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United States Department of the Interior

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IN REPLY REFER TO:

February 2, 1998

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

DECISION AND ORDER

PROCEDURAL BACKGROUND

These consolidated dockets were referred by the Interior Board of Land Appeals (IBLA) to the Hearings Division for purposes of conducting a public hearing and ruling initially on the factual and legal issues raised by these appeals. (Nevada Department of Wildlife, et al., v. BLM, IBLA 93-88 (April 3, 1996))

Prehearing telephone conferences were conducted by the undersigned with respect to these dockets on November 3 and 7, 1997. Pursuant to those prehearing conferences, and with the concurrence of the undersigned, the respective parties in interest hereto mutually stipulated and agreed to waive the public hearing in this matter, which was previously, formally scheduled to commence on November 17, 1997, in Winnemucca, Nevada. During the referenced prehearing conferences, counsel for the parties in interest agreed to brief and adjudicate these dockets exclusively on the written, administrative record. In conjunction therewith, the undersigned issued a Scheduling Order on November 7, 1997, setting out the mutually-agreed upon briefing schedule. Subsequently, on December 22, 1997, Respondent filed a Request For Extension of Time with respect to the briefing schedule previously established under my November 7, 1997, Scheduling Order. By Scheduling Order issued on December 24, 1997, the undersigned approved an extension of time in the briefing schedule. Following thereon, both parties filed their ensuing briefs in a timely fashion, and this matter is now procedurally ripe for decision by the undersigned.

Both sides having now submitted their briefs and related exhibits and materials in a timely fashion, without further attribution, this decision incorporates portions of the briefs of the parties in setting forth both the facts and the law. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent that they are not so consistent or may be immaterial or irrelevant, they are rejected.

FACTUAL AND LEGAL BACKGROUND

These consolidated appeals cover the Paiute Meadows Allotment located in the Winnemucca District of the Bureau of Land Management (BLM) in the State of Nevada. On November 22, 1991, BLM issued a Full Force and Effect Decision covering the Paiute Meadows Allotment. The Nevada Commission For The Preservation of Wild Horses (Commission) filed an appeal therefrom on December 17, 1991, and the Nevada Division of Wildlife (NDOW) appealed on December 18, 1991. The Administrator of NDOW and the Nevada State Director of the BLM negotiated an agreement under which the Decision was withdrawn by the BLM, except for that portion permitting a removal of wild horses. (See Opening Brief of Appellants Nevada Division of Wildlife and Commission For

Preservation Of Wild Horses, December 5, 1997, p. 2) (Hereinafter "Appellants' Opening Brief") On May 12, 1992, the BLM issued a one year permit to the permittee, Mr. Dan Russell. That permit authorized livestock numbers equal to those of previous years on the allotment. (See Exhibit 1 to Appellants' Opening Brief) On June 18, 1992, NDOW appealed the one year permit. (See Exhibit 2 to Appellants' Opening Brief) On June 30, 1992, the BLM Area Manager issued a decision that NDOW's appeal of the one year permit was not an appealable procedural event. (See Exhibit 3 to Appellants' Opening Brief) On July 30, 1992, NDOW appealed the determination by the Area Manager that the issuance of a one year permit was not an appealable event. (See Exhibit 3 to Appellants' Opening Brief) On August 6, 1992, the Area Manager sent a letter to the permittee, Mr. Russell, authorizing a change in the 1992 grazing use of the Paiute Meadows Allotment. The Area Manager's letter stated, "This represents a change in your authorized use areas, season of use, and authorized active preference. . . . This represents a reduction in herd size of 57% during the remainder of the normally scheduled use period, by taking voluntary non-use and deferring use until November." (See Exhibit 4 to Appellants' Opening Brief, p. 1) The content of the Area Manager's August 6, 1992, letter to the permittee was then appealed by NDOW on September 11, 1992, on the ground that the Area Manager's August 6th letter constituted a "re-authorization of grazing livestock on the Paiute Meadows Allotment." (See Exhibit 5 to Appellants' Opening Brief, p. 1)

The principal procedural issue implicated by the above-referenced factual background is whether an annual grazing authorization constitutes an appealable action by the BLM. It is the position of NDOW and the Commission that the issuance of an annual grazing permit does, in fact, constitute an appealable final agency action, under circumstances where the BLM allegedly had actual knowledge that significant deterioration of the rangeland resource would result from the use which the referenced one year permit authorized. (See Appellants' Opening Brief, p. 3)

BLM contends, to the contrary, that the one year permit to Russell no longer constitutes an appealable action, in part because the permit upon which the one year grazing authorization was based was arguably, procedurally superseded when the BLM issued a new Multiple Use Decision on April 12, 1993, which covers the Paiute Meadows Allotment. Based upon this, the BLM argues that "The 1992 annual authorizations are simply no longer relevant in terms of the management of the allotment." (See BLM's Response Brief, December 29, 1997, p. 5) (Hereinafter "BLM Response") In this context, BLM argues that the instant appeals should be dismissed because ". . . the annual authorizations appealed from are now moot." (BLM Response, p. 4)

STATEMENT OF ISSUES

Appellants contend that the annual authorizations to permittee Russell constituted a final decision by the authorized BLM official, which they now argue remains

jurisdictionally amenable to appeal. In context, Appellants argue that BLM has taken an action which constitutes a final decision within the purview of 43 C.F.R. § 4.470 and § 4160.4, and that the Hearings Division now enjoys jurisdiction with respect to their timely filed notices of appeal therefrom. In the context of the pertinent facts of this case, a final decision under the auspices of 43 C.F.R. § 4.470 and § 4160.4 could have resulted if BLM had approved material, substantive changes covering the 1992 grazing season. Each side has submitted numerous exhibits and attachments to their previously referenced briefs. In plain terms, the parties disagree as to the basic factual issue of whether or not the annual authorizations approved by the BLM implicated material, substantive changes. Appellants contend that the changes referenced in the BLM letter of August 6, 1992, addressed to the permittee (See Exhibit 4 to Appellants' Opening Brief) were material and substantive largely because, ". . . 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." (See Appellants Opening Brief, p. 4)

With respect to this basic factual dispute involving the condition of the range itself, BLM takes a diametrically opposed position to that asserted by the Appellants. In particular, BLM has argued with respect to the changes approved in BLM's August 6, 1992, letter to the permittee the following, "On August 6, 1992, the Area Manager sent out a letter authorizing a change in grazing use for the 1992 season. . . . Essentially, the decision reduced the number of cows authorized on the allotment, but extended the time from November 5 to February 28. It also authorized an additional two weeks in the North area in the summer. Thus the total number of AUMs was 224 less than the 4,350 AUMs authorized for the year." (See BLM's Response, p. 4) BLM thus argues that the changes effectuated in the August 6, 1992, BLM letter were intended to reduce grazing pressure on the range, rather than to increase such grazing pressure.

The issues for adjudication in this case are twofold, therefore. The first issue is exclusively procedural in content, namely, whether an annual grazing authorization issued by the BLM, under the circumstances of this case, is an appealable decision. The second issue is a purely factual one, namely, even if the annual authorization is technically appealable, was the content and impact of such annual authorization material and substantive in the sense that its changes served to degrade or reduce critical forage on the allotment or to damage the condition of the range.

DISCUSSION

As discussed above, this case raises directly the procedural issue of whether an annual grazing authorization by BLM constitutes a final decision of the authorized officer that is, in turn, jurisdictionally amenable to appeal to the Hearings Division under the auspices of 43 C.F.R. § 4.470 and § 4160.4, which make clear that appeals are limited to

". . . a final decision of the authorized officer." (43 C.F.R. § 4160.4) In context, Appellants take the procedural position that any annual grazing authorization automatically constitutes an appealable final decision. The undersigned does not concur with this procedural premise, given the relevant facts of this particular case. In particular, the undersigned concludes that an annual extension of grazing authorization constitutes an appealable event only under circumstances where Appellants prove that such an extension has a direct negative impact upon critical plant species or otherwise directly damages the condition of the range.

In the opinion of the undersigned, for an otherwise routine annual authorization to constitute an appealable decision, the authorized officer would have to approve therein a material, substantive change covering the allotment that would result in negative impacts upon the critical plant species on that allotment. For example, if an approved change included a very large increase in AUMs and a substantive increase in the season of use, under circumstances where recent BLM monitoring showed a decline in the critical plant species on the allotment, then an appealable action would have occurred, notwithstanding other procedural formalities. In the instant case, however, the Appellants have not adequately tied their procedural argument, that is, that the annual authorization was an appealable action, to necessary corroborative facts, namely, that the changes or actions effectuated by BLM in its annual authorization did, in fact, have a direct negative impact upon critical plant species. The Appellants herein have not demonstrated the adequate factual bases necessary to perfect their case. For example, in their Reply Brief, Appellants acknowledge the following, "Appellants in this case admit the substantive resource issues on the allotment are resolved, but the issue of the right to appeal annual authorizations remains an important, unresolved issue in BLM administrative practice." (emphasis added) (Appellants' Reply Brief, January 9, 1998, p. 2) Appellants, therefore, are pursuing a purely, procedural, hypothetical remedy, given the facts of this particular case. In its August 6, 1992, letter to Mr. Russell, BLM actually reduced the number of AUMs by 224 from the previously authorized number of AUM's. The inferential impacts of such a reduction in AUM's would, ordinarily, be to reduce grazing pressure by cows on the affected rangeland. That outcome is confirmed by the above-referenced admission of Appellant's that ". . . the substantive resource issues on the allotment are resolved."

In the opinion of the undersigned, the issue of the appealability of annual authorizations is, indeed, an important, generic procedural issue; however, that issue cannot be addressed in a factual vacuum; it cannot be jurisdictionally addressed by the Hearings Division in a hypothetical or advisory opinion fashion. In the opinion of the undersigned, this procedural issue may become jurisdictionally ripe for adjudication by the Hearings Division only under circumstances where the action or actions taken by BLM can be demonstrated to result in negative impacts upon the range. Without such negative impacts having been proven herein, there has been no BLM management action that would now be

jurisdictionally subject to appeal. (See, for example: Headwaters, Inc., et al., 101 IBLA 234, 239-240 (1988); and , Ruskin Lines, Jr., v. BLM, 66 IBLA 109 (1982))

In the Ruskin case, the Board addressed the generic, ongoing jurisdictional requirement for a "case in controversy," as follows:

> In State of Alaska, 85 IBLA 170, 172 (1985), the Board observed that it 'does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction.' Moreover, the Board stated that its duty is 'to decide actual controversies by a decision that can be carried into effect and not to give opinions on moot questions or abstract propositions.' 85 IBLA at 172. We will apply that rule here. (Ruskin, Supra, p. 239)

As the referenced admission from Appellants confirms, and as the exhibits and attachments to the briefs of both parties confirm, no showing of negative impacts or damage to the allotment resulting from BLM's action has been made in this case. To the contrary ". . . the substantive resource issues on the allotment are resolved," as acknowledged by Appellants themselves. Consequently, it is the determination of the undersigned that Appellants have not demonstrated a still-pending "case in controversy," and that a substantive decision in this matter would perforce "give opinions on moot questions."

Under these factual circumstances, the BLM's 1992 authorization of grazing on the Paiute Meadows Allotment could be regarded as arbitrary or capricious only if not supported by a rational basis in compliance with the grazing regulations. (See, for example: Bert N. Smith v. Bureau of Land Management, 48 IBLA 385 (1980); and, Clyde L. Dorius v. Bureau of Lana Management, 83 IBLA 29 (1984)) No such factual or evidentiary showing has been made by the Appellants in this case.

CONCLUSION AND ORDER

Based upon the foregoing reasons, Respondent's request to **DISMISS** these dockets (See BLM's Response Brief, p. 9) is hereby **GRANTED**, because the annual authorizations involved herein did not constitute appealable decisions, as originally and correctly determined by the BLM Area Manager, and because the issues implicated in these dockets by Appellants' appeals are now moot.

James H. Heffernan
Administrative Law Judge