

JAMES G. KATSILOMETES
v.
BUREAU OF LAND MANAGEMENT

IBLA 98-287

Decided October 4, 2002

Appeal from an order of Administrative Law Judge Nicholas T. Kuzmack dismissing an appeal of a decision of the Pocatello, Idaho, Resource Area Office, Bureau of Land Management (BLM), for lack of standing. ID-037-96-001.

Order of dismissal set aside; Bureau of Land Management decision affirmed in part, reversed in part, and set aside in part and remanded.

1. Administrative Practice--Administrative Procedure:
Hearings--Appeals: Generally--Grazing and Grazing
Lands--Grazing Permits and Licenses: Generally--Grazing
Permits and Licenses: Adjudication--Res Judicata--Rules
of Practice: Appeals: Failure to Appeal

The regulation at 43 CFR 4.470(b) is a codification of the doctrine of "administrative finality," the administrative counterpart of res judicata, which normally precludes reconsideration in a subsequent case of matters finally resolved for the Department in an earlier appeal. A precondition for the application of the doctrine is that the matter raised in the subsequent proceeding was one distinctly put in issue and directly determined in the earlier appeal, as reflected in the language of 43 CFR 4.470(b) providing that a party who fails to appeal a BLM final grazing decision be barred thereafter from challenging "the matters adjudicated in that final decision." Where a party failed to appeal a final BLM grazing decision rejecting his application for a grazing permit on the grounds that the permitted use he sought was not available (but not mentioning cancellation of his grazing preference), that party's successor-in-interest is not barred under 43 CFR 4.470(b) from appealing a subsequent final BLM decision declaring the party's grazing preference canceled for failure to comply with the notice requirements of 43 CFR 4110.2-3.

2. Administrative Practice--Administrative Procedure: Hearings--Appeals: Generally--Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Adjudication--Rules of Practice: Protests--Rules of Practice: Standing to Appeal

A decision of an administrative law judge dismissing a grazing appeal for lack of standing is properly set aside where the party appealing is adversely affected by a BLM final grazing decision rejecting his protest.

3. Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses

The regulation at 43 CFR 4110.2-3(e) provides that, if an unqualified transferee acquires rights in base property through operation of law or testamentary disposition, such transferee shall qualify under 43 CFR 4110.2-3(a) within a 2-year period after the transfer or the grazing preference "shall be subject to cancellation." However, 43 CFR 4110.2-3(a) does not require that BLM be notified within that 2-year period, and a BLM decision canceling preferences for failure to file such notice is properly reversed.

4. Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses

BLM properly denies an application for permitted use in an allotment where, as the result of an approval of a transfer of grazing privileges made by BLM 19 years previous to the application, the applicant does not own base land for which grazing preference was assigned in that allotment. The applicant's ownership of base lands assigned to a different allotment does not support his application.

5. Administrative Procedure: Generally--Contests and Protests: Generally--Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses--Rules of Practice: Protests

A protest against BLM's yearly issuance of permits for grazing use for cattle is properly considered as a protest under 43 CFR 4.450-2. Where such protest challenges BLM's authority to issue permits for grazing cattle under the governing resource

management plan, it raises an issue that is capable of repetition and is therefore not moot, even though the time is past when BLM's action can be redressed by canceling any permit improperly issued in a particular year. Where, by confessing error in a proceeding before the Hearings Division, BLM effectively denies the protest without explanation, the matter is properly remanded to BLM for further consideration.

APPEARANCES: Murray D. Feldman, Esq., Boise, Idaho, for appellant James G. Katsilometes; W. Alan Schroeder, Esq., Boise, Idaho, for Respondent Pete and Christine Miller Revocable Trust 1/; Kenneth M. Seby, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

James G. Katsilometes (appellant James G.) has appealed from the April 13, 1998, Order of Administrative Law Judge Nicholas T. Kuzmack, dismissing his appeal of the March 8, 1996, decision of the Pocatello, Idaho, Resource Area Office, Bureau of Land Management (BLM).

A full recitation of the long procedural history of this matter will clarify the issues presented in the instant appeal.

Grazing of Sheep by the Blackrock Sheep Company; Dissolution of the Blackrock Sheep Company in the Early 1970's; Distribution of Grazing Privileges to Brothers Appellant James G., Peter G., and William G. Katsilometes; Division of Range into Allotments in 1973, Including the Moonlight Mountain Allotment

This appeal concerns grazing in an area near Pocatello, Idaho. Appellant James G. explains the early history of grazing in the area:

The Blackrock Sheep Company was a partnership composed of [appellant James G. and his] brothers Peter G. Katsilometes and William G. Katsilometes. The partnership was a continuation of ranching and farming begun by [appellant James G.'s] father, George D. Katsilometes, in 1904 who in 1937 obtained the first grazing license under the Taylor Grazing Act. When the partnership was dissolved in the early 1970's, most of the land owned by Blackrock Sheep Company was divided individually

1/ On Aug. 19, 1999, the Board received a motion from Pete Miller's attorney requesting that the "Pete and Christine Miller Revocable Trust" (the Trust) be substituted as the "Respondent-Intervener" in this case, as Miller had passed away on Aug. 1, 1999, subsequent to conveying the "base property" that is the subject of this appeal to the Trust. That motion is granted. References to Pete Miller in this decision should be read as referring to the Trust.

among the three partners. As a result of that division, the grazing preference attached to the lands was also divided giving 200 AUM's to William G., 339 AUM's to Peter G., and 387 AUM's to [appellant James G.], and also included 850 AUM's exchange-of-use. [2/]

(Letter from Appellant to BLM dated Mar. 16, 1992, at 1.) BLM implemented the distribution of "Federal range privileges," in the amounts described by appellant above, on March 28, 1973, pursuant to 43 CFR 4115.2-2 (1973) by approving three Applications and Transfers of Grazing Privileges.

These three Applications and Transfers of Grazing Privileges also provided where the grazing use for each applicant was "to be made." Thus, use of the 339 AUMs of Federal range privileges that were transferred to Peter G. Katsilometes 3/ and the 387 AUMs that were transferred to appellant James G. was "to be made * * * in the Black Rock Unit south of Buckskin Road." Use of the 200 AUMs of Federal range privileges that were transferred to William G. Katsilometes was "to be made * * * on Federal lands north of Buckskin Road." The lands north of Buckskin Road have come to be known as the Moonlight Mountain allotment and are at the center of the present controversy. William G. Katsilometes' base property that was associated with the Moonlight Mountain allotment consisted of 1,226 acres which are identified in Exhibit B to the form.

Appellant James G. has generally disputed that BLM formally divided the range into separate allotments, arguing that division of the range was merely a "suggestion" that "was never agreed to by the parties." (Letter from appellant James G. to BLM dated Mar. 16, 1992, at 1.) However, the record contains BLM Forms 42-R1305.1 confirming that BLM's March 28, 1973, transfers of grazing privileges did specify the areas transferred to each of the brothers as former partners.

Miller's Acquisition of Grazing Preference in the Moonlight Mountain Allotment in 1984 from William G. Katsilometes; Death of William G. in 1984; Distribution of William G.'s Estate

As noted, the instant dispute centers around the Moonlight Mountain allotment, i.e., the lands north of Buckskin Road, which were held from 1973 until 1984 by William G. Katsilometes. The record uniformly indicates that this interest has been associated since 1973 with 200 AUMs of grazing preference.

On April 12, 1984, with BLM's approval, William G. Katsilometes transferred 12 AUMs of grazing preference to Miller, leaving William G. with 188 AUMs of grazing preference. (Miller's Motion to Intervene, etc., at 10.) Miller has been grazing cattle in or near the Moonlight Mountain Allotment with BLM's authorization since 1984. 4/

2/ We find nothing in the record explaining these exchange-of-use AUMs.

3/ The transfer was actually made to Mrs. Peter G. Katsilometes, his widow.

4/ William R. Haight, the BLM official who administered livestock within the Moonlight Mountain Allotment, notes that Miller was grazing at that time

On August 24, 1984, William G. Katsilometes died, leaving as his heirs his wife Margaret Anne Katsilometes and four children, James A., George W., Nancy, and John D. Katsilometes. (Last Will of William G. Katsilometes at 1.) As Idaho is a community property State, William G.'s wife presumably held a half community interest in the base lands supporting the grazing privileges in the Moonlight Mountain allotment (among other real property that he owned) that became undivided upon his death. William G.'s will at Section 4.3 appears to leave his half community interest in those base lands equally to his four children. 5/

The property owned by William G. Katsilometes was distributed to his heirs in September 1985. Our review of the Schedule of Distribution indicates that Margaret Anne and all of his four children received at least some of the base property identified in 1973 as being associated with the Moonlight Mountain allotment. In the Matter of the Estate of William George Katsilometes, Case No. SP-2529 (Schedule of Distribution, Sept. 17, 1985, at 1.) Some received more than others, but all received some. Appellant James G. was not an heir.

Nothing in the record shows that William G. Katsilometes' estate or any of his heirs ever gave BLM notice of the transfer of base lands or associated grazing preference under 43 CFR 4110.2-3 (1985). 6/

The Blackrock Area is Grazed Until 1990 By Richard Stallings, as Lessee; Stallings Lease of Moonlight Mountain Allotment is Terminated in April 1990;

fn. 4 (continued)

"within a portion of the Moonlight Mt. Allotment, but which was called the 'North Fork of Rapid Creek Allotment.'" This was "a 120 acre tract of public land used in conjunction with a 320 acre tract of private land owned by" Miller. (Affidavit of William R. Haight dated Apr. 6, 1996, at 2.) Appellant states that the North Fork Rapid Creek Allotment was placed on "a 120 acre isolated tract of BLM managed lands" and provides a land description. (Letter from Appellant to BLM dated Mar. 16, 1992, at 2.) The record shows that the described lands are just to the east of the current Moonlight Mountain allotment.

5/ The base lands are not specifically devised under the will. Accordingly, they appear to be part of "the remainder of [William G. Katsilometes'] interest in any real estate [he] owned at the time of [his] death" under sec. 4.3(c) of his will. Those lands were devised under that section "to [his] four children."

The will also established, at Sec. 5.1, the William G. and Margaret A. Katsilometes Revocable Trust to receive the residue of William G.'s estate. However, it was reported on the Schedule of Distribution for the William G. estate that "no property [was] distributed" to the Trust, because, "[u]nder the terms of the trust, the family trust would receive" an amount that was "not economical to administer." In the Matter of the Estate of William George Katsilometes, Case No. SP-2529 (Schedule of Distribution, Sept. 17, 1985, at 1.) It thus appears that the real property was never administered by that trust.

6/ That regulation has remained in effect from 1985 through the present, with minor variations. We cite to 43 CFR 4110.2-3 (1985) because it sets

Miller Acquires Base Property and Additional Grazing Preference in That Allotment in April 1990; BLM Recognizes Miller as Sole Permittee in That Allotment

Although the record is not completely clear, it appears that Richard Stallings grazed sheep throughout the former Blackrock allotment area (north and south of Buckskin Road) until 1990. It appears that he did so as lessee of the interests of both Margaret Anne Katsilometes (and the other heirs of William G. Katsilometes) and of James G. Katsilometes. 7/

In April 1990, Margaret Anne Katsilometes canceled her agreement with Stallings. Immediately thereafter, Miller acquired 120 acres of base property and 144 additional AUMs of grazing preference in the Moonlight Mountain allotment from James A. Katsilometes (William G.'s son and appellant James G.'s nephew). Miller explains:

On April 10, 1990, William G.'s son, James A., sold 120 acres of real property/"base property" to Miller which supported 144 AUMs of the 188 AUMs of Grazing Preference. A [BLM] Memorandum dated April 17, 1990, confirmed this fact, stating "(t)hese above lands are the base property for the following existing BLM, Section 3 Permit."
* * * Another
[BLM] Memorandum dated March 19, 1991, reconfirmed this fact, stating "(t)hese lands (purchased by Miller) provide the private base lands for the BLM permit known as the Moonlight Mountain Allotment #06090." * * * .

On April 10, 1990, Miller filed with BLM the Warranty Deed which conveyed the 120 acres of real property and "base property" from James A. to Miller. BLM represented to Miller that nothing more was required to transfer the 144 AUM Grazing Preference to Miller. * * * .

(Miller's Motion to Intervene, etc., at 11.)

The record is somewhat unclear on these points. The April 10, 1990 warranty deed is in the record, but there is also a second, slightly

fn. 6 (continued)

out the language that was in effect during the 2-year period following the transfer of the base lands from William G. Katsilometes to his heirs. 7/ The record contains a copy of a 7-year lease evidently executed in 1987 by Margaret Anne Katsilometes in favor of Stallings leasing him grazing interests supported by the base lands once owned by William G. Katsilometes. It does not appear that this lease took into account the distribution of those lands among William G.'s various heirs in 1985. It is not known whether Margaret Anne was acting as the agent of those heirs or if she had some other authority to lease their interests.

The record also contains a copy of a 7-year lease executed in 1987 by appellant James G. in favor of Stallings, leasing him grazing interests supported by base lands owned by appellant James G. Those base lands were

different, warranty deed dated April 13, 1990. ^{8/} However, the record also suggests that, as of March 1991, Miller was leasing grazing preference in the Moonlight Mountain allotment from George W. Katsilometes. Further, the record contains a lease to Miller dated January 1992 for those 144 AUMs signed by Margaret Anne Katsilometes and James A. Katsilometes. Nevertheless, the existence of the April 1990 warranty deeds indicates that Miller acquired base property associated with the Moonlight Mountain allotment at that time.

It is clear that, from 1990 forward, BLM issued permits to Miller authorizing him alone to graze the Moonlight Mountain allotment, apparently on the strength of his ownership of the 12 AUMs he received from William G. Katsilometes in 1984, the 120 acres of base land he purchased from James A. Katsilometes in 1990, or the 144 AUMs of grazing preference he leased from James A. and Margaret Anne Katsilometes. See BLM Memorandum to the Pete Miller Grazing Record #113692 dated Mar. 19, 1991. BLM came to view Miller as the only party authorized to utilize any of the AUMs allowed on the Moonlight Mountain allotment under the 1988 Pocatello Resource Management Plan (RMP). In early 1992, appellant James G. began strenuously to challenge that view.

BLM summarized its view of the situation in the following letter, sent to appellant James G. on March 4, 1992:

In 1973, the grazing file of the Blackrock Sheep Company was closed. The grazing preference and the privately owned base properties were divided between William G., [appellant James G.], and Peter G. Katsilometes. This division clearly shows that William received 200 AUMs of federal grazing preference to be used on those lands north of Buckskin Road. [Appellant James G.] and Peter were to use federal lands south of Buckskin Road.

On March 30, 1984, William transferred 12 AUMs of his grazing preference to Pete Miller. This was an outright sale of preference and no private land was involved in the transaction.

After the death of William, his wife and co-owner, Margaret Anne, continued to keep the remaining 188 AUMs of preference active by leasing her private base lands. The latest base property lease was with Richard Stallings, a sheep rancher from Blackfoot.

On April 2, 1990, Margaret Anne canceled her private land lease with Mr. Stallings. Subsequently, on April 10, 1991, she

fn. 7 (continued)

some of the lands grazing privileges to which were transferred to James G. in 1973, that is, the lands outside the Moonlight Mountain allotment.

^{8/} That might be explained by the fact that the Apr. 10, 1990, deed apparently contains a legal deficiency in the notarization.

sold 144 AUMs of her federal grazing preference to [Miller]. This transaction was approved by [BLM] and this reduced Margaret Anne's remaining preference to a total of 44 AUMs. This remaining preference was distributed, on a pro-rata basis, over her private base property of record.

In January, 1992, it came to the attention of [BLM] that back in 1985 the private lands in question had been divided between Margaret Anne, George, John [D.], Nancy[,], and James [A.] Katsilometes. Since this change in base property ownership was not brought to the attention of [BLM], and no application for transfer was filed within the time allowed, the preference was lost as per the instructions contained in 43 CFR 4110.2-1(d).

The loss of base property left in place only the preference attached to the base lands controlled by Margaret Anne in 1991. This amounts to 20 AUMs.

For those folks who inherited portions of the original base (John [D.], George, Nancy[,], and James [A.]), grazing alternatives are lacking. First of all, after the above mentioned sales of grazing preference to Pete Miller, only 44 AUMs of the original 200 AUM preference remained attached to the original base lands. Secondly, of these 44 AUMs, 20 remain attached to the 506 acres currently owned by Margaret Anne. This is a required action under the terms of 43 CFR 4110.2-1(d). The regulations governing the transfer of grazing preference in 43 CFR 4110.2-3(b) require that a grazing transfer application must be filed within 90 days of the date of sale of the base property. When the ownership changed, Margaret Anne lost the 20 AUMs of preference attached to those lands. The other heirs did not acquire the preference because they failed to apply for transfer of preference within 90 days of the date of the ownership change. Since no transfer application was filed, the 20 AUMs are no longer available for allocation.

(BLM Letter to appellant James G. dated Mar. 4, 1992 (emphasis supplied).)

There are several relevant points about this letter. First, it was not denominated a "final decision" or issued to any of William G.'s heirs, and therefore was not appealable. 43 CFR 4.470(a). Second, it failed to recognize that Margaret Anne, George, John [D.], Nancy, and James A. Katsilometes had all received their interests in 1985 either by operation of law (Margaret Anne) or by testamentary transfer (his children), such that the provisions of 43 CFR 4100.2-3(e) (1985) applied, instead of the provisions of 43 CFR 4100.2-3(b) (1985), which govern sale or lease of base property. Accordingly, the appropriate period after transfer for compliance was 2 years, not 90 days. Third, it failed to take into account that Margaret Anne had also failed to file a transfer application. Fourth, it did not mention Miller's evident failure to comply with 43 CFR 4100.2-3(b) when he purchased the base land from James A. Katsilometes. Finally, BLM

incorrectly presumed that cancellation under 43 CFR 4110.2-1(d) (a different provision governing situations where ownership or control of base property is lost) was a mandatory consequence of failure to comply with 43 CFR 4110.2-3(e), when the latter states merely that failure to comply shall subject the affected preferences to cancellation. 9/

Appellant James G. responded immediately, expressly objecting to BLM's putative "cancellation of preference attached to the lands owned by the heirs of William G. Katsilometes" and asserting that Miller had also failed to notify BLM about the transfer of lands to him from James A. Katsilometes. He also noted that the cancellation provision cited by BLM was not mandatory but discretionary and disputed that the Blackrock Sheep Company's holding had ever been broken into separate allotments. (Letter from Appellant to BLM dated Mar. 16, 1992, at 3.) Finally, he noted that BLM, in a March 19, 1991, memorandum, had stated that "land owned by James A. Katsilometes has served as base property for the permit to graze the Moonlight Mountain Allotment, while the land owned by George W. Katsilometes does not have preference attached to it." He asserted that there was no basis for this distinction, since the land owned by each of them was acquired in exactly the same way. (Id. at 4.)

George W. Katsilometes and Appellant James G. Both Apply for Grazing Use Throughout the Blackrock Area, Including the Moonlight Mountain Allotment; BLM Rejects Applications; George W. Fails to Protest or Appeal; Appellant James G. Protests and Appeals

On March 23, 1992, BLM responded to appellant James G., allegedly inviting him to apply for a grazing permit for the Moonlight Mountain allotment. 10/ On March 30, 1992, both appellant James G. and George W. Katsilometes filed separate applications for permitted use in several allotments, including the Moonlight Mountain Allotment. 11/

9/ The letter also presumes that, after the death of William G. Katsilometes in 1984, Margaret Anne Katsilometes succeeded to 144 AUMs of the 188 AUMs of grazing preference he owned at the time of his death, such that she had the power to lease them to Miller. We can appreciate that, if between 1984 and 1990 Margaret Anne (through Stallings, her then lessee) was the only party applying annually for permitted use, BLM would regard the AUMs as belonging to her. However, we find nothing in the record showing that BLM ever formally decided how the 188 AUMs of grazing preference that had been held by William G. Katsilometes at the time of his death in 1984 had been distributed. 10/ The present record does not contain a copy of that letter. Appellant represents in pleadings that this occurred. See, e.g., Response of Katsilometes to Miller's Motion to Dismiss dated Jan. 23, 1998, at Ex. 1A-1. We have no reason to doubt that BLM invited the application as a means of crystallizing the evident dispute.

11/ The present record does not contain copies of those applications. It appears that appellant James G.'s Mar. 23, 1992, application was jointly filed with Richard Stallings. The record suggests that Stallings had grazed

On May 13, 1992, BLM issued two separate proposed decisions formally denying the applications of appellant James G. and George W. Katsilometes.

BLM's May 13, 1992, proposed decision issued to George W. Katsilometes provided:

I have received three applications for grazing use in the Blackrock, Chinks Peak, Moonlight and Camelback Allotments. The records show that these allotments are fully allocated for grazing use to current permit holders. The combined grazing capacity of the four allotments in question is 926 AUMs of livestock forage.

The current permittees of record are:

Lucille Katsilometes*	339 AUMs Blackrock Allotment.
[Appellant]**	387 AUMs Blackrock Allotment.
Pete Miller	156 AUMs Moonlight/Camelback Allotment.
Margaret Anne Katsilometes	44 AUMS *** Moonlight/Camelback Allotment. [12/]

* Currently leased by McNabb.

** Currently leased by Stallings

*** These AUMs have been lost due to failure to apply.

The livestock grazing capacity of the above mentioned allotments was established in the grazing adjudication conducted early in the 1970s and reaffirmed in the 1988 Pocatello RMP in accordance with 43 CFR 4100.0-8. Existing monitoring data does not support an increase in grazing capacity in these four allotments. Under terms of 43 CFR 4110.2-2 "active use shall be based on the amount of forage available for livestock grazing established in the land use plan."

Your application for grazing use in the Chinks Peak, Moonlight, Camelback, and Blackrock Allotments is hereby rejected under the terms of 43 CFR 4130.6-1 which states "the authorized livestock grazing use shall not exceed the livestock carrying capacity...".

fn. 11 (continued)

sheep, as a lessee, throughout the area formerly controlled by the Blackrock Sheep Company. Stallings grazed lands north of Buckskin Road (i.e., on the Moonlight Mountain allotment) as the lessee of Margaret Anne Katsilometes until 1990 when Miller began to graze. It also appears that Stallings continued to graze sheep on the other lands in the vicinity at least through 1992 as the lessee of appellant James G.

12/ This number, 44 AUMs, differed from the 20 AUMs which BLM stated in its Mar. 4, 1992, memorandum had been retained by Margaret Anne Katsilometes.

(BLM Proposed Decision to George W. Katsilometes dated May 13, 1992, at 1 (emphasis supplied.)) BLM concluded by notifying George W. Katsilometes of his right to protest the proposed decision.

It is undisputed that George W. Katsilometes failed to protest BLM's May 1992 proposed decision. On June 19, 1992, BLM issued a final decision to George W. Katsilometes, holding:

The livestock grazing capacity of the Moonlight Allotment was established in the grazing adjudication conducted in the early 1970s and reaffirmed in the 1988 Pocatello RMP in accordance with 43 CFR 4100.0-8. Existing monitoring data does not support an increase in grazing capacity in this allotment. Under terms of 43 CFR 4110.2-2(a) "active use shall be based on the amount of forage available for livestock grazing established in the land use plan...".

Your application for grazing use in the Moonlight Allotment is hereby rejected under the terms of 43 CFR 4130.6-1 which states..."the authorized livestock grazing use shall not exceed the livestock carrying capacity...".

(BLM Final Decision issued to George W. Katsilometes dated June 19, 1992, at 1.)

It is thus clear that, in its May 1992 proposed decision and June 1992 final decision, BLM gave notice to George W. Katsilometes that the grazing use he was seeking in the Moonlight Mountain allotment was already fully awarded, in that the limit imposed by the 1988 Pocatello RMP was met, and that BLM would not award more. However, BLM did not give notice in that decision that George W. Katsilometes' preference had been canceled under 43 CFR 4110.2-3 for failure to notify BLM of the transfer of base land to him in 1985 or expressly adjudicate the preference (if any) associated with the transfer of William G. Katsilometes' property to George W. Katsilometes. Nor does the record indicate that George W. Katsilometes got any actual, informal (oral) notice of any cancellation of grazing preference under 43 CFR 4110.2-3 prior to March 1996. Rather, BLM's decision apparently presumed without explanation that any excess preference resided in William G. Katsilometes' widow Margaret Anne.

George W. Katsilometes did not appeal BLM's June 19, 1992, final decision.

On May 13, 1992, BLM also issued a proposed decision to appellant James G., identical to the one issued to George W. Katsilometes and quoted above, denying his application for grazing use in the Chinks Peak, Moonlight, Camelback, and Blackrock Allotments. Appellant James G. did timely protest that decision.

Accordingly, on June 19, 1992, BLM issued a final decision to appellant James G. As this final decision announced independent grounds for rejecting appellant James G.'s application and elucidates BLM's view of the state of affairs at that time, it is appropriate to quote it fully:

Point One -- You have stated that you are the current permit holder for grazing preference within the Blackrock and Chinks Peak Allotments and that until recently you held the permit for Moonlight and Camelback Allotments.

Richard Stallings is the current permit holder for a grazing preference of 387 aums in the area south of the Buckskin Road known as Chinks Peak and Blackrock Allotments (this is via his lease of your base property). However, you have never been a permittee in the Moonlight and Camelback Allotments which are north of the Buckskin Road. Current grazing preferences are documented in the Pocatello RMP.

Point Two -- You stated that a nearby cattle operator [(here referring to Miller)] purchased 120 acres of land, that served as base property for the permit held by Margaret Katsilometes, from Margaret's son James A. Katsilometes. Within days BLM issued a grazing permit to [Miller] for the Moonlight Allotment and transferred 144 aums of active preference from Margaret Katsilometes to land owned by [Miller]. You also state that Richard Stallings was then informed by BLM that he could no longer graze his sheep in the Moonlight Allotment. Also you stated that [Miller] purchased grazing preference from Margaret Katsilometes, [amounting] to 144 aums in the Moonlight and Camelback Allotments. This preference was then transferred to [Miller] by BLM and attached to the 120 acre parcel that [Miller] purchased from James A. Katsilometes earlier.

Prior to the transaction that you have mentioned, only Margaret Katsilometes or one of the lessees of her base property held active preference in the Moonlight and Camelback allotments. Therefore, it was quite proper for Margaret to sell her preference to [Miller] and it was routine action for BLM to attach the preference to [Miller's] newly purchased property.

Mr. Stallings lost his authorization to graze in the Moonlight Allotment when Margaret Katsilometes canceled his lease of her base property. When a lessee loses control of base property the grazing permit terminates immediately without further notice from the authorized officer.

Point Three -- You state that you were not apprised of any of the foregoing actions.

Since you are not a permittee of record in the Moonlight and Camelback allotments[, BLM] had no reason to notify you of the actions that took place north of the Buckskin Road. Also, George [W.] Katsilometes was not notified since he has never held a BLM grazing preference in Pocatello Resource Area.

After evaluating the points you raised in your letter of protest, I find that no new information pertinent to the case has been brought to light. Therefore, the proposed decision is affirmed and my final decision follows:

The livestock grazing capacity of these allotments was established in the grazing adjudication conducted in the early 1970s and reaffirmed in the 1988 Pocatello RMP in accordance with 43 CFR 4100.0-8. Existing monitoring data does not support an increase in grazing capacity in these four allotments. Under terms of 43 CFR 4110.2-2(a) "active use shall be based on the amount of forage available for livestock grazing established in the land use plan...". Your application for additional grazing preference in the Chinks Peak and Blackrock Allotments and for new grazing preference in the Moonlight Mountain and Camelback Allotments is hereby rejected under the terms of 43 CFR 4130.6-1 which states "the authorized livestock grazing use shall not exceed the livestock grazing capacity...".

(BLM Final Decision dated June 19, 1992, issued to James G. Katsilometes at 1-2 (emphasis supplied).) Appellant James G. filed a timely notice of appeal of that decision on July 17, 1992.

BLM Continues to Issue Permits in Moonlight Mountain Allotment to Miller; In May 1993, Appellant James G. Purchases 300 Acres from George W. Katsilometes

During the pendency of the 1992 appeal and subsequently, BLM continued to issue grazing permits to Miller for permitted use in the Moonlight Mountain Allotment. Miller explains: "On July 8, 1992, after [2 years] of issuing annual grazing authorizations to Miller, BLM offered and Miller accepted a multi-year Grazing Permit * * * . This Grazing Permit was reissued on March 14, 1995 to add some additional terms [and conditions], and continued to be Miller's current grazing authorization." (Miller's Motion to Intervene, etc., at 13.)

On May 21, 1993, appellant James G. purchased from George W. Katsilometes 300 acres that George W. had inherited from the Estate of William G. Katsilometes. That land was part of the lands that were identified in 1973 as base property for grazing on the Moonlight Mountain allotment. The purchase and sale agreement between appellant James G. and George W. Katsilometes indicates that appellant James G. purchased all of George W.'s rights in the lands, together with "BLM grazing rights, if any." (Purchase and Sale Agreement dated Feb. 19, 1993, at 1.)

In Late 1994, BLM Withdraws Its June 19, 1992, Decision Issued to Appellant James G. and the Matter Is Remanded to BLM to Prepare a New Decision

As noted above, appellant James G. and Richard Stallings had appealed BLM's June 19, 1992, decision rejecting their joint application for grazing preference in the Moonlight Mountain Allotment and elsewhere. Their appeals were docketed as James Katsilometes v. BLM, ID-030-92-004, and Richard R. Stallings, ID-030-92-005, and set for hearing in September 1994. BLM explains what transpired at that hearing:

At the hearing, [BLM] was prepared to defend its decision that additional forage was not available. However, the appellants, [appellant James G.] and Richard Stallings, wanted to discuss the propriety of the transfer of preference to Pete Miller. When it became clear that not all issues were joined for the hearing (and that Pete Miller was not present to represent his interests), [Administrative Law] Judge Ramon Child suggested that [BLM] withdraw the decision appealed from in order to issue a new decision speaking to all the issues raised by the parties present and joining all other parties, namely Pete Miller.

(BLM Opposition to Petition for Stay filed May 28, 1998, at 6-7). BLM acquiesced. At the hearing, counsel for BLM stated:

[BLM] is willing to withdraw the [June 19, 1992,] decision and would ask that [Judge Child] would remand the matter to the resource area and the district for the issuance of a new opinion, which in fact would address not only the issues of the availability of forage, but the issues that have been spoken to by [appellant James G. and Stallings] regarding the propriety of [Miller's] authorization, which specifically would then set forth these matters in a decision which would be served upon not only [appellant James G. and Stallings], but upon [Miller], probably Margaret Katsilometes and perhaps others to allow them to exercise their rights, if any, in any appeal of any decision * * * that would issue from [BLM]. [13/]

(Transcript of Proceedings on Sept. 19, 1994, before Administrative Law Judge Ramon Child in James Katsilometes v. BLM, ID-030-92-004, and Richard R. Stallings, ID-030-92-005, at 50.)

It appears that BLM made such a motion and that it was granted. BLM explains that it "then reviewed its records, the materials available to it, Judge Child's instructions, and the positions of the parties in rendering its final decision dated March 8, 1996 (which joined all

13/ In this exchange, BLM conceded the existence of others' rights than those previously identified as belonging to Margaret Anne Katsilometes.

interested parties and issues)." (BLM Opposition to Petition for Stay filed May 28, 1998, at 6-7.)

In 1995 Appellant Protests Continued Issuance of Grazing Permits to Miller

Although the record does not contain these documents, it appears from a BLM conversation record dated May 2, 1995, that appellant James G. and Stallings filed "letters of protest" in 1995 against BLM's "yearly issuance of [Miller's] grazing application and billing." They also raised the question whether "proper transfer documents" had been filed and whether the "conversion from sheep to cattle" was proper. BLM rejected those protests in its March 8, 1996, final decision presently under appeal.

BLM Issues a New Proposed Decision on November 1, 1995, Declaring Canceled All Interests Arising From the Distribution of Base Property from the Estate of William G. Katsilometes in 1984 Because the Transferees Failed to Notify BLM Per 43 CFR 4110.2-3; Interests of Appellant James G., George W. Katsilometes, and Miller Are All Canceled; BLM Rejects Appellant's Protest Against Issuance of Permits to Miller; Miller Protests and Appeals; Appellant James G. Appeals

On November 1, 1995, BLM issued a new proposed decision in this matter, canceling all grazing interests of William G. Katsilometes' wife and four children and of those who acquired interests from them, including both Miller and appellant James G. BLM also denied appellant James G.'s protest against Miller's grazing cattle in the Moonlight Mountain allotment. BLM held:

#1) Margaret Anne Katsilometes, George W. Katsilometes, James A. Katsilometes, John D. Katsilometes, and Nancy J. Katsilometes lost that grazing preference held by William G. Katsilometes in the Moonlight Mountain Allotment #06090, due to their failure to apply for transfer within 90 days of the date of his death and/or the date of the distribution of the base property as per 43 CFR 4110.2-3. In the case of the distribution of an estate, it is not [BLM's] responsibility to track or research the distribution of the base property.

#2) [Miller] has no recognized grazing preference in the Moonlight Mountain Allotment #06090 since the above named heirs to the estate of William G. Katsilometes failed to timely apply for transfer and hence had no recognized preference to assign to [Miller]. Grazing use by [Miller] in the Moonlight Mountain Allotment #06090 will no longer be licensed. Moreover, the applicable land use plan has provided that the area in question is only available for sheep authorization and there has never been any formal amendment to the land use plan which would legally allow grazing by cattle.

#3) I am rejecting the protests received from James G. Katsilometes and Richard R. Stallings regarding issuance

of [Miller's] 1995 grazing license. These protests were inappropriate to the issuance of the license, which as a decision, should have been properly challenged in the form of an appeal. This procedure was clearly discussed at the appeals hearing held on September 19, 1994.

(BLM Proposed Decision dated Nov. 1, 1995, at 1-2.)

Miller filed a timely protest of the proposed decision. Appellant James G. did not file a protest, but instead filed what he described as an "[a]ppeal pursuant to 43 CFR § 4160.3" of the proposed decision, which, he asserted, "has become final regarding grazing permits and preference on the Moonlight Mountain and Camelback Mountain allotments."

BLM Issues Its Final Decision on March 8, 1996, Adopting Proposed Decision; Miller and Appellant James G. Both Appeal

BLM issued its final decision on March 8, 1996, essentially adopting unchanged its previous proposed decision. In so doing, BLM observed that there "is no record of application for transfer by [Miller] for the remainder of the recognized grazing preference associated with the Moonlight Mountain Allotment #06090," and that "[i]ssuance of a grazing permit to [Miller] does not establish [Miller] as having a right to that preference, since proper procedure for application and transfer of the disputed grazing preference was not adhered to." Finally, BLM concluded that although "the applicable land use plan does provide for the conversion of kind of livestock" from sheep to cattle, "it also defines specific guidelines and actions necessary to complete such a conversion," and that "the fact that the land use plan allows for such conversions does not mean that each conversion considered will be found to be compatible with desired resource management objectives and goals." (BLM Final Decision dated Mar. 8, 1996, at 1-2.)

BLM concluded as follows in that decision:

From the date of William G. Katsilometes' death on August 24, 1984, no application for transfer was made, nor was a 2-year extension ever requested by the heirs. It is not [BLM's] responsibility to track or research the distribution of base property in a probate case such as this. Therefore, it is my decision that the distribution of William G. Katsilometes['] estate constituted a change in ownership of the base property. Furthermore, the heirs of William G. Katsilometes failed to comply with the regulations stated above.

Id. at 2-3.

BLM also canceled Miller's preference in the Moonlight Mountain Allotment to the extent that it arose from the base lands he had acquired from James A. Katsilometes, since James A. Katsilometes' interest was also canceled for failure to comply with 43 CFR 4110.2-3(e) (1985):

The remaining 144 AUMs of grazing preference on Pete Miller's permit for the Moonlight Allotment #06090 are canceled by this decision. This cancellation is based on two factors. The first factor is that * * * the heirs of William G. Katsilometes did not have control of the grazing preference in the Moonlight Mountain Allotment #06090 and could not transfer that preference to Pete Miller. Furthermore, BLM has no record that Pete Miller ever made application for the transfer of the grazing preference [in violation of 43 CFR 4110.2-3(b) (1995)] * * * .

BLM also ruled that cancellation of Miller's interest was appropriate because Miller had been grazing cattle on the Moonlight Mountain allotment in violation of the 1988 Pocatello RMP:

The second factor of consideration for this cancellation of the 144 AUMs of grazing preference is the conversion of livestock kind from sheep to cattle at the time that Pete Miller began grazing livestock in the Moonlight Mountain Allotment #06090. The Moonlight Mountain Allotment #06090 is identified in the 1988 Pocatello [RMP] as a sheep allotment. And while the applicable land use plan does provide a means for livestock conversions, the specific actions necessary to effect such a conversion were not completed. * * * .

Finally, BLM ruled against James G. Katsilometes and Richard Stallings to the extent that they had protested BLM's yearly issuance of Miller's grazing application and billing. BLM ruled that its decision issuing the 1995 license should have been appealed rather than protested.

Appellant filed a notice of appeal to the Hearings Division from BLM's March 8, 1996, decision, which was docketed as James G. Katsilometes v. BLM, ID-037-96-002. Miller appealed that decision to the Hearings Division, which was docketed as Pete Miller v. BLM, ID-037-96-001. 14/

BLM Concedes Error Before Administrative Law Judge Kuzmack Only Insofar As Its Decision Declared Miller's Interests Canceled

In its Response filed with Administrative Law Judge Kuzmack, BLM stated that, although rejecting Miller's argument that BLM was estopped from canceling his grazing preference, "[u]pon a complete review of the argument and authorities presented by [Miller] * * * , BLM must concede the validity of [Miller's] argument" that Miller's grazing preference should not have been canceled. (BLM Response filed Feb. 3, 1998, at 9-10.) BLM explained:

14/ By Orders dated May 16 and Aug. 13, 1996, we granted both appellants' petitions for stay, and the matters were referred to the Hearings Division to issue a decision on the merits. Pete Miller, IBLA 96-344 (Order dated May 16, 1996); James G. Katsilometes, IBLA 96-598 (Order dated Aug. 13, 1996).

BLM did not take any action to cancel or issue any decision canceling the "William G. Katsilometes" Grazing Preference in the time frame beginning two years after the death of William G. Katsilometes and before transfer to [Miller]. Moreover, it was never the intent of [BLM] that the 144 AUMs of forage were no longer available. That forage remains available within the Moonlight Mountain Allotment. [BLM's] intent was only to comply with the directive of [Judge] Child to render a decision on the information available to [BLM] which would join the issues and allow [Miller and appellant James G.] to participate in any appeal.

Id. at 10.

Administrative Law Judge Kuzmack Issues the Order Presently Under Appeal

On April 13, 1998, Judge Kuzmack issued the order presently under appeal. Accepting BLM's "acknowledgment * * * that [Miller] is entitled to a grazing preference * * * in the Moonlight allotment," he reversed "that part of [BLM's] Final Decision, dated March 8, 1996, that canceled" Miller's grazing preference. (Order of Administrative Law Judge Kuzmack dated Apr. 13, 1998, at 3.) Judge Kuzmack also held as follows in dismissing appellant James G.'s appeal "for lack of standing":

[Appellant James G.] claims standing to appeal the March 8, 1996, Decision predicated on his purchase from George W. Katsilometes of 300 acres of purported base property for the Moonlight Allotment, as evidenced by a Warranty Deed dated May 21, 1993. He alleges that a pro rata portion of the grazing preference for the Moonlight Allotment should have been assigned to the 300 acres of the base property which George W. Katsilometes inherited from his father and which [appellant James G.] later purchased in 1993. He concludes that he was adversely affected by the cancellation of the 144 AUMs of grazing preference because a portion of that preference should be assigned to the 300 acres which he now owns.

