997). *See* Exhibit 7. Language contained therein, however, provides the seed of an important distinction. It was held:

> [i]f some material change had been effectuated by the grazing extension, then jurisdiction could arguably be triggered. For example, if, in fact, BLM had not conducted reasonable monitoring with respect to the forage condition of the allotment *or if Appellants could factually aver that the condition of the range had materially declined, then such an extension might provide the basis for an appeal.*

(Emphasis added.) Appellants do not here take issue with the BLM's monitoring efforts, for they in fact depict a range in serious condition. Appellants do therefore assert, though, that BLM's decision to make the annual grazing authorization is appealable because it is in contempt of BLM's own published data, set forth in the Allotment Evaluation of November 1991, showing a range in decline.

A second distinction which appears from the *Defenders of Wildlife* decision is that one of the two appealed-from authorizations deviates significantly from previous authorizations. The *Defenders of Wildlife* decision states, "a final decision under the auspices of 43 C.F.R. §§ 4.470 and 4160.4 would have resulted only if BLM had approved some change in the previously authorized grazing on the allotment." *Id.* at 2. The BLM letter to the permittee, Exhibit 3, dated August 6, 1992, is a self-professed "change in your 1992 grazing use of the Paiute Meadows Allotment." This fits precisely the criterion established by the *Defenders of Wildlife* opinion.

Appellants' position is also supported by recent court decisions. The federal district court found a final agency action in the U.S. Forest Service decision to maintain the status quo in its Region 8 pending development of a future land management plan. *Southern Timber Purchasers Council v. Alcock*, 779 F. Supp. 1353 (N.D. Ga. 1991) *modified*, 993 F.2d 800 (11th Cir. 1993). The BLM's

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decision to continue permitting livestock on the Paiute Meadows Allotment is analogous: it preserves the status quo while a decision is devised.

In reaching its conclusion, the court in *Alcock* referred to the Supreme Court's practical approach to the definition of "final" agency action. "The court looks to see whether the action is 'definitive'; whether it has a direct and immediate effect on the parties; and finally, whether judicial review will serve efficiency or enforcement of the regulatory scheme." *Id.*, 779 F. Supp. at 1358, (*quoting Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 1185 (D.D.C. 1985)).

Appellants would argue that each of these criteria is met by the reinstitution of grazing on the Allotment at harmful levels pending the formulation of the promised decision at some indefinite time in the future.

First, the action is definitive because it establishes the permittee's grazing for the 1992 grazing season. The permit very simply sets the level of grazing which will occur.

Second, issuance of the permit has the effect of authorizing grazing on a depleted range resource at levels known to be deleterious to the vegetation. This has a highly adverse effect on habitat, and therefore on the interests of the Appellants, which are legislatively charged with protection of Nevada's natural resources.

Third, allowing an appeal from the permit would serve to enforce the regulatory scheme, because it subjects a non-ministerial, allotment-specific BLM grazing decision to public scrutiny for arbitrariness, capriciousness, and unlawfulness. If the appeal is not allowed, then the affected interests have no administrative recourse.

In another decision, *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), a similar "interim strategy" was held to be a final agency action. The court remarked that the Ninth Circuit interprets the term "agency action" broadly. *Id.* at 294. The BLM should make the same broad interpretation in recognition of the many interests which are affected by the annual grazing decision.

CONCLUSION

Because the decision to issue the permit to Paiute Meadows Ranch for grazing on the Paiute Meadows Allotment was not merely ministerial, because it rested in the agency's sound professional

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judgment, and because it perpetuated harmful levels of grazing, it was a final agency action subject to appeal.

Dated this 5th day of December, 1997.

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