

W. WESLEY WALLACE

IBLA 2002-155

Decided March 13, 2002

Petition for stay of a decision of the San Juan Field Office, Bureau of Land Management, authorizing grazing use in the amount of 1,117 active AUM's within the Cahone Mesa Allotment. CO-174-02-02.

Petition denied.

1. Grazing Permit and Licenses: Appeals--Rules of Practice: Appeals: Stay

A petition for stay of a grazing decision, filed under the provisions of 43 CFR 4160.3(c), will be denied where the number of active AUM's granted in the permit, which is being challenged on the ground that it improperly decreases authorized use, is consistent with the authorized and actual use which has occurred in the recent past.

APPEARANCES: Franklin J. Falen, Esq., and Karen Budd-Falen, Esq., Cheyenne, Wyoming, for petitioner; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On December 17, 2001, W. Wesley Wallace filed an appeal from issuance by the San Juan Field Office, Bureau of Land Management (BLM), of a temporary permit to the extent it authorized grazing use of 1,117 AUM's within the Cahone Mesa Allotment, contending that this decision improperly reduced the authorized level of grazing use of that allotment by 617 AUM's. The permit in question had been signed by Wallace on November 19, 2001, and approved by the authorized officer on November 27, 2001. The notice of appeal which Wallace filed did not contain a petition seeking to stay the effectiveness of the San Juan Field Office decision. However, in an instrument dated December 28, 2001, counsel for appellant submitted a statement of reasons and a request for a stay.

Insofar as grazing appeals are concerned, the applicable regulations, 43 CFR 4.470 and 4160.4, provide for appeals by adversely affected parties to be taken to an Administrative Law Judge. However, while jurisdiction to initially hear such appeals is lodged with an Administrative Law Judge, the regulations further provide that decisions upon requests for stays are to be determined by this Board. Notwithstanding the fact that a motion has

been filed challenging the standing of appellant to prosecute the appeal and seeking its dismissal, this decision deals solely with appellant's request for a stay, since this is the only question before the Board at the present time. All other matters, including motions to dismiss the appeal as untimely, are properly presented to the assigned Administrative Law Judge for his or her consideration. 1/

The standards which the Board applies in considering a request for a stay require advertence to:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of irreparable harm to the appellant or resources if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

The proponent of the stay bears the burden of establishing that each of the conditions has been met. For the reasons set forth below, we do not believe that issuance of a stay is warranted in this matter.

[1] Our conclusion is based on two separate, though interrelated, considerations. First, issuance of a stay is generally designed to maintain the status quo during consideration of an appeal. Practically, this can be of considerable importance since the effectiveness of any relief may be compromised if actions objected to are allowed to go forward during the period of adjudication. In the instant case, however, issuance of a stay would not serve to maintain the status quo. The fact of the matter is that the lands within the Cahone Allotment have been subject to grazing in the past to the same manner and degree permitted by the decision under appeal. Indeed, grazing in the past year was authorized under a temporary use permit at the exact level of active AUM's (1,117) which appellant now challenges. Maintenance of the status quo is, in this case, actually accomplished by denying the request for stay.

In any event, a review of the applicable regulations shows that, even if the Board were to grant the request for stay in this case, the result would be the same. Grazing would occur in accordance with the BLM decision below. Thus, 43 CFR 4160.3(e) provides that:

When the Office of Hearings and Appeals stays a final decision of the authorized officer to change the authorized

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1/ While the Board does have jurisdiction to determine whether or not a stay should issue in the instant proceeding, it does not otherwise have pendent jurisdiction over substantive matters involved in the appeal. Until issuance of a decision by the assigned administrative law judge, all substantive determinations, including consideration of questions related to whether or not the appeal has been properly perfected, are properly the province of the administrative law judge, not the Board.

grazing use, the grazing use authorized to the permittee or lessee during the time that the decision is stayed shall not exceed the permittee's or lessee's authorized use in the last year during which any use was authorized.

Since, as noted above, the last level of use authorized was the same as that challenged in the instant appeal, i.e., 1,117 AUM's, issuance of a stay would result in the same level of grazing use during the pendency of the appeal as would denial of the stay. Where issuance of a stay will not result in any effective relief, the Board will simply decline to enter a stay.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is denied and the case files are referred to the Hearings Division.

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James L. Burski  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge