

Editor's note: Reconsideration denied by order dated Sept. 2, 1975

BOYD L. MARSING

IBLA 74-99

December 30, 1974

Appeal from decision of Administrative Law Judge Rudolph M. Steiner, dismissing an appeal from the decision of a District Manager establishing grazing privileges.

Reversed and remanded.

1. Administrative Procedure: Generally -- Administrative Procedure: Adjudication -- Administrative Procedure: Decisions -- Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Appeals

On appeal from review of an initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. 5 U.S.C. § 557(b) (1970). This Department has prescribed the rule that no adjudication of grazing privileges will be set aside on appeal if it appears that it is reasonable and that it represents substantial compliance with the provisions of the Federal Range Code, 43 CFR, Part 4110. 43 CFR 4.478(b). Where such an adjudication fails to satisfy regulatory criteria, it will be set aside.

2. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Apportionment of Federal Range

Federal range agreements between private parties are generally construed as contracts, but cannot abrogate the sole responsibility of the Bureau of Land

Management in establishing grazing capacity or the season of use for the Federal range. Such agreements will be followed where practicable, if the division is in substantial conformity with the parties' respective grazing permit qualifications and if the agreement is reduced to writing and approved by the District Manager. 43 CFR 4111.3-2(c).

APPEARANCES: Milton A. Oman, Esq., Oman, McLachlan & Cowan, Salt Lake City, Utah, for appellant. Reid W. Nielson, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for appellee Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Boyd L. Marsing has appealed 1/ from a decision of Administrative Law Judge Rudolph M. Steiner, dated July 27, 1973, which dismissed appellant's appeal from a decision of the Price District Manager, Bureau of Land Management (BLM), which had rejected his application for a license to graze sheep in the Coal Creek Allotment from April 16, 1971, to June 30, 1971.

The District Manager's decision concurred with the Advisory Board of the Price Grazing District Number 7, which recommended that appellant, during the 1970-71 grazing season, be allowed 342 AUMs of use within the period November 1, 1970, to March 15, 1971. The District Manager also accepted the Advisory Board's recommendation that a grazing system be established for the Coal Creek Allotment, Coal Creek Unit. This system would allow appellant the winter use of the allotment alternately on the two pastures into which the allotment is divided.

The District Manager, after stating that more intensive management is necessary in the future, declared that

1/ Appellee suggests in its brief that the appeal is subject to summary dismissal. The Judge's decision was served on Oman on August 6, 1973. On September 10, 1973, appellant filed a notice of appeal certifying that on September 4, 1973, he had mailed copies thereof to appellee's and intervenors' counsel. Appellee's counsel received his copy on September 6, 1973. We make a favorable finding for appellant under 43 CFR 4.401, i.e., that the notice of appeal "was transmitted or probably transmitted to the office in which the filing is required, before the end of the period in which it was required to be filed."

* * * The coal Creek Allotment must be managed through a rotation grazing system rather than by dividing the area into individual allotments in order to protect the Government's investment and maximize benefits to all users.

Pursuant to the regulations, 43 CFR 4115.2-5 and 43 CFR 4.470, appellant appealed from the District Manager's decision, and requested a hearing. At the hearing before Judge Steiner two issues were developed.

- a. Whether rejection of appellant's application for spring use was arbitrary and capricious.
- b. Whether appellant should have a private allotment.

The Administrative Law Judge discussed an agreement executed in 1965 by the users of the Coal Creek Allotment (which included appellant) and the Bureau of Land Management, the pertinent parts of which are discussed *infra*. The Judge also noted the extensive questioning at the hearing of the District Manager, an independent range consultant, appellant himself, and the Area Manager. An allotment agreement executed by appellant's predecessor in interest was introduced; appellant testified to his expenditures and prior use. The Area Manager testified to the reasons for denying appellant a private allotment.

Then, after discussing the applicable regulations and previous cases dealing with allotment agreements and the extent of discretion vested in the Bureau of Land Management, the Judge held that the District Manager was not bound by the 1965 agreement, nor was his decision denying a private allotment arbitrary or capricious. In support of this latter finding, the Judge determined that no positive evidence showed that appellant had been denied any of the grazing rights to which he was entitled.

Before turning to the substantive arguments raised by appellant, we must discuss a threshold issue. The Bureau of Land Management, in response to this appeal, argues that the sole issue before us is whether the decision of the Administrative Law Judge is supported by substantial evidence and is a correct application of the law and regulations to the evidence of record.

[1] It is true that this Board has ruled that local officials have the discretion to allocate seasons of use, and their decision, if reasonable and based on sufficient evidence, will not be changed on appeal. Mildred Carnahan, 10 IBLA 150, 155 (1973). However, where the decision of a District Manager is arbitrary or capricious,

i.e., unreasonable or with no rational basis, it will be overruled by this Board. United States v. Maher, 5 IBLA 209, 217, 79 I.D. 109, 113 (1972). And even if it is not, the principle of intra-agency review must be re-emphasized, for " * * * [o]ur review is not limited to determining simply whether administrative action at the lower level is unreasonable, arbitrary or capricious." Id. An administrative grazing decision, although superficially reasonable, may cause a grazing user severe economic damage to the point where the decision may be rendered unreasonable thereby. Id. at 221, 79 I.D. at 115; see 43 CFR 4.478(b).

Section 8 of the Administrative Procedure Act, 5 U.S.C. § 557(b) (1970), provides in part that:

* * * [o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

This Department has adopted such a "rule." 43 CFR 4.478(b) provides:

No adjudication of grazing privileges will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4110 of this title.

See Midland Livestock Co., 10 IBLA 389 (1973); Lloyd Pewonka, 8 IBLA 303 (1972).

The BLM has argued in its brief to this Board that one seeking grazing privileges has the burden of proof that the decision of a District Manager is improper. United States v. Maher, supra at 219, 79 I.D. at 114; E. L. Cord, 64 I.D. 232, 244 (1957). In grazing hearings an appellant must sustain this burden of proof with "substantial evidence." Id. at 243. This quantum of probative weight was enunciated in the Administrative Procedure Act, 43 U.S.C. § 501 et seq. (1970), and defined in Willapoint Oysters v. Ewing, 174 F.2d 676, 690 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949). There it was said that "substantial evidence" is " * * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

As already noted, the issues at the hearing were two. Taking the latter one first, i.e., whether appellant is entitled to an

individual allotment, segregated in space, as opposed to time, from the other allottees, we turn our attention to an agreement made in 1965 (Exh. A).

The policy regarding allotment agreements, as established in Departmental decisions and the Federal Range Code, which was incorporated into the Code of Federal Regulations, *infra*, can be traced to Dulcie S. Williams, IGD 280 (1942), Bolten & Davis Livestock Co., IGD 325, 58 I.D. 193 (1942), and Wayne M. Whitehill, IGD 486 (1947). In the first case, where the Williamses refused to abide by an agreement as to the location of a common boundary with another party, it was stated that "[t]o all intents and purposes range-line or allotment boundary agreements are contracts." Dulcie S. Williams, *supra* at 281.

This "contract" theory was supported by the fact that such agreements were entered by two or more parties and their mutual promises to abide by the division (which established private allotments) initiated the mutual rights and duties necessary to enforcement of the contract. However, this analysis was qualified by two exceptions: if the agreement was consummated under conditions warranting rescission; or if "it is incompatible with the proper administration of the Federal range." *Id.* 2/

In Wayne M. Whitehill, *supra* at 489, further illumination was directed at these agreements.

Under range conditions as they actually exist on the public lands, range-line agreements have long been a natural and regular basis for division of the range between livestock operators. These range divisions do not create any vested rights to the continued use of the Federal range in accordance with such private agreements, no matter how long such a division has previously existed; and despite any such agreements on previous use, the Bureau of Land Management may, if deemed necessary in the public interest, close any area to grazing or modify the allotments of a permittee or licensee, or disregard these agreements if they usurp the Bureau's function of adjudicating the rights of allottees as to numbers of livestock to be permitted, time of grazing, and other related matters. (Emphasis supplied.)

2/ After the Department examined the record for evidence warranting rescission, and found none, it required the Williamses to abide by the agreement.

After noting the Departmental policy of cooperating with the livestock industry and the legislative command, in section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), to "adequately safeguard grazing privileges recognized and acknowledged," the Whitehill decision set forth more fully the rule laid down in the Williams case, which we have discussed. As was stated,

* * * Unless the public interest or the needs of governmental administration require modification of the boundary line or withdrawal of some or all of the lands from a particular permittee or licensee, these range-line agreements are generally recognized by this Department as effective between the parties, unless it is clearly shown that force or coercion was used in effecting the range-line agreement, or that rescission of the contract is warranted, or that radical changes have occurred which merit a reconsideration of the range-line, or the parties themselves agree on a modification.

Wayne M. Whitehill, supra at 490. (Emphasis supplied.)

The Departmental policy regarding allotment agreements was also established in the Federal Range Code, incorporated originally into the Code of Federal Regulations as 43 CFR Part 501 (1938). There it was stated that

* * * Allotments of Federal range will be made to licensees or permittees when conditions warrant and divisions of the range by agreement or by former practice will be respected and followed where practicable.

43 CFR 501.6(c) (1938); 43 CFR 501.6(d) (1942). (Emphasis supplied.)

At present, it is provided that:

Allotments of Federal range will be made to licensees or permittees when conditions warrant. Division of the range by agreement or former practice will be followed where practicable, provided such division [**11] is in substantial conformity with the qualifications for grazing privileges of the respective applicants and the agreement is reduced to writing and approved by the District Manager.

43 CFR 4111.3-2(c). (Emphasis supplied.) This provision was in effect on September 23, 1965, when the District Manager signed and approved the range agreement (Exh. A).

In Bolten & Davis Livestock Co., IGD 329, 58 I.D. 193 (1942), the original regulation was found insufficient as a rationale for substituting such agreements for the normal adjudication of grazing license applications. In other words, where it was not practicable to respect allotment or range boundary agreements, they would not be enforced. This result was found to be required by the fact that the Taylor Grazing Act was more than "a mere empty gesture which could be set aside at the whims of the licensees involved," and the fact that to let a permittee bind the signing parties or the Grazing Service to such an agreement would in effect permit him to determine the extent of his license, something not provided for in the regulations. Id. at 330, 58 I.D. at 198-99.

Ten years later, a case arose where an agreement was ambiguous as to whether or not an exclusive area had been set aside for a livestock operator. After noting the ambiguity, it was found that the agreement was

* * * clearly subordinate to the policies and technical requirements of the Bureau of Land Management in its range management program, and * * * did not confer on the appellant a vested right as against the Government to graze the land in his allotment as he saw fit.

Ira Hatch, IGD 575, 577 (1952).

The rationale applied to the earlier version of the Federal Range Code is equally applicable to the regulation in its present form. But before the question of practicability is considered here, we must determine whether the 1965 agreement presently in issue is an allotment or range line agreement. Thus we must look to its terms.

THE AGREEMENT

[Written additions to the printed agreement are included in brackets.]

This constitutes agreement amongst the several range livestock licensees and the Bureau of Land Management in the management, improvement, development, and rehabilitation of those Federal lands known as the Coal Creek Allotment.

* * * * *

The potential forage production of this area under proper management, development, and improvement, will eventually allow full activation of the total qualifications, [dating to and including the 1961 25% reduction]. The range licensees endorse the planned program of

rehabilitation and desire to cooperate to the extent possible within their economic limits.

Therefore, the range licensees and the Bureau of Land Management agree to the following:

Range Users -

1. Will accept and cooperate on the following range use adjustment program and so regulate their livestock operations as to facilitate the rapid improvement of the range land.

a. Only sixty (60) percent of the present privileges will be activated effective January 15, 1965, for a period of two grazing years, on a proportionate basis for each operation. The remaining forty (40) percent will be carried as suspended non-use. The grazing season is to be established as April 16 to May 31 and October 16 to October 31 each year for cattle; and January 15 to February 28 for sheep. [These dates can be flexible to the extent that BLM & range users would agree to an on and off date and the time of use is proper for good range management as determined by cooperative inspection of the area.]

[b. After the five year rehabilitation program has been completed the AUM's will be determined and divided proportionately to each range user. The sheep will be divided from the cattle into a private allotment [sic]. Also when practicle [sic] the larger cattle permits will be divided into private allotments, and the smaller permits will be grouped together to form another allotment.]

* * * * *

3. Will cooperate with the BLM in gathering and providing information for evaluating the range use of the allotment. The range users will also work with the BLM in proposing and carrying out a range management plan to be placed into effect at the end of the 5-year period.

* * * * *

Upon total rehabilitation of the area, a management plan will be developed by the range users and the Bureau of Land Management to define management practices to be used and the plan for future operations. In the interim period, a temporary range management plan (See Attachment B) will be used.

* * * * *

RECOMMENDED FOR APPROVAL:

Ellis Wild [signed]
Advisory Board Chairman

September 21, 1965
Date

AGREEMENT APPROVED: Bureau of Land Management by:

Lorin J. Welker
District Manager

September 23, 1965
Date

Attachment B

SHORT-TERM RANGE MANAGEMENT PLAN
Coal Creek Allotment
Price Resource Conservation Area

* * * D. Action Recommended:

* * * 2. Season of use

(a) For the next two years (July 1, 1964, to July 1, 1966), a common spring use of April 16 to May 31 and a fall use of October 16 to October 31 will be established for all cattle operators. A season of January 16 to February 28 will be established for the sheep operators.

(b) After July 1, 1966, and if an additional 18 percent adjustment is necessary, the season of use for cattle will be further adjusted to include only the spring season of April 16 to May 31. The season for sheep use would be adjusted to February 1 to February 28.

(c) Thereafter, the spring season of use for cattle will remain the same. Fall use may be reinstated upon completion and success of rehabilitation practices. Sheep season of use will ultimately be confined to January and February of each year.

Although the purpose of this agreement was rehabilitation of the Coal Creek Allotment, it appears to be within the category of documents classified as allotment agreements. 3/

3/ The BLM Manual, at 4111.32F3, states:

"3. Allotment and Range Line Agreements. It is the practice of the Bureau to establish allotments by agreement based on an equitable

[2] On appeal to this Board, appellant urges that the cases of G. L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1962), and United States v. Alexander, 115 F. Supp. 240 (S.D. Cal. 1953), are authority for the general rule that when the federal government enters a contract its position is similar to that of a private party to a contract in regards to rights and duties thereunder. However, the agreement at issue herein was a contract to which the Government did not give its unqualified consent in that the contract was subject to regulatory limitations.

fn. 3 cont.

adjudication or apportionment of the Federal range. The district manager will seek the agreement of the range users in a given area to the establishment of individual and group allotment boundaries. All such agreements shall be reduced to writing and signed by the affected range users and the district manager. Allotment proposals and agreements should be referred to the district advisory board for recommendation (43 CFR 4111.3-2(c) and 4114.1-5. See Appendix 2 for a sample allotment agreement and Appendix 3 for a sample range line agreement. Failure on the part of the range users to reach full agreement on allotments or range lines will not be reason to delay indefinitely their establishment. If there is substantial agreement and/or in the judgment of the district manager, the Federal range would be benefited thereby, he may render a decision creating such allotments or range lines subject to the right of appeal (43 CFR 4115.2-3)."

The manual provides the following as a sample allotment agreement:

"Sample Allotment Agreement

Allotment	District
Unit	Date

I. GENERAL CONDITIONS:

(I) (We), the Undersigned, hereby agree that the boundaries of (my) (our) Allotment will be described on the reverse side of this agreement.

(I) (We) stipulate that the Federal range area within this described allotment satisfies (my) (our combined) apportioned share of the available Federal range forage within the Grazing Unit of the District; with the exception of any other allotments in which (I) (any of us) have grazing use in this Unit. Such other allotments are listed under Part III of this Agreement.

It is also agreed that in the event of the increase or diminution of the Federal range forage within this allotment for any past, present, or future cause whatsoever, the resultant adjustment of grazing privileges will be made within this allotment and will not affect grazing privileges in adjoining allotments, or be a cause for the amendment of this agreement, or a readjudication of the range. In the event substantial forage is developed in

Nonetheless, recent decisions of this Board strongly suggest that an agreement, such as that at issue, is a contract binding on all the signatories thereto. For example, in Evart Jensen, 5 IBLA 96, 99 (1972), this Board, citing Dulcie S. Williams, supra, said, "Generally, valid range-line or allotment boundary agreements have been treated by the Department [of the Interior] as enforceable contracts."

A more recent case, W. Dalton LaRue, Sr., 9 IBLA 208 (1973), involved a cooperative agreement to build a division fence over public land, pursuant to section 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1970). The BLM approved the agreement and furnished fencing materials and bulldozing. The private parties involved furnished the labor. Later, in the proceedings which resulted in an appeal to this Board, one of the private parties sought to disregard the agreement as to the situs of the fence line, on the ground that the agreement was a contract and was induced by fraud.

fn. 3 cont.

excess of the present base property qualifications, the Bureau may impose adjustments in the allotments in accordance with policies and procedures set forth in BLM Manual 4112.1. This agreement shall be binding on heirs or assignees of all licensees or permittees who are party to this agreement unless otherwise altered or changed by the mutual consent of the undersigned licensees or permittees or their heirs or assignees, with the concurrence of the Bureau of Land Management.

II. SPECIAL CONDITIONS:

III. Other allotments within the Grazing Unit in which any of the undersigned have grazing use: The Allotment includes all of the Federal range within the following boundary:

(I) (We) hereby agree:

Name Date

Approved:

Title

Date"

In that case, the Board agreed with appellant that " * * * range agreements are 'to all intents and purposes' contracts, and thus must comply with general legal principles applicable to contracts * * *." Id. at 213, citing Wayne M. Whitehill, supra, and Dulcie S. Williams, supra.

None of the foregoing cases relates to a situation where the Bureau of Land Management found enforcement of the agreement not "practicable." 43 CFR 4111.3-2(c) provides:

(c) Allotments. Allotments of Federal range will be made to licensees or permittees when conditions warrant. Division of the range by agreement or former practice will be followed where practicable, provided such division is in substantial conformity with the qualifications for grazing privileges of the respective applicants and the agreement is reduced to writing and approved by the District Manager.

Here the issue rests on the provision written into the "Agreement" which provides for dividing the sheep from the cattle by means of a private allotment. A similar case, likewise presenting "a difficult case" "by a poorly worded agreement" was cited by the BLM in their appeal brief. Buffalo Creek Cooperative State Grazing District v. Tysk, 290 F. Supp. 227 (D. Mont. 1968), involved a "Federal-State Cooperative Grazing Districts Agreement," which was not expressly authorized either in the Taylor Grazing Act, 43 U.S.C. § 315 (1970), or the regulations. Id. at 232.

The District Court found that a plausible argument could be made by focusing on the regulation authorizing cooperative agreements, 43 CFR 4114.4-4, and the clause in said agreement which stated that grazing capacity would be set "in cooperation with the State District." However, the Court found that a better construction of the agreement as a whole along with the Taylor Grazing Act, supra, and the regulations, gave the BLM the sole responsibility for establishing grazing capacity.

In the case at bar, the BLM has the sole responsibility, pursuant to the Taylor Grazing Act, supra, and the regulations, 43 CFR Part 4110, to do several things involving the Federal range. Regardless of any agreements between the BLM and a cooperative grazing district, the BLM has the responsibility and the right to establish grazing capacities of the Federal range. Lloyd Pewonka, supra; United States v. Johnson, 8 IBLA 68 (1972). The District Manager determines the season of use for the Federal range. Mildred Carnahan, supra. The BLM must approve the changing of a range-line agreement where the private parties mutually consent to such a change. Cf.

Evart Jensen, *supra*. The BLM has the sole responsibility for selection of particular areas of the Federal range for permittees or licensees. Delbert Allan, 2 IBLA 35, 78 I.D. 55 (1971); Thomas Ormachea, 73 I.D. 339 (1966). The BLM is fully empowered to determine the use which a livestock operator should be allowed, irrespective of agreements. Cf. Zack P. Mathes, A-23698 (September 30, 1943). ^{4/} Furthermore, a permittee has no vested right to the use of any discrete area on the federal range, and the allocation of areas is within the ambit of the discretion of the BLM. Max Tanner, 2 IBLA 183, 204-205, 78 I.D. 134, 143 (1971).

Moreover, as a general proposition, "[t]he Bureau of Land Management may make adjustments in licenses and permits at any time when necessary to comply with the Federal Range Code for Grazing Districts." 43 CFR 4115.1(e)(13)(ii). Benny Lucero, 8 IBLA 46, 49 (1972), citing Malvin Pedroli, 75 I.D. 63, 69-70 (1968). If an actual allocation or range privileges is so subject to adjustment, it follows that an agreement is also subject to such adjustment.

