



DAVID G. AND JACELYN A. HOLMGREN v. BUREAU OF LAND MANAGEMENT

175 IBLA 321

Decided August 19, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

DAVID G. AND JACELYN A. HOLMGREN

v.

BUREAU OF LAND MANAGEMENT

IBLA 2007-79, 2007-107

Decided August 19, 2008

Appeals from a decision of Administrative Law Judge Andrew S. Pearlstein assessing damages and suspending a grazing permit in grazing trespass cases. NV-030-01-02, NV-030-01-03, NV-032, NV-030-02-01, NV-030-04-01, NV-030-04-02.

Affirmed in part, affirmed as modified in part, and reversed in part.

1. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Base Property (Water)

BLM authorizes grazing within a grazing district by issuing permits pursuant to section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (2000), which requires that “preference” in issuing grazing permits be given “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” BLM’s regulations define “preference” as a superior or priority position against others for the purpose of receiving a grazing permit, and this priority is attached to base property owned or controlled by the permittee. One who owns or controls base property does not have an absolute right to graze livestock on the public land; such grazing is subject to the reasonable discretion of BLM.

2. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Base Property (Water)

Although water rights on Federal land had been put to the beneficial use of watering livestock before the Taylor Grazing Act was enacted in 1934, the holders of those water rights did not have an appurtenant right to graze livestock.

3. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Trespass

Damages due for repeated willful grazing trespass include all reasonable expenses incurred by the United States in detecting, investigating, and resolving violations, and impounding livestock, as well as three times the value of the forage consumed.

4. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Trespass

A severe reduction or cancellation of a permittee's grazing privileges is appropriate where (1) the permittee's trespasses were both willful and repeated; (2) they involve fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they involve a failure to take prompt remedial action upon notification of the trespass. Cancellation is appropriate where all of those factors are present and no lesser sanctions would be sufficient to reform a permittee's behavior, such as where the permittee takes the position that BLM has no authority to regulate grazing in the allotment where the trespasses are occurring.

APPEARANCES: David G. and Jacelyn A. Holmgren, Hawthorne, Nevada, *pro sese*; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

David G. and Jacelyn A. Holmgren, owners of the Rawhide Ranch and holders of a 10-year grazing permit for the Pilot-Table Mountain Allotment (PTMA), and the Bureau of Land Management (BLM) have filed separate appeals from a November 30,

2006, decision of Administrative Law Judge Andrew S. Pearlstein.¹ His decision involves consolidated appeals from six decisions of BLM's Carson City, Nevada, District Office, issued from June 22, 2000, to June 8, 2004.² In those decisions, BLM assessed total trespass damages in the amount of \$204,185.52 including administrative costs, and ultimately, in the sixth decision, cancelled the Holmgrens' 10-year permit because of their willful and repeated grazing trespasses.

After dismissing two of the appeals as moot, Judge Pearlstein addressed the four remaining trespass appeals. He found that the Holmgrens had grazed cattle in excess of the number authorized by their 10-year permit in the summers of 2000 through 2004 and had failed to obtain annual grazing authorization and to pay applicable grazing fees during certain time periods. He rejected their argument that they had valid existing rights to graze their cattle, and, therefore, were not in trespass. However, he modified BLM's decisions to reduce the total trespass damages assessed by BLM to \$39,070 and mitigated the cancellation of the Holmgrens' grazing permit to a temporary 5-year 20-percent reduction in animal unit months (AUMs).³ He declined to charge rates for willful or repeated willful trespass for the consumption of AUMs that were authorized under the allotment management plan (AMP) because the forms offered by BLM to obtain that authorization had expired.⁴

¹ BLM has also moved for expedited consideration of these appeals. Since we are now deciding the appeals, BLM's motion is moot and will not be addressed further.

² The Holmgrens' first appeal, NV-030-01-02, was from a June 22, 2000, decision that assessed a \$10,132.72 penalty for willful trespass and required removal of cattle. Their second appeal, NV-030-01-03, was from a Jan. 26, 2001, decision to restrict grazing to certain pastures for the 2001 grazing season. The ALJ dismissed this appeal as moot. Their third appeal, NV-032, was from a Feb. 7, 2002, decision assessing a penalty of \$52,620.26 for repeated willful trespass. Their fourth appeal, NV-030-02-01, was from a Mar. 4, 2002, decision denying their request to increase spring and summer grazing to accommodate cattle in 2002. This appeal was also dismissed as moot. The fifth appeal, NV-030-04-01, was from a decision dated Jan. 2, 2004, that assessed a \$141,432.54 penalty for repeated willful trespass. A sixth appeal, NV-030-04-02, was from a decision dated June 8, 2004, cancelling their grazing permit for repeated willful trespasses and for refusal to pay grazing fees and obtain annual authorizations.

³ "Animal unit month (AUM) means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. § 4100.0-5.

⁴ In an order dated Oct. 8, 2004, he determined that the Holmgrens would not be charged at trespass rates for failing to complete "bootleg forms" that lacked a current
(continued...)

He admonished BLM for failing to issue appealable decisions concerning temporary nonrenewable use (TNR) for the summer of 2000 and the Holmgrens' application to amend the AMP. He also faulted BLM for failing to reduce the number of wild horses in the PTMA within the range specified in the 1993 Final Multiple Use Decision (FMUD) associated with the AMP.

In their appeal, the Holmgrens reassert a number of legal theories to support their argument that BLM may not restrict their use of the allotment for grazing during the summer months.⁵ In general, they assert that their water rights include a right to graze on land within the service area around each water source,⁶ free from interference from BLM. In its appeal, BLM argues that Judge Pearlstein erred in reducing the damages and in mitigating the cancellation of the permit to a temporary reduction in AUMs.⁷

We affirm Judge Pearlstein's decision dismissing two of the appeals as moot because the seasons affected by those decisions had passed.⁸ We affirm his finding that the Holmgrens had no valid existing rights to graze cattle in the allotment, his conclusion that they committed repeated willful trespasses, and his findings concerning the number of AUMs consumed. We affirm as modified the rates he applied in his computation of the amounts due for authorized and unauthorized use. We reverse his decision to the extent it mitigated the damages sought by BLM based on BLM's failure to issue appealable decisions concerning TNR and amendment of the AMP or to adequately control excess wild horses, and rejected BLM's cancellation of the Holmgrens' grazing permit and substituted lesser sanctions based on those mitigating circumstances.⁹

⁴ (...continued)

Office of Management and Budget (OMB) control number as required by the Paperwork Reduction Act, 44 U.S.C. § 3512 (2000).

⁵ The Holmgrens' appeal has been assigned docket number IBLA 2007-79.

⁶ Service area means the area that can be properly grazed by livestock watering at a certain water. 43 C.F.R. § 4100.0-5. The area may extend to a radius of 5 miles from a water, but the distance may vary depending on topography. *See, e.g., Delbert Allen*, 2 IBLA 35, 43, 78 I.D. 55, 61 (1971).

⁷ BLM's appeal has been assigned docket number IBLA 2007-107.

⁸ NV-030-01-03 involved the 2001 grazing season and NV-030-02-01 involved the 2002 grazing season.

⁹ As to the underlying BLM decisions, our decision essentially (1) affirms BLM's June 22, 2000, decision; (2) affirms in part and reverses in part BLM's February 2, (continued...)

Background

The PTMA covers about 530,000 acres of public and private lands, including the Rawhide Ranch, near Hawthorne in Mineral County, Nevada. Decision at 4. The Rawhide Ranch consists of about 10 parcels of private land, totaling approximately 1,200 acres, scattered throughout the PTMA. *Id.* at 5. Judge Pearlstein concluded that “the vast bulk of the allotment, about 98%, is public or [F]ederally owned land under the jurisdiction of BLM.” *Id.*

[1] BLM authorizes grazing within the PTMA by issuing a permit pursuant to section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (2000), which pertains to land within a grazing district. That provision requires that “preference” in issuing grazing permits be given “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” BLM’s regulations define “preference” as “a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee.” 43 C.F.R. § 4100.0-5.¹⁰ One who owns or controls base

⁹ (...continued)

2002, decision by accepting the rate BLM applied in its decision, but reducing the AUMs charged to conform with Judge Pearlstein’s findings; (3) affirms BLM’s January 2, 2004, decision except that we modify it to conform to Judge Pearlstein’s finding that AUMs corresponding to the amount of use authorized by the AMP should only be assessed at the rates applicable to authorized use because BLM had provided the Holmgrens with expired forms, not current forms, for obtaining that authorization; and (4) affirms BLM’s June 8, 2004, decision cancelling the Holmgrens’ permit and rejects Judge Pearlstein’s conclusion that there were mitigating circumstances that warranted a lesser sanction.

¹⁰ The grazing regulations at 43 C.F.R. Part 4100 *et seq.* were amended effective Aug. 11, 2006. *See* 71 Fed. Reg. 39402 (July 12, 2006). On June 8, 2007, the United States District Court for the District of Idaho issued an Order enjoining in all respects the BLM regulations set forth in the Federal Register of July 12, 2006, 43 C.F.R. Part 4100 *et seq.* *Western Watersheds Project v. Kraayenbrink*, No. CV-05-297-E-BLW, 2007 WL 1667618 (D. Idaho June 8, 2007). BLM subsequently issued Instruction Memorandum 2007-137 (June 15, 2007), which directed all western BLM field offices (excluding Alaska) not to implement any of the 2006 amendments to the grazing regulations. On Feb. 28, 2008, the District Court reaffirmed its ruling enjoining the 2006 regulations. *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp.2d 1302, 1325 (D. Idaho 2008). Accordingly, citations in
(continued...)

property does not have an absolute right to graze livestock on the public land; such grazing is subject to the reasonable discretion of BLM. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 739-44 (2000).

BLM's regulations define "base property" as: "(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing." 43 C.F.R. § 4100.0-5. The PTMA is a water-based allotment, *i.e.*, an allotment in which the base property supporting the preference takes the form of water rights rather than land that can be grazed. Decision at 4. The PTMA contains approximately 60 springs and seeps, most of which are permitted water rights now owned by the Holmgrens. *Id.* at 6.

Wild horses compete with cattle for forage and water in the PTMA as in other allotments in Nevada.¹¹ *Id.* The Pilot-Table Mountain Wild Horse Herd Management Area (HMA) encompasses most of the PTMA, with about 90 percent of the HMA within the PTMA. *Id.* at 7. In September 1993, BLM adopted a FMUD which continued the AMP's grazing system and increased the appropriate management level (AML) for wild horses in the PTMA from the 284 head initially established in the 1986 Walker Resource Management Plan (RMP) to 346 head, consuming 3,630 AUMs. *Id.* at 6. Judge Pearlstein found that actual numbers have exceeded the AML by two to four times. *Id.* at 7.

The Holmgrens purchased the Rawhide Ranch in December 1997 from the Estills, who obtained it 1983. *Id.* at 8. Since the Estills had summer range in California, they used the allotment primarily as winter range to reduce the costs of purchasing winter feed, and greatly reduced cattle numbers in the summer. *Id.* A 1988 AMP divided the allotment into four summer and three winter pastures, but over-utilization of forage in some pastures prompted a revision in 1990. The 1990 revision established a grazing system that allowed 900 cattle in the winter period from November 1 to March 31 and 150 cattle in the summer season from April 1 to October 31, with flexibility in livestock numbers up to 20 percent over normal

¹⁰ (...continued)

this opinion to any regulations in 43 C.F.R. Part 4100 refer to the regulations that were in effect prior to the 2006 amendments.

¹¹ 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).

operation and 15 days' variation in turnout dates. *See* Decision at 8-9. The AMP also identified certain pastures for seasonal use. *Id.*

Prior to their purchase of the Rawhide Ranch, the Holmgrens owned a cattle ranch in Montana. *See id.* at 11. While considering the purchase of the ranch, the Holmgrens met with BLM in September 1997 and were informed that BLM would probably not agree to modifying the AMP to a year-long operation. *Id.* They were also told that wild horses would be gathered and reduced every 3 to 4 years. *Id.* The Holmgrens met with BLM again on October 16, 1997, and were given a Grazing Application-Grazing Schedule, which they signed and dated on that date. *Id.* at 12.¹² BLM approved the transfer of the grazing permit and preference from the Estills on December 15, 1997, when the sale to the Holmgrens became final. *Id.* Both BLM and the Holmgrens also signed the Holmgrens' 10-year grazing permit, which authorized the grazing of 900 cattle November 1 to March 31 and 150 cattle April 1 to October 31, in accordance with the AMP and FMUD, on December 15, 1997. *See* Ex. 8.¹³

During the first winter, cattle were seen north of a highway in the PTMA outside of their winter pasture, and the Holmgrens were notified to remove them. Decision at 13. When cattle were subsequently observed there, BLM sent a notice of unauthorized grazing use and charged the Holmgrens with a trespass that was settled at the nonwilful rate for \$225 on March 24, 1998. *Id.* Snowy conditions, lack of feed on the south side of the highway, and the absence of a fence along the highway made it difficult to keep the cattle in their proper area. *Id.*

The Holmgrens made improvements in the corrals and water developments and hauled water extensively to make better use of forage. *Id.* BLM praised these

¹² In order to qualify for a transfer of the Estills' permit and preference, the Holmgrens were required to accept the terms and conditions of that permit, subject to whatever modifications BLM might require or approve. 43 C.F.R. § 4110.2-3(a)(3). Those conditions include conforming permitted use to the requirements of an AMP. *See* 43 C.F.R. § 4110.2-2. Because the AMP itself was issued in implementation of the property rights of the United States as expressed through the Taylor Grazing Act and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2000), the applicant's acknowledgment of BLM's authority over the land that the plan governs is implicit in the submission of an application for transfer. Thus, if the Holmgrens had expressed their current views of their ownership rights at the time they sought the permit transfer, they would not have been eligible for the permit transfer in the first place.

¹³ BLM's hearing exhibits are designated by numbers and the Holmgrens' hearing exhibits are designated with an "A" followed by a number. *See* Decision at 4 n.3.

efforts and granted the Holmgrens permission to extend the time for removal of the cattle to June 1, 1998. *Id.* at 13-14. However, the Holmgrens did not have readily available summer pasture like the Estills, and removal of the cattle proved expensive and physically stressing for the cattle. The grazing plan did not work for the Holmgrens. *Id.* at 14.

In late 1998, they queried BLM about changing the AMP to a year-long rest-rotation system, but BLM indicated that amending the AMP would be a difficult and lengthy process. *See id.* The Holmgrens proposed an amendment to the AMP that BLM denied by letter dated April 13, 1999. *Id.* at 14-15. The Holmgrens again proposed a year-long plan in a May 17, 1999, application and, although it did not undertake a thorough review of monitoring data, BLM denied the application in a proposed decision dated June 23, 1999. *Id.* at 15. Judge Pearlstein described the Holmgrens' predicament:

As the summer season of 1999 began, the Holmgrens felt that they did not have the ability or the financial resources to remove the excess cattle from the allotment. Their main bank loan was nearly cancelled, and foreclosure proceedings had begun before Mr. Holmgren obtained another loan from a bank in Montana. Based on what Mr. Holmgren termed the "doctrine of necessity" and [an] alleged "tongue-in-cheek" agreement [with BLM], the Holmgrens maintained their herd of approximately 450 head on the allotment during the summer of 1999. Due to the profuse growth of forage and brush on the allotment that year, resulting from heavy winter and spring precipitation, Mr. Holmgren also felt that grazing would reduce the wildfire danger. (Tr. VII-170-175)[¹⁴].

Id. at 16.

After conducting several cattle counts on the PTMA that summer, BLM issued a Notice of Trespass on August 5, 1999, followed by a September 23, 1999, notice of intent to impound the cattle. *Id.*

The Holmgrens met with BLM in August and September 1999 to resolve the situation. Although the Holmgrens stated in an October 5, 1999, letter, that they had removed their excess cattle, BLM issued a proposed decision on October 18, 1999,

¹⁴ Judge Pearlstein cited the transcript using Roman numerals for the volume followed by a hyphen and the page number. He designated the volumes as follows: I, Nov. 1, 2004; II, Nov. 2, 2004; III, Nov. 3, 2004; IV, Nov. 4, 2004; V, Nov. 5, 2004; VI, Feb. 1, 2005; VII, Feb. 2, 2005; VIII, Feb. 3, 2005; and IX, Feb. 4, 2005. *See* Decision at 4 n.3

noting that 162 trespassing cattle had been observed on October 13. *Id.* BLM proposed to allow the Holmgrens to extend payment of their current bills to December 31, 1999, but revoked future after-the-grazing-season privileges and stated that the trespass had to be resolved by January 1, 2000, or their grazing permit would be suspended. *Id.* In a final December 9, 1999, decision, BLM extended the time to resolve the unauthorized use issue until January 31, 2000, but reaffirmed the revocation of after-the-season privileges. *Id.* at 17. The Holmgrens settled their unauthorized use on January 31, 2000, making a partial payment and signing a note to pay the rest in installments. *Id.*

On January 6, 2000, the Holmgrens presented a more detailed grazing plan for the PTMA than the one BLM had rejected previously. *Id.*

On February 7, 2000, BLM notified the Holmgrens of unauthorized cattle at the Luning Corral across the highway from the authorized grazing area to which the cattle could drift due to the lack of a fence preventing them from crossing the highway to get water. *See id.* These issues were not resolved at a subsequent February 22, 2000, meeting. *Id.* The Holmgrens made their legal position clear in a February 25, 2000, letter:

We reiterate our position that this is a Water Base Allotment and that the [AMP] governing this allotment is illegal, and therefore, your actions at this time should be tabled until you have discovered the intent and meaning of a Water Base Allotment described in the Code of Federal Regulations.

Ex. 25.

During the spring of 2000, the Holmgrens began to seek help from State officials in resolving their problems with BLM. Decision at 18. They also paid their grazing bills in advance, but were notified by their bank that their collateral was at risk if the issues with BLM were not resolved. *Id.*

The AMP required the Holmgrens to reduce their cattle on the allotment to 150 head beginning April 1. However, on April 11, 2000, the Holmgrens again requested the amendment of the AMP to a year-long plan and sought a 30-day extension of the winter grazing authorization. *Id.* The plan was presented in an April 26, 2000, meeting at United States Senator Richard Bryan's office that included BLM personnel and other persons. The Holmgrens also requested a waiver of the summer limit of 150 head due to their previous extreme difficulty in meeting this condition and the initiation of the process of modifying the AMP. In response, a BLM employee indicated that he was not sure that a waiver could be granted, but he

promised to look into it. And, as a condition to moving forward on the AMP amendment, the Holmgrens settled their outstanding trespass notice. *Id.* at 18-19.

The Holmgrens renewed their request for a summer waiver of the 150-head limit in a May 8, 2000, letter. *Id.* at 19. On May 10, 2000, BLM responded with a letter denying their request, finding that, based on extensive research, no authority for granting such a variance existed. *Id.* The letter stated that there could be no approval of a change in the current management without careful and considered consultation, cooperation, and coordination with all affected and interested parties, citing 43 C.F.R. § 4120.2.¹⁵ The letter contained no indication that it was subject to protest or appeal, and none was taken. Although April 1 had long passed, the letter gave the Holmgrens 10 days to reduce their cattle to 150 head. Decision at 19.

¹⁵ BLM has an obligation to consult with members of the interested public and issue a proposed decision that can be protested before any change in current management, including TNR, is approved. See 43 C.F.R. §§ 4130.6-2(a), 4160.1, 4160.2. Because any decision that BLM would make would be subject to protest and appeal by any interested party, BLM could not approve TNR or amend the AMP without undertaking fieldwork and preparing an environmental analysis (EA) as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (2000), and the implementing regulations at 40 C.F.R. Part 1500. Under NEPA, BLM must prepare an environmental impact statement (EIS) or an EA unless the agency has determined that a proposed action is categorically excluded from that requirement pursuant to a procedure established in accordance with 40 C.F.R. § 1507.3(b)(2). See *Center for Native Ecosystems*, 170 IBLA 331, 345 (2006); *Vulcan Power Co.*, 143 IBLA 10, 19-20 (1998); *State of Wyoming*, 90 IBLA 364, 367 (1986). There was no categorical exclusion for approval of TNR. We note that BLM was already experiencing challenges to its approval of TNR, even in cases where an EA had been prepared. *E.g. Committee for Idaho's High Desert (CIHD)*, 149 IBLA 1 (1999). Unlike the circumstances in *CIHD*, there was no EA in place to provide a basis for approval of TNR within the PTMA in a short time frame. Where there is no prior EA, the applicant for TNR must apply sufficiently in advance to allow for completion of the review process before the needed use can begin. This period can take several months. See, *e.g., Western Watersheds Project v. BLM*, IBLA 2004-94 (Feb. 4, 2004) (rancher filed request for TNR 6 months before TNR was to begin and, because there was no prior EA supporting approval of TNR, BLM was required to prepare one, which delayed issuance of the final decision granting TNR until 7 months after the application was filed). Thus, even a temporary waiver or authorization of TNR could not have been granted within any time period that would have enabled the Holmgrens to avoid limiting their cattle use that summer. BLM had no choice but to require that the Holmgrens adhere to the conditions of the AMP that summer.

Another meeting took place at the BLM State Office in Carson City on May 17, 2000, but BLM and the Holmgrens did not resolve their differences. *Id.* at 19-20. In a letter dated May 25, 2000, the State Office rejected the Holmgrens' arguments about a regulatory distinction between water and land base property, and reiterated that there was no authority that would allow BLM to waive the terms and conditions of the permit while a proposal for a change to the AMP was being considered. *Id.* at 20; Ex. 36.

The Holmgrens' inability to get timely relief from the requirements of an AMP that made ranching uneconomical for them impelled them to assert they had property rights that enabled them to graze without BLM's approval and they chose not to remove cattle to achieve compliance with the AMP as required by BLM.

On May 22, 2000, BLM conducted a helicopter cattle count, which found a total of 382 cattle "all over the allotment" in winter and in summer areas and observed two riders pushing cattle to the Stimson Well. Cattle were still on the allotment the next day. Ex. 35. On May 25, 2000, BLM issued a Notice of Unauthorized Use. Ex. 37. In a response dated May 31, 2000, the Holmgrens denied BLM's allegations, asserting that the AMP itself was not legal and binding because it failed to recognize their water base property rights. Ex. 38.

The First Decision Appealed

BLM issued a final decision dated June 22, 2000, ordering the Holmgrens to remove all unauthorized cattle and place the remaining 150 in areas authorized in the AMP. Ex. 39. The decision also demanded payment of \$10,132.72. BLM determined that the 282 excess cattle consumed 290 AUMs from May 16 to June 22, resulting in \$5,220 damages at the willful trespass rate of \$18 per AUM. The remaining \$4,912.72 resulted from administrative costs, including more than 10 hours of helicopter flight time.

The Holmgrens appealed the June 22, 2000, decision to the Hearings Division and requested that this Board stay the decision.¹⁶ NV-030-01-02. The Board granted the request in part and denied it in part by order dated August 1, 2001. *David and Jacki[e] Holmgren*, IBLA 2001-1 (Aug. 8, 2001). The Board noted that the 150-head

¹⁶ At the time BLM's decision was issued, 43 C.F.R. § 4160.4 (2000) provided for the filing of an appeal for the purpose of a hearing before an administrative law judge, but the regulations establishing standards and procedures for obtaining a stay provided that only "[t]he Director or an Appeals Board shall grant or deny a petition for a stay pending appeal . . ." 43 C.F.R. § 4.21(b)(4). Subsequently, the regulations were amended to provide for issuance of stays by the Administrative Law Judges in the Hearings Division. *See* 43 C.F.R. §§ 4.471, 4.472.

limit had been established by formal decision making in which the Holmgrens fully participated and no appeal was filed, so that the 150-head limit appeared to be “administratively final.” The Board identified the principal issue as whether appellants had violated these terms. The Board only stayed the assessment of damages and administrative costs, not the finding of a willful trespass or the order to remove the cattle.

Meanwhile, on July 5, 2000, the Holmgrens’ lender notified them that the trespass charge and removal order had placed their collateral in jeopardy, and they considered filing a bankruptcy petition. Decision at 21. On July 12, 2000, they began to remove cows to patented and leased land, leaving between 150 and 200 on the public lands in the allotment; various circumstances, however, prevented them from keeping the cattle on these parcels. *See id.* They had sold their irrigation system to pay the trespass damages and could not afford to replace it. *Id.* The cattle quickly consumed the remaining grain and the Holmgrens were unable to replant the land with cattle present. *Id.* The cattle were weakening and beginning to starve, and believing that there was abundant forage on the public land, the Holmgrens again exceeded the 150-head limit later in the summer. *Id.*

The Holmgrens also continued their efforts to secure an amendment to the AMP to authorize more year-round grazing. They submitted a proposal on July 13, 2000, to which BLM responded in a September 15, 2000, letter. *See id.* at 22. While stating that the proposal was a good starting point, BLM noted that the Holmgrens still had cattle outside the summer pastures and would be subject to another notice of unauthorized use unless they were removed in 5 days. *Id.* The Holmgrens submitted additional drafts of their grazing plan on October 4 and November 28, 2000. By that time, however, BLM had shifted its focus to the Holmgrens’ continuing trespass problems and to billing them for fees that were due. *Id.* On February 6, 2001, the Holmgrens paid the balance due for grazing during the winter through February 28. *Id.*

As BLM shifted its focus from considering proposals to amend the AMP to achieving compliance with it, the parties came to a stalemate. The Holmgrens could not run the ranch economically on the basis of the current AMP, but BLM could not approve an AMP amendment without fieldwork and environmental analysis. As noted before, any decision that BLM would make would be subject to protest and appeal by any interested party. As BLM became less amenable to providing authorization for a rancher who was not in compliance, the Holmgrens claimed that their property rights placed the area to be covered by any AMP outside the scope of BLM’s authority. Given the resources that would be expended in considering any AMP amendment, BLM was reluctant continue further action on the AMP amendment until the Holmgrens’ challenge to the scope of BLM’s authority was resolved.

The Second Decision Appealed

On January 26, 2001, BLM issued a Notice of Final Decision limiting grazing to the Gabbs Winter Pasture until March 31, 2001. By April 15, livestock numbers were to be reduced to 150 in accordance with the AMP, and cattle were to be moved to the Gabbs Summer Pasture from April 15 to July 15. To discourage livestock from crossing the highway, water was to be turned off at the Luning Corral until November 1, except for authorized trailing in that area. As a rationale for this decision, BLM cited damage to key forage species due to overgrazing in the western portion of the Pilot Winter Pasture. Decision at 23; Ex. 46.

The Holmgrens appealed the January 26, 2001, decision to the Hearings Division and requested that this Board stay the decision. NV-030-01-03. The Board granted the stay in part and denied it in part. *David and Jacki[e] Holmgren*, IBLA 2001-273 (Aug. 8, 2001). Although the Board again referred to the administrative finality of the 150-head limit, the Board noted that the Holmgrens challenged new restrictions on their “water-based property” and found that their arguments provided a fair ground for litigation that warranted the issuance of a stay for whatever portions of the decision were still in effect, noting that the question of mootness was properly before the Hearings Division.

The Third Decision Appealed

The Holmgrens did not observe the limits established in BLM’s January 26, 2001, decision. Although this Board had granted a stay of that decision, the requirements of the Holmgrens’ permit and the AMP that limited grazing after April 1 to 150 cattle were not suspended.¹⁷ After conducting helicopter counts of cattle on April 23 and 24, 2001, BLM found 363 cattle, only 32 of which were in the authorized area. Decision at 23. BLM sent the Holmgrens notices of unauthorized use on April 30 and May 11, 2001. *Id.*; Exs. 51, 55. On February 7, 2002, BLM issued a final decision and a demand for payment that included \$44,739 for 1,657 AUMs at the \$27 rate for repeated willful trespasses and \$7,881.26 for administrative

¹⁷ Ordinarily, stays are granted to maintain the status quo pending resolution of an appeal, not to change it. See *Martin S. Chattman*, 154 IBLA 64, 68 n.8 (2000); *Oregon Natural Resources Council*, 135 IBLA 389, 393 (1996). Although granting a stay makes the decision under appeal inoperative, it “does not require the agency to take positive action for the benefit of an applicant.” See *Prima Exploration, Inc.*, 96 IBLA 80, 82 (1987), quoting Attorney General’s Manual on the Administrative Procedure Act, 105 (1947).

expenses, totaling \$52,620.26.¹⁸ BLM imposed a 10 percent AUM reduction for 5 years. *Id.* at 24; Ex. 60.

The Holmgrens appealed the February 7, 2002, decision to the Hearings Division and requested that this Board stay the decision. NV-032. The Board granted a stay, referring specifically to the requirement that the Holmgrens pay the fees pending appeal and the AUM reduction. *Holmgren v. BLM* (IBLA 2002-287, June 4, 2002). BLM's petition for reconsideration of the Board's June 4, 2002, order was denied. *Holmgren v. BLM*, IBLA 2002-287R (Sept. 26, 2002). In that order, the Board stated:

The Holmgrens' claim that any resource damage, to the extent that it has occurred, results from BLM's (1) failure to construct fences and develop water in the manner that BLM had promised (this action was, according to BLM, integral to the success of the Allotment Management Plan (Motion for Stay at 25, 32, 46)); (2) willingness to permit wild horses to graze year-round under the current AMP, destroying the native range at the expense of the Holmgrens' grazing operations; (3) threatened seizure of the Holmgrens' livestock and (4) low-flying aircraft over Holmgrens' occupied residence, perceived by the Holmgrens as being intimidation, raise[s] questions regarding BLM's faithful stewardship of the public lands (questions which necessarily implicate BLM's characterization of the alleged trespasses as "repeated willful trespass"). The Holmgrens have raised questions so serious, substantial, difficult and doubtful, as to make them a fair basis for litigation, and therefore a basis for more deliberative investigation.^[19]

Id. at 2-3. The Board was also concerned that failure to grant a stay might render ineffective any relief that could be granted if the Holmgrens were to prevail when the case was decided on its merits. *Id.* at 3.

¹⁸ "A party found to have committed an act of grazing trespass similar to that charged in a prior trespass proceeding is properly charged with a repeated trespass regardless of the fact that an appeal of the initial trespass charge is still pending." *Klump v. BLM*, 130 IBLA 119, 132 (1994).

¹⁹ This did not mean that the Board considered that the Holmgrens had any likelihood of prevailing on the merits of their property claims; evidence to support the Holmgrens' claims had yet to be developed and it appears that the Board took the Holmgrens' claims at face value. The Board's focus was on the finding of a willful trespass on which the partial suspension of grazing use under their permit was based, which tipped the balance of harms in favor of the Holmgrens. *Id.* at 3.

The Fourth Decision Appealed

In late 2001, the Holmgrens sent BLM copies of lease agreements with other Nevada and California ranchers, which BLM construed as an application to graze approximately 535 cattle, mostly in the winter but with some remaining through May 15, 2002. Decision at 24. In a Notice of Proposed Decision dated January 29, 2002, BLM approved the grazing of cattle in accordance with the AMP, *i.e.*, 450 cattle from October 15, 2001, to April 15, 2002, but rejected the proposed grazing of some leased cattle from November 10, 2001, through various dates from April 15 to May 15, 2002. *Id.* The rejection was based in part on the failure of the proposal to conform to the AMP as well as on the Holmgrens' failure to provide legal brands for the leased cattle. The Holmgrens filed a protest to this decision which included additional information about the brands. In a decision dated March 4, 2002, BLM accepted certain authorized brands but upheld the remainder of its earlier decision. The Holmgrens appealed the March 4, 2002, decision to the Hearings Division and requested that this Board stay the decision. NV-030-02-01. The Board granted a stay only because BLM failed to send a case file. *David and Jackie Holmgren*, IBLA 2002-411 (July 30, 2002).

The Fifth Decision Appealed

Although the stays of BLM's March 4, 2002, decision and others may have suspended the effect of those decisions, the requirements of the AMP remained in effect and the Holmgrens were required to conform to them. The Holmgrens continued to graze cattle on the allotment and exceeded the limits of the AMP. On January 22, 2003, BLM sent the Holmgrens grazing bill R410302 for \$55,142.83 for periods from April 16 to October 31, 2002.²⁰ On March 5, 2003, BLM issued a notice of unauthorized use, noting that no livestock were currently authorized because the Holmgrens had failed to pay for grazing use. Ex. 80. The notice required them to remove all cattle within 10 days. On March 10, 2003, BLM sent the Holmgrens a letter that referred to earlier bills for grazing use and stated a current total of \$55,298.04 which included additional late fees. Ex. 81. On the same date, the Holmgrens sent BLM a letter challenging its earlier bills. Ex. 82. BLM provided a detailed response in a letter dated March 17, 2003, and again referred to the need for the Holmgrens to remove their cattle. Ex. 83. The parties' efforts to resolve their differences proved unsuccessful. In a letter dated June 10, 2003, the Holmgrens referred to BLM's failure to pay them \$513,000 for water consumed by wild horses.

²⁰ The bill covers periods from Apr. 16 to Oct. 31, 2002, and its components appear in Exs. A-254 and A-256. They include charges of \$54,862 for 2763 AUMs that are broken down to \$1,402.83 for 981 AUMs at the rate of \$1.43 per AUM, and \$53,460 for 1782 AUMs charged at the repeated willful trespass rate of \$30 per AUM, plus fees bringing the total to \$55,142.83.

Ex. 85. They also claimed that they were not in trespass because of their vested property rights.

On June 3 and 4, 2003, BLM counted 384 cattle in the allotment. Ex. 84. In a proposed decision dated July 3, 2003, BLM ordered removal of cattle from the allotment and demanded payment of a total of \$140,802.54. Ex. 86. This total included \$55,298.04 from grazing bill R410302 and associated late fees; \$55,800 for 1860 AUMs at the repeated willful trespass rate of \$30 for livestock reported by the Holmgrens in a letter dated December 2, 2002; and \$29,704.50 for 861 AUMs at the rate of \$34.50 for the period from March 1 to June 6, 2003. On July 31, 2003, the Holmgrens submitted their protest of the July 3, 2003, proposed decision. Ex. 87. Claiming that their water base property included the service areas around their water sources, they contended there was no trespass. BLM issued its decision in response to the protest on January 2, 2004. Ex. 91. BLM's decision ordered the Holmgrens to remove all cattle and demanded payment of a total of \$141,432.54 on the basis of a recalculation. The higher figure resulted from an additional 21 AUMs added to the 1860 in the proposed decision. The Holmgrens appealed this decision. NV-030-04-01.

The Sixth Decision Appealed

In a letter dated March 5, 2004, BLM offered the Holmgrens the opportunity to apply for grazing use and pay the fees for the current grazing of livestock on the PTMA. Ex. 95. On April 15, 2004, the Holmgrens sent BLM a demand for payment of \$513,000 for consumption of water by wild horses from November 2002 through March 2004. Ex. 96. On May 5, 2004, BLM issued a notice of proposed decision to cancel the Holmgrens' permit and the Holmgrens filed a protest of this decision. Exs. 97-98.

On June 8, 2004, BLM issued its decision cancelling the Holmgrens' permit. Ex. 99. The decision cited the Holmgrens' prior trespasses, violation of permit terms, and refusal to pay grazing fees and obtain annual authorization, as well as complaints from the public. One written complaint involved an individual who claimed that he had been intimidated and told that he could not ride on the public lands in the PTMA without the presence of the Holmgrens. Another stemmed from a letter the Holmgrens had written to the organizer of an Off Road Vehicle (ORV) race on public land concerning "trespass nuisance." And a third concerned a BLM field archaeologist accompanying a group of paleontologists who complained of harassment by the Holmgrens' parents. The Holmgrens appealed this decision. NV-030-04-02.

Judge Pearlstein's Decision

After holding almost two weeks of hearings in November 2004 and February 2005, Judge Pearlstein issued a 101-page decision on November 30, 2006. Following a brief procedural history of the appeals, his decision sets forth his findings of fact, which we have summarized in the previous portion of this opinion. Decision at 1-30. He then addressed and rejected a variety of legal theories advanced by the Holmgrens to support their argument they were not in trespass because they had vested rights to graze their cattle on land within the service area around each water source, free from interference from BLM, because these areas were no longer public land. Decision at 31-60. The Holmgrens admitted that they had grazed livestock during the summer in excess of the numbers authorized in the PTMA from 2000 to 2004, and they did not deny that they had filed no annual grazing applications and paid no fees that were billed after April 2002. Decision at 61-62. Despite these findings, Judge Pearlstein did not consider himself compelled to affirm BLM's decisions. Rather, he felt that BLM should have been aware of the Holmgrens' need for an amendment of the AMP to accommodate their use from the very beginning in 1997, and faulted BLM for enforcing trespasses instead of attempting a resolution of the Holmgrens' problems by giving further consideration to their proposals to amend the AMP to provide for summer use and by temporarily authorizing more summer use while the proposal to amend the AMP was under consideration. See Decision at 63, 69-87.

He also considered the Holmgrens' claims that BLM's failure to control excess wild horses in the PTMA had resulted in a "taking" of the Holmgrens' water rights. He referred to two cases where courts have found that BLM owes a duty to ranchers to remove excess horses and can be ordered to do so, *Dahl v. Clark*, 600 F. Supp. 585, 592 (D. Nev. 1984), and *Fallini v. Hodel*, No. R-85-535 BRT (D. Nev. Nov. 28, 1986).²¹ While noting that he lacked jurisdiction to consider the takings claim, he

²¹ The *Dahl* and *Fallini* cases were discussed and analyzed by this Board in *Fallini v. BLM*, 162 IBLA at 16-20. Dictum in a recent Supreme Court decision raises a question as to whether the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (2000), establishes an enforceable obligation for BLM to remove excess horses. In reaching its conclusion that BLM cannot be compelled to follow commitments made in resource management plans, the Court indicated that mandamus would not be appropriate in a case where a plaintiff alleged "that the Secretary had failed to 'manage wild free-roaming horses and burros in a manner to achieve and maintain a thriving ecological balance[.]'" *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004). The Court, however, was citing an example of a "broad statutory mandate" that was difficult for a judge to enforce, not a specific number such as an "appropriate management level" established in a herd management plan.

nevertheless concluded that BLM's failure to remove wild horses was a factor that mitigated the willfulness of the Holmgrens' trespass. Decision at 87-88.

He then addressed whether other BLM actions warranted mitigation of the damages, specifically referring to items identified in this Board's September 26, 2002, Order, quoted above. He turned first to BLM's failure to construct fences as promised in the AMP, which would have prevented cattle from drifting across the highway at times when their presence was not authorized. Judge Pearlstein found that failure to construct the fence did not materially contribute to the trespasses and declined to consider it as a mitigating factor. Decision at 89.

Judge Pearlstein similarly rejected BLM's threat to impound the Holmgrens' cattle as a mitigating factor. While noting that impoundment was authorized under 43 C.F.R. Subpart 4150 and that BLM had followed proper procedure, no cattle had been impounded and BLM's decisions had been stayed. Decision at 89-90. As for the Holmgrens' complaints about harassment from BLM helicopters, he found that the record did not establish any intentional conduct on the part of BLM or its contractors that should be considered as mitigating factors. *Id.* at 90.

He then turned to the complaints from the public cited in BLM's June 8, 2004, decision cancelling the Holmgrens' permit. Of those involved in these incidents, only the Holmgrens testified at the hearing, and Judge Pearlstein found that they gave credible accounts showing that their conduct did not amount to a violation of 43 C.F.R. § 4140.1(b)(7) concerning interference with lawful users of public lands. He concluded that these incidents did not support the cancellation of the Holmgrens' permit. Decision at 90-91.

Judge Pearlstein next addressed BLM's finding in its June 8, 2004, decision that the Holmgrens had failed to pay grazing fees and obtain annual authorizations. After noting that they had paid fees until August 2002, he cited their concerns that the forms BLM had provided had expired and concluded that the Holmgrens could not be penalized for failing to execute expired forms.²² *Id.* at 92. While finding that they had failed to pay fees in 2003 and 2004, he noted that they did not stop paying fees until more than two years after BLM denied their application for a waiver and "ignored" their application to amend the AMP. *Id.* He determined that the same mitigating factors affecting the penalty, addressed below, were applicable to these violations. *Id.*

After concluding that the two BLM decisions of January 26, 2001, and January 29, 2002, that did not involve trespasses were moot, Decision at 93-95, Judge Pearlstein focused on determining damages and penalties in the four

²² See note ,4 *supra*.

remaining trespass appeals in light of his conclusion that BLM's "failure to properly and timely consider the Holmgrens' applications to change grazing use . . . substantially mitigated" the gravity of the trespasses. *Id.* at 95.

Judge Pearlstein did not base his trespass damages calculations on the published average monthly rates per AUM for pasturing livestock on privately owned, non-irrigated land in Nevada as directed by 43 C.F.R. § 4150.3, which according to BLM, were \$9.00 in 2000, \$9.50 in 2001, \$10.00 in 2002, \$11.50 in 2003, and \$10.50 in 2004.²³ See BLM Statement of Reasons (SOR) at 11. Rather, he used \$10 per AUM as the value of forage consumed in an attempt to average the values used by BLM. Decision at 96. He further found that the rate for authorized grazing ranged from \$1.35 to \$1.43 per AUM, but "[w]ith approximate interest for past due grazing fees," he decided to use \$1.50. *Id.* He found that the Holmgrens "did technically commit repeated willful trespasses that would justify the cancellation of their permit,"²⁴ but concluded that BLM's actions substantially mitigated the willful characterizations of those trespasses. *Id.* at 98. His "overriding purpose" in determining the penalty was to "find a resolution that will allow the Holmgrens a reasonable chance to retain their permit, while reimbursing the government for unauthorized forage consumed and penalizing the Holmgrens for knowingly committing grazing trespasses." *Id.* Instead of basing his calculations on a rate per AUM ranging from \$9.00 to \$11.50, he charged the Holmgrens \$1.50 per AUM for use that was authorized under the AMP, even though the Holmgrens had not obtained annual authorization or paid for that use. For grazing in excess of those numbers, he charged \$15.00, which he found to "exceed[] the non-willful rate by 50%, and is half the usual rate for repeated willful trespass." *Id.*

Judge Pearlstein eliminated the administrative costs for helicopters assessed in BLM's June 22, 2000, and February 7, 2002, decisions,²⁵ finding those costs unreasonable "since the number of trespassing cattle could have been more

²³ These are the rates for nonwillful trespass. 43 C.F.R. § 4150.3(a). As discussed in more detail *infra*, damages for willful trespass are assessed at twice this amount and damages for repeated willful trespass are calculated at three times this amount. See 43 C.F.R. § 4150.3(b), (c).

²⁴ He found that the trespasses were deliberate and repeated, that large numbers of animals were involved, that the trespasses occurred over a long period of time, and that the Holmgrens made no attempt to remedy the trespasses after notification by BLM. He found that these conditions satisfied the elements for finding a willful repeated trespass under *Eldon Brinkerhoff*, 24 IBLA 324, 337, 83 I.D. 185, 190 (1976).

²⁵ BLM's June 22, 2000, and Feb. 2, 2002, decisions respectively assessed \$4,912.72 and \$7,881.26 for helicopter costs, making a total of \$12,793.98.

accurately determined by simply asking Mr. Holmgren.” Decision at 97. He affirmed the numbers of AUMs for unauthorized use set forth in BLM’s June 22, 2000, decision, but charged \$15 per AUM instead of the \$18 rate applied by BLM for willful trespass. He found that the evidence supported 98 AUMs of unauthorized use in the February 7, 2002, decision instead of the 1,657 AUMs found by BLM, and used his \$15 rate instead of the \$27 rate applied by BLM.

BLM’s January 2, 2004, decision had several components encompassing the 2002 and 2003 grazing seasons. The first component, which addressed grazing in the 2002 summer season, was from grazing bill R410302 for \$55,298.04 based on 981 AUMs of authorized use charged at \$1.43 and 1782 AUMs charged at \$30 for repeated willful trespass plus various fees. Judge Pearlstein affirmed BLMs determinations of the numbers of AUMs, but applied a charge of \$1.50 for the 981 AUMs of authorized use and \$15 for the 1782 AUMs of repeated willful trespass or \$26,730. Decision at 99.

The second component derived from the Holmgrens’ December 2, 2002, report listing 1,881 AUMs consumed in the 2002-2003 winter season plus an additional 458 AUMs in March 2003. BLM had charged the Holmgrens for the reported 1,881 AUMs at the repeated willful rate of \$30 and for the 458 AUMs in March at the repeated willful rate of 34.50. Judge Pearlstein determined that the 1,881 AUMs reported by the Holmgrens and the additional 458 AUMs in March did not exceed use that would be authorized by the AMP and should be charged at \$1.50, or \$3,508.50. The third component related to use on the allotment from April to June 2003. BLM charged them for 403 AUMs from April 1 through June 6, 2003, at the repeated willful rate of \$34.50. Judge Pearlstein determined that 18 percent or 73 of the AUMs consumed after April 1 were attributable to livestock exceeding the 150 head limit and charged those 73 AUMs at the \$15 rate with the remaining 330 AUMs charged at the \$1.50 rate or \$1,095. Decision at 100.

After applying his dollar values to the AUMs of unauthorized use, he ordered the Holmgrens to pay \$39,070 in damages instead of the \$204,185.52 found by BLM. *Id.* at 100-101. And, rather than canceling the Holmgrens’ permit as provided in BLM’s June 8, 2004, decision, Judge Pearlstein ordered a 20 percent suspension of the authorized level of 7,900 AUMs in the PTMA for 5 years. *Id.*

BLM and the Holmgrens appealed Judge Pearlstein’s decision. We address the Holmgrens’ appeal first.

The Holmgrens’ Appeal

The Holmgrens assert that grazing their cattle on the PTMA is not a trespass because they obtained property rights, including the right to graze cattle on the land

surrounding their water rights, from their predecessors-in-interest. Because these rights vested prior to the enactment of the Taylor Grazing Act in 1934, they assert that the land within the PTMA was no longer “public land” when the Taylor Grazing Act was enacted.²⁶ See Holmgren SOR at 4-20. The Holmgrens base their assertion of “vested rights” to graze in the PTMA without BLM authorization primarily on their interpretation of section 9 of the Act of July 26, 1866, *as amended*, 43 U.S.C. § 661 (1970) (1866 Act).²⁷ Holmgren SOR at 40. That section provided that the vested rights to the use of water for mining, agricultural, manufacturing, or other purposes, which had been “acknowledged and confirmed by the local customs, laws, and the decisions of courts[,] . . . shall be maintained and protected,” and a “right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.” The Holmgrens assert that the holder of such water rights has the right to trail livestock across public lands to and from the water and “the incidental use of enough forage for the amount of livestock the vested water [right] would support[.]” Holmgren SOR at 18-19. The Holmgrens further state that the rights-of-way afforded the grazier “control of the [affected] area” for the purpose of the “grazing and watering of livestock,” since these rights were “for the livestock.” *Id.* at 36. Since their predecessors-in-interest obtained numerous vested rights to water within the area of private and public lands now encompassed by the PTMA, the Holmgrens argue, they acquired the rights to graze virtually all of the allotment, and such rights predate the Taylor Grazing Act, which was enacted in 1934, and FLPMA, which was enacted in 1976, and exist apart from those Acts.

Believing that they had established rights-of-way (ROWs) covering the PTMA under the 1866 Act prior to the enactment of the Taylor Grazing Act, the Holmgrens

²⁶ On Oct. 21, 2004, the Holmgrens filed a complaint with the United States Court of Federal Claims, *Holmgren v. United States*, No. 04-1592L (Fed. Cl.), contending that they were deprived of their property rights to graze in the allotment without just compensation, in violation of the Fifth Amendment to the U.S. Constitution, by various actions of BLM, including allowing excess wild horses to utilize the Holmgrens’ water and forage and issuing multiple adverse decisions to the Holmgrens, which resulted in a taking of their ranch, easement rights, forage grazing rights, and range improvements. By order dated Mar. 21, 2005, the court stayed that case pending the outcome of this appeal.

²⁷ Section 706(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2793, amended sec. 9 of the 1866 Act, effective Oct. 21, 1976, but repealed the language providing for rights-of-way for the construction of ditches and canals. The Holmgrens properly note that existing rights-of-way, which are in the nature of “possessory rights,” were preserved by the savings clauses of section 6 of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315e (2000), and section 701(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2786. Holmgren SOR at 34, 35.

assert that those ROWs removed the land from the status of public land, citing *Bardon v. Northern Pacific R.R. Co.*, 145 U.S. 535, 538 (1892), where the Court held that “[a]ll land, to which any claims or rights of others have attached, do not fall within the designation of public land,” and *Northern Pacific Ry. v. Townsend*, 190 U.S. 267 (1903). These cases, however, involved pre-1871 railroad ROW grants, and are not apposite to ROWs such as the ones the Holmgrens assert here.²⁸

In considering the Holmgrens’ right-of-way claims, Judge Pearlstein noted that ROWs under the 1866 Act must have been acquired by the construction of ditches, canals, or other structures for the containment or diversion of water, prior to the repeal of that Act by FLPMA. See *Bear Lake & River Water Works & Irrigation Co. v. Garland*, 164 U.S. 1, 18-19 (1896); *Dalton Wilson*, 156 IBLA 89, 96-97 (2001). Finding “no evidence in the record that supports a conclusion that either the Holmgrens or their predecessors constructed” any of the required improvements prior to the repeal of the 1866 Act by FLPMA, he concluded that the Holmgrens had not shown the existence of any 1866 Act ditch ROW.²⁹ Decision at 46.

²⁸ The Court in *Bardon* did not hold that a ROW under the 1866 Act segregated land from the public domain. The Court held that an 1853 preemption entry that remained on land office records severed the land from the public domain when Congress enacted a grant of a ROW to a railroad in the Act of July 2, 1864, 13 Stat. 365, so the railroad grant did not attach to that land. In *Townsend*, the railroad company had acquired a ROW pursuant to the Act of July 2, 1864. Thereafter, homestead entries were initiated and patents issued which purported to convey subdivisions traversed by the ROW, but the Court held that the homesteaders acquired nothing because the land had been granted to the railroad. 190 U.S. at 270-71. The Court subsequently limited this holding to railroad ROWs granted prior to 1871 which, unlike other ROWs, were “limited fees”. *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 279 (1942).

²⁹ He further found that even if the Holmgrens had established the existence of a valid ditch ROW, they would at most be entitled to a very limited right to graze cattle within 50 feet on each side of the ditch. Decision at 46. In so doing, he rejected the Holmgrens’ reliance on the decision in *Hage v. United States*, 42 Fed. Cl. 249, 251 (Fed. Cl. 1998), where the court held “that implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water,” noting that the court had also described the appurtenant right as being “contiguous with the scope of the ditch right-of-way [under the 1866 Act]: the ground occupied by the water and fifty feet on each side of the marginal limits of the ditch,” 42 Fed. Cl. at 251, and that these findings had been affirmed in the court’s final decision, *Hage v. United States*, 51 Fed. Cl. 570, 580 (2002). Decision at 43; see also *Colvin Cattle Co., Inc. v. United States*, 67 Fed. Cl.

(continued...)

Judge Pearlstein also relied on *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1215 (10th Cir. 1999), in which the court held that the 1866 Act “cannot fairly be read to recognize private property rights in [F]ederal lands, regardless of whether proffered as a distinct right or as an inseparable component of a water right.” See Decision at 39. The court further stated that “[v]irtually every attempt like plaintiffs’ to expand the reach of the Mining Act of 1866 to include [F]ederal recognition of private property rights in [F]ederal land has been soundly rejected.” *Diamond Bar Cattle Co. v. United States*, 168 F.3d at 1215; see *Colvin Cattle Co., Inc. v. United States*, 468 F.3d 803, 807 (Fed. Cir. 2006) (involving an alleged taking of water rights and a ranching operation as a result of BLM’s denial of a grazing permit for a grazing allotment in Nevada, where the court found: “[A]ny water right that Colvin or its predecessors obtained could not and did not include an attendant right to graze on public lands”); see also *Gardner v. Stager*, 892 F. Supp. 1301, 1303 (D. Nev. 1995) (grazing rights are not appurtenant to vested water rights). Judge Pearlstein rejected similar claims based on other statutes.³⁰

²⁹ (...continued)

568, 575 (Fed. Cl. 2005), *aff’d*, 468 F.3d 803 (Fed. Cir. 2006) (“[T]he Hage court did not find that the plaintiffs’ water right included a right to graze on land adjacent to the water (as plaintiff here claims for itself) but instead found a very limited right to graze cattle within 50 feet on each side of an established Mining Act ditch right-of-way”).

³⁰ He rejected the Holmgrens’ argument that they held easements under the Livestock Reservoir Sites Act of 1897, ch. 11, 29 Stat. 484 (codified at 43 U.S.C. § 952 (2000)), finding that the statute did not intend to grant an easement, citing *Hage v. United States*, 51 Fed. Cl. at 590. Decision at 47-48. He further found that there was no evidence that there was the required approved declaration of intent to construct a reservoir. *Id.* at 47; see *Joe Stewart*, 33 IBLA 225, 228 n.2 (1977).

Judge Pearlstein also rejected their claims of grazing rights arising from sec. 10 of the Stock-Raising Homestead Act of 1916 (SRHA), 39 Stat. 862, 865, formerly codified at 43 U.S.C. § 300 (1970), repealed by FLPMA, 90 Stat. 2792 (1976), which withdrew public lands containing water holes or other bodies of water used by the public from entry under the homestead laws and reserved and held them open for public use and authorized the Secretary to create stock “driveways” necessary to enable the public to move livestock to such watering places. He found that the SRHA not only did not provide for the creation of a ROW over public land, as the Holmgrens asserted, but also that any such stock “driveways” were not automatically granted but had to be applied for and approved by the Secretary, which had not happened here. Decision at 49-50. See also *Hage v. United States*, 51 Fed. Cl. at 591.

He further found no merit in the Holmgrens’ claims of grazing rights arising
(continued...)

[2] Although the Holmgrens continue to employ a variety of theories to support their assertion that BLM may not restrict their use of the allotment for grazing during the summer months because their water rights include a right to graze on land within the service area around each water source, we note that Justice Holmes once wrote: “A page of history is worth a volume of logic,”³¹ and the history of water rights and grazing shows that any legal theory that would support the result the Holmgrens seek cannot be valid. Like the water rights held by the Holmgrens’ predecessors-in-interest, there were many water rights on Federal land that had been put to the beneficial use of watering livestock before the Taylor Grazing Act was enacted, but the holders of those water rights did not have an appurtenant right to graze livestock. In *Schmutz v. United States*, 56 F.2d 269, 270 (D. Utah 1932), the state engineer had issued a certificate for water from a spring that was used for troughs and ponds for watering livestock, but the court rejected the argument that the holders of the water right also had a right to use public land: “[N]o one has suggested . . . that the state through its engineer, or otherwise, can give appropriators of the public waters of the state any right in or to the public lands of the United States. Congress alone can do that.” In a case involving water rights that vested before enactment of the Taylor Grazing Act, the Supreme Court of Nevada held that a State statute involving stock watering rights had been superseded and rendered ineffective by the Taylor Grazing Act with respect to grazing on Federal land. *Ansolabehere v. Laborde*, 310 P. 2d 842, 845-49 (Nev. 1957), *cert. denied*, 355 U.S. 833 (1957).

Long before the Taylor Grazing Act was enacted, the Supreme Court held: “Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used.” *Omaechevarria v. Idaho*, 246 U.S. 343, 352 (1918), *citing Buford v. Houtz*, 133 U.S. 320, 326 (1890). After the enactment of the Taylor Grazing Act, subsequent withdrawals for the creation of grazing districts were intended to “terminate the sufferance.” Sol. Op., *Grazing Districts upon Public Lands*, 54 I.D. 353, 357 (1934).

“[I]n order to promote the highest use of the public lands,” the Taylor Grazing Act authorized the Secretary of the Interior to establish grazing districts, to “make provision for the protection, administration, regulation, and improvement of such

³⁰ (...continued)

from R. S. 2477 (Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, formerly codified at 43 U.S.C. § 932 (1970), repealed by FLPMA, 90 Stat. 2793 (1976)), which provided for a ROW for the construction of highways over public lands. Decision at 50-54.

We find no error in the Judge’s analysis of these legal issues.

³¹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

grazing districts,” and to issue “permits to graze livestock on such grazing districts . . . upon the payment annually of reasonable fees.” 43 U.S.C. §§ 315, 315a, 315b (2000). Those who owned land or water rights that had been used for grazing in conjunction with public lands were not exempted from the operation of the Act. Section 3 of the Act requires that “preference” in issuing grazing permits be given “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). This provision of “preference” for holders of water rights would make no sense if the service areas around a water source were not subject to the requirements of the Act. “[G]razing privileges based on the ownership or control of waters can only be granted on lands within the service areas of such waters.” *Joe C. Warf*, A-213167, IGD 263, 266 (December 6, 1941).

Graziers who had been using the Federal range were allowed until June 28, 1938, to apply for a permit to use land within a grazing district, although deadlines were extended for many districts. 3 Fed. Reg. 604 (Mar. 22, 1938); *see* 43 C.F.R. Part 501 (1940);³² *Walter K. Ellis*, 57 I.D. 113, 115 (1940). Applicants were required to identify their “base property,” defined as their “[p]rivately owned or controlled land or water used in range livestock operations . . . for which a grazing privilege is sought” 43 C.F.R. § 501.2(d) and (e) (1940). Water base properties were assigned one of three classifications: A full-time prior water was designated Class 1; a full-time water that was not prior was designated Class 2, unless it was developed later than other water servicing a part or all of the same area, in which event it was designated Class 3.

Thus, those who had water rights used for livestock before the enactment of the Taylor Grazing Act had no *right* to continue grazing on Federal land. Instead, they could apply for a *preference* based on their ownership of a “prior water” which had been used during the 5-year period *preceding* enactment of the Taylor Grazing Act “to service certain public range within the service area of the water” for grazing. *See* 43 C.F.R. § 161.2(1) (1940). The fact that the owner of a well may have watered livestock did not exclude the service area of the well from the operation of the Act. In *John T. Muir*, A-21816, IGD 204 (February 18, 1941), it was held that an

³² The regulations underwent a series of modifications as the Department developed a program for adjudicating applications and issuing permits. *See Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *E.L. Cord*, 64 I.D. 232, 233-34 (1957). Those first promulgated addressed issuance of temporary licenses under section 2, 43 U.S.C. § 315a (2000), and leases under section 15, 43 U.S.C. § 315m (2000). *See Joseph R. Livingston*, 56 I.D. 92, 95 (1937). For convenience, citations to the early regulations are to the 1940 edition of the C.F.R.

applicant's class 1 demand was restricted to the carrying capacity of that portion of the service area which was used during the priority period.

The Department recognized that the Act did not *require* issuance of permits to preference holders. “[I]t means simply that all persons with certain qualifications are to be considered before persons lacking those qualifications, but it does not mean necessarily that the applications of all those in the first class must be granted.” Sol. Op., “The Nature and Extent of the Department’s Authority to Issue Grazing Privileges under the Taylor Grazing Act,” 56 I.D. 62, 64 (1937). As the Supreme Court more recently stated:

[T]he conditions placed on permits reflected the leasehold nature of grazing privileges, consistent with the fact that Congress had made the Secretary the landlord of the public range and basically made the grant of privileges discretionary. The grazing regulations in effect from 1938 to the present day made clear that the Department retained the power to modify, fail to renew, or cancel a permit or lease for various reasons.

Public Lands Council v. Babbitt, 529 U.S. 728, 735 (2000). Thus, any grazing by the Holmgrens on the PTMA is subject to BLM’s regulatory authority. The Holmgrens have not explained how their water rights differ from all of the other water rights used for watering livestock prior to the enactment of the Taylor Grazing Act that were subsequently recognized as base property eligible for a preference and a permit under section 3 of the Act.

We turn next to the Holmgrens’ assertion that, although BLM had cited them for trespass for grazing that had not been approved, no penalties can be applied to them because the forms provided by BLM to obtain approval had expired, citing the Paperwork Reduction Act, 44 U.S.C. § 3512 (2000). The expiration of the forms, however, did not relieve the Holmgrens of their obligation to limit grazing as set forth in the AMP and the applicable regulations. As the Court noted in *United States v. Matsumoto*, 756 F. Supp. 1361, 1365 (D. Hawaii 1991), the purpose of 44 U.S.C. § 3512 was “to protect the *nonfeasor*, not the *malfeasor*.” Consistent with his findings in his October 8, 2004, order, Judge Pearlstein applied a trespass penalty only to use that exceeded the AMP levels and assessed use within AMP levels at a rate

applicable to authorized use.³³ Decision at 96. We affirm his decision to the extent that he held that use beyond authorized levels was properly treated as a trespass.

Although we may not have specifically addressed each of the Holmgrens' arguments, we have considered them and find that they provide no basis for reversal of Judge Pearlstein's decision.³⁴ See generally, *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F.2d 645, 652 (6th Cir. 1954); *Glacier-Two Medicine Alliance*, 88 IBLA 133, 156 (1985).

BLM's Appeal

BLM finds no flaw in Judge Pearlstein's legal conclusion that the Holmgrens hold no property interests allowing them to disregard BLM's grazing regulations in the PTMA, or with his finding of repeated willful trespass. Rather, BLM's appeal is directed at Judge Pearlstein's calculation of damages, his elimination of administrative costs, and his order for a 20-percent suspension of authorized AUMs for 5 years instead of cancellation of the Holmgrens' permit as provided in BLM's June 8, 2004, decision.

[3] The regulations at 43 C.F.R. Subpart 4150 address unauthorized grazing use. Under 43 C.F.R. § 4150.1, violations of 43 C.F.R. § 4140.1(b)(1), which, *inter alia*, prohibits persons from allowing privately owned livestock to graze on or be

³³ See note 4, *supra*. In *Fallini v. BLM*, 162 IBLA at 52-53 n.32, we observed that requirements set out on the face of a grazing form would not be enforceable if the OMB control number for the form had expired at the time BLM provided the forms, citing a provision of the Paperwork Reduction Act, 44 U.S.C. § 3512 (2000), *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990), and *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989). Although the Holmgrens rely on the *Smith* and *Hatch* cases to support their argument that no penalty can be assessed, BLM points out that in those cases, neither the forms nor the regulations had the required OMB control number, whereas the regulations applicable in this case satisfied that requirement. BLM Response at 14 n.6 and accompanying text; see 919 F.2d at 1395-96; 866 F.2d at 1099.

³⁴ Throughout these proceedings, the Holmgrens have attempted to equate their failure to comply with the grazing parameters set in the AMP with BLM's failure to perform various actions described in the AMP and imply that BLM's shortcomings estop it from requiring them to comply with the AMP. The critical distinction, however, is that the grazing terms of the AMP were explicitly incorporated into their grazing permit and thus their failure to conform to the AMP's grazing limitations constituted a violation of the grazing permit, which explicitly limited summer grazing use to 150 cattle between April 1 and October 31. See Ex. 8.

driven across public lands “(I) [w]ithout a permit or lease, and an annual grazing authorization,” “(ii) . . . in excess of the number authorized,” or “(iii) [i]n an area or at a time different from that authorized,” constitute unauthorized grazing use. When a violation of 43 C.F.R. § 4140.1(b)(1) occurs, the authorized officer must determine whether the violation is nonwillful, willful, or repeated willful. 43 C.F.R. § 4150.1(a). The damages due for unauthorized grazing use are set forth in 43 C.F.R. § 4150.3 which provides in part:

The amount due for settlement shall include the value of forage consumed as determined in accordance with paragraph (a), (b), or (c) of this section. Settlement for willful and repeated willful violations shall also include the full value for all damages to the public lands and other property of the United States; and all reasonable expenses incurred by the United States in detecting, investigating, resolving violations, and livestock impoundment costs.

(a) For nonwillful violations: The value of forage consumed as determined by the average monthly rate per AUM for pasturing livestock on privately owned land (excluding irrigated land) in each State as published annually by the Department of Agriculture

. . . .

(b) For willful violations: Twice the value of forage consumed as determined in paragraph (a) of this section.

(c) For repeated willful violations: Three times the value of the forage consumed as determined in paragraph (a) of this section.

While disagreeing with Judge Pearlstein’s analysis underpinning his decision to mitigate trespass penalties, BLM focuses on his calculation of the damages, which BLM considers to be improper. BLM SOR at 9 n.2. Specifically, BLM asserts that, while mitigating factors may be applied in determining whether to suspend or cancel a permit under 43 C.F.R. § 4170.1-1, damages *must* be calculated in accordance with 43 C.F.R. § 4150.3 once a finding of willful and repeated willful trespass has been made. According to BLM, the applicable “average monthly rate per AUM” as provided in subsection (a) was \$9.00 in 2000, \$9.50 in 2001, \$10.00 in 2002, \$11.50 in 2003, and \$10.50 in 2004. BLM SOR at 11.

We agree with BLM that Judge Pearlstein improperly eliminated helicopter expenses and other costs for counting trespassing cattle from the reasonable expenses incurred by the United States in detecting, investigating, and resolving violations

which 43 C.F.R. § 4150.3 requires be included in settlement of willful and repeated willful trespass. BLM SOR at 14-15. Although the Judge found those costs unreasonable “since the number of trespassing cattle could have been more accurately determined by simply asking Mr. Holmgren,” Decision at 97, we conclude that it would not ordinarily be prudent for BLM to take enforcement action in a grazing trespass without an employee personally observing trespassing livestock. Nor is there any evidence here that the BLM employees’ personal observations could have been undertaken at less expense. Indeed, Judge Pearlstein himself found that, with respect to BLM’s February 7, 2000, decision, the evidence supported 98 AUMs, instead of the 1,657 AUMs determined by BLM, partly because BLM had *not* provided evidence of a count from more than one helicopter survey. *See* Decision at 99.

As to the amount of the trespass damages, BLM insists that an administrative law judge may not properly invoke mitigation to substitute different dollar amounts from those prescribed for the particular form of trespass in 43 C.F.R. § 4150.3. This leads to the question of whether a judge may rely on mitigative factors in deciding what category governs a trespass in order to reduce trespass damages. We need not resolve that issue, however, because we find no merit in the reasons that Judge Pearlstein provided for mitigating damages in this case. As stated above, Judge Pearlstein essentially based mitigation on the following grounds: BLM’s failure to issue an appealable decision concerning the Holmgrens’ request to waive the 150 head limit for the summer of 2000; BLM’s failures to review the grazing system as directed by the AMP and to issue an appealable decision with respect to the Holmgrens’ request to amend the AMP; and BLM’s failure to remove wild horses to the appropriate management level. We now address each of Judge Pearlstein’s concerns.

The Judge characterized the April 26, 2000, meeting in Senator Bryan’s office as a “critical juncture” at which BLM had agreed to consider whether to allow the Holmgrens an exemption from the 150-head summer limit to provide time for BLM to consider amending the AMP. Decision at 72.³⁵ Subsequently, in a May 10, 2000, letter, BLM advised the Holmgrens that it had determined that a “waiver” allowing them to exceed the 150-limit that summer could not be granted.

Although the BLM representatives at the April 26, 2000, meeting may have agreed *to consider* whether to allow the Holmgrens to exceed the AMP limit, any commitment was necessarily qualified because they needed to find out if they actually had authority to carry out the requested action. BLM’s May 10, 2000, letter

³⁵ He also noted that the Holmgrens had agreed to comply with the AMP during the amendment review process, but that “this was not, in their view, a real option due to the extreme financial and physical difficulties they had experienced in the past in trying to meet the summer limit condition.” *Id.*

quoted 43 C.F.R. § 4120.2(a), which requires “careful and considered consultation, cooperation, and coordination with affected permittees or lessees, landowners involved, the resource advisory council, any State having lands or responsible for managing resources within the area to be covered by such a plan, and the interested public” in the preparation of AMPs, and 43 C.F.R. § 4120.2(c), which requires environmental analysis, including public participation, of proposed AMPs.

Judge Pearlstein faulted BLM for failing to base its decision on 43 C.F.R. § 4130.6-2, under which BLM may specifically authorize TNR. While acknowledging that this regulation also included consultation, cooperation, and coordination (CCC) requirements,³⁶ Judge Pearlstein noted the time-sensitive nature of TNR authorizations and concluded that “the CCC process should presumably be scheduled and shortened as necessary in order that the regulation may be given effect and not treated as a nullity.” Decision at 73. He rejected the truthful testimony of BLM’s witness that, unless TNR had been previously authorized, the process could take from 3 to 5 months. *Id.* He found that “BLM has apparently adopted a policy of NEPA compliance for TNRs” which “extend[s] the process beyond the grazing year applied for, rendering TNR applications essentially futile.” *Id.* at 74.

³⁶ Judge Pearlstein perceived this as a “problem” that was addressed in revisions of the grazing regulations that were intended to go into effect on Aug. 11, 2006. See 71 Fed. Reg. 39402 (July 12, 2006); Decision at 73 n.14. Although Judge Pearlstein perceived these regulatory changes as salutary in his Nov. 30, 2006, decision, a U.S. district court judge had already reached an opposite conclusion and enjoined the new regulations to the extent that they changed rules on public participation because he found those changes to violate NEPA and FLPMA. *Western Watersheds Project (WWP) v. Kraayenbrink*, No. CV-05-297-E-BLW, 2006 WL 2348080 (D. Idaho Aug. 11, 2006). In particular, he found that the new regulations would eliminate public oversight of TNR, noting that the existing regulations required BLM to issue proposed decisions that could be protested by the public. *Id.* at 2. He further stressed this concern in a later decision: “The new regulations would freeze the public out of the TNR permit process until the decision had been made and the TNR permit issued.” *WWP v. Kraayenbrink*, No. CV-05-297-E-BLW, 2007 WL 1667618 (D. Idaho June 8, 2007), at 11. “Congress, in FLPMA, did not give the BLM any discretion to cut the public out of these management and execution issues.” *Id.* at 12. The final decision closing the case reiterates these findings. *WWP v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1314, 1316 (D. Idaho 2008). No appeal from that decision was taken. We question Judge Pearlstein’s efforts to draw guidance from regulations that were not intended to go into effect until 6 years after the events of the summer of 2000, especially since those regulations had been enjoined at the time he prepared his decision.

As we stated earlier in this opinion, BLM was in no position to authorize TNR for the summer of 2000 because there was no existing EA upon which a TNR authorization could be based and, without such an EA, the necessary review typically took several months. This Board has consistently recognized that BLM cannot properly be blamed for an applicant's failure to file an application sufficiently in advance of the time when the authorization is needed to provide adequate time for processing it. See *ATP Oil & Gas Corporation*, 173 IBLA 250, 263-64 (2008); *Lario Oil and Gas Company*, 92 IBLA 46, 53 (1986); *Jones-O'Brien, Inc.*, 85 I.D. 89, 96-97 (1978). As indicated earlier, compliance with NEPA is not merely a "policy" that BLM has adopted for TNR but a requirement of law to which BLM must adhere. Indeed, one Court has chastised a different BLM office for issuing TNR permits "without complying with NEPA or FLPMA." *Western Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1225 (D. Idaho 2005). Although Judge Pearlstein recognized that there was no categorical exclusion in effect for TNR at the time of the Holmgrens' application or at the time of his decision, see Decision at 75 n.14,³⁷ he nevertheless faulted BLM for being unwilling to short-circuit its NEPA obligations in this case.

The fact that BLM may not have issued an "appealable" decision on TNR is irrelevant to the mitigation issue.³⁸ As we stated earlier, BLM had no choice but to require the Holmgrens to adhere to the AMP until an amendment could be processed.

The same analysis underpins our consideration of Judge Pearlstein's finding that BLM erred in failing to issue an appealable decision with respect to the Holmgrens' request to amend the AMP. The question is whether it was unreasonable for BLM to discontinue its consideration of the Holmgrens' request after November of 2000. Given that the Holmgrens had taken the position that BLM had no authority to regulate grazing in the PTMA, we find that BLM did not act unreasonably in waiting for that issue to be resolved before taking further action.³⁹

³⁷ In note 14 of his Decision, Judge Pearlstein recognized that it was not until Jan. 25, 2006, that a categorical exclusion pertaining to TNR had even been *proposed*, see 71 Fed. Reg. 4159, yet he faulted BLM for not acting as if one were already in effect in 2000.

³⁸ Although BLM may have been able to issue an appealable decision to *deny* an application without preparing an EA, see, e.g., *Bear River Development Corporation*, 157 IBLA 37, 48-50 (2002), BLM could not have *granted* the Holmgrens' application without a NEPA analysis.

³⁹ The Holmgrens' failure to comply with the AMP during the review process, despite their agreement to do so at the Apr. 26, 2000, meeting, further underscores the reasonableness of BLM's deferral of the processing of their AMP amendment.

Although Judge Pearlstein faulted BLM for not limiting wild horses to the AML set in the FMUD, that failure has no relevance here. BLM's inability to remove excess wild horses in no way affects the requirement that the Holmgrens adhere to the AMP while an amendment is being processed, or the nature of their trespass in failing to do so.

We agree with BLM that the rates for willful and repeated willful trespasses should be at the rates set out in BLM's decisions, but this does not mean that those decisions can be automatically affirmed. In certain cases, Judge Pearlstein found that the evidence did not support the number of AUMs charged by BLM. He also declined to apply the willful or repeated willful trespass rates for the consumption of AUMs authorized under the AMP because the annual grazing application forms BLM had sent the Holmgrens had expired. We agree with both those conclusions and with his revision of some of the appealed decisions to conform to those findings.

No revision is required for BLM's decision of June 22, 2000, charging \$4,912.72 in administrative costs and \$5,220.00 in damages for willful trespass, totaling \$10,132.72.

BLM's February 7, 2002, decision charged 1,657 AUMs repeated willful trespass, but Judge Pearlstein found that the evidence supported a finding of only 98 AUMs. At the repeated willful rate of \$27, the Holmgrens must pay \$2,646.00 in damages plus \$7,881.26 in administrative fees for a total of \$10,527.26.

As noted above, BLM's January 2, 2004, decision had several components. We modify Judge Pearlstein's decision and find no error in BLM's decision with respect to grazing bill R41032 for \$55,298.04. We agree with Judge Pearlstein that the Holmgrens cannot be required to pay damages at trespass rates for failing to execute an expired form, and affirm his decision to charge rates applicable to authorized use for the AUMs authorized under the AMP.⁴⁰ As stated earlier, he determined that the 1,881 AUMs reported by the Holmgrens plus the 458 AUMs consumed during March and 330 of the AUMs consumed from April 1 to June 6 did not exceed the use authorized by the AMP. The remaining 73 AUMs are properly charged at the repeated willful rate of \$34.50, making the Holmgrens responsible for \$6,272.13. The total due for the January 2, 2004, decision is \$61,570.17. Combined with the damages from the prior decisions, the total amount of trespass damages due is \$82,230.15.

⁴⁰ Although Judge Pearlstein applied a rate of \$1.50 per AUM for all such use, we apply the established grazing fee of \$1.43 for use in 2002 and \$1.35 for use in 2003. See BLM SOR, Attachment A.

[4] We finally turn to Judge Pearlstein's decision to partially suspend the Holmgrens' use instead of cancelling their permit. BLM argues that Judge Pearlstein improperly reduced the penalty imposed under 43 C.F.R. § 4170.1-1 from cancellation of the Holmgrens' permit to a 20 percent suspension of authorized AUMs for 5 years.

Departmental regulation 43 C.F.R. § 4140.1(b) provides for the imposition of civil penalties under 43 C.F.R. § 4171.1 when privately owned cattle graze on the public lands "[w]ithout a permit" or "[i]n an area or at a time different than that authorized." Subsection (b) of 43 C.F.R. § 4170.1-1 provides:

The authorized officer shall suspend the grazing use authorized under a grazing permit, in whole or in part, or shall cancel a grazing permit or lease and grazing preference, in whole or in part, under subpart 4160 of this title for repeated willful violation by a permittee or lessee of § 4140.1(b)(1) of this title.

Thus, BLM is *required* to suspend or cancel grazing privileges in the case of repeated willful trespass. *Granite Trust Organization v. BLM*, 169 IBLA 237, 248 (2006); *BLM v. Burghardt Co.*, 138 IBLA 365, 369 (1997).

BLM considers the suspension ordered by Judge Pearlstein a meaningless penalty "because there is no indication that Appellants have sufficient livestock to even reach the 6320 AUMs represented by the temporary suspension." BLM SOR at 17. BLM points to our decision in *Eldon Brinkerhoff*, 24 IBLA at 337, 83 I.D. at 190, where we recognized that the Department has limited severe reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass. In *BLM v. Burghardt Co.*, 138 IBLA at 372, we stated that the objective of imposing a sanction is to reform a permittee's grazing practices and that a grazier's repetition of a trespass can establish that lesser sanctions were insufficient to reform his behavior. Given the Holmgrens' total refusal to acknowledge BLM's authority to manage grazing in the PTMA, BLM asserts that a temporary suspension "cannot resolve the fundamental intractability of a permittee who refuses to comply with federal law and regulation over a sustained period of time." BLM SOR at 19.

Judge Pearlstein's reduction of the penalty based on mitigating or extenuating circumstances appears to be driven by his sympathy for the Holmgrens' plight and by BLM's failure to control excess wild horses which may have consumed more forage during the summer period than the Holmgrens' trespassing cattle. He also reproves BLM for never having considered the Holmgrens' request for a change in the grazing

system, especially during the period from 1998 to 2000. Decision at 63, 97-98. As noted earlier, his “overriding purpose” was to “find a resolution that will allow the Holmgrens a reasonable chance to retain their permit” Decision at 98.

As BLM points out, the 20 percent suspension ordered by Judge Pearlstein is virtually meaningless. As stated above, severe reduction or cancellation of a permittee’s grazing privileges is appropriate where (1) the trespasses were both willful and repeated; (2) they involve fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they involve a failure to take prompt remedial action upon notification of the trespass. *Eldon Brinkerhoff*, 24 IBLA at 337, 83 I.D. at 190. All of those factors are present in this case. If the objective of imposing a sanction is to reform a permittee’s grazing practices and a grazier’s repetition of a trespass can establish that lesser sanctions were insufficient to reform his behavior, *see BLM v. Burghardt Co.*, 138 IBLA at 372, it is difficult to find that anything less than cancellation is warranted when the *Brinkerhoff* conditions are met and the grazier takes the position that BLM has no authority to regulate grazing in the allotment where the trespasses are occurring. *See also Granite Trust Organization v. BLM*, 169 IBLA at 256-67. Because BLM properly cancelled the Holmgrens’ permit, we reverse Judge Pearlstein’s decision suspending it.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part, affirmed as modified in part, and reversed in part.

_____/s/
Sara B. Greenberg
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge