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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

APPELLANTS' REPLY BRIEF

This reply 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, in reply to the brief of respondent Bureau of Land Management (BLM).

Appellants have argued they should be allowed to appeal annual grazing authorizations, at least where the authorizations are different from the underlying multi-year permit. BLM denies this right to appeal exists, and in its responding brief raises several arguments.

1. WAIVER.

Part of BLM's argument is based on waiver. BLM argues appellants should not be heard to appeal from annual authorizations in 1991 and 1992 when appellants had not appealed the underlying permit, a four year permit issued in 1990.

No significance should be attached to appellants' failure to appeal decisions on the allotment prior to 1991. Appellants necessarily rely upon BLM's own monitoring data, because they do not independently generate their own data about grazing impacts on vegetation. Prior to 1991, BLM had published no competent data upon which to base an appeal. A 1988 draft allotment evaluation—which incidentally was not made available to the state or the public—contained some vegetative utilization data, but no actual use information with which to correlate it. Only in 1991 did such information become available. BLM published a final Allotment Evaluation for Paiute Meadows which bears the date of November 22, 1991. It contains both actual use data (i.e. actual livestock use data) and vegetative utilization data. It was only at this point that appellants were able to correlate utilization with actual use numbers and thereby present a cogent argument that current authorized use was excessive.

2. MOOTNESS.

Another argument is made based upon mootness. The Ninth Circuit, in *Idaho Department of Fish and Game v. National Marine Fisheries Service*, 56 F.3d 1071, 1074-1075 (9th Cir. 1995), states the general rule that "[a]lthough the mootness doctrine ordinarily bars a challenge to an action that has already taken place, a challenge is not barred if the action at issue is capable of repetition, yet likely to evade review." 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. By its very nature, an annual permit

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will almost always evade review because of the length of time required to resolve administrative appeals in general. Yet the question of whether an annual permit can be appealed is certain to recur, for it is common practice for BLM to issue annual authorizations on a multitude of allotments.

3. RIGHT TO APPEAL.

After positing the threshold challenges based on mootness and waiver, BLM engages the substantive issue in the appeals, which is the right to appeal annual grazing authorizations. BLM here argues that the annual authorizations to which appellants objected are not appealable decisions. No clear argument, and very little authority, is offered to support this position. Where appellants have cited a number of case and regulatory authorities which explore the meaning of the term "decision," BLM cites only the opinion of the hearing officer in the case entitled *Defenders of Wildlife, et al. v. BLM*, AZ-020-97-03080. Appellants respectfully suggest the decision itself has no binding precedential effect, as it is an unpublished decision. Appellants would further suggest with due respect that the decision is wrong, contrary to express language of the applicable regulation.

Appellants first note the regulations do not include a definition of the term "decision." Thus, as employed at 43 C.F.R. Subpart 4160 (1990), the term can only be defined by its context, and by its ordinary meaning. *See* Black's Law Dictionary (5th ed. 1979), where "decision" is defined as "a popular rather than technical or legal word, a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as those that are judicial or of a judicial character."

The term appears in the regulations in a context where a *decision* corresponds with a "proposed action on applications for permits . . . or leases, or by the proposed action relating to terms and conditions of permits . . . or leases." 43 C.F.R. § 4160.1-1. Notice of such a decision must be served on affected persons. These persons then have a right to protest the proposed decision, 43 C.F.R. § 4160.2, and also have a right to appeal the final decision. 43 C.F.R. § 4160.4. Thus there is an evident purpose to allow participation of interested parties in agency decision making, and the term "decision" should be defined in a way that acknowledges and furthers this purpose.

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Express reference is made in the regulatory context to proposed action on *applications for permits or leases*, 43 C.F.R. § 4160.1-1, and this reference does not discriminate between permits or leases of differing terms. It is therefore irrelevant under the regulations whether the permit is for a day, a month, a year, or ten years. No basis exists in law or fact to differentiate between one year, four year, or ten year permits, as BLM suggests, *see* response brief at 7-8. The important point is that BLM has made a decision about use of resources, and affected interests are given a right to challenge that decision before a neutral hearing officer if they disagree with it. Presumably this is the intent behind the regulations establishing the right of appeal, and this intent is signficantly frustrated by BLM's decision segregating a large segment of its decisions from the appeal procedure.

Appellants rely on the argument, set forth in their opening brief, that BLM's annual authorization of grazing use, even where there exists a subsisting multi-year lease or permit, is a discretionary "decision." BLM is invested both with authority and duty to adjust authorized use to protect the range. A decision at any point, therefore, to renew authorization is an exercise of agency discretion. If that discretion is abused, it should be appealable.

Even if the decision in *Defenders of Wildlife* is accepted, it still allows for appeal of reauthorizations which contain material changes, or which are issued in the presence of declining range conditions. BLM argues neither of these conditions were present in this case, but in fact both were.

BLM states in its brief that the 1992 annual authorization "for the most part conformed to the 1990 permit." Response brief at 3. Thus BLM admits the 1992 permit was not a *pro forma* reauthorization. BLM's footnoted explanation of differences between the 1992 and 1990 authorizations, extending livestock grazing into the south of the allotment, argues but does not prove the changes were harmless and, presumably therefore, immaterial. NDOW argued in its appeal that "the grazing permit replaced wild horses with livestock on the South Pasture. Livestock are known to use mountain browse species important to big game during summer/fall months. The South Pasture is critical big game winter range and livestock will compete with big game on these depleted ranges." Appellants' Exhibit 3, attachment B, at 4.

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BLM also relies on the asserted reasonableness of the underlying permit to imply the propriety of the 1992 change which "for the most part" mimicked it. But the record repels the factual premise of this argument, even if it is otherwise logical. The assertion on page 3 of the response brief, that the 1990 permit reduced actual use by 53.5 percent, is not consistent with page 2 of the Allotment Evaluation, where reported actual livestock use exceeded 6,000 AUM's in one year past; the best that can be said for the 1990 authorization is that it merely perpetuated a proven harmful regime. The reduction made in the 1990 permit was only from preference, not actual use.

BLM makes the same argument about the decision—and even BLM calls it a "decision," *see* response brief at 4, line 9—issued on August 6, 1992, for a change in use. Although admitting that this decision extended grazing for *three additional months*, *see* response brief at 4, BLM also alleges the change was not detrimental. Presumably this implies that the change is not material, therefore not appealable, in keeping with the holding in *Defenders of Wildlife*.

Appellants could debate that the changes were certainly detrimental. In fact, utilization thresholds had been exceeded by the time of the changes in the annual authorization; thus the decision extended season of use on areas where utilization limits were already reached. *See* photographs and report of NDOW, Appellants's Exhibit 3, attachment C. But this is not the time to decide whether the change was harmful. The decision's effect was the issue raised by the appeals which BLM would not entertain. Now, by circular reasoning, BLM asks the hearing officer to decide the underlying dispute in favor of BLM at this preliminary stage, to determine the threshold issue of right to appeal. If BLM's argument is accepted, then BLM can always defeat an appeal by this simple expedient, and its unilateral assertion about a decision's harmless effect is unchallengeable.

The decision in *Defenders of Wildlife* suggests that annual authorizations might be appealable when issued on an allotment with declining range condition. Notably, BLM does not dispute that the range on the allotment was in poor condition. It only argues that the declining condition does not require reduction in livestock AUM's. But this changes the meaning of the statement in *Defenders of Wildlife* that an appeal can be taken if "Appellants could factually aver that the condition of the range had materially declined." The test established by *Defenders of Wildlife* is whether range conditions

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are declining, not whether AUM's must be reduced; the means chosen to address decline in range conditions *may very well serve as the substantive basis for the appeal*, and should not serve to determine whether to entertain the appeal in first place.

CONCLUSION

BLM would no doubt find it expedient to disallow appeals from annual grazing authorizations. However, expediency should give way to Congress' clear intent to permit involvement by the state in public land management decisions. BLM's Organic Act provides for significant involvement of state agencies in the management of natural resources on public lands. *See e.g.* 43 U.S.C. §§ 1712(c)(9), 1712(f), 1732(b), 1739(e). *See also* "Department of Interior Fish and Wildlife Policy: State-Federal Relationships." 43 C.F.R. § 24 (1996). BLM's decisions in this case, that certain annual authorizations are not appealable, are inconsistent with this intent to permit state involvement.

Appellants therefore respectfully request the decisions of the BLM be reversed.

Dated this 9th day of January, 1998.

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CERTIFICATE OF FILING AND SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 9th day of January, 1998 I filed the foregoing APPELLANTS' REPLY BRIEF via UPS Next Day Air addressed as follows:

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