The Federal Range Code envisages that grazing privileges will be granted in conformity with good range management, and more specifically, for the proper seasons of use and the appropriate maximum period of time for which any licensee or permittee will be allowed to use the Federal range during any one year. See 43 CFR 4111.2-1(a) and 43 CFR 4111.3-1(a).

Thus the prime issue presented by the appeal is whether those grazing privileges sought by appellant under the contract are "practicable" within the ambit of 4111.3-2(c).

The determinations made by officers of the Department of the Interior regarding the Federal range must be affirmed if they have a reasonable basis and represent substantial compliance with the Federal Range Code. See 43 CFR 4.478(b). The degree of economic injury involved is merely one factor in determining the reasonableness of these officers' decision. Midland Livestock Co., *supra*, at 405 (1973); see United States v. Maher, *supra* at 221, 223, 79 I.D. at 115, 117.

^{4/} In Mathes, as in the instant case, a ruling that such agreements are sometimes superfluous should not be " * * * construed as an indication that the Department looks with disfavor upon amicable settlements of disputes * * *." But, as was stated, " * * * it should be borne in mind that at all times the primary responsibility for the adjudication of grazing applications is vested in the district graziers [now District Managers] * * *." Id. at 7.

Appellant assertedly has invested thirty-five to forty thousand dollars in lambing sheds, anticipating a private allotment envisaged by the agreement, and spent approximately ten thousand dollars during the five years he took non-use for supplemental feeds and forage. On the other hand, appellant admitted it was not practical to graze his sheep during the rehabilitation period in the Coal Creek allotment, and it was shown that his predecessor in interest had range privileges which were limited to winter use. Furthermore, appellant, at the time he signed the "agreement" at issue, was only leasing his predecessor's permits and was only taking winter use under them. It must be stressed that appellant's expectation of a private allotment and for grazing privileges during certain periods of time, standing alone, could not vitiate the force of applicable regulations.

Gary L. Hanson, the Bureau of Land Management Area Manager for the lands in issue since about 1964, testified that the long-range grazing plan was designed "to protect the resources which we have in this allotment, in light of the many improvements that we had put into it" (Tr. 331). He also testified that the plan provided for a two-pasture rotation system (Tr. 332), which envisaged sheep grazing in the winter time (Tr. 333). Hanson also mentioned that certain sagebrush in the area had never been treated and there are areas, one of which once contained pinon and juniper cover (Tr. 338), where the sagebrush is coming back into the reseeding (Tr. 336). Included in the objectives of the long-range plan were improvement of the watershed condition by increasing the vegetation on the area, balancing the grass-browse to a ratio of 60% to 40%, production of a sufficient amount of usable forage in the allotment to satisfy the total qualified demand on a sustained basis, and production of sufficient forage to sustain the deer herd in winter (Tr. 341).

Hanson also testified that the operating plan would be evaluated after each complete cycle and if found unsatisfactory would be considered for appropriate changes (Tr. 365, 371). A drastic decrease in the moisture in the area impeded regrowth after livestock grazing (Tr. 366). Since 1964, the Bureau of Land Management has ceased to encourage private allotments, and rotation grazing plans have been adopted to meet range needs (Tr. 369-70).

The implementation of the long range plan, and the actions taken pursuant thereto, involve laudable objectives. As we have indicated earlier, our scope of review is limited to a determination whether the action taken below is reasonable and accords substantially with the Federal Range Code. While, concededly, experts might differ, as indeed they did on the record, as to the worth of the Bureau of Land Management long range plan and its implementation, the test to be applied is not confined to whether

the plan represents better range management, but rather whether the following of the agreement is "practicable." Indeed, even if we were to apply the criterion of better range management, it is questionable whether the decision below could be sustained. In any event "practicable" simply means "feasible in the circumstances." Frey v. Security Ins. Co. of Hartford, 331 F. Supp. 140, 143 (D.Pa. 1971).

The impact of the decision below would be to give the sheep grazier minimal quality forage in contradistinction to the lush forage which would be afforded to the cattle graziers. The record is singularly bereft of any convincing evidence that implementation of the contract would not be "practicable." In all respects the agreement satisfies the criteria of 43 CFR 4111.3-2(c) and therefore must be honored.

We reach this conclusion on the basis that the range agreement obviously envisages that appellant receive consideration no less than that afforded to the other livestock users of the Federal range. Indeed, common fairness alone would impel such a modus operandi. That agreement prescribes a private allotment for Marsing, and inferentially, his right to utilize the forage in its peak condition. Granting Marsing the private allotment would best accomplish the purpose of the agreement in a "practicable" manner.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for appropriate action consistent herewith.

Frederick Fishman
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING, CONCURRING:

I concur in Judge Fishman's conclusion that the commitment to provide a separate allotment for the sheep must be honored. In my view the decisions of the District Manager and the Administrative Law Judge discriminate unfairly against the appellant and in favor of the other operators who have permits in the Coal Creek Unit, and should be reversed for that reason alone. Further, I regard the Government to be bound contractually. It is also apparent to me that this case is one of those relatively rare instances wherein equitable estoppel against the Government will lie.

The essential facts are not in dispute. In 1965, and for many years prior thereto, the range in the Coal Creek Unit was in poor condition, and deteriorating. All permittees had taken a 25% reduction in use in 1961 when a new management plan was effectuated. Prior to that date there had been some sheep grazing on the unit during the spring and summer months. Although this sheep use dated back to the 1930's, in 1961 sheep were limited to use of the range during the winter months while the cattle permittees were allowed grazing during the spring and fall.

In 1964, in conjunction with another 40% reduction in the permittee's use, a new management plan was proposed whereby the Bureau would undertake an extensive five-year program of range rehabilitation. This involved the elimination of much of the sagebrush, pinon and juniper, and reseeding with crested wheat grass. In addition the plan called for certain fencing and other physical range improvements. This plan was reduced to writing, and submitted to the stockmen at a series of meetings. Incident to the plan was a requirement that the permittees either forego use of their grazing privileges on the unit voluntarily for five years or contribute financially to the cost of the improvements. Each permittee was asked to agree to the plan and to signify his agreement by signing it.

The appellant, the only sheep operator on the unit, refused to agree unless a provision was inserted which would create an individual allotment for sheep use. The District Manager agreed, and the following was written into the agreement in longhand:

- b. After the five year rehabilitation program has been completed the AUM's will be determined and divided proportionately to each range user. The sheep will be divided from the cattle into a private allotment. Also when practical the larger cattle permits will be divided into private allotments, and the smaller permits will be grouped together to form another allotment. (Emphasis supplied.)

The appellant and each of the other permittees, all cattlemen, agreed to this provision by placing their initials in the space immediately under it (the provision being written in separately on the back of one of the printed pages). They each then signed the agreement, signifying that they had accepted the plan as a whole, and each indicated by his signature whether or not he would take total non-use for the five-year period. These signatures were appended at various times from June 1964 to October 1965. The plan was recommended for approval by the Chairman of the District Advisory Board, who signed it on September 21, 1965, and the agreement was finally approved by the Bureau of Land Management and signed by the then District Manager on September 23, 1965.

