

JOE B. FALLINI, JR., ET AL.

v.

BUREAU OF LAND MANAGEMENT

IBLA 96-463

Decided June 24, 2004

Appeal from decision of Administrative Law Judge James H. Heffernan, affirming decisions of the Area Manager, Tonopah Resource Area, Battle Mountain District, Bureau of Land Management, denying applications for range improvement permits. N6-94-06, N6-95-10.

Administrative Law Judge's decision in N6-94-06 reversed; Bureau of Land Management's Decision reversed; case remanded.

Administrative Law Judge's decision in N6-95-10 reversed; Bureau of Land Management's Decision reversed in part and vacated in part; case remanded.

1. Grazing and Grazing Lands--Grazing Leases: Generally--
Grazing Permits and Licenses: Generally

The purpose of the Taylor Grazing Act is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference. The specific provisions pertaining to a Section 4 permit clearly illustrate a primary Congressional intent to protect livestock and cattle grazing.

2. Grazing and Grazing Lands--Grazing Leases: Generally--
Grazing Permits and Licenses: Generally--Wild Free-Roaming Horses and Burros Act

BLM acts arbitrarily in imposing a requirement that a rancher make water available to wild horses if BLM fails

to consider an important aspect of the problem such as the adverse effect of such a requirement on cattle grazing practices.

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

The improvements authorized under range improvement permits are solely funded by the holder of the grazing permit or lease, and cooperative agreements are appropriate when the improvements are funded by joint public and private expenditures. The sharing of costs is a relevant factor when determining whether to authorize a particular improvement under a range improvement permit or a cooperative agreement.

4. Grazing and Grazing Lands--Grazing Leases: Generally--
Grazing Permits and Licences: Generally--Grazing
Permits and Licences: Base Property (water)

The Taylor Grazing Act expressly contemplates private ownership of water rights on public land used for grazing by giving preference in the issuance of permits to those within or near a district who are owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them. That Act should not be construed or administered in any way that would diminish or impair a right to the possession and use of water.

5. Grazing and Grazing Lands--Grazing Leases: Generally--
Grazing Permits and Licenses: Generally

When BLM uses its discretionary authority to reject an application for a land use authorization or impose a condition upon a land use authorization, it must provide a rational basis for its decision. If BLM has failed to consider a relevant factor in making a decision in the exercise of its discretionary authority, its decision will not be affirmed.

6. Administrative Procedure: Administrative Procedure Act--
Administrative Procedure: Adjudication: Leases and
Permits--Grazing and Grazing Lands--Grazing Leases:
Generally--Grazing Permits and Licenses: Hearings

Upon denial of an application for a range improvement permit, an applicant has a statutory right to a hearing under 43 U.S.C. § 315h (2000) that must conform to the adjudication requirements of the Administrative Procedure Act, 5 U.S.C. § 554 (2000), and the record in support of BLM's decision must be developed in accordance with those procedures. An applicant seeking relief from a grazing decision reached in the exercise of BLM's administrative discretion bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper. It is implicit in this holding that an appellant must be provided an opportunity to introduce evidence to meet this burden.

7. Administrative Authority: Generally--Regulations: Force and Effect as Law

A BLM instruction memorandum is not a regulation, has no legal force or effect, and is not binding on the Board or the public at large.

8. Administrative Authority: Generally--Administrative Procedure: Rulemaking--Regulations: Force and Effect as Law

When a federal agency issues a directive concerning the future exercise of its discretionary power, for purposes of the APA, 5 U.S.C. § 553, its directive will either constitute a substantive rule, for which notice-and-comment procedures are required, or a general statement of policy, for which they are not.

9. Administrative Authority: Generally--Administrative Procedure: Rulemaking--Regulations: Force and Effect as Law

When an agency applies a policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

10. Administrative Authority: Generally--Administrative Procedure: Rulemaking--Regulations: Force and Effect as Law

If a directive denies the decisionmaker the discretion in the area of its coverage, the statement is binding, and creates rights or obligations. For the purposes of 5 U.S.C. § 553, whether a statement is a rule with binding effect depends on whether the statement constrains the agency's discretion. Even though an agency may assert that a statement is not binding, the courts have recognized that the agency's pronouncements can, as a practical matter, have a binding effect. If an agency acts as if a document is controlling and treats the document in the same manner as it treats a regulation or published rule, or bases enforcement actions on the policies or interpretations formulated in the document, or leads private parties or other authorities to believe that they must comply with the terms of the document, the agency document is, for all practical purposes, binding.

11. Grazing and Grazing Lands--Grazing Leases: Generally--Grazing Permits and Licenses: Generally--Wild Free-Roaming Horses and Burros Act

Departmental regulation 43 CFR 4710.4 requires that management of wild horses and burros be undertaken with the objective of limiting the animals' distribution to herd areas. Management shall be at the minimum level necessary to attain the objectives identified in approved

land use plans and herd management area plans. Absent a factual showing that optimum levels cannot be achieved without additional resources, a policy to manage allotments by requiring ranchers to make additional resources available to wild horses cannot be reconciled with the regulatory requirement that management be kept at the minimal level necessary.

12. Grazing and Grazing Lands--Grazing Leases: Generally--
Grazing Permits and Licenses: Generally--Wild Free-
Roaming Horses and Burros Act

The constraints on wild horse management established by 43 CFR 4710.4 make the effect of a water source on herd distribution a relevant factor that BLM is required to consider before requiring a rancher to provide water for wild horses. Because the constraints were adopted for the stated purpose of controlling herd size, the effect of sharing water with horses on the rate of herd growth is a relevant factor that must be considered before a requirement to share water with horses may be imposed. A decision to require a rancher to provide water for horses must be supported by specific evidence that the requirement would not have undue adverse effects on grazing practices and range conditions.

13. Grazing and Grazing Lands--Grazing Leases: Generally--
Grazing Permits and Licenses: Generally--Wild Free-
Roaming Horses and Burros Act

When BLM has rejected range improvement permit applications in order to require the applicants to transfer an undivided one-half interest in the water rights to the United States and to provide water for wild horses under the terms of a cooperative agreement and BLM has not provided a rational basis for imposing such requirements, BLM's decision denying the applications for range improvement permits cannot be affirmed because such denial would be an abuse of discretion.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho; William F. Schroeder, Esq., and Carol Skerjanec, Esq., Vale, Oregon, for appellants; Bruce Hill, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

By decision dated May 31, 1996, Administrative Law Judge James H. Heffernan affirmed a May 31, 1994, decision issued by the Area Manager, Tonopah Resource Area, Battle Mountain District, Bureau of Land Management (BLM) (Ex. R-9), denying an application for a range improvement permit filed by Joe B. Fallini, Jr., and Susan L. Fallini. The Fallinis sought to construct a well, windmill, pump and 20,000 gallon water tank and trough on the Reveille Allotment. (N6-94-06.) In the same decision, Judge Heffernan also affirmed an April 3, 1995, BLM decision (Ex. R-8) denying applications for six range improvement permits filed by Colvin & Son. (N6-95-10.)^{1/} The Fallinis and the Colvins have appealed Judge Heffernan's decision.

As will be more fully explained below, BLM rejected appellants' range improvement permit applications after having directed the appellants to seek authorization for their range improvements pursuant to cooperative agreements, to transfer an undivided one-half interest in the water rights to the United States, and to provide water for wild horses. Appellants refused to apply for cooperative agreements because they wished to retain control of the water, objected to providing water for wild horses at their own expense, and desired to retain the ability to periodically turn the water off at the wells to facilitate the movement of cattle from one area to another and avoid overgrazing.

I. Relevant Background

As one court has noted: "The competition between domestic cattle and free roaming wild horses for food and water on these public lands has produced folk lore, movies, legislation, and litigation." Fallini v. Hodel, 963 F.2d 275, 276 (9th Cir. 1992). Because the BLM decisions leading to this appeal are a direct outgrowth of prior litigation between BLM and the Fallinis (see Exhs. R-10, R-11, and R-12;

^{1/} Judge Heffernan also reversed a BLM decision denying permission to extend a pipeline and approved the permit application for that project. (N6-95-15.) BLM's appeal of that portion of Judge Heffernan's decision was dismissed as untimely. BLM v. Fallini, 136 IBLA 345 (1996).

Tr. 108-16), the issues raised by the parties in this appeal cannot be properly appreciated or analyzed without a brief recount of the history of that litigation.^{2/}

The Fallini family has been ranching in Nevada since the nineteenth century. The Reveille Allotment is about 46 miles long and 32 miles wide, or about the size of the State of Rhode Island. (Ex. A-7.) It contains approximately 657,520 acres of public land administered by BLM. (Ex. A-21, p.1.) The Fallinis own about 3,000 acres and another individual owns 80 acres in the allotment. (See Tr. 596.)

The base property owned by the Fallinis which affords them their grazing preference is in the form of water rights that support about 250 water sources in the Reveille allotment. (See Tr. 618.) Traditionally, the allotment has been grazed using a rest/rotation system. To assure more even utilization of forage, cattle are moved from one place to another by turning off the water sources in one area and turning the water on in another. The cattle move to be near the water, thereby assuring periods of rest for various areas of the allotment. (See Tr. 620-21.) Referring to the period before 1971, Joe Fallini characterized this system as “superb * * * because we normally had two years of feed all the time ahead, and the reason we done that is because you get into a dry year or drought year, then you might need that extra year’s feed where there’s no growth on it.” (Tr. 622.) At the time BLM’s manager considered the Fallini ranching operation to be “a shining example of range management.” (Tr. 622.)

The ranching operations in Nevada have been adversely affected by the Wild Free-Roaming Horses and Burros Act of December 15, 1971, 16 U.S.C. §§ 1331-1340 (2000) (Wild Horse Act). This Act was intended to protect wild horses and burros on public lands in those areas where they were historically found. Prior to 1971, the ranchers would remove wild horses from the public lands, then graze their cattle. The Wild Horse Act prevented them from continuing this practice, the wild horse populations burgeoned, and the horses consumed forage and water that had previously been available to cattle. In the Reveille Allotment, for example, the wild horse population skyrocketed from 126 in 1971 to 2,306 in 1984. See Fallini v. United States, 31 Fed. Cl. 53, 56 (1994).

Some of the ranchers affected by deteriorating range conditions attributable to the overpopulation of wild horses filed a suit, seeking to require BLM to maintain

^{2/} The history of this litigation is also important because BLM is not free to relitigate with the same party the legal issues resolved in the prior litigation. See United States v. Stauffer Chemical Co., 464 U.S. 165 (1984).

populations at the 1971 levels. In Dahl v. Clark, 600 F.Supp. 585, 592 (D.Nev. 1984), the Court expressly concluded:

[T]he ranges in question are substantially over used and * * * the environment on the allotments has been severely damaged, because of wild horse and livestock use. This Court, therefore concludes that the areas in question are not in a thriving, ecological condition.

It doesn't appear, therefore, that so far as these three allotments are concerned, the Secretary of the Interior is carrying out his mandate under the Wild Horse Act, as amended.