On May 13, 1992, BLM issued a Proposed Decision denying George W. Katsilometes' application for grazing use in several allotments, including the Moonlight Allotment, which is the subject of the present contest. The decision referenced [Miller] and George W. Katsilometes, as holding the grazing privileges for the Moonlight Allotment. [15/] Therefore, George W. Katsilometes was on notice of [Miller's] acquisition of the grazing privileges.

15/ In fact, the proposed decision cited Margaret Anne Katsilometes as owning 44 AUMs.

George W. Katsilometes expressed an intent to file a protest of this decision but then failed to do so. Consequently, BLM issued a Final Decision dated June 19, 1992, affirming the Proposed Decision.

There is no evidence that George W. Katsilometes timely filed a notice of appeal to the June 19, 1992, Final Decision. Pursuant to 43 C.F.R. § 4.470(b):

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

Therefore, George W. Katsilometes was barred from challenging the award of 144 AUMs of grazing privileges to [Miller]. See Leonard [Bown] v. BLM, 12 IBLA 192, 194 (1973).

[Appellant] argues that the May 13, 1992, Proposed Decision and June 19, 1992, Final Decision do not specifically say that [Miller], and not George W. Katsilometes, has the grazing preference for the Moonlight Allotment, but that all of the existing carrying capacity was being used by the then current permit holder, [Miller]. However, in a May 27, 1992, letter from [appellant James G.] to BLM, he specifically acknowledges that George W. Katsilometes was informed by BLM in December of 1991 that he no longer had any grazing preference in the Moonlight Allotment because of the issuance of the grazing privileges to [Miller] based upon his purchase of the 120 acres from James A. Katsilometes, George's brother. Consequently, if George wished to assert his claim to a pro rata share of the grazing preference, he had the requisite knowledge and opportunity to do so at the time of the issuance of the June 19, 1992, Final Decision. Because he failed to do so, he is barred from asserting that claim now.

On May 21, 1993, George W. Katsilometes and his wife conveyed the 300 acres he had inherited from his father to [appellant James G.] and his wife. Since at that time George W. Katsilometes was barred from challenging [Miller's] grazing preference and one cannot convey more than one owns, it follows that his successor, [appellant James G.], is barred from challenging [Miller's] grazing preference, since that challenge is predicated on the ownership of those 300 acres. See Vincent Barnard v. BLM, 66 IBLA 100 (1982) and Crescent Porter Hale Foundation v. BLM, 108 IBLA 288 (1989). Further, [appellant James G.] acknowledged in this letter to BLM dated May 27, 1992, that he too was on notice of [Miller's] grazing preference in 1991. In short, since George W. Katsilometes had no standing, [appellant James G.] has no standing and his appeal is

dismissed. Therefore, any issues raised by [appellant James G.] are moot.

Id. at 2-3.

[1] As set out above, Judge Kuzmack concluded that in June 1992 George W. Katsilometes had forfeited whatever interest he had by failing to appeal BLM's final decision dated June 19, 1992, purportedly holding that he no longer had any grazing preference. As a result of that forfeiture, he held, there was nothing for George W. to convey to appellant James G. in May 1993. Since appellant James G. had acquired nothing, Judge Kuzmack concluded, he lacked standing to pursue his appeal.

In dismissing appellant James G.'s appeal on this ground, Judge Kuzmack cited 43 CFR 4.470(b), which is a codification of the doctrine of "administrative finality." As has been observed in numerous decisions, the principle of administrative finality is generally considered to be the administrative counterpart of res judicata. See, e.g., State of Alaska, Department of Transportation and Public Facilities, 140 IBLA 205, 211 (1997); United States v. Stone, 136 IBLA 22, 26 (1996). As such, it is a jurisprudential concept which normally precludes reconsideration in a later case of matters finally resolved for the Department in an earlier appeal. See, e.g., Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994). Under the principle of res judicata, a party or his successor may not raise an issue actually litigated and settled by a judgment in a prior proceeding between the same parties or their privies. See State of Alaska, 140 IBLA at 211. However, a precondition for the application of the principle of res judicata is that the matter raised in the subsequent proceeding was one "distinctly put in issue and directly determined in the earlier litigation." (Emphasis supplied.) See State of Alaska, 140 IBLA at 211; Eva Wilson Davis, 136 IBLA 258, 262-63 (1996), quoting Montana v. United States, 440 U.S. 147, 153 (1979). That principle is duly reflected in 43 CFR 4.470(b), which provides that "[a]ny applicant, permittee, lessee, or any other person who, after proper notification, fails to appeal a final decision of the authorized officer within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in that final decision." (Emphasis supplied.)

Thus, it must be determined whether "the matters adjudicated" in the June 19, 1992, decision are the same as the matters determined in the March 8, 1996, decision presently under appeal. They are not.

As discussed above, in its May 1992 proposed decision, BLM gave notice to George W. Katsilometes that the permitted use he had applied for was not available, in that the maximum use allowed by the 1988 Pocatello RMP had already been awarded to Miller, and that BLM would not award more. However, BLM did not give notice in that decision that George W. Katsilometes' grazing preference was being canceled under 43 CFR 4110.2-3(e) (1985) for failure to notify BLM of the transfer of base land to him, or for any other reason.

BLM's determination that George W. Katsilometes could not secure any permitted use because Miller had been granted all that was then available under the 1988 Pocatello RMP did not amount to a determination that his entitlement (if any) was being canceled for all time. BLM's decision left open the possibility that he could secure permitted use if conditions subsequently changed, for example, if additional AUMs were authorized or if the current holder of the preference lost all or part of his entitlement.

BLM's May 13, 1992, proposed decision issued to George W. Katsilometes did list Margaret Anne Katsilometes as holding 44 AUMs in the Moonlight Mountain allotment. Since William G. had started with 200 AUMs and Miller had acquired 156 AUMs, only 44 AUMs of preference remained outstanding. With that knowledge, George W. might have been able to deduce from the proposed decision that, by indicating that all of those 44 AUMs were held by Margaret Anne, BLM regarded him as having 0 AUMs. We are not willing to impute that knowledge to him. Although BLM knew in March 1992 that George W. and heirs other than Margaret Anne did in fact receive base property by testamentary transfer from William G. Katsilometes (see BLM Letter to appellant James G. dated Mar. 4, 1992), it failed to acknowledge that fact. Instead, it evidently presumed that Margaret Anne had somehow succeeded to all of the 44 AUMs remaining from the 200 AUMs held by William G. after accounting for the 156 AUMs Miller had acquired. We cannot conclude that the issue of the validity of George W. Katsilometes' grazing preference was finally adjudicated in June 1992 when BLM failed even to correctly set out its understanding of the situation or to present the issue squarely in an appealable decision.

Nor does the record indicate that George W. Katsilometes got any actual, informal (oral) notice of loss of preference under 43 CFR 4110.2-3(e) prior to May 1992. Judge Kuzmack pointed to the following statement in appellant James G.'s May 27, 1992, protest:

I was not apprised of any of the foregoing until I attempted to purchase 300 acres from George W. Katsilometes, son of Margaret Anne, in November of 1991. George visited the Pocatello office in December 1991 to inquire about the proper procedure regarding transfers. He was told by William Haight that he no longer had any grazing preference because of the issuance of the permit to [Miller] based on the sale made by George's brother.

(Letter from appellant James G. to BLM dated May 27, 1992, at 2.) It is impossible to draw any precise conclusions about what Haight told George W. Katsilometes in November 1991 from this hearsay statement. Although the statement refers to George W. Katsilometes' having been "told that he no longer had any grazing preference," it does not refer to his preference as having been "canceled" under 43 CFR 4110.2-3 or for any other reason. The statement actually attributes the fact that George W. "no longer had any grazing preference" to the fact that a permit had been issued to Miller. The issuance of a permit to Miller would not affect George W.'s preference right, but would instead serve as a basis to deny George W.'s competing application for permitted use. See 43 CFR 4130.1-2. That is

the explanation that BLM set forth when it issued its final, appealable decision in June 1992; it does not equate to a finding that George W. Katsilometes' grazing interests had been canceled.

In any event, even assuming arguendo that the record showed that Haight orally told George W. Katsilometes that his grazing preference had been canceled, that would not have been an appealable decision. Departmental regulations impose the duty to appeal only when BLM has issued a "final decision of" the BLM "authorized officer." 43 CFR 4.470(a). Accordingly, any failure to appeal such an oral communication is without legal significance.

When BLM did issue an appealable final decision in June 1992, that decision did not rule that George W. Katsilometes had grazing preference that had been canceled. Under 43 CFR 4.470(b), a party who fails to appeal a final decision by a BLM authorized officer is only barred thereafter from challenging the "matters adjudicated in that final decision." In view of the fact that it imposes a forfeiture, that provision must be read strictly to mean that it is improper to look outside the four corners of the final decision to impute knowledge of a broader basis for the decision than that actually set out in the decision itself. ^{16/} Accordingly, George W. Katsilometes' failure to appeal the final decision that no permitted use was to be awarded did not bar appellant James G. (as George W.'s successor-in-interest) from appealing BLM's subsequent ruling that George W.'s preference had been canceled.

[2] Even if we could disregard the foregoing, we could not affirm Judge Kuzmack's order dismissing appellant James G.'s appeal. Appellant James G. was adversely affected by that decision because it ruled against him to the extent that he protested BLM's yearly issuance of Miller's grazing application and billing. He perfected an appeal of BLM's March 8, 1996, decision in his own right by filing a timely notice of appeal of that decision. Judge Kuzmack's order does not mention this aspect of the appeal that was before him.

In these circumstances, we cannot affirm Judge Kuzmack's order dismissing appellant James G.'s appeal. In lieu of remanding the matter

^{16/} BLM's decision does state that 44 AUMs held by Margaret Anne Katsilometes in the "Moonlight/Camelback Allotment" had been "lost due to failure to apply." However, BLM did not refer specifically to cancellation for failure to provide BLM notice of a transfer from William G. Katsilometes to Margaret Anne. It appears instead to suggest that Margaret Anne had lost her grazing preference because she did not file an application for use based on that preference. BLM's authority to make that ruling is doubtful, as the regulation allowing cancellation for failure to apply, 43 CFR 4115.2-1(e) (9) (1977), was repealed in 1978. In any event, BLM's statement regarding the status of Margaret Anne Katsilometes' grazing preference was not dispositive of George W. Katsilometes' grazing preference.

to the Hearings Division, we will exercise our de novo review authority and proceed to consider the merits of appellant James G.'s challenge to BLM's underlying decision. U.S. Fish and Wildlife Service, 72 IBLA 218, 220-21 (1983).

[3] BLM ruled in its proposed decision that George W. Katsilometes "lost that grazing preference [formerly] held by William G. Katsilometes in the Moonlight Mountain Allotment #06090, due to [his] failure to apply for transfer within 90 days of the date of his death and/or the date of the distribution of the base property as per" 43 CFR 4110.2-3 (1985). (Proposed Decision dated Nov. 1, 1995, at 1.) BLM took a slightly different stance in its Final Decision: "From the date of William G. Katsilometes' death on August 24, 1984, no application for transfer was made, nor was a 2-year extension ever requested by the heirs."

The regulation at 43 CFR 4110.2-3(e) (1985) provides that, if an unqualified transferee acquires rights in base property through testamentary disposition, such transferee shall "qualify under 43 CFR 4110.2-3(a)" within a 2-year period after the transfer or the grazing preference "shall be subject to cancellation." Thus, BLM misstated the requirements of that regulation by indicating that a testamentary transferee had only 90 days to comply and by stating that the time for compliance began as of the death of the transferor in August 1984. The timeframe for compliance is 2 years, not 90 days, and it did not begin until title to the lands was transferred at the distribution of the estate in September 1985 from the estate of William G. Katsilometes, not in August 1984 at the time of his death. The reference to an "extension" in that provision refers to BLM's authority to extend the 2-year period "where there are delays solely attributable to probate proceedings," not to BLM's authority to extend the period for compliance for an additional 2 years. However, those errors are immaterial, as it is agreed that none of the testamentary transferees complied at any time.

Nevertheless, BLM's decision canceling a grazing preference for failure to comply with 43 CFR 4110.2-3 (1985) cannot be affirmed because that regulation does not in fact require one who acquires rights in base property through operation of law or testamentary disposition ^{17/} to notify BLM. As noted above, 43 CFR 4110.2-3(e) (1985) provides that, if an unqualified transferee acquires rights in base property through testamentary disposition, such transferee shall "qualify under 43 CFR 4110.2-3(a)" within a 2-year period after the transfer. It merely requires that "[t]he transferee shall meet all necessary qualifications for a grazing preference under the regulations of" 43 CFR Part 4100. 43 CFR 4110.2-3(a) (1) (1985). The provision at 43 CFR 4110.1 (1985) establishes "mandatory qualifications" that an applicant must meet "to qualify for grazing use on the public lands." However, those qualifications are limited to a citizenship requirement (43 CFR 4110.1(a)) and the requirement that a group or association

^{17/} The 1985 regulation uses the word "deposition," an obvious error that was corrected in subsequent versions of the regulations.

(43 CFR 4110.1(b)) or a corporation (43 CFR 4110.1(c)) be authorized to conduct business in the State in which the grazing use is sought, and do not require that BLM be notified. Although 43 CFR 4110.2-3(a) (2) and (4) both refer to what must be done under 43 CFR 4110.2-3(b) and 4110.2-3(c), neither (b) nor (c) applies to transferees who acquire rights through operation of law or testamentary disposition: 43 CFR 4110.2-3(b) applies only "[i]f the base property is sold or leased," and 43 CFR 4110.2-3(c) applies only "[i]f a grazing preference is being transferred from one base property to another base property." Neither situation was presented here.

A transferee who has acquired rights through operation of law or testamentary disposition could not divine from the language of 43 CFR 4110.2-3 (1985) any requirement that he notify BLM in any way. Instead, he could reasonably view the provision as requiring him to take any steps to become qualified, such as those requiring a transferee to apply for citizenship or for authority to conduct business in the State.

This appears to be a lacuna in the regulations: It would be expected that the regulations would require a transferee to notify BLM of his succession to the interests of the transferor. Nevertheless, as promulgated, the regulation does not do that. In the absence of a regulation clearly requiring notification on pain of cancellation, BLM's decision here cannot be affirmed. Accordingly, BLM's decision is reversed on this point. 18/

[4] We next consider appellant James G.'s challenge to BLM's implicit denial of his March 30, 1992, application for a grazing permit based on ownership of base land throughout the general allotment area, as opposed to ownership of base land that is directly associated with the Moonlight Mountain allotment. Although Judge Child remanded this question to BLM for resolution in 1994, BLM did not expressly consider the matter in its March 1996 decision. Further, no appellate decision on this question has ever been made.

We find adequate reasons to uphold BLM's conclusion that appellant James G.'s land holdings in 1992 did not support a grazing preference in the Moonlight Mountain allotment. Thus, appellant James G. was assigned preference in 1973 only in "the Black Rock Unit south of Buckskin Road," an area outside the Moonlight Mountain allotment. That assignment was never

18/ In its Mar. 8, 1996, decision, BLM cited Miller's failure to make "application for the grazing preference" to him from James A. or Margaret Anne Katsilometes, presumably in violation of 43 CFR 4110.2-3(b). (Decision at 2-3.) Appellant James G. refers to that failure, citing "a number of statutory and regulatory violations" associated with the transfer of James A. Katsilometes' interest to Miller. (Appellant's Statement of Reasons filed May 26, 1998, at 4, and 23-25.)

By confessing error before Judge Kuzmack, BLM necessarily forgave any failure by Miller to comply with that provision. That was, we hold, within BLM's discretion.

challenged. Accordingly, appellant James G. did not (as of March 1992) have grazing preference within the Moonlight Mountain allotment, and there is no basis to upset BLM's refusal to grant him permitted use in that allotment. BLM's action on this question was correct and is affirmed.

[5] We next consider BLM's decision to reject appellant James G.'s 1995 letters of protests against BLM's yearly issuance of Miller's grazing application and billing. (Mar. 8, 1996, Decision at 4.) Although the time is long past that BLM's action can be redressed by canceling Miller's grazing permit, the appeal is not moot. It is well established that an appeal which raises an issue that should be decided for the purpose of determining the action to be taken on future applications by the appellant James G. must be considered even though the original appeal involves a grazing season which is past. See Ira Hatch, A-26483 (Nov. 17, 1952). If the issue is a continuing one, the matter is not moot, and BLM's decision must be reviewed. See C. T. Lingenfelter, A-24494 (Sept. 18, 1947).

We reject the reason BLM set forth in its November 1, 1995, proposed decision and March 8, 1996, final decision for rejecting appellant James G.'s protest. Appellant James G., by filing the protest, was objecting to BLM's continuing, yearly practice of awarding permitted use to Miller for grazing cattle, asserting that such practice violated the terms of the Pocatello RMP. See BLM Conversation Record dated May 2, 1995. Under 43 CFR 4.450-2, a protest may be filed by any party against any action proposed to be taken by BLM. An objection to this continuing practice, which in fact carried forward into 1996, was a valid protest and should have been adjudicated by BLM. BLM's rejection of the protest was also appealable under 43 CFR 4.410.

Appellant has repeatedly alleged that the permits BLM issued over the years to Miller were improper because they allowed cattle grazing, in violation of the 1988 Pocatello RMP's restriction on use for sheep grazing. (Appellant's SOR at 26-28, Exs. 20 through 23.) Indeed, BLM conceded this point in its March 8, 1996, decision. ^{19/} However, in confessing error before Judge Kuzmack and allowing Miller to continue to graze cattle in the Moonlight Mountain allotment, BLM inexplicably omitted any consideration of the matter. Accordingly, at this point, we deem it appropriate to remand the matter to BLM to consider the general question of the propriety of allowing cattle ranching in the Moonlight Mountain allotment in the context of the protest asserted by appellant James G.

^{19/} Although BLM rejected appellant James G.'s protest, it agreed that the 1988 Pocatello RMP identified the Moonlight Mountain allotment as a sheep allotment and that the "specific actions necessary to effect" a conversion from sheep to cattle grazing "were not complete," in that no technical report or environmental assessment was completed and necessary structural improvements such as fences and water developments had not been completed prior to allowing the conversion. (BLM's Final Decision dated Mar. 8, 1996, at 3-4.)

Several observations are in order prior to closing. We do not find or imply herein that BLM erred in granting Miller permitted use in the Moonlight Mountain allotment over the years based on his acquisition of grazing preference from James A. and/or Margaret Anne Katsilometes. Indeed, the record suggests that Miller was the only qualified applicant for such use for many years. We recognize that under 43 CFR 4130.1-2 it was necessary for BLM to issue a decision allocating grazing use only where competing applications for permitted use were made by more than one qualified applicant and that no conflicting applications were received until 1992. Nevertheless, it is evident from the record that BLM presumed for reasons never fully explicated that Miller had actually acquired the grazing preference but never clarified the matter in a formal decision issued to all parties even after the question had been raised. Further, BLM never issued a decision (as it should have) either expressly stating that a competing applicant was unqualified or applying the standards set out in 43 CFR 4130.1-2.

We note further that the continuing existence of possibly 20/ valid grazing preferences in George W. Katsilometes raises the possibility that present owners of those preferences (such as appellant James G. or his successors) will now file competing applications for permitted use. It is clear that it is not adequate for BLM, as it has done in the past here, simply to assert that a competing application must be rejected because all available grazing preference is being used by another user. Instead, BLM must apply the regulations at 43 CFR 4110.2-3 and 4130.1-2.

We also note that the current regulation at 43 CFR 4110.2-2(c) (1) states that "[t]he animal unit months of permitted use [are] attached to * * * the acreage of land base property on a pro rata basis." (Emphasis supplied.) 21/ That suggests that permitted use should be "attached" in AUMs to particular acreages of base property when permits are issued; it at least requires BLM to consider the amount of acreage of base property owned by an applicant in assigning permitted use. BLM may be required to consider this question in any future adjudications. Doing so will prevent the type of confusion and uncertainty that has surrounded this matter previously.

20/ There are many questions surrounding whether George W.'s successors presently have a valid grazing preference. If the matter is again presented, BLM should address those questions in a formal, appealable decision.

21/ The supplied word "are" has been missing from the published versions of the regulations for many years. That regulation was amended in 1995 to clarify that it was "permitted use" (and not "grazing preference" as it had been previously) that is "attached to" the "acreage of the land base property on a pro rata basis."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the administrative law judge is set aside, and the decision of the Bureau of Land Management is affirmed in part, reversed in part, and remanded.

David L. Hughes
Administrative Judge

ADMINISTRATIVE JUDGE HEMMER CONCURRING IN THE RESULT:

I agree with the outcome in this matter but differ with my colleague's logic in getting to that point in a significant respect. Briefly, I attempt to state why.

The 1992 decision issued to George W. Katsilometes (George W.) with respect to the 300 acres of property which he acquired by testamentary transfer was final for the Department. I agree with Judge Kuzmack that George W.'s uncle and appellant, James G. Katsilometes (James G.), who acquired the 300 acres from George W. in 1993, had no "standing" to appeal from the 1992 decision directed to George W. in that he acquired only whatever rights George W. owned in the property in 1993. At that juncture in 1992, BLM made clear that it did not believe George W. owned base property. BLM stated that he had no right to a permit. While BLM's 1992 decision to George W. was fraught with complexity and, likely, error, I believe my colleague nonetheless goes too far to revisit a conclusion that, right or wrong, became final when George W. did not appeal. The Board should take care to adhere to and maintain principles of finality and, in the simplest terms, avoid permitting parties, even family members in an obvious intra-family dispute, to champion issues resolved adversely to the actual interested party years before.

I also disagree with any suggestion that a "preference" attaches to property never used in recent memory for grazing. The definition of "grazing preference" in the 1985 regulations is "the total number of [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 CFR 4100.0-5 (1985) (emphasis added); see also 43 CFR 4100.0-5 (2000) (similar). I would uphold BLM's discretion, and agree with my colleague in addressing that discretion under 43 CFR 4110.2-3(e) (1985), to find that the heirs not party to this case let any issue of grazing lapse by failing to comply with BLM transfer regulations. I would not require BLM to reconsider such an issue now.

I agree with the outcome for this reason. When, at the September 1994 hearing in James Katsilometes v. BLM, ID-030-92-004, BLM chose to withdraw its 1992 order to James G., it stated that it would "issue a new decision speaking to all the issues raised by the parties." (Transcript of Proceedings on Sept. 19, 1994, at 50.) BLM's counsel expressly stated that BLM would consider all issues raised by all potentially interested persons, as those issues existed on that date. Id. (counsel committed to "address not only the issues of the availability of forage, but the issues that have been spoken to * * * [including others'] rights, if any.") At this point in 1994, James G. owned 300 acres of property located within, and formerly identified as base property on, the Moonlight Mountain allotment. By withdrawing the 1992 decision issued to James G., BLM effectively reinstated James G.'s application for a permit in the Moonlight Mountain allotment. Addressing this issue in 1995 and 1996 as BLM proceeded to do, BLM was required to review this application under rules requiring adjudication of conflicting applications under 43 CFR Subpart 4130 (1996). For

these reasons, I would disagree with Judge Kuzmack that James G. had no standing to appeal based upon his interest in the 300 acres, and I would reverse BLM for failing properly to apply its regulations at that juncture. Because my colleague reaches this same conclusion, I concur in the result.

On all other matters, I concur.

Lisa Hemmer
Administrative Judge