The range rehabilitation program went forward to completion and was extremely successful, increasing the quantity and quality of the available forage vastly, and converting the range to one in which the highly nutritious crested wheat grass became the principal forage plant on the 9000 acres treated.

During the entire five-year period the appellant complied with the agreement by taking total nonuse of his grazing privileges in the unit. During this period he testified that he was obliged to spend \$10,000 for supplemental feed. The range was benefited by his keeping his sheep off while the newly seeded grass became established, and the success of the program was thereby advanced.

Appellant alleges that in reliance upon the Bureau's commitment to create a separate sheep allotment at the end of the five years, he also disposed of other range outside the unit where his spring lambing operations were conducted, and purchased a small irrigated farm within about two miles of his proposed Coal Creek allotment, where he spent between \$35,000 and \$40,000 in the construction of lambing sheds. This, he said, was in anticipation that when he got his individual allotment he would have good spring grazing nearby for his pregnant ewes and those with nursing lambs.

However, the new District Manager refused to abide by the 1965 agreement to create a separate allotment for sheep, and refused also to permit any spring or fall grazing by sheep on the allotment. Instead, the appellant was relegated to a grazing season between November 1 and March 15. There were two reasons given for this action. First, it was said that there has been a change of view within the Bureau since the agreement was made; whereas then the policy was to encourage the creation of separate allotments, the policy now is to manage larger common allotments, although evidence at the hearing tended to show that this new policy is not being widely implemented. The second and most compelling reason is that the Price District Manager and the Area Manager view the appellant's sheep as a management tool which they can use to retard the reinvasion of undesirable species of sagebrush in the treated area. The theory

is that sheep will nibble on sage and, when the sage is frozen, leaves will be knocked off the brush by the sheeps' bodies as they forage. The sagebrush thus partially defoliated will not propagate as effectively as it would otherwise. The sheep would be encouraged to consume more of the sage than they would ordinarily by putting them on the range in the winter when other browse is not so abundant or available.

Expert testimony was given to the effect that while sheep do nibble on big sage (the species which BLM most wants to control), they cannot digest large quantities, and this inhibits the amount they will eat unless deprived of other forage in adequate amounts. Testimony also established that, "After crested wheat grass is headed out and seeded, it became tough and less palatable, more particularly to sheep than cattle -- it becomes woody, rank, and the nutritive value diminishes very greatly." Also, "* * * the value of crested wheat grass as winter forage as compared to spring forage, it is practically nil in comparison with using it as a spring forage * * *" (Tr. 145). Various estimates were made by the witnesses as to the history and amount of snowfall on this range, but there seems to be agreement that the unit is subject to heavy snows on occasion and that in some years the snowpack has made the north pasture in the unit unusable, while in other years it has reduced the availability of winter forage. The Area Manager denies that this would constitute a serious problem for appellant because he will allow the appellant to move into the south pasture when the snowpack gets too severe. The elevation is from 5500 to 7000 feet.

Appellant argues that he doesn't need or want winter range, that he already has sufficient winter range for his sheep outside the unit.

He makes the further argument that the great improvement in the productivity of the allotment, to which his five years of voluntary nonuse contributed, will enure exclusively to the benefit of all of the other users, while he is expected to continue to contribute to the enhanced productivity by having his stock used as a management tool for the benefit of the others and to assume a unique disadvantage with no corresponding benefit.

The evidence is inconclusive to support the District Manager's contention that the utilization of the range by sheep during the winter season will benefit the range to a significant extent by retarding the rate of sagebrush reinvasion of the area (Tr. 394). But, conceding that such use of sheep may be a good management tool, it is a discriminatory practice to utilize that tool without regard for the fact that the sheep and their owner are being denied the quality forage that the cattle operators are getting at the appellant's expense. In effect, it is saying to the appellant, "It's a good

thing for the range to put sheep out in the winter and, since you're the only sheep operator we have, we will put your sheep out then, and never mind that you alone will have to take the sparsest, least nutritive, and least palatable forage the range has to offer. Forget that you alone have to face the probability of heavy snow conditions. It's a benefit to the range, and the other users, the cattlemen, can reap those benefits at your expense.

The Class I qualifications of Marsing is of equal dignity as the Class I qualifications of the other users. In the words of Thackaberry, a witness for the appellant, "He should be treated on an equal basis regardless of whether he runs sheep or cattle. His AUM's are just as good as anybody else [sic]. He should be granted forage of the same quality and the same season of use as anybody else in the Coal Creek allotment." (Tr. 151). Thackaberry, a range management expert, also testified that any improvement to the range resulting from winter use by appellant's sheep will probably be defeated by heavy cattle use of the same range during the spring by the other operators in the allotment (Tr. 181).

In my opinion it is patently ridiculous to assert that as long as appellant's sheep can find enough inferior forage to sustain life appellant is getting all the AUM's he is entitled to, while all his fellow permittees' cattle are provided with lush grazing in the spring and fall.

The Area Manager testified that it was decided not to give the appellant an individual allotment for the following reasons:

1. Sheep use is required to control the sagebrush which is invading the reseeded areas.
2. An individual allotment would disrupt the historical cattle use of the area.
3. Individual allotments would also have to be established for some of the other users.
4. Rotation grazing management plans could not be implemented on small individual allotments.

(Tr. 368).

I have already discussed the salient reason, number 1, above. Reasons 2, 3 and 4 all concern matters which were, or should have been, well known to the District Manager at the time the agreement was drafted and approved. Moreover, they are not very compelling reasons for abrogating the 1965 agreement, even if we assume that the agreement can be legally abrogated for good cause.

The "historical use" upon which the Area Manager places such great importance really only refers to the "past few years." (Tr. 378). Since there was no sheep grazing at all on the Coal Creek Allotment from 1965 to 1970, he is apparently relying on the period from 1960 to 1965 to establish the historical use of the area as winter range for sheep. Prior to that it was used as a spring range for sheep according to the testimony of John H. Mahleres, a sheepman and a former member of the District Advisory Board. From his testimony and other evidence of record it is my finding that the history of the area indicates more sheep use in spring and summer than in winter.

The Area Manager's argument that if the appellant is given the individual allotment he was promised, other users would also have to be given individual allotments is not well taken. It is interesting to note that his concern for equal treatment seems to run in only one direction. However, that result would not necessarily follow. The agreement to make a private allotment for sheep is couched in absolute, declaratory language, with no ambiguity or equivocation, and a definite time is set for the creation of the allotment. By contrast, the rest of the provision, referring to the creation of individual cattle allotments says that "the larger cattle permits" will be divided "when practical" into private allotments. If it is not practical to do so, it need never be done, regardless of whether or not a separate sheep allotment is created.

The Area Manager's final reason, *i.e.*, that rotation grazing management plans could not be implemented on small individual allotments is irrelevant. It assumes the validity of the preceding reason that if one allotment is created for sheep there must be other private allotments created for cattle. This is not so, nor is it the issue. The issue is limited to a consideration of whether one private allotment should be given to the appellant. The totality of the evidence shows that the balance of the Coal Creek Allotment could be managed on a rotation basis in very much the same way that it is now if a separate sheep allotment was established, and that each of the cattlemen would receive his full entitlement.

The Area Manager testified that the present total Class I demand, sheep and cattle, on the Coal Creek Allotment is 2904 AUM's, but the carrying capacity is actually 4600 AUM's. Forage is going to waste on the allotment because there is insufficient water. In this context it is instructive to note Exhibit B, the Area Manager's report of his meeting with the allottees in an effort to get their agreement to his management plan for the Coal Creek Allotment. The report is dated February 4, 1970.

One fact that did come out in the meeting that may be of benefit in management of the allotment at a later

date (provided things go as we propose) is that Marsing is willing to haul stockwater in areas that are dry and the cattlemen are not. If utilization problems develop and the cattlemen refuse to haul water to remedy this problem, it may be beneficial for the Government to reduce the stocking rate of cattle to what they are actually using and change the sheep winter use to spring use if Marsing is still willing to haul water. This would probably save time-consuming decision and supervision costs. However, I believe the cattlemen should be given first chance to haul water before any other action is taken. (Emphasis supplied.)

As in George Orwell's The Animal Farm, it seems that all animals are equal, but some animals are more equal than others.

It is my opinion that appellant has been unfairly discriminated against, as previously explained. Although this discrimination may not have been deliberately calculated to damage appellant, he nevertheless has been denied equal treatment. The use of appellant's sheep as a management tool, although implemented for the good of the range, is an inadequate reason for forcing the appellant to accept hardship and inferior forage, and for failing to keep the commitment to provide him an individual allotment.

That commitment should be regarded as a contractual obligation. As pointed out in Judge Fishman's opinion, the Department has often held that such agreements are contracts to all intents and purposes. The circumstances under which such an agreement may be abrogated do not obtain in this case. It is not in the public interest to discriminate against one user of a common allotment to the benefit of the others. The agreement was made by BLM and subscribed by all of the users of the allotment, so it cannot be said to usurp the Bureau's function, as might be the case if it were merely an agreement between users, as in Wayne M. Whitehall, IGD 486 (1947). No "radical changes" in the range have occurred, except that it has been greatly improved, and this was anticipated when the agreement was made.

In fact, the present regulation seems to command that the agreement be respected, as it reads:

Allotments of Federal range will be made to licensees or permittees when conditions warrant. Division of the range by agreement or former practice will be followed where practicable, provided such division is in substantial conformity with the qualifications for grazing privileges of the respective applicants and the agreement is reduced to writing and approved by the District Manager. 43 CFR 4111.3-2(c). (Emphasis supplied.)

This provision was in effect on September 23, 1965, when the District Manager signed and approved the range agreement (Exhibit A). It covers precisely the situation with which this appeal is concerned. The only question is whether it is "practicable" to honor the agreement. Every user will get his fair share of nutritive forage if a separate sheep allotment is created, the difference being that appellant will be getting his for the first time. A few of the cattlemen will suffer some inconvenience in that they will be excluded from a portion of the range they used to graze, but there is apparently plenty of forage for everyone, and besides, the cattlemen agreed to this in writing at the beginning. So it can hardly be said to be not "practicable" as to them. It is true that the range will be denied the advantage of the use of appellant's sheep as a "management tool," but that is an advantage which it never should have had under these conditions anyway.

Counsel for the Bureau stated that there was no consideration for the agreement, and that it cannot therefor be treated as a contract. Inasmuch as the commitment was a provision of the overall range rehabilitation project proposal and was negotiated for by the appellant as a condition to securing his agreement, in consequence of which he agreed to forego his grazing privileges on the allotment for five years, it is futile to assert that there was no consideration running from the appellant to both the Government and the other permittees. He gave two promises in exchange for the promise of a separate allotment: (1) to grant his approval to the proposed project, and (2) to forego grazing privileges for five years, both of which were fully executed.

It is clear from the regulation, supra, that the creation of a separate allotment is not unlawful, but rather that it is well within the contemplation of the Taylor Grazing Act and Departmental administrative practice. The regulation likewise establishes beyond question that the District Manager has full authority to enter into written agreements for this purpose, and in fact his approval is required to validate them. Therefore, since the agreement was lawful, the signatories had full authority and capacity to act, the agreement was in written form adequate to satisfy the statute of frauds, and there was consideration given and received, a contract should have resulted, and I maintain that one did.

However, even if it were conclusively established that the Bureau is not bound contractually, I submit that the Government is estopped from refusing to provide appellant the promised individual allotment.

Despite generalized statements in various texts as to the unavailability of estoppel against the Government in matters relating to public lands, United States Supreme Court cases make it quite

clear that this is true only when the Government agent making the representations acts beyond the scope of his authority. Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States 261 U.S. 219, 234 (1923).

A definitive analysis of the operation of estoppel against the Government is contained in the two judicial opinions delivered recently in the case of United States v. Lazy F C Ranch, 324 F. Supp. 698 (1971), aff'd, 481 F.2d. 985 (9th Cir. 1973). The Court of Appeals held that the estoppel doctrine is applicable to the United States where justice and fair play require it, citing Moser v. United States, 341 U.S. 41, 71 (1951), Schuster v. C.I.R., 312 F.2d. 311 (9th Cir. 1962), and Brandt v. Hicckel, 427 F.2d 92 (9th Cir. 1970). The Court held that estoppel will lie in a proper case even if the Government is acting in a sovereign capacity (as distinguished from proprietary), referring to United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), and Pitner v. Federal Crop Insurance Corp., 491 P.2d 1268 (Ida. 1971).

The opinion in the case of United States v. Georgia-Pacific Co., supra, also contains a definitive treatment of the application of estoppel against the United States, together with an extensive collection of authorities. It reiterates the test applied in Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960), which must be satisfied in order to invoke equitable estoppel:

"Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F.2d 520, 525."

United States v. Georgia-Pacific Co., supra at 96. Moreover, the Court held that, "Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules." (Citations omitted). Id.

In the appeal here at issue each element of the foregoing test has been met beyond any possible doubt. The District Manager certainly knew the facts and intended that Marsing should act in accordance with the agreement in reliance thereon. Marsing had a right to believe that the Manager so intended, and Marsing surely didn't know of any facts which would prevent the agreement from being carried out, wherefore he relied upon the representations of the District Manager to his injury. Further, every evidence indicates

that appellant operated in complete good faith. As the Court said in Brandt v. Hickel, *supra*, "administrative regularity must sometimes yield to basic notions of fairness."

As to the cattlemen-intervenors, I can find no basis at all to support their present position. All of them agreed, specifically and in writing that the appellant should be provided an individual allotment. Now they merely assert that they are opposed to it. Their reasons are that they will have less range in the common allotment, that they will be inconvenienced in skirting the fence lines of the private allotment with their cattle, or that they may have to utilize a different area of the common allotment than they previously have. All of these matters should have been quite apparent to them when they made their agreement. Their complaints in no way indicate any severe hardship will result. There is more than ample forage available for all.

A separate allotment for sheep must be created within the Coal Creek Allotment, such allotment to be adequate to provide sufficient forage to annually satisfy appellant's Class I demand to the same extent that the active use of the other permittees could be allowed were water available, and situated so as to make the most reasonable accommodation for the convenience of the common allottees and the appellant. I would further order that he be given a season of use which better comports with his needs, as it certainly would be arbitrary to compel a livestock operator to confine his grazing to winter use on his own allotment where the best forage would be wasted over the balance of the year.

Edward W. Stuebing,
Administrative Judge.

ADMINISTRATIVE JUDGE RITVO, DISSENTING

As the majority decision points out, the Board's scope of review in grazing cases is restricted. We must affirm a decision of the district manager if it is reasonable and represents a substantial compliance with the provisions of the grazing regulations.

If this were all there were to the case there would be little doubt but that the manager's decision would be affirmed. There is, however, an added factor -- the provision of the regulations dealing with range agreements, which provides that range agreements will be followed "where practicable." If it is assumed that the document signed by Marsing and the other permittees is a range agreement, we must then decide if it is "practicable" to follow it. The initial decision, of course, must be made by the district range manager, subject to appeal. On appeal, again, we must consider the scope of review, and, again, our scope of review is limited by the regulation to a determination of whether the manager's decision is "reasonable." Although as will be discussed below, I would find his decision proper even if our review were de novo, I again stress that our review is limited. There can be more than one reasonable determination of whether in the circumstances of this case, an individual allotment for Marsing is "practicable." If the manager has reached a reasonable decision, we must uphold it, whether or not we would have reached the same conclusion ourselves.

All this is recognized and set out in the majority opinion, but I most respectfully submit, once having stated the controlling law, the majority proceeds to ignore it. It says that practicable means "feasible in the circumstances," citing Frey v. Security Trust Co., supra. "Feasible," in turn, means: "practically possible," "capable of being managed, utilized or dealt with successfully." In re Washakie Needles Irrigation District, 76 P.2d. 617, 621 (Wyo. 1938).

In applying these definitions we must decide first from whose point of view the "practicability" of individual allotments must be examined. It seems indisputable that the arrangements must be analyzed to determine whether individual allotments would be "practicable" in light of the BLM management responsibilities, not simply from a permittee's operational problems. That is, an operation might be practicable for a permittee considering only his own setup, but completely impracticable, considering the BLM's obligations to manage the range properly.

We must also note that the range agreement envisaged an individual allotment not only for Marsing, but also for each of the larger cattle permittees as well. True, the agreement stated the cattle

graziers would get individual allotments "where practical" but since this qualification by regulation applies equally to Marsing, all the permittees, except the smaller cattle graziers, in the Coal Creek allotment have the same rights to an individual allotment. That Marsing is the first to insist on a private allotment cannot enlarge his rights. If it is "practical" for him to have an individual allotment, then we must determine why it is not "practical" for the others to have theirs. Several of the cattlemen stated that they would prefer an individual allotment and that, if Marsing received one, they wanted one too. Tr. 306, 488, 511.

Keeping in mind the limited scope of our review and the fact that we must judge the manager's decision in light of the possibility that several permittees have the same claim to an individual allotment as does Marsing, we turn to an examination of the facts leading to institution of the rehabilitation program, its results, and the necessity for and the reasonableness of the steps taken to protect and preserve the success achieved.

For many years, possibly as long as there has been a Taylor Grazing Act, but in any event at least from the early 1950's and as long as Marsing or Diamanti, his predecessor, has had an interest in the area (Tr. 48), there has been sheep use in the area only in the winter, with cattle use in spring and fall.

The range had been seriously overgrazed, so much so that in 1960, although a prior range survey had proposed a 52% reduction, a voluntary 25% unit wide reduction was accepted and approved. Three years later a survey determined that an additional 58% reduction was needed in the Coal Creek allotment, Ex. 2. 40% of the second reduction was put into effect, but the final 18% was not taken due to the success of the rehabilitation program.

The Coal Creek allotment was selected because of its physical characteristics, as a representative area of the Price District to show the positive effects of a development program. It was designated the Price Resource Conservation Area. The program involved the cooperation of state and private agencies with the BLM.

The rehabilitation program was begun in 1964 and completed in 1966. Of the 27,000 acres in the allotment, approximately 6000 acres of pinon-juniper and sagebrush lands were cleared or plowed and reseeded to grass and 3000 acres of short grass-salt brush were contour furrowed. In 1967 the allotment was divided by an east-west fence, creating a North and South pasture. The program was very successful. The allotment now has an estimated carrying capacity of 4600 AUM's. Tr. 110.

The U.S., through the BLM, expended \$200,000 in carrying out the rehabilitation work. The permittees bore no part of that expenditure. They were, however, obligated to share proportionately in \$9,705 of rangeland improvements; but if they chose to take nonuse of their privileges for the five-year period of the program the Government assumed their proportionate share of the cost. Marsing was one of the permittees who took nonuse; thus the entire program cost him nothing. Tr. 274.

After the rehabilitation program was completed, the BLM prepared a long range plan. The plan, set out in detail in Ex. 2, provided for a two-pasture (North and South) rest-rotation grazing system. For two years the cattle would graze the North pasture in the spring, from April 16 through June 31. Then in the fall the cattle would graze the South pasture from October 16 to October 31 and then the South pasture would be available for sheep from November 1 to March 15, with flexibility as to numbers and time of use in the North pasture in these years. In the third and fourth years the grazing pattern would be the same except use of the North and South pastures would be reversed.

The plan was first written and presented in 1968. Tr. 346. After a series of meetings, the plan was signed in 1970 by all the users except Marsing and another, Funon Shimmin.

The U.S. presented extensive evidence in support of its management plan. It pointed out that the purpose of the rehabilitation plan had been to improve the watershed condition through increased quality and quantity of the vegetative resource and reduce overland erosion. Tr. 341. It sought to accomplish this by increasing vegetative cover from 35-40% to 40-45% and to maintain a grass-browse ratio of 60-40. A major objective was to remove sagebrush and to replace it with grass. Tr. 357. In order to maintain the favorable results obtained by rehabilitation, the plan envisaged winter use by sheep. Id. The sheep, as browsers, would eat the sagebrush, thus reducing the size of the plants and stopping seed production. Tr. 423. Gary L. Hanson, the area manager testified and offered photographs to show that sagebrush was reinvading some of the areas which had been cleared and reseeded. Tr. 337-340, 356. Dr. Neil C. Frischknecht, a range scientist, with the Department of Agriculture, who has made extensive studies on the revegetation of range lands and use of sheep to control erosion by sagebrush, also testified that sagebrush was invading the treated area. Tr. 427.

Hanson testified that management of the range through regulation of classes of livestock and season of use was effective to maintain a desired grass-browse ratio. Dr. Frischknecht stated that the use of sheep to control sagebrush invasion into crested wheat grass had worked well in long range experimental studies he had conducted. Tr. 417-429, 432-433. Hanson said that the program

had been very successful--that most of the sagebrush had been eradicated from the sagebrush flats and the desired balance achieved. Tr. 357. He then discussed why he felt individual allotments were undesirable. After first considering them, it was decided not to create any. Tr. 368. Sheep use, he believed, was necessary to control the sagebrush from reinvasion which had already begun; that other than winter use by sheep would disrupt area use, that the plan would use the forage in the allotment more efficiently, and that if Marsing received an individual allotment, similar allotments would also have to be allowed to the cattle operators. Chopping up the area into small allotments would create a situation that "could not feasibly be used in rotation plans, grazing plans."

He then testified that since 1964 the Bureau had reversed its former policy of favoring individual allotments and that as a result of studies the Bureau now favored rest-rotation management plans which could be implemented without placing sole responsibility for success on an individual operation. Tr. 370. He concluded that he and his associates believed the plan was workable and was accomplishing its objectives. Tr. 372.

He pointed out that the plan had not yet gone through a complete cycle, and that, despite the increased grass on the allotment, restoration of the cuts in grazing use had not yet been made. Tr. 370.

Marsing does not contend that the proposed management plan will not work. He asserts however, that it is in breach of the promise of an individual allotment made to him and that the plan will still be workable even if he is given an individual allotment.

The evidence, then amply supports the conclusion that the proposed plan is technically sound, embodies the current concepts of range management, and is well adapted to maintaining and furthering the rehabilitation so far achieved.

However, we must recognize that the now-proposed plan was not the management scheme in mind when the rehabilitation program was conceived and put into operation. At that time individual allotments for Marsing and the cattle operators were in accord with the then-accepted methods of range management. As we have seen, while the rehabilitation work was going on, the Bureau evolved new concepts of range management, which require a larger scope of operations to be feasible. Thus, to divide the area into individual allotments would be inimical to the successful maintenance of the demonstration area.

While a rest rotation system might work if Marsing alone were given an individual allotment, it admittedly will not if all permittees who are as entitled to one as he is also insist on receiving one. The "practicability" of an allotment for Marsing cannot

be determined in isolation. Nor ought he to get one and no one else, merely because he asked for it first and has insisted upon his right to one. It can only be "practicable" to give him an individual allotment if it is also practicable to give one to all others equally qualified. Since this cannot be done, it is not "practicable" to create an individual allotment for appellant.

Thus the manager's determination was correct, viewed de novo, and certainly is a reasonable one, if viewed from the limited scope of review available to us. Therefore, I would affirm the Administrative Law Judge's decision.

I would also like to indicate my disagreement with the thrust of Administrative Judge Stuebing's concurring opinion.

First, as the majority decision points out, range agreements are not construed as binding on the government as are ordinary contracts. In proper circumstances privileges granted by a range agreement may be modified by the Bureau of Land Management, just as privileges granted by an allotment may be.

Secondly, assuming that in some circumstances equitable estoppel may lie against the United States, there are no such circumstances here. In a recent case, Marathon Oil Company, 16 IBLA 298, 81 I.D. 447 (1974), (suit for judicial review pending, Marathon Oil Company v. Morton, Civil Action File No. C74-179, D.C. Wyo.), the Board discussed equitable estoppel. It pointed out that one factor militating against the application of the doctrine is harm to the United States. Here a United States investment of \$200,000 in rehabilitating the grazing land may well be wasted if Marsing and the other equally qualified permittees are given individual allotments.

Furthermore the facts, in my opinion, do not warrant the application of equitable estoppel, even if there were no other objection to its use.

As we have seen, Marsing's rights to any allotment at all in the Coal Creek allotment are founded on the Diamanti permit. Diamanti had only winter use for sheep in Coal Creek. Marsing leased the Diamanti privileges in 1960 or 1961, (Tr. 292), and took the same season of use.

Marsing has other private lands and allotments which he uses in his operation. Tr. 269. In fact his family and he have operated sheep in the District ever since the Taylor Grazing Act was enacted. Tr. 269. At the time he acquired the Diamanti privileges he was running about 700-1200 head of sheep. Tr. 293, 309. He was then operating jointly with his father, who controlled certain private lands and presumably had grazing privileges on the public lands. Tr. 202. His father's ranch was essential to his spring operations. It had approximately 250 acres of alfalfa and 100 acres of grass which was used during the five-year interim period for taking the

ewes and lambs on. He also lambled on another ranch near Miller Creek. Tr. 288-291. His father sold his ranch in 1971. Tr. 291. However, he had spring use there for his lambing operations for several years thereafter. Tr. 291-292.

Since 1960 Marsing's operation has grown until now he runs 3000 head. Tr. 284, 286, 309.

At some time after the agreement was signed, beginning in 1963, Marsing bought a small irrigated farm within two miles of the Coal Creek allotment upon which he expended \$35,000 to \$40,000 for sheds and other improvements to be used in bringing his sheep within the protection of these buildings in February and March while their lambs were being born. Tr. 272, 305. By using the sheds Marsing is able to produce a substantially greater percentage of lambs a month earlier than when the lambing had been on the open range.

Marsing alleges that in reliance upon the 1965 agreement, his father sold his ranch, he (Marsing) purchased a ranch, improved it, and changed his method of operation. Tr. 304-309.

While it may be accepted that Marsing and his father did as Marsing testified, I cannot find that they acted upon the basis of the 1965 agreement. The most crucial factor is that when Marsing signed the agreement he was only a lessee of Diamanti's base land and the privileges dependent on it. He entered into an agreement to purchase Diamanti's land no earlier than 1969 and purchased it in 1971. Similarly his father did not sell his ranch until 1971.

However, it was in 1968, from one to three years earlier, that the District Manager decided and proposed the rest-rotation plan, with no individual allotment for Marsing. Tr. 346.

Before Marsing had purchased or even agreed to purchase the Diamanti land he could not reasonably have relied on his lease to make the expenditures that he did. And after 1968 he knew there was a great doubt that he would be given the individual allotment on which he says he based his entire method of operations.

Similarly, his father could not have relied on the 1964 agreement when in 1971 he sold his ranch, for he, too, was then aware that there was little certainty that his son would be granted an individual allotment.

Rather the chronology strongly suggests another sequence. Marsing changed and enlarged his method of operations and his father sold his ranch for valid reasons of his own without regard to the 1965 agreement. As result of their actions, Marsing now has a great need for spring use of his grazing privileges in the Coal Creek

allotment. The District Manager, however, is in no way responsible for his predicament. 1/ Therefore there is no basis for the application of the doctrine for equitable estoppel.

Martin Ritvo,
Administrative Judge.

1/ As Marsing said in his noticed appeal filed on May 13, 1970, from the District Manager's decision:

"Protestant has yards and sheds for lambing at his ranch near Price. In the past he has used alfalfa fields in the spring which caused loss through bloat. He is now losing these fields and has been counting on the Coal Creek area for spring feed he can use in connection with his lambing sheds."