Nevertheless, the Court did not order BLM to remove the horses, pointedly referring to the fact that the plaintiffs sought reduction to no other levels than the 1971 levels and that it was "constrained to consider the relief plaintiffs seek in this case, rather than what they do not seek." Id. at 593. Indeed, the Court expressly stated: "If plaintiffs were looking for a mandamus requiring reduction of wild horse levels to levels other than to 1971, this case might come out differently as to this issue." Id. at 595. Thus, in the Court's view, BLM may be required to remove wild horses from public land to the extent that their presence contributes to deteriorating range conditions.

The Fallinis were more successful than the Dahl litigants in their suit against BLM. As an Appendix to their Statement of Reasons (SOR), appellants have provided a copy of a Federal District Court order setting forth Findings of Fact, Conclusions of Law, and Judgment in Fallini v. Hodel, No. R-85-535 BRT (D. Nev. Nov. 28, 1986).^{3/}

The Court found that BLM and the Department "owe a clearly prescribed ministerial duty" to the Fallinis to "immediately remove" excess horses and directed BLM to determine the "optimum number" for management. (Order, 17, 20.) The Court also directed BLM to manage horses in a manner that would cause them to remain on that portion of the Reveille Grazing Allotment which the Court determined to have been occupied by wild horses on December 15, 1971. (See Order, 10-13, 16-17, 20, as amended by order dated November 13, 1987.) On December 1, 1986, BLM informed the Court that it had determined the optimum number of horses to be between 145 and 165.

Meanwhile, in an attempt to protect their water sources and the range resources on the public land from the burgeoning wild horse herds, the Fallinis installed guard rails across gate openings that would deter horses from entering but

^{3/} The Board referred to this order in Craig C. Downer, 105 IBLA 369, 370 (1988).

allow free entry to cattle. BLM notified the Fallinis that the guard rails were unauthorized modifications that must be removed, and all of the guard rails were removed, except for those at the Deep Well. BLM responded with a decision canceling the permit for the Deep Well. That decision was set aside by an Administrative Law Judge. Fallini v. BLM, N6-4-0646 (September 27, 1984). When this Board reversed the Administrative Law Judge and directed the Fallinis to remove the remaining guard rails, Fallini v. BLM, 92 IBLA 200, 210 (1986), the Fallinis took the matter to District Court, and that Court reversed the Board. Fallini v. Hodel, 725 F. Supp. 1113 (D. Nev. 1989).

[1] The Court rejected BLM's argument that the guardrails were "gates" that could not be installed without an approved amendment to the permit. 725 F. Supp. at 1116-17. The Court also rejected BLM's argument that wild horses were "wildlife" for which the Fallinis were required to provide water under their range improvement permit, because there were no wild horses in the area of the Deep Well when the permit was issued.^{4/} Id. at 1117. Quoting Kidd v. United States Department of the Interior, Bureau of Land Management, 756 F. 2d 1410, 1411 (9th Cir. 1985), the Court found that " 'the purpose of the Taylor Grazing Act is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference.' " 725 F. Supp. at 1117. "The specific provisions pertaining to * * * a 'Section 4' permit * * * clearly illustrate a primary Congressional intent to protect livestock and cattle grazing." Id. The Court stated:

While defendants are correct in pointing out that Congress by various enactments has declared additional purposes for which Taylor Grazing Act lands will be managed by BLM, there is no indication that Congress has repealed the Act's primary purpose to manage grazing lands so as to stabilize and preserve the livestock industry.

This court has rejected the contention that cattle have a status inferior to wild horses in public lands as a result of congressional enactments after the Taylor Grazing Act of 1934. In American Horse Protection Association, Inc., v. Frizzel, 403 F.Supp. 1206 (D.Nev.

^{4/} The Court may have based its conclusion that wild horses could not be considered "wildlife" because the case involved land outside of the horses' historic areas. However, the Wild Horse Act and its implementing regulations at 43 CFR Part 4700 give wild horses and burros a legal status unlike that afforded any other form of wildlife. BLM is not required to maintain populations of elk, deer, antelope, bears, or sage grouse at appropriate management levels, restrict them to historic herd areas, or provide for their adoption.

1977), the court held that neither wild horses nor cattle possess any higher status than the other on the public lands.

725 F. Supp. at 1118 (emphasis added.)^{5/}

[2] The Court found that BLM “gave little or no consideration to cattle grazing concerns,” expressly noting that “[t]he Administrative Law Judge found the BLM’s reaction to the guardrail was partially in response to complaints by various wild horse activists.” 725 F. Supp. at 1118. The Court continued: “In failing to consider an important aspect of the problem, namely the adverse impact on cattle grazing practices, the agency acted arbitrarily.” *Id.* Referring to “improper political considerations,” the Court further stated: “The record shows that the violation was charged partially as a result of political pressure by wild horse activists, and the sensitive nature of wild horse issues, rather than a ‘reasoned process of considering the relevant factors pertaining to this problem.’” *Id.* The Court further concluded that BLM acted beyond its authority and jurisdiction in requiring the Fallinis to make water from the well available to wild horses, *id.* at 1121, and that BLM had “effected a regulatory taking of Fallinis’ water rights.” *Id.* at 1124.

The Court of Appeals for the Ninth Circuit affirmed the District Court’s decision. That Court held that the Fallinis’ permit was not violated when they erected guardrails without prior approval, and stated that “no sane rancher would spend thousands of dollars to drill a deep well and build associated water works in order to attract a population of wild horses that would eat and uproot all the grass for miles around the water hole.” *Fallini v. Hodel*, 963 F.2d at 279. The Court reiterated its statement in *Kidd* that “the purpose of the Taylor Grazing Act is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference.” 963 F.2d at 279. Because the Court considered it adequate to affirm the District Court on that basis, it found no need to rule on the District Court’s findings concerning state law issues with respect to the Fallinis’ water right or on the Court’s findings as to regulatory takings issues and undue political influence, except

^{5/} In his opening statement at the hearing, counsel for BLM suggested that there has been a “misuse of nomenclature” under which BLM “looked at Section 4 permits as something separate and then a cooperative agreement as something else.” (Tr. 16.) Counsel then recognized that Section 4 provides authority for both instruments. *Id.* Since the statutory basis for cooperative agreements is the same as for range improvement permits, cooperative agreements are equally subject to the Court’s conclusion that the provisions for authorizing range improvements “clearly illustrate a primary Congressional intent to protect livestock and cattle grazing.” 725 F. Supp. at 1117.

to note that there was no evidence that this Board's decision was affected by political pressure. Id. at 279. It did not vacate or overturn the District Court's findings, however.

II. The Fallinis' Application

On December 12, 1991, the Fallinis filed their application for a range improvement permit authorizing the New Reveille Well (the subject of this appeal) (Ex. R-1.) Section 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1994), provides in part as follows:

Fences, wells, reservoirs, and other improvements necessary to the care and management of livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve.

Prior to 1995, the BLM regulations implementing this statute required permittees and lessees to enter into a cooperative agreement with BLM or have an approved range improvement permit prior to installing an improvement. 43 CFR 4120.3-1(b) (1991).^{6/}

Under the regulations in effect at the time appellants filed their applications, range improvement permits were "issued at the discretion of the authorized officer" and the grazing permittee or lessee would provide full funding for the improvement. 43 CFR 4120.3-3(a) (1991). The permittee or lessee would hold title to removable improvements, 43 CFR 4120.3-3(b) (1991), and the use by livestock of ponds or wells was controlled by the holder of the permit. 43 CFR 4120.3-3(c) (1991).

BLM's regulations also provided that any person could enter into a cooperative agreement with BLM, and the agreement would "specify the division of costs, labor, or both between the United States and the cooperator(s)." 43 CFR 4120.3-2 (1991). Under cooperative agreements, BLM and the parties to the agreement share title to structural or removable improvements in proportion to their respective contribution to the initial construction, and "[t]itle to nonstructural or nonremovable improvements shall be in the United States." Id. In its Answer, BLM also refers to BLM Manual H-1740-1 (Ex. R-4; Answer, 9.) That provision also emphasizes the cost-sharing aspect of cooperative agreements: "Cooperative agreements * * * will

^{6/} See the discussion of the 1995 regulations at pages 29-30 of this decision.

normally be used to authorize installation of multiple use improvements involving joint public/private expenditures.” (Emphasis added.)

[3] BLM correctly notes that the Public Rangelands Improvement Act (PRIA) contains a provision that emphasizes the use of cooperative agreements: “To the maximum extent practicable, and where economically sound, the Secretary shall give priority to entering into cooperative agreements with range users (or user groups) for the installation and maintenance of on-the-ground range improvements.” 43 U.S.C. § 1905(c) (2000). The statutory context of this policy explains its purpose. This sentence is the last sentence of a provision that required BLM to spend 80 percent of the money provided under that Act for “on-the-ground range rehabilitation, maintenance and the construction of range improvements.” PRIA’s linkage of public funding to the policy favoring cooperative agreements for sharing range improvement costs is indicated in the following section of that Act: “Notwithstanding any other provision of this chapter, authority to enter into cooperative agreements and to make payments under this chapter shall be effective only to the extent or in such amounts as are provided in advance in appropriation Acts.” 43 U.S.C. § 1906 (2000). Thus, PRIA’s policy in favor of cooperative agreements may be properly invoked when BLM proposes to share the costs for an improvement. Because improvements authorized under range improvement permits are funded solely by the grazing permittee or lessee, cooperative agreements are appropriate when there are joint public and private expenditures. The use of public funds to pay a portion of the improvement costs is a relevant factor when determining whether the contemplated improvement will be authorized by a range improvement permit or a cooperative agreement.

Irrespective of the PRIA, BLM’s regulations implementing 43 U.S.C. § 315c also expressly made the source of funding a relevant, if not definitive, factor when deciding whether to authorize a proposed range improvement under a permit or under a cooperative agreement. A permittee or lessee would provide full funding under a range improvement permit, see 43 CFR 4120.3-3(a) (1991), and a cooperative agreement must “specify the division of costs, labor, or both between the United States and the cooperator(s).” 43 CFR 4120.3-2 (1991). Although the use of the disjunctive “or” suggests that there may be instances when the United States would not participate in the costs of an improvement authorized by a cooperative agreement, the text of the regulation makes the source of the funding a threshold matter and who furnishes the labor a critical issue when determining whether the improvement should be authorized under a permit or cooperative agreement.

On the takings issue the District Court had found in the Fallinis’ favor. The Fallinis’ permit application was pending in 1992, when the Court of Appeals issued its decision in Fallini v. Hodel, supra, without ruling on that issue. The Fallinis filed a

complaint in the Court of Federal Claims contending that BLM had taken water for consumption of wild horses, but their claim was rejected. Fallini v. United States, 31 Fed.Cl. 53 (1994). On appeal to the Federal Circuit, the decision of the Court of Federal Claims was vacated because the Circuit Court deemed the Fallinis' complaint untimely. Fallini v. United States, 56 F. 3d 1378 (Fed. Cir. 1995), cert. denied, 517 U.S. 1243 (1996). ^{2/}

The Fallinis' pending takings litigation had a direct effect on BLM's consideration of their application for a range improvement permit. In a memorandum to the Regional Solicitor, dated March 4, 1993, BLM's Nevada State Director referred to the litigation and sought the Regional Solicitor's advice regarding the disposition of the Fallinis' range improvement application. (Ex. R-10.) By memorandum dated March 11, 1993, the Regional Solicitor responded:

I would propose that language be inserted in the permit requiring the permittee to make water available for wild horses and burros, in areas where they belong. The applicant might be required to waive any claim which he might have as a result of the use, by wild horses and burros,

^{2/} In its Answer in the instant appeal, BLM refers to the Fallinis' "takings argument" as having "ultimately failed," and counsel for BLM erroneously indicates that the decision of the Federal Court of Claims was affirmed. (Answer, 8.) The Federal Circuit Court of Appeals did not affirm that decision. It vacated it. The Circuit Court analogized the Fallinis' case to the Supreme Court's decision in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), where the asserted taking of beachfront property arose from the enactment of legislation requiring a landowner to let others walk along the shore. The Court concluded that it was the enactment of the wild horse statute, not the use of the Fallinis' water by horses, that effected a taking, 56 F.3d at 1383, and, therefore, the Fallinis' claim was time-barred. By vacating the lower Court's decision, the Circuit Court left the takings issue open in cases where the statute of limitations could not be interposed. Unlike the water sources involved in that litigation, the ones in this appeal have not become subject to use by wild horses, so that the limitation period that would bar a claim by the Fallinis arguably has not run.

BLM should note that the takings issue was considered by the United States District Court in Nevada which found that BLM had "effected a regulatory taking of Fallinis' water rights." 725 F. Supp. at 1124. Although the Ninth Circuit affirmed the Nevada District Court on other grounds, 963 F.2d at 279, the Ninth Circuit did not vacate the Nevada District Court's findings on the takings issue. This action contrasts with that of the Federal Circuit Court which vacated the findings of the Court of Federal Claims upon which BLM relies in its Answer.

of waters being utilized in connection with the range improvement. You correctly surmise that the use of Cooperative Agreements, in lieu of range improvement permits, could avoid the “takings” issue. The choice of whether to use a range improvement or a cooperative agreement is discretionary with BLM.

(Ex. R-11.) On April 6, 1993, BLM issued Instruction Memorandum (IM) No. NV-93-087 to provide interim guidance:

In the interim, for those Range Improvement Applications for livestock water developments in Herd Management Areas (HMAs), or in the proximity of HMA's that are currently under consideration, [^{8/}] I am directing that District Managers authorize proposed water developments through the cooperative agreement process.

(Ex. R-12.)

The New Reveille Well is slightly inside the boundary of the Reveille HMA. (See Ex. A-7.) In a letter to Joe Fallini dated June 9, 1993, BLM's Area Manager referred to the new IM, and provided Fallini the opportunity to reapply for the improvement under a cooperative agreement, explaining the difference as follows:

1. For Cooperative Agreements, BLM policy requires that BLM hold an undivided one half interest in the water rights of the source, Range Improvement Permits do not. As it is our understanding that you possess all of the water rights to the New Reveille well, an undivided

^{8/} “Herd management areas” under 43 CFR 4710.3-1 are distinguished from “wild horse and burro ranges” under 4710.3-2. Wild horse and burro ranges are “to be principally, but not necessarily exclusively, for wild horse or burro needs” while herd management areas are not. Under 4710.3-1, HMA's are subject to the constraints on management set forth in 4710.4, which provides: “Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas. Management shall be at the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans.” Under 4700.0-5(d), a “herd area” is defined as “the geographic area identified as having been used by a herd as its habitat in 1971.” (Emphasis added).

Because BLM regulations require BLM to limit horse distribution to those areas used by the herd in 1971, it is difficult to perceive how a policy of proposing new areas can be reconciled with this requirement, nor does allowing horses to use wells in proximity to HMA's appear to be consistent with the requirement.

one half interest in the water rights would have to be provided to the United States prior to authorization of the project.

2. Under Cooperative Agreements, title to structural or removable improvements are shared by the United States and the cooperator in proportion to the actual amount of the respective contribution of the initial construction. Under Range Improvements, title to all removable improvements is held by the permittee, with any residual held by the United States.

(Ex. R-3.) The letter invited Fallini to contact the office within 45 days to apply for a cooperative agreement, but indicated that in the absence of a response, BLM would issue a proposed decision denying the Fallinis' request for a range improvement permit.

BLM took no action until after the Court of Federal Claims rejected the Fallinis' takings claim. Citing the lack of a response, BLM issued its Notice of Proposed Decision to deny the Fallinis' application on May 31, 1994. This led to the appeal to Judge Heffernan. As noted above, during the pendency of the administrative appeal, the United States Court of Appeals for the Federal Circuit vacated the decision of the Court of Federal Claims. Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995), cert. denied, 517 U.S. 1243 (1996).

III. The Colvins' Applications

On October 5, 1992, BLM received six range improvement permit applications from the Colvins. The contemplated improvements, in the Stone Cabin and Wagon Johnnie Allotments, are the Lucky Well, the Divide Well, the Golden Arrow Well, the Kawich Well, the Butte Well, and the Seven Mile Wash Well and Pipeline. In a letter dated June 24, 1993, BLM stated that the Divide and Lucky Wells were "viable projects in that they have the potential to improve the distribution of livestock and wild horses," but advised the Colvins that it had determined that the other projects would not serve to improve livestock distribution. (Ex. R-7.) Like the June 9, 1993, letter issued to the Fallinis, BLM referred to IM No. NV-93-087 as requiring BLM district managers to authorize water developments in HMA's only through cooperative agreements. The letter noted that the two proposed wells were within the Stone Cabin HMA, and extended the opportunity to apply for cooperative agreements.

On March 28, 1994, BLM received the Colvins' applications for cooperative agreements for the Lucky Well, Divide Well, and Golden Arrow Well, together with

certain stipulations added by the Colvins that BLM found unacceptable. On August 2, 1994, the Colvins submitted applications for cooperative agreements for the Kawich Well, the Butte Well, and the Seven Mile Wash Well and Pipeline which also included stipulations BLM found to be unacceptable. A proposed decision denying the applications was issued on September 23, 1994, and the applications were withdrawn.

On March 2, 1995, BLM received applications for range improvement permits for the Butte Well, Divide Well, Golden Arrow Well, Kawich Well, Lucky Well, and Seven Mile Wash Well and Pipeline. (Ex. R-5.) On April 3, 1995, BLM issued a Notice of Proposed Decision rejecting the applications. The decision referred to BLM's policy requiring authorization of water improvements under cooperative agreements, but BLM also deemed Colvins' applications unacceptable because certain standard stipulations^{9/} had been deleted. (Ex. R-8.) When that decision became final, the Colvins filed an appeal.

IV. Proceedings before Judge Heffernan

By order dated August 17, 1995, Judge Heffernan consolidated the Colvin and Fallini appeals. On November 13, 1995, BLM filed a motion for summary judgment, alleging that there were no issues of material fact and that the sole issues were legal ones. On November 21, Judge Heffernan denied BLM's motion for summary judgment, finding that those appeals "may implicate potential factual disputes between the parties."^{10/}

At the hearing, the Fallinis and the Colvins provided substantial evidence to support their permit applications, including their own testimony and that of their expert witnesses. Exhibits were introduced to show the service areas of the proposed wells, and the testimony by expert witnesses was sufficient to establish that proposed wells would improve utilization of forage by enhancing the rest/rotation regime

^{9/} The Colvins had drawn a line through one provision stating that the permit would be subject to modification or cancellation if the improvement was not compatible with multiple use objectives for the site. They drew another line through another provision that the permit would be subject to cancellation if the permittee does not comply with the regulations under which the permit is authorized.

^{10/} Judge Heffernan's order also granted a motion to consolidate another appeal filed by the Fallinis, N6-95-15. As indicated in note 1, supra, Judge Heffernan decided that appeal in favor of the Fallinis, and BLM's appeal from Judge Heffernan's decision was dismissed as untimely.

under which the allotments have been successfully managed. They also presented substantial evidence regarding the deleterious effects on range values resulting from requiring livestock water to be made available to wild horses. No rebuttal evidence on these issues was submitted on behalf of BLM.

Judge Heffernan noted that BLM had made no technical evaluation of the range improvement applications and characterized the issue in the appeal as a legal and procedural one: “whether or not the BLM enjoys the statutory and regulatory discretion to restrict or limit applications for water improvements, which are in or near herd management areas, to cooperative agreements, as distinguished from range improvement permits.” (Decision, 4.) He referred to IM No. NV-93-087 (quoted above) and found that it was in effect at the time BLM issued its decisions in both the Fallini and Colvin cases.^{11/} After quoting 43 U.S.C. § 315c, Judge Heffernan found that it pertained to the improvements proposed by appellants and stated:

The provision makes clear that the Secretary “may” allow construction of such improvements. The Secretary is not mandated by any kind of “shall” language to ever approve such improvements in an automatic or mandatory fashion. Further, it is clear that the Secretary “may” allow such construction of wells and the like through either of two co-equal procedures, that is, permit “or” cooperative arrangement. The Act’s use of the term “or” is plain and determinative--the Secretary of the Interior enjoys the unfettered discretion to review and potentially approve range improvements through either the permit “or” the cooperative arrangement mechanism. In that context, the incidents of public property ownership are not vitiated by the provision of the Taylor Grazing Act, namely, the Secretary may decline to review and consider such proffered range improvements, unless some facet of applicable public land law mandates otherwise.

(Decision, 7.) He further found that range improvement permits and cooperative agreements were both subject to multiple use requirements. He rejected appellants’ arguments that their stewardship agreements with BLM^{12/} precluded BLM from

^{11/} Although the IM stated on its face that it was to expire on Sept. 30, 1994, Judge Heffernan sustained BLM’s view that the policy remained in effect, having been extended by program officials under BLM Manual 1221.14A (Ex. ALJ-3). (Decision, 5-6.)

^{12/} The Twin Springs Ranch Individual Stewardship Program for the Fallinis
(continued . . .)

insisting that the improvements be authorized only under cooperative agreements, noting that the PRIA under which the stewardship agreements were authorized also directed the Secretary to “give priority to entering into cooperative agreements with range users (or user groups) for the installation and maintenance of on-the-ground range improvements.” 43 U.S.C. § 1904(c) (2000). (Decision, 9-11.) He also rejected the Colvins’ argument that an earlier consent decree covered the improvements sought in their applications. (Decision, 11.)

V. Issues on Appeal

In their statement of reasons (SOR), appellants argue that Judge Heffernan erred in finding that BLM has unfettered discretion to deny a range improvement application that conforms to the requirements established by Congress. They assert that Judge Heffernan departed from applicable standards of review in affirming the decision because BLM had abused its discretion, BLM had established no rational basis for its action, and BLM’s action was arbitrary and capricious.^{13/}

Appellants assert that under 43 U.S.C. § 315c, the purpose for which range improvements may be installed is to sustain the domestic livestock permitted to graze

^{12/} (. . . continued)

approved by BLM contained the following provision: “Range improvements have been and will continue to be constructed and maintained solely by Twin Springs Ranch. The improvements shall continue to be documented by BLM with Section 4 Range Improvement Permits in the same fashion as the existing 53 permits formerly issued to Twin Spring Ranch.” (Ex. 21, p. 10a, emphasis added.) The Wagon Johnnie Allotment Management Plan for the Colvins contained a similar provision: “Range improvements may be constructed and maintained by Colvin and Son. The improvements shall be documented by BLM Section 4 Range Improvement Permits. The Section 4 permits shall apply to all range improvement projects constructed on BLM administered lands.” (Ex. 24, pp. 33-34, emphasis added.)

^{13/} Appellant has identified this standard as one arising under 5 U.S.C. § 706 (SOR at 1), but that statute sets forth a standard for judicial review, not a standard for review by this Board. In reversing this Board’s use of a deferential review standard based on the expertise of the bureau whose decision was being reviewed, the Federal Court of Appeals for the 10th Circuit distinguished between standards of judicial review and standards of agency review: “The deference given to an agency’s decision on a matter requiring expertise should only be made in the judicial forum, after the final agency determination is made following its review of all evidence presented.” Bender v. Clark, 744 F.2d 1424, 1430 (10th Cir. 1984).

the land. They assert that “Congress did not authorize the Secretary to impose different conditions (unrelated to those implicitly involved in respect to standards, design, construction and maintenance)” and that Congress did not give the Secretary authority “to forbid improvements which satisfied these conditions.” (SOR, 5.) Appellants believe that the discretion conferred upon the Secretary by the statute is limited to requiring that the statutory conditions be satisfied. (SOR, 7.)

Characterizing a cooperative agreement that would require them to transfer their water right and provide water for wild horses as a “contract of adhesion” (SOR at 7-8), appellants sought to avoid having to enter into a cooperative agreement by applying for range improvement permits. (SOR, 9.) They describe at length their efforts to obtain water and its importance to the grazing operation:

The water is artificially produced at the surface and captured exclusively with the expenditure of labor, capital, and expense of the owner of the improvement. Except for the application for the proposed improvement at New Reveille Well, consisting of the retrofitting of an already existing water well * * *, all of the proposed improvements involve the application to the State of Nevada for a permit to appropriate water, searching for underground water by drilling and, if found, constructing a well by casing, bringing the water to the surface with machinery which harnesses an energy source such as wind and fuel, confining the water at the surface in storage tanks, installing machinery or mechanisms to release the water for use, installing troughs for the receipt of the water for animal consumption, and fencing to protect all of the works. * * *

These activities, machinery, and implements conducted and installed in the harsh, remote, widely separated, and isolated desert areas far from commercial electricity, are very expensive * * *, and the expense continues after the improvements are in place to protect, monitor, service, repair, maintain, and control the facilities. * * * Typically, water which appellants produce would be held at the surface in a large, closed holding tank, smaller than, but like a water tower, and from the tank the water would be piped to a watering trough within a gated fenced corral. It is confined by the owner and released for and as needed to sustain his domestic livestock.

Water artificially produced and impounded by appellants within their containers is private property.

(SOR, 10-11.) Appellants believe that if BLM requires them to provide water to wild horses as a condition for BLM granting a permit, it would more clearly implicate a “taking” of their private property. (SOR, 13-14.)

[4] We take this allegation seriously. The Taylor Grazing Act does not treat water rights the same way it treats rights to property for which title may typically become subject to government ownership under the terms of a cooperative agreement. The Act expressly contemplates private ownership of water rights on public land used for grazing when it provides that “[p]reference shall be given in the issuance of permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them * * *.” 43 U.S.C. § 315b (2000). It is important to this case that the grazing preferences enjoyed by appellants are based on their ownership of water as base property, even though they do not seek added preferences based on the proposed wells. The Act further provides: “[N]othing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.” *Id.* (Emphasis added.)

A. Did BLM lack authority to deny range improvement applications that conformed to the requirements of 43 U.S.C. § 315c?

We turn first to appellants’ statutory arguments that BLM lacked authority to deny range improvement applications that conformed to the requirements of 43 U.S.C. § 315c. Our analysis of this issue is materially impacted by developments that have occurred during the pendency of these appeals.

On February 22, 1995, BLM published the amendments to its grazing regulations that became effective on August 21, 1995. These regulations included new provisions for range improvement permits and for cooperative range improvement agreements. 60 FR 9965 (February 22, 1995). These regulations were published during the pendency of the Fallinis’ appeals before Judge Heffernan but before issuance of the Judge’s decision rejecting the range improvement permit applications. The regulations were not in effect when BLM rejected those applications. These new regulations provide that authorization for water developments may only be granted through cooperative agreements, and that the United States would take title to permanent range improvements including wells.

43 CFR 4120.3-2(b). The regulations made the following further reference to water rights:

Any right acquired on or after August 21, 1995 to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any such water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 CFR 4120.3-9.^{14/}

In another action, the parties challenging BLM's regulations asserted, *inter alia*, that the regulatory provisions concerning title to range improvements exceeded BLM's statutory authority, and several of their arguments were similar to those advanced by appellants in this appeal. That litigation concluded on May 15, 2000, when the Supreme Court issued its decision in Public Lands Council v. Babbitt, 529 U.S. 728 (2000). After rejecting arguments that other new provisions regarding "preference" violated the statutory directive that grazing privileges be "adequately safeguarded," the Court addressed the arguments concerning range improvements. The Court noted that the new regulations affected the rules pertaining to the title to range improvements installed pursuant to a cooperative agreement: "For cooperative agreements, they specify that 'title to permanent range improvements' (authorized in the future) 'such as fences, wells, and pipelines ... shall be in the name of the United States.' 43 CFR § 4120.3-2(b) (1995)." 529 U.S. at 749. Although the ranchers argued that this change violated 43 U.S.C. § 315c which recognized ownership of improvements by "prior occupants," the Court referred to the response of the Secretary and sustained the regulation:

The Secretary responds that, since the statute gives him the power to *authorize* range improvements pursuant to a cooperative

^{14/} These new rules were intended to be applied prospectively only, and Judge Heffernan purported to follow the prior regulations, even though the new regulations had gone into effect: "It is without dispute that the referenced August 1995 regulatory amendments, in fact, do not cover or control the instant dockets, which are exclusively governed by the regulations in effect at the time." (Decision, 5.) Neither BLM nor the other parties to this appeal have suggested otherwise, and we do not disturb this aspect of Judge Heffernan's analysis.

agreement—a greater power, § 315c, he also has the power to set the terms of title ownership to such improvements—a lesser power—just like any landlord. See R. Schoshinski, *American Law of Landlord and Tenant* § 5:31 (1980) (ownership of tenant improvements is a matter open to negotiation with landlord); H. Bronson, *A Treatise on the Law of Fixtures* § 40 (1904); 2 J. Taylor, *A Treatise on the American Law of Landlord and Tenant* § 554, pp. 164-166 (1887). Under this reading, the subsequent statutory provision relating to “ownership” simply provides for compensation by some future permit holder *in the event* that the Secretary decides to grant title.

* * * * * *

In short, we find nothing in the statute that denies the Secretary authority reasonably to decide when or whether to grant title to those who make improvements. And any such person remains free to negotiate the terms upon which he will make those improvements irrespective of where title formally lies, including how he might be compensated in the future for the work he had done, either by the Government directly or by those to whom the Government later grants a permit. Cf. 43 U.S.C. § 1752(g) (requiring the United States to pay compensation to a permittee for his “interest” in range improvements if it cancels a permit).

529 U.S. at 749-50. Accordingly, we reject appellants’ argument that BLM lacked statutory authority to limit authorization for water developments to cooperative agreements only and preclude the use of range improvement permits for such purposes.^{15/}

^{15/} We note that the Court’s validation of the Secretary’s discretionary authority to require the exclusive use of cooperative agreements for water projects under which title would be owned by the government was expressly premised on its view that an applicant “remains free to negotiate the terms upon which he will make those improvements.” By necessary implication, this view by the Court rejects the notion that BLM has “unfettered discretion” to impose by fiat terms and conditions that would make a cooperative agreement a “contract of adhesion.”

When assessing the Public Lands Council decision, it is important to remember what the Court did not decide. In a concurring opinion, joined by Justice Thomas, Justice O’Connor referred to the “facial” nature of the challenge to the regulations and stated that the Court’s opinion did not foreclose an “as-applied challenge to the

(continued . . .)

B. Does BLM Have Unfettered Discretion to Deny
Appellants' Range Improvement Applications?

If the Court had agreed with those who challenged the regulations, our inquiry would be ended because BLM's action in this case would be invalid. The logical outflow from the Court's actual holding is the question of whether the Court's conclusion that the Secretary had the power to promulgate regulations under which permanent range improvements may be authorized only by entering into cooperative agreements dictates the finding that BLM's decision in this case must be affirmed. It has been BLM's view throughout these proceedings that its policy requiring cooperative agreements for water improvements in HMA's made the factual issues raised by appellants essentially irrelevant, so that no hearing was necessary.^{16/} Although Judge Heffernan ruled at the hearing that appellants should be allowed to introduce their evidence,^{17/} his decision adopted BLM's characterization of the issue

^{15/} (. . . continued)

Secretary's action." 529 U.S at 751. Further, Justice O'Connor noted that the Court made no ruling as to whether the Secretary acted arbitrarily and capriciously in promulgating the regulations, so that "the Court's decision does not foreclose such APA challenge generally by permit holders affected by the 1995 regulations." *Id.* at 751-52.

^{16/} On November 13, 1995, BLM filed a motion for summary judgment with Judge Heffernan, contending that there were no material issues of fact and that Judge Heffernan should "focus on the sole issue * * * whether BLM's insistence that a cooperative arrangement be the vehicle for approving range improvements in Herd Management Areas or adjacent lands is arbitrary and capricious." (Memorandum in Support of Motion for Summary Judgment, 5.) Appellants countered that there were factual issues concerning the appropriateness of requiring cooperative agreements rather than range improvement permits. Judge Heffernan denied BLM's motion for summary judgment.

^{17/} During the hearing, BLM adhered to its view that there were no relevant issues of fact. During the direct examination of Charles N. Saulisberry, appellants' range expert, counsel for appellants referred to soil maps of the Reveille allotment prepared by the witness, where the issue concerned a pipeline, the New Reveille Well, and the wells in the Colvins' Wagon Johnnie and Stone Cabin Allotments. Counsel for BLM objected "on the scope of the rebuttal proof that counsel is going to put on here." (Tr. 339.) Stating that BLM "made no technical determinations as to the viability of those proposals," counsel for BLM expressed concern regarding appellants "putting on proof as to technical viability of projects that were denied for a purely legal

(continued . . .)

in the appeal as purely a legal and procedural one: “whether or not the BLM enjoys the statutory and regulatory discretion to restrict or limit applications for water improvements, which are in or near herd management areas, to cooperative agreements, as distinguished from range improvement permits.” (Decision, 4.) Having found that BLM had “unfettered discretion” (Decision, 7, 8), Judge Heffernan referred to BLM’s policy of authorizing water improvements in HMA’s solely by means of cooperative agreements rather than by range improvement permits, and made no further inquiry into whether BLM had provided a rational basis for the application of its policy in these cases. Having found that BLM “never at any time undertook a full or complete evaluation on the merits of any of the applicants’ various permit applications,” Judge Heffernan concluded that until appellants submitted applications in the form of cooperative agreements, “any final decision with respect to the merits of such applications would be premature.” (Decision, 9.)

[5] BLM’s decisions did not reach the technical merits of appellants’ proposed range improvements, and Judge Heffernan may have correctly ruled that those issues were premature. However, the merits of BLM’s decision to require authorization of the proposed improvements through cooperative agreements rather than range improvements is not purely a question of law. See discussion in part V.E. infra. When BLM issued the decisions that were appealed and addressed by Judge Heffernan, there was no regulation in effect that made the appellants ineligible for range improvement permits. Under the regulations in effect at that time, BLM’s

^{17/} (. . . continued)

reason.” (Tr. 340.) Counsel for BLM contended that to admit appellants’ evidence pertaining to those permit applications would not “be timely * * * because if the Court were to rule that there was not a rational basis for BLM to deny the permits on the bases that we did, then obviously BLM would have to review these permit applications and determine whether they are technically viable.” (Tr. 340.) Counsel further argued that “it would be obviously inappropriate for the Court to order the BLM to approve permits that have not had appropriate environmental background work done.” (Tr. 340.)

Counsel for appellants objected to BLM’s efforts to try the case on a “piecemeal basis.” (Tr. 342.) Counsel for BLM countered that “it would be absurd * * * to go out and do EAs [environmental analyses] on these projects that it has already denied because they felt it complied with the law.” (Tr. 345.)

Speaking from the bench, Judge Heffernan concluded: “[I]t seems to me that these people are procedurally entitled to prove in this hearing that they submitted a properly documented and properly substantiated section 4 permit application.” (Tr. 350.) He later reiterated his ruling that “[a]ppellants are entitled to put on evidence with respect to the validity of their applications.” (Tr. 364-65.)

authorized officer had discretionary authority to grant those applications as well as to reject them. It is well established that, when BLM uses its discretionary authority to reject an application for a land use authorization, it must provide a rational basis for its decision. E.g., George W. Philp, 141 IBLA 195, 197 (1997); Burnett Oil Co., 122 IBLA 330, 332 (1992); The City of Chico, 119 IBLA 136, 138-40 (1991). It is likewise well established that if BLM wishes to impose a condition upon a land use authorization, it must provide a rational basis for its decision. James M. Chudnow, 70 IBLA 225, 226 (1983); James E. Sullivan, 54 IBLA 1, 2 (1981).

[6] When their applications were denied, appellants had a statutory right to a hearing under 43 U.S.C. § 315h (2000), the hearing held under that section must conform to the adjudication requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-558 (2000), and the record in support of BLM's decision must be developed in accordance with those procedures.^{18/} Section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (2000), applies to and requires a hearing in cases involving "matters that arise in the administration of grazing districts." William H. Thoman, 157 IBLA 95, 106 (2002). A range improvement permit is such a matter. This right to a hearing does not evaporate if BLM declares its action to be discretionary, and labeling an action "discretionary" does not cause issues of fact to disappear.^{19/} An appellant seeking relief from a grazing decision reached in the exercise of BLM's administrative discretion bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper. See Eason v. BLM, 127 IBLA 259, 262-63 (1993). It is implicit that an appellant must be afforded an opportunity to introduce evidence to meet this burden.

Thus, BLM has the discretionary authority to reject appellants' range improvement applications and require them to apply for cooperative agreements.

^{18/} Grazing permits are licenses, and the Department has long recognized that its actions and procedures must conform to the APA requirements that pertain to licensing. See Frank Halls, 62 I.D. 344 (1955).

^{19/} Even in cases where there is no statutory right to a hearing courts have recognized that a hearing may be required when BLM's action is clearly discretionary. In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the Court recognized that the Department's authority to grant or deny Alaska Native allotment applications was discretionary but rejected the agency's argument that no hearing was required. The grant of an extension of time to complete a desert land entry may be discretionary, but the Court found that an applicant for an extension had a due process right to a hearing in Stickelman v. United States, 563 F.2d 413, 416-17 (9th Cir. 1977).

However, it must establish a rational basis for its action. In this case, it is clear that BLM rejected appellants' permit applications not merely because cooperative agreements would better serve "multiple use objectives." A primary reason, if not the primary reason for its action, was to require appellants to provide water for wild horses.^{20/} Thus, BLM must provide a rational basis for requiring appellants to transfer a half interest in their water rights, and for requiring appellants to provide water for wild horses pursuant to a cooperative agreement. If it does not, its decision denying their applications for range improvement permits cannot be affirmed.

By adopting BLM's mischaracterization of the issue in the appeal as being a purely legal and procedural issue of whether or not the BLM had discretionary authority to restrict or limit applications for water improvements in herd management areas to cooperative agreements, Judge Heffernan ignored appellants' factual arguments that it was arbitrary and capricious for BLM to deny their applications. By doing so, he ignored the un rebutted evidence appellants submitted that supports those arguments. Even if Judge Heffernan had been correct in finding that consideration of the merits of appellants' applications may be "premature," appellants had a right to introduce evidence to support their argument that there was no rational basis for BLM's decision to require them to transfer a one-half interest in their water rights and to provide water for wild horses pursuant to cooperative agreements. See 5 U.S.C. § 556(d) (2000).

C. Did BLM Abuse its Discretion In Rejecting Appellants' Range Improvement Permit Applications?

Appellants assert that "there is no rational reason to prevent enlarging the water supply for animals," and point to BLM's statement in its reply brief before Judge Heffernan that the permits were denied because the permittee could restrict the use of the water improvement to the detriment of wild horses." (SOR at 15, citing BLM Reply Brief below at 3.) Appellants argue that there would be no detriment to the horses if the permits are granted. (SOR, 15.)

[7] Appellants question BLM's reliance on IM NV-93-087 which directed District Managers to authorize proposed water developments through the cooperative agreement process, asserting that an IM does not provide "stand-alone justification" for rejecting their applications. (SOR, 24.) First, appellants correctly note that an instruction memorandum is not a regulation and therefore does not have the legal force or effect of a regulation. An IM is not binding on this Board or the public at

^{20/} The IM upon which BLM relied did not require cooperative agreements for multiple uses generally but was applicable only to HMA's.

large. See Pamela S. Crocker-Davis, 94 IBLA 328 (1986). Appellants contend that BLM is not “‘required, as a matter of law, to comply with its manual,’ much less, supervisory instructions of a State office which purport to change national policy,” citing Secretary Lujan’s decision in In re Southern Utah Wilderness Alliance, SEC 92-UT101 (December 17, 1992), and the Supreme Court’s decisions in Schweiker v. Hansen, 450 U.S. 785 (1981), and U.S. v. Caceres, 440 U.S. 741 (1979). (SOR, 24-25.)

Appellants also assert that IM No. NV-93-087 had expired by its own terms (SOR, 25-27), but contend that, if the IM remained in effect, a decision that is arbitrary, capricious, or an abuse of discretion “cannot be validated by relying upon a superior’s instruction.” (SOR, 27.) Appellants continue:

It is impossible for appellants to challenge an Instruction Memorandum except by an appeal of a Final Decision which purports to invoke the instruction. And in such a case, it is the Final Decision, not the instruction upon which the decider chooses to be guided, that is in issue.

* * * [I]t is the Final Decision which constitutes the agency action, the officer authorized to take this action is the one upon whom rests the responsibility for deciding and, in deciding, upon what he relies, and it is his decision which must meet the standard required.

(SOR, 27-28.) Appellants’ right to submit evidence that BLM’s denial of their permit applications was arbitrary and capricious cannot be postponed until after the submission of applications for cooperative agreements. As we stated earlier, unless BLM in this proceeding has provided a valid and rational basis for requiring appellants to transfer a half interest in their water rights and provide water for wild horses pursuant to a cooperative agreement, a decision denying their applications for range improvement permits cannot be affirmed because such denial would be an abuse of discretion.

D. Can Instruction Memorandum NV-93-087 Provide a “Stand Alone” Justification for BLM’s Decision?

[8] Appellants’ argument that the IM cannot provide a “stand alone” justification for rejecting their applications raises an important issue of administrative law that is not adequately answered by BLM’s reiteration of its position that BLM had the discretionary authority to reject their applications. “When a federal agency issues a directive concerning the future exercise of its discretionary power, for purposes of

APA section [5 U.S.C. §] 553, its directive will either constitute a substantive rule, for which notice-and-comment procedures are required, or a general statement of policy, for which they are not.” Baharona-Gomez v. Reno, 167 F.3d 1228, 1235 (9th Cir. 1999), citing Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987).

The courts have recognized that when an agency publishes rules that establish binding norms, such as conditions for eligibility for a permit or license, the agency can avoid statutory hearing requirements. E.g., Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609 (1973); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); ^{21/} see generally, Stein, Mitchell, & Mezines, Administrative Law, § 41.07 (1990). In the instant case, however, BLM did not exercise its discretionary power by publishing a regulation that made appellants ineligible for a range improvement permit; BLM only issued an IM. ^{22/}

[9] Appellants’ argument that BLM cannot rely on a policy statement such as an IM as a “stand alone” justification for rejecting their applications is well founded. Twenty years before BLM issued the decisions rejecting appellants’ application, the United States Court of Appeals for the District of Columbia Circuit stated:

When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. * * * An agency cannot escape its responsibility to present

^{21/} The Storer decision is recognized as a landmark of administrative law. In that case, the Court sustained a regulation by the Federal Communications Commission (FCC) establishing ownership and control limitations for license applicants over objections that the rulemaking effectively preempted an individual applicant’s statutory right to a hearing. Although the Court believed that invalidating the regulation would unduly diminish the rulemaking authority that Congress had given the Commission, the Court also made clear that a decisive element in sustaining the regulation was the fact that individual applicants could apply for a waiver of the requirement, id. at 201-02, a point that the Court reemphasized in its discussion of an earlier case it relied upon as authority. Id. at 204-05. Thus, in this case, had BLM promulgated a regulation making appellants ineligible for a range improvement permit, the rejection of their application would not trigger the hearing requirement.

^{22/} Although BLM issued its decision to the Fallinis while the IM was in effect, appellants have argued that the IM had expired as of the time BLM issued its Colvin decisions. Judge Heffernan ruled that the IM remained in effect. For the purposes of this discussion, we treat the IM as if it had remained in effect.

evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Thus, at the time BLM issued the decisions appealed to Judge Heffernan, BLM was required to proceed as if the IM had not been issued, by providing a rational basis for its action which is supported by the evidence. Appellants had a statutory right to introduce evidence challenging the rationale applied by BLM. It was Judge Heffernan's duty to weigh that evidence, determine which side preponderated, and rule accordingly.

In United States v. Kaycee Bentonite Corp., 64 IBLA 183, 214, 89 I.D. 262, 279 (1982), we considered BLM's reliance on an IM in a proceeding subject to APA hearing requirements. Citing Schweiker v. Hansen, 450 U.S. 785, 789 (1981), we stated that "such documents [IM's] are not regulations and have no legal force," but also stated that "BLM employees * * * are obliged by the conditions of their employment to abide by the policies and to follow the instructions handed down by their Director." We have adhered to this formulation ever since. E.g., Robert S. Glenn, 124 IBLA 104, 107-109 (1992); Beard Oil Co., 105 IBLA 285, 288 (1988). In this appeal, BLM and appellants have referred to other IBLA opinions that apply the principles established in these cases.

Even though IM's may be binding on BLM's employees, we have not considered them as having the practical effect of binding the public because members of the public could obtain this Board's review of BLM's decisions, and this Board is not bound by an IM. Thus, BLM must justify the application of the requirements of an IM in a manner consistent with the holding in Pacific Gas & Electric Co. v. Federal Power Commission, *supra*.

In Kaycee, for example, the IM in question purported to establish criteria for determining whether bentonite deposits were a common variety or uncommon variety of clay, subject to location under the mining laws. The Administrative Law Judge and the Board considered evidence about the development of the standards and concluded that the clay deposits were uncommon even though the criteria set out in the IM had not been met. In the instant appeal, if BLM had referred to the IM and introduced evidence sufficient to provide a rational basis for its decision, we would not simply observe that the IM lacks the binding force and effect of law. Rather, we would have considered the evidence adduced at the hearing and determined whether it had provided a sufficient basis for BLM's decision. This is what was done in Kaycee. However, in this case BLM has attempted to invoke the IM as a statement of "policy" and argued that the IM obviated the need to tender evidence in support of its

position. Appellants' argument that the IM cannot provide a "stand alone" justification for rejecting their applications directly and unavoidably raises the issue of the nature and effect of that directive. The fact that BLM has the statutory discretion to reject a range improvement application in favor of a cooperative agreement does not mean that BLM can give its "policy" statement the same force and effect as a published rule.

Although BLM insists that the IM is an internal document for guidance of BLM employees, recent court decisions show that an agency's characterization of a directive as a statement of policy rather than a rule is not always dispositive. In CropLife America v. E.P.A., 329 F.3d 876, 883 (D.C. Cir. 2003), the Court stated:

General Electric [Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002)] and other cases also make it clear that the agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the "force of law," but the record indicates otherwise. See Gen. Elec., 290 F.3d at 383-85; see also, e.g., Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 95-96 (D.C. Cir. 2002).

Even when the agency's directive contained an express disclaimer, indicating that its "policy" statement was not binding on the public, the D.C. Circuit Court of Appeals has found that the agency intended to create a rule with force of law, calling the disclaimer "boilerplate" or a "charade," and holding that the directive was a rule which required notice-and-comment rulemaking. See Appalachian Power Co. v. EPA, 208 F. 3d 1015, 1022-23 (D.C. Cir. 2000). Thus, to properly resolve the issue of whether the IM cited by BLM in its decision can provide a "stand alone" basis for BLM's decision, without having to consider the evidence adduced at the hearing, we must look to the tests that courts impose in determining the nature and purpose of that directive.

Earlier in this opinion we referred to Baharona-Gomez v. Reno, 167 F.3d at 1235, in which the Court stated that a directive concerning the exercise of discretionary power (such as BLM's IM in this case) "will either constitute a substantive rule, for which notice-and-comment procedures are required, or a general statement of policy, for which they are not," citing Mada-Luna v. Fitzpatrick, 813 at 1013. The Court in Baharona-Gomez continued:

Except in specified circumstances, an agency cannot promulgate a rule without first following the APA's notice and comment procedures. Section 553 of the APA specifically exempts "general statements of policy" from these procedures, as well as "rules of agency organization,

procedure or practice.” Determining whether a directive is a substantive rule or a general policy requires the reviewing court to examine the amount of discretion retained by the recipients of the directive. See Mada-Luna, 813 F.2d at 1013-14. [Emphasis added.]

In Mada-Luna, 813 F.2d at 1013-14, the Court explained:

The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is “the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case.” Jean [v. Nelson], 711 F.2d [1455,] 1481[(11th Cir. 1983)]; accord Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1708, 80 L.Ed.2d 181 (1984); American Mining Congress v. Marshall, 671 F.2d 1251, 1263 (10th Cir 1982); Burroughs Wellcome [Co. v. Schweiker], 649 F.2d [221,] 224 [(4th Cir. 1981)]; Guardian Federal [Savings and Loan Association v. Federal Savings and Loan Insurance Corp.], 589 F.2d [658,] 666-67 [(D.C. Cir. 1978)].

* * * To the extent that the directive merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make “individualized determination[s],” it constitutes a general statement of policy. Guardian Federal, 589 F.2d at 666-67; Noel [v. Chapman], 508 F.2d [1023,] 1030 [(2d Cir.), cert. denied, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975)]; see Ryder, 716 F.2d at 1377; Jean, 711 F.2d at 1481. * * * In contrast, to the extent that the directive “narrowly limits administrative discretion” or establishes a “binding norm” that “so fills out the statutory scheme so that upon application one need only determine whether a given case is within the rule’s criterion,” it effectively replaces agency discretion with a new “binding rule of substantive law.” Ryder, 716 F.2d at 1377 (emphasis added); Jean, 711 F.2d at 1481; Guardian Federal, 589 F.2d at 666-67. In these cases, notice-and-comment rulemaking are required, as they would be for any other substantive rule, see 5 U.S.C. § 553(b), (d) * * *.

In Mada-Luna, 813 F.2d. at 1017, the Court found that the directives in question were merely statements of policy because they expressly authorized the official to whom they were directed to consider individual facts and left that official broad discretion.

In Barahona-Gomez, 167 F.3d at 1235, the Court did not reach the same conclusion. Even though the procedural posture of the case prompted the Court of Appeals to observe that a ruling on the issue of whether the directive required notice and comment rulemaking was a matter for further examination by the District Court, the Court of Appeals stated that the directives in question “did not leave any real discretion” to the members of the administrative body to which they were directed.

BLM’s regulations provided that range improvement permits were “issued at the discretion of the authorized officer,” 43 CFR 4120.3-1(a), and BLM’s authorized officers had authority to grant the permits or reject them. In issuing the IM “directing” that BLM’s officers “authorize proposed water improvements through the cooperative agreement process” in HMA’s, the State Director clearly and unambiguously intended to eliminate their discretion to authorize proposed water improvements through range improvement permits in HMA’s. The IM contains no language which could be construed to indicate that BLM’s authorized officers retained the discretion they previously enjoyed. Appellants are correct in their argument that IM No. NV-93-087 cannot provide “stand alone” justification for BLM’s decision. Application of the ruling in Mada-Luna to IM No. NV-93-087 would impel us to conclude the directive set out in that IM was not a statement of policy. IM No. NV-93-087 established a “binding norm” that applications for water improvements in HMA’s could only take the form of cooperative agreements, and thereby constricted the discretion enjoyed by BLM’s authorized officers under 43 CFR 4120.3-1(a) (1991). In the absence of notice-and-comment rulemaking, the IM could not be used as a stand alone basis for rejecting the appellants’ applications.

In certain circumstances, this Board will not limit its consideration of a legal issue to the guidance provided by a single court because our decisions may be subject to review in more than one forum. See Pacificorp, 95 IBLA 16, 17-19 (1986) (suggesting that the Board properly considers opinions by courts in any jurisdiction where one of its decisions would be subject to judicial review). However, a long line of decisions issued by other courts has embraced the view that when directives have a “practically binding effect,” those directives must satisfy the notice and comment requirements of the APA.

In American Bus Association v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980), the Court identified one of the criteria that a directive must meet to qualify as a “policy” statement. It must leave “the agency and its decision-makers free to exercise discretion.” In that case the agency statement failed that test because it was “a flat rule of eligibility,” id. at 531-32, and absent compliance with the APA, the statement was unlawful. It is difficult to consider the IM in this case to be anything

other than a “flat rule of eligibility” with respect to range improvement permits in HMA’s.

[10] In McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988), the Court referred to its prior decision in Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987) and considered whether a statement was nonbinding policy or a rule requiring compliance with the notice and comment procedures of the APA. The Court said:

If a statement denies the decisionmaker the discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement’s position, then the statement is binding, and creates rights or obligations, in the sense those terms are used in Community Nutrition. The question for purposes of § 553 is whether a statement is a rule of present binding effect; the answer depends on whether the statement constrains the agency’s discretion. [Emphasis added.]

It is clear that in its June 9, 1993, letter to Joe Fallini and its May 31, 1994, decision BLM “automatically decline[d] to entertain challenges to the [IM’s] position.”^{23/} By constraining the discretion of the authorized officer, the IM constitutes a rule rather than a statement of policy under the Community Nutrition/McLouth doctrine.^{24/}

BLM contends that its IM is not binding because it was not promulgated as a regulation. The Court provides the following answer to BLM’s argument:

[W]e have also recognized that an agency’s other pronouncements can, as a practical matter, have a binding effect. See, e.g., McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits

^{23/} This is also true of the April 3, 1995, Colvin decision.

^{24/} BLM’s reliance on the IM and appellants’ attempt to challenge it in this proceeding raises the same concerns identified by the Court in Appalachian Power Co. v. E.P.A., 208 F. 3d 1015, 1020 (D.C. Cir. 2000).

invalid unless they comply with the terms of the document, then the agency document is for all practical purposes “binding.”

Appalachian Power Co. v. EPA, 208 F. 3d 1015, 1021 (D.C. Cir. 2000). The terms of BLM’s IM and the decisions appealed to Judge Heffernan unequivocally establish that BLM intended that its “policy” of allowing improvements within HMA’s only through cooperative agreements would be binding on its officials and the regulated public.^{25/}

In a recent decision, the Court summarized the current state of its case law when vacating a directive contained in an agency press release because it was a rule and not a statement of policy:

As a general matter, the case law reflects two related formulations for determining whether a challenged action constitutes a regulation or merely a statement of policy. One line of analysis focuses on the effects of the agency action. See Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (stating that the court should consider whether the agency action (1) “impose[s] any rights and obligations,” or (2) “genuinely leaves the agency and its decisionmakers free to exercise

^{25/} The APA exempts “interpretative rules” and statements of policy and rules of procedure from the notice-and-comment requirement, see 5 U.S.C. § 553(b) (2000). In Appalachian Power, 208 F. 3d at 1024, the Court made clear that substantive changes to a rule cannot be made by using this exception. See also Paralyzed Veterans v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir.1997); American Mining Congress v. MSHA, 995 F.2d 1106, 1109-10 (D.C. Cir.1993). The courts “look to whether the interpretation itself carries the force and effect of law, . . . or spells out a duty fairly encompassed with the regulation that the interpretation purports to construe. See Paralyzed Veterans, 117 F.3d at 588.” Appalachian Power, 208 F.3d at 1024.

The APA also excepts “a matter relating to * * * public property,” 5 U.S.C. § 553(a)(2) (2000), and rules affecting public lands have been held to fall within this exception. See Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979), cert. denied, 446 U.S. 982 (1980). However, the Department remain subject to a directive to “utilize to the fullest extent possible” the public participation procedures of 5 U.S.C. § 553 when issuing rules relating to public lands and other matters exempt under subsection (a)(2). 36 FR 8336 (May 4, 1971). See Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1983). The Department is bound to follow section 553 procedures in rulemakings related to public property. See Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980).

discretion”) (internal quotations omitted); see also, e.g., Troy Corp. v. Browner, 120 F.3d 277, 287 (D.C. Cir. 1997); Am. Bus. Ass’n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980). The second line of analysis focuses on the agency’s expressed intentions. See Molycorp., Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999) (stating that the court should consider “(1) the Agency’s own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency”); see also, e.g., Am. Portland Cement Alliance v. EPA, 101 F.3d 772, 776 (D.C. Cir. 1996). However, as we recently noted in General Electric v. EPA, 290 F.3d 377, these two lines of analysis overlap at step three of the Molycorp formulation, “in which the court determines whether the agency action binds private parties or the agency itself with the ‘force of law.’” Id. at 382. General Electric and other cases also make it clear that the agency’s characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the “force of law,” but the record indicates otherwise. See Gen. Elec., 290 F.3d at 383-85; see also, e.g., Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 95-96 (D.C. Cir. 2002).

CropLife America v. EPA, 329 F.3d 876, 883 (D.C. Cir. 2003).

The foregoing cases make it clear that under Ninth and District of Columbia Circuit case law, the IM is a rule that has not been promulgated in the manner called for in the APA, 5 U.S.C. § 553 (2000), and cannot provide a “stand alone” justification for BLM’s decision.

We note that most cases applying the Community Nutrition/McLouth doctrine arose from suits bringing facial challenges to the directives themselves. When an agency’s final decision is made by an official that is not bound by the directive, as in this case, there is much less force to the argument that directives binding a bureau’s employees also bind the public. So long as members of the regulated public have the opportunity to seek internal review of a bureau decision, and the bureau recognizes at the outset that “it must be prepared to support the policy just as if the policy statement had never been issued” (see Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d at 38-39), then it is plausible for the agency to take the position that a directive that binds its employees does not have the “practical effect” of binding the public. Thus we see no reason to depart from Kaycee Bentonite. Even when BLM considers an IM or other directive to be binding on its employees, the

Board will not find that directive invalid if BLM supports its decision in the same manner it would if the directive did not exist.^{26/}

There is a further reason why IM No. NV-93-087 cannot provide a “stand alone” basis for BLM’s decision. Judge Heffernan rejected appellants’ arguments that their stewardship agreements with BLM precluded BLM from insisting that the improvements can be authorized only under cooperative agreements. However, the appellants had evinced a longstanding BLM policy in Nevada that was changed by IM No. NV-93-087. Existing regulations provided that the Government would gain title to permanent improvements installed pursuant to a cooperative agreement. However, there is no evidence that BLM required ranchers to transfer their interest in the water rights as a condition for entering into a cooperative agreement. The IM clearly contained an important policy change. Thus, IM No. NV-93-087: (1) imposed new substantive requirements that can become effective only after notice and comment rulemaking, or (2) effected changes in longstanding policy that were so substantial as to require notice and comment rulemaking. BLM did not promulgate a regulation affecting ownership of water rights related to range improvements until 1995, and that regulation did not require the transfer of existing rights but only those prospectively acquired and only to the extent allowed by State law. 43 CFR 4120.3-9.

Appellants are correct in asserting that IM No. NV-93-087 cannot provide a “stand alone” justification for BLM’s decision. BLM, however, points to the discretionary nature of its authority to grant or deny permits, and contends that “there is no need for a policy memorandum for the Secretary to exercise his discretion if there is statutory authority in place.” (Answer, 9.)^{27/} We will now consider appellants’ argument that the rejection of their applications was arbitrary, capricious, and an abuse of discretion.

^{26/} Taking this position, however, appears to place us closer to that of the critics of the Community Nutrition/McLouth doctrine. See, e.g., III R.J. Pierce, Administrative Law Treatise, § 17.3 at 1245 (2002), citing Community Nutrition, 818 F.2d at 950 (Starr, J., dissenting).

^{27/} Throughout its pleadings BLM has mischaracterized the action under review as an exercise of the Secretary’s discretion. If this statement were factually correct, this Board would lack authority to consider this appeal. See Blue Star, Inc., 41 IBLA 333, 335 (1979). The determinations that BLM attributes to the Secretary “never reached the level of administrative appeal at which authoritative departmental determinations on behalf of the Secretary are made” until this appeal was filed. See Udall v. Battle Mountain Co., 385 F.2d 90, 95 (9th Cir. 1967), cert. denied, 390 U.S. 397 (1968).

E. Did BLM's Decision to Reject Appellants' Range Improvement Applications Have a Rational Basis after Consideration of the Relevant Factors?

The issue in this case is not whether BLM had the discretionary authority to require appellants to seek authorization for their wells through cooperative agreements, but whether BLM had a rational basis in fact for requiring appellants to surrender one half of their interest in the water and provide water for wild horses. BLM argues that it properly exercised its discretion under 43 U.S.C. § 315c, contending that Judge Heffernan properly found that

[C]onsideration of the Wild and Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331, Federal Land Policy and Management Act, 43 U.S.C. § 1702, the Public Rangeland Improvements Act, 43 U.S.C. §§ 1901-1903, and pertinent regulations all play a vital role in guiding the Secretary in exercising his discretion. * * * The Secretary must manage public lands under principles of multiple use and sustained yield. Given that the proposed range improvements on appeal are all planned in Herd Management Areas, the Secretary had to consider that use in deciding whether to allow range improvements via permits. The restrictive nature of the permits would have failed to achieve the Secretary's goals in protecting wild horses and burros, and as such is sufficient justification for the decision. [Emphasis in original.]

(Answer, 6.)

On appeal, appellants have raised specific arguments that show that BLM failed to consider relevant factors when exercising its discretionary authority and rejecting their permit applications. Appellants assert that “there is no rational reason to prevent enlarging the water supply for animals,” and refer to BLM's statement in its reply brief before Judge Heffernan that the permits were denied because the permittee could restrict the use of the water improvement to the detriment of wild horses.” (SOR at 15, citing BLM Reply Brief below at 3.) The appellants argue that there would be no detriment to the horses if the permits are granted. (SOR, 15.)

[11] In response, BLM asserts that appellants' argument “misses the point” because the lands at issue “are for grazing of both domestic livestock and use by wild horses and burros.” (Emphasis in original.) (Answer at 10.) It is BLM's argument that “misses the point.” The Department's regulations governing wild horses and herd management areas are the guides for our consideration of appellants' argument that

the horses will not be harmed if a permit is granted. Departmental regulation 43 CFR 4710.4 sets out the following constraints on wild horse management:

Management of wild horses and burros shall be undertaken with the objective of limiting the animals' distribution to herd areas. Management shall be at the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans. (Emphasis added.)

If requiring appellants to share the water they develop with the horses evinces a level of management beyond the “minimum level necessary” to attain the objectives identified in approved land use plans and herd management area plans, appellants’ argument that the horses will be no worse off if the appellants are not required to provide water to horses goes to the very merits of BLM’s decision in this case.

BLM refers to “multiple use objectives” to justify requiring cooperative agreements within herd management areas. However, BLM has failed to identify a particular objective in an applicable land use plan or herd management plan that would justify obligating the ranchers to provide water for horses at the ranchers’ cost. There is no argument that multiple use objectives apply throughout grazing allotments in the Tonopah Resource Area.^{28/} However, it is only for HMA’s that BLM has adopted a “policy” that required the use of cooperative agreements to satisfy “multiple use objectives.” BLM’s management objective for HMA’s is “to provide an optimum number of wild horses in a healthy condition.” However, the history of the HMA clearly establishes that, on a regular basis, the optimum number is exceeded to the extent that wild horses must be removed. Absent a showing that optimum levels cannot be achieved without the additional water resources, a policy requiring ranchers to make additional water resources available to wild horses cannot be reconciled with the regulatory requirement that management be kept at the “minimal level necessary.” In the face of these facts, BLM chose not to introduce any evidence

^{28/} The Tonopah Management Framework Plan set out the following objectives: (1) to maintain or improve, where necessary, the condition of the rangeland vegetation resource; (2) to increase the amount of forage available to livestock; (3) to minimize short-term disruptions and ensure long-term stability of the livestock industry; (4) to manage portions of the public lands to provide an optimum number of wild horses in a healthy condition, while maintaining the integrity of rangeland ecosystems; (5) to maintain and improve where necessary the quality of wildlife habitat for game and non-game fish and wildlife including endangered, threatened, and sensitive animal species; and (6) to provide forage for reasonable numbers of mule deer, antelope and bighorn sheep. (Ex. R-14, p.2; See Tr. 181-84.)

that additional water would be required to maintain the optimum wild horse herd level. BLM has failed to provide a rational basis for its exercise of discretion.

[12] The constraints on wild horse management established by 43 CFR 4710.4 also make the location of water sources relevant factor that BLM is required to consider. There is no evidence that it did. The New Reveille Well lies within a HMA, but lies less than a mile from its boundary. (Ex. A-7.)^{29/} Providing wild horses water is known to “attract a population of wild horses that would eat and uproot all the grass for miles around the water hole.” Fallini v. Hodel, 963 F.2d at 279. The preponderance of evidence in this case establishes that wells serve areas several miles in diameter. Thus, a requirement to make water at the New Reveille Well available to horses cannot be reconciled with the requirement of 43 CFR 4710.4 that wild horses and burros are to be managed with the objective of “limiting the animals’ distribution to herd areas.”

Even in the Colvins’ case, where the service areas of the proposed wells would be within the boundaries of a HMA, the management constraint of “limiting the animals’ distribution to herd areas” has relevance. BLM specifically stated that this objective was to be met by “controlling herd size to prevent habitat from being overpopulated.” 51 FR 7412 (March 3, 1986). The need to prevent wild horse overpopulation militates against the adoption of any measure that would accelerate herd growth, and is a relevant factor that must be addressed by BLM and made a part of the record if there is to be a rational basis for the decisions in this case. Thus, the impact of furnishing additional water to the wild horses is a relevant factor that must be considered prior to imposing a requirement that a rancher must deliver water to the wild horses.

We find nothing in the record indicating that BLM had considered the adverse effects on grazing practices or on the range itself before imposing the requirement that the appellants deliver a portion of their water to the wild horses. A failure to consider “the adverse impact on cattle grazing practices” if cattle must share a well with wild horses has previously been found to be an arbitrary act. See Fallini v. Hodel, 725 F. Supp. at 1118. The Circuit Court went further. It stated that “no sane rancher would spend thousands of dollars to drill a deep well and build associated water works in order to attract a population of wild horses that would eat and uproot all the grass for miles around the water hole.” Fallini v. Hodel, 963 F.2d at 279. Any adverse effect on public resources and multiple use objectives resulting from providing water to wild horses from a well developed for livestock on an allotment

^{29/} Counsel for BLM suggested that the HMA boundary on Exhibit A-7 “might not be the most accurate line.” (Tr. 388.)

must be considered and addressed, regardless of whether the well is in or outside a HMA. BLM's obligation to provide a rational basis for its decision cannot be satisfied by unsupported references to "multiple use objectives." The decision record must contain specific evidence that the requirements to be imposed by BLM would not have undue adverse effects on grazing practices and range conditions.

In support of its decisions, BLM refers to PRIA, 43 U.S.C. § 1905(c) (2000), which emphasizes use of cooperative agreements to the "maximum extent practicable." (Answer, 9.) As noted earlier in this opinion, this statute and BLM's regulations make the source of funding the principal defining distinction between range improvement permits and cooperative agreements. Issues concerning the funding of the contemplated improvement lie at the very heart of this case.^{30/} Therefore, the need to address the cost-sharing issue to provide a rational basis for BLM's decision is all the more compelling. BLM has failed to consider a factor that was not merely relevant but critical to BLM's exercise of its discretion when it decided to reject appellants' permit applications and direct them to apply for cooperative agreements.^{31/} BLM's decision is subject to reversal for this reason alone.

^{30/} We referred earlier to appellants' argument regarding the importance of water to their grazing operations, the effort and expense incurred when providing it (SOR at 10-11) and their belief that, if BLM imposed a requirement that they provide water to wild horses, it would more clearly implicate a "taking" of their private property. (SOR, 13-14.) We have also noted that BLM's concern about "takings" was the animating rationale of its actions in this case. (See Exhs. R-10, R-11, and R-12.)

^{31/} BLM points to the current regulations that were sustained by the Supreme Court in the Public Lands Council decision as "evidence of a rational basis" for requiring appellants to apply for cooperative agreements. (See Answer at 11.) However, there are several reasons that the Supreme Court's opinion affirming the 1995 regulations does not provide clear support for BLM's decisions in this case.

First, as we noted in n 16, supra, Justice O'Connor stated that the Court made no ruling as to whether the Secretary acted arbitrarily and capriciously in promulgating the regulations, so that "the Court's decision does not foreclose such APA challenge generally by permit holders affected by the 1995 regulations." 529 U.S. at 751-52. BLM must still supply a rational basis for its decisions under the new regulations.

Second, BLM's decisions in this case were not based on a regulation but a policy. BLM "could not escape its responsibility to present evidence and reasoning" to support its decision. Pacific Gas and Electric, 506 F.2d at 38-39. This is an APA adjudication, and BLM's rational basis must be discernable from the record at the

(Continued . . .)

[13] In summary, BLM rejected the appellants' range improvement permit applications in order to impose the requirements that the appellants transfer an undivided one half interest in the water rights subject to the permits to the United States and provide water for wild horses through a cooperative agreement. The record does not contain a rational basis for imposing those requirements, and the failure to do so is grounds for reversal. Therefore, to the extent that BLM's decisions were based on its policy to require authorization of water improvements under cooperative agreements, BLM's decisions to reject the Fallinis' and the Colvins' applications must be reversed.

F. Was The Rejection of the Colvins' Application
For Making Deletions Proper?

We cannot stop here, however. In its decision BLM stated a second reason for rejecting the Colvins' applications:

The applications contained stipulations which were lined out, most importantly, the provision that states that the permit is subject to modification or cancellation if "the improvement was not compatible with multiple use objectives for the site" [and] the provision that "The permit is subject to cancellation if the permittee does not comply with the regulations under which the permit is authorized."

(Ex. R-8.) When he affirmed BLM's decision, Judge Heffernan ruled only on the issue involving the requirement for cooperative agreements, and made no ruling on the

^{31/} (. . . continued)

hearing which must show that BLM gave due consideration to relevant factors when issuing its decisions. The regulations were not effective at the time BLM's decisions were issued.

Third, when the Court affirmed the regulations it recognized that compensation for improvements made pursuant to a cooperative agreement was negotiable. 529 U.S. at 750. Thus, the rational basis for any adverse decision must be a part of the record on appeal.

Fourth, the new regulations still recognize that a permittee or lessee would provide full funding under a range improvement permit, see 43 CFR 4120.3-3(a). On the other hand, a cooperative agreement "shall specify how the costs or labor, or both, shall be divided between the United States and the cooperator(s)." 43 CFR 4120.3-2(a). In this case where BLM retained the discretionary authority to authorize range improvements by means of a permit, the allocation of costs is a critical factor that BLM was required to address before issuing its decisions.

second ground for rejection. For this reason the issue was not addressed in the Colvins' appeal to this Board. However, it was addressed in the pleadings filed with Judge Heffernan.

In the Colvins' Notice of Appeal/Statement of Reasons for appealing BLM's decision, the Colvins contended that the latter provision was redundant as they had already agreed to the applicable law and regulations in accepting his grazing permit. Asserting that this provision is of no legal consequence, the Colvins contended that its omission may not defeat their applications.

The Colvins offered two explanations regarding why they had excised the permit language stating that the permit would be subject to modification or cancellation if the improvement was not compatible with multiple use objectives for the site. The Colvins first argued that the provision was redundant because they had already agreed that the permit would be subject to modification, suspension, or cancellation as required by land use plans or applicable law. Nevertheless, they also argued that a range improvement permit "has a single, not multiple purpose, and the omitted provision unlawfully implies its dedication to multiple purposes."

The Board generally has looked with favor on stipulations in land use authorizations that require the holder of the authorization to comply with pertinent regulations. E.g., *Arizona Silica Sand Co.*, 148 IBLA 236, 238 (1999). The reasonableness of BLM's decision to include a condition providing for cancellation of the permit for failure to comply with applicable regulations is demonstrated by the following provision of section 302(c) of the Federal Land Policy and Management Act, 43 U.S.C. § 1732(c) (2000):

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan * * *.
[Emphasis added.]

One writer noted the value of including such provisions in land use authorizations in efforts to enforce compliance with regulations:

It is most important to note that §§ 302(c) and 506 of FLPMA give the Interior Department the clear authority to suspend or revoke land use permits for violations of its regulations as well as those of other federal [and] state agencies, thus becoming a potent tool for the enforcement of pollution standards of other federal and state agencies.

Sturgis, Administrative and Judicial Review of Interior Department Decisions, 31 Rocky Mtn. Min. L. Inst. § 3.07[1] at 3-47 (1985), quoted in James C. Mackey, 96 IBLA 356, 364 n.5, 94 I.D. 132, 137 n.5 (1987).

Nevertheless, when an instrument authorizing use of land contains a provision making it subject to cancellation for failure to comply with applicable regulations, the regulations contemplated are specific requirements that have been duly promulgated after notice and comment. In the case of a regulation, the holder of the land use authorization has adequate notice of the requirement that must be met in order to retain tenure under the authorization. But if a land use authorization is subject to cancellation because the facilities authorized by the permit are later deemed to be incompatible with multiple use objectives, it is difficult to understand how a permittee is capable of knowing whether, at any point in time, BLM managers consider or will continue to consider the facilities to be compatible with their multiple use objectives (whatever they may be).

Our concern about this requirement arises from the vagueness of the term “multiple use objectives.” The term is vague and does not impart specific notice to the permittee of the particular objectives that could lead to cancellation of his permit. That vagueness is evidenced by the lack of precision with which BLM has used the term in the briefs they have filed with this Board. Throughout its argument in this appeal, BLM has contended that “multiple use objectives” justify the rejection of these range improvement permit applications without citing any provision of a land use plan or allotment management document that sets forth any “multiple use objective” with sufficient precision and specificity to allow us to make an objective determination whether the permit would in fact be inconsistent with a “multiple use objective” now in existence, let alone one that may be formulated some time in the future. Moreover, BLM has made no effort to reconcile any “multiple use objective” that would require ranchers to make water available for wild horses with the regulatory constraints BLM is required to observe in its management of wild horses and herd management areas. Accordingly, we find it appropriate to vacate BLM’s decision rejecting the Colvins’ permit applications. ^{32/}

^{32/} If we had not, there would be another reason for vacating BLM’s decision. The
(continued . . .)

VI. Conclusion

Throughout the course of this proceeding, appellants and BLM have disagreed as to the consequences of a reversal of BLM's decisions. The record contains no evidence that BLM fully examined the merits of appellants' proposed range improvements, whether the improvements are compatible with stated multiple use objectives for the site, or what mitigating measures might be warranted. BLM contends that the cases should be remanded to allow BLM to undertake this exercise (Tr. 340.). Appellants contend that their applications should not be subject to such piece-meal adjudication.^{33/} Having presented evidence on the merits of their applications, appellants assert that the applications should be approved. However, this argument is based on their view that the Secretary does not have the discretionary authority to reject permit applications that meet the statutory requirements. This argument was rejected earlier in this opinion. Issuance of permits would be improper until the procedures required by law have been satisfied.

In these cases, BLM issued its IM requiring the use of cooperative agreements to impose new requirements on ranchers seeking authorization for improvements: transfer one-half of their water right; and provide water for wild horses. BLM rejected appellants' permit applications because appellants would not accept the conditions that BLM would impose under cooperative agreements. Having found that IMs do not have the force of law and that BLM established no rational basis for imposing those conditions, the appropriate action is to remand the permit applications for further processing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Heffernan's decision in N6-94-06 is reversed, the BLM's Decision is reversed, and the case remanded for further action consistent herewith; and Judge Heffernan's decision in N6-95-10 is reversed; BLM's

^{32/} (. . . continued)

permit forms were submitted on March 2, 1995. The Office and Management control number for the form expired on July 31, 1985, so the requirements set out on the face of the form would not have been enforceable. See 44 U.S.C. § 3512 (2000); United States v. Hatch, 919 F.2d 1394 (9th Cir. 1990); United States v. Smith, 866 F.2d 1092 (9th Cir. 1989).

^{33/} See n. 17, supra.

Decision is reversed in part and vacated in part, and the case remanded for further action consistent herewith.

R.W. Mullen
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge