Editor's note: 88 I.D. 665; decision subject to a prior grant of mandamus issued in Mountain States Legal Foundation v. Andrus, Civ.No. C79-275K (D.Wyo. April 21, 1981) directing BLM to remove excess horses

BAR X SHEEP CO. ET AL.

IBLA 80-510 Decided July 24, 1981

Appeal from decision of Administrative Law Judge Robert W. Mesch, vacating in part District Manager's decisions temporarily suspending portions of maximum allowable active grazing preferences in the Rock Springs District, Wyoming. W 4-79-1.

Reversed.

1. Grazing Permits and Licenses: Cancellation or Reduction

BLM may temporarily suspend portions of maximum allowable active grazing preferences under 43 CFR 4110.3-2(a) authorizing suspensions in cases of "drought, fire, or other natural causes," in order to provide forage for excess wild horses.

APPEARANCES: Marla E. Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for appellant;

Calvin E. Ragsdale, Esq., Green River, Wyoming, for appellees.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Robert W. Mesch dated February 13, 1980, vacating in part decisions of the District Manager for the Rock Springs District, Wyoming, dated March 30, 1979. The relevant portions of those decisions temporarily suspended portions of maximum allowable active grazing preferences for livestock and allocated the suspended grazing preferences to excess wild horses. 1/ The decisions involved 11 holders of grazing preferences (appellees herein) 2/ and 5 grazing allotments. 3/

The District Manager placed the decisions in full force and effect as of April 1, 1979, pursuant to 43 CFR 4160.3(c), in order to ensure the "orderly administration of the range."

The stated rationale for the temporary suspension was "for resource protection in accordance with 43 CFR 4110.3-2(a)(c) [43 CFR 4110.3-2(a) and (c)]." The applicable regulation, 43 CFR 4110.3-2(a), provides in pertinent part: "When authorized grazing use exceeds the

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1/ The decisions also canceled portions of maximum allowable active grazing preferences, pursuant to 43 CFR 4110.3-2(b) (1979). That regulation was amended on July 11, 1980, 45 FR 47105; however, 43 CFR 4110.3-2(a) was not changed.
2/ The appellees are Bar X Sheep Co., Leonard Hay, Frank Mayo, White Acorn Sheep Co., Erramouspe Brothers, Magagna Brothers, Vernan Mrak, Blair and Hay Land and Livestock Co., Chilton Land and Livestock Co., Dearth Jamieson Sheep Co., and Burton H. and Ralph E. DeLambert.
3/ The allotments are Bush Rim, Continental Peak, Red Desert, Sands, and Steamboat Mountain.

amount of forage available for livestock grazing within an allotment on a temporary basis: (1) Due to drought, fire, or other natural causes * * * grazing permits or leases may be suspended in whole or in part." 4/

A hearing on the matter was held before the Administrative Law Judge on September 5, 1979, in Green River, Wyoming. At the hearing, the District Manager and the Assistant District Manager expanded on the rationale for the decisions, as summarized by the Administrative Law Judge:

> [T]hey determined there were excess wild horses within the allotments on the basis of inventory information within their office and information contained in an environmental impact statement; they do not as yet [almost eight years after the Secretary of the Interior was directed to manage wild horses] have any wild horse management plans within the district; it is anticipated that such plans should be developed within a couple of years; the plans will provide for removal of excess wild horses; the actual removal of the horses will not start, however, until funds and manpower are available; it is not known when the funds and manpower will be available -- it could be three years or thirty years; the wild horses increase as much as 15 or 20 percent a year on a geometric basis * * *.
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4/ This provision may in part be derived from section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1976), which provides in relevant part:

"During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists."

> * * * [T]hey had not secured adequate funds to remove the excess wild horses from the allotments and in order to avoid an over obligation of the forage resources, they felt they had no alternative other than to make a temporary allocation of forage for the excess wild horses pending their removal from the range; they thought it best, since the condition appeared to be only temporary, and in order to insure that the livestock operators would not permanently lose their grazing privileges, to temporarily suspend the privileges under subsection (a) rather than cancel the privileges under subsection (b) of 43 CFR 4110.3-2; he construes the phrase "or other natural causes" in the regulation authorizing temporary suspensions of livestock grazing because of a decrease in the amount of available forage as including anything that might be termed an Act of God; he believes wild horses and any increases in their population are natural and if they cause a decrease in the amount of available forage for livestock grazing this would be an Act of God or a natural cause * * *.

(Decision at 5-6).

In his February 13, 1980, decision the Administrative Law Judge made the following findings:

I agree with the appellants that 43 CFR 4110.3-2(a) does not grant the District Manager the authority to temporarily suspend livestock grazing use under the circumstances present in this case. The authorized grazing use exceeds the amount of forage available for livestock grazing, not because of drought, fire, or other natural causes but, because of the BLM's failure to manage the wild horses and remove the excess wild horses as authorized by the 1971 Act [Act of December 15, 1971, as amended, 16 U.S.C. § 1331 (1976)] and its failure to take any action to immediately remove the excess animals as mandated by the 1978 Act [Public Rangelands Improvement Act of 1978, P.L. 95-514, 92 Stat. 1803, 1808, 16 U.S.C. § 1333 (Supp. II 1978)]. While the wild horses may be the result of natural causes, the presence of excess numbers in the allotments and the decrease in the amount of available forage created by the excess animals are solely the result of, or due to, the BLM's failure to respond to the mandates of the 1971 and

> the 1978 Acts. This failure, for whatever reason, is not an Act of God or a natural cause creating a decrease in the amount of available forage.

(Decision at 6).

[1] The principal question in this case is whether 43 CFR 4110.3-2(a) allows the temporary suspension of livestock grazing preferences where there has been a decrease in available forage due to an increase in a competing population of wild horses.

In order to answer that question we must analyze the phrase "or other natural causes." Appellant argues that the increase in the wild horse population was due to natural procreation. Appellees, on the other hand, assert that but for the failure of BLM to comply with its statutory mandates the population would not have increased. Appellees also urge the invocation of the doctrine of ejusdem generis. That rule, as stated by the court in Gooch v. United States, 297 U.S. 124, 128 (1936), "[o]rdinarily * * * limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation." See also 2A Sands, Sutherland Statutes and Statutory Construction 118 (1973).

Further investigation reveals that "other natural causes," as used in the regulation, should not be read as restrictively as appellees assert. The precursor of 43 CFR 4110.3-2(a) was 43 CFR 4125.1-1(i)(8) (1977). It read in pertinent part: "If necessary to rehabilitate the

vegetative resources on the public land, the Authorized Officer may temporarily close the leased land to grazing or reduce livestock use whenever vegetal cover is depleted due to drought, epidemic, fire or any other cause, or for rehabilitation of the area."

In 1976 the Department proposed changes to the grazing regulations in an attempt to modernize them. 43 CFR 4110.3-2 (Decrease in forage) was proposed to read as follows:

> When authorized grazing use exceeds the livestock forage available within a grazing area or where reduced grazing use is necessary to facilitate multiple-use management objectives or protection of the environment, authorized grazing use and grazing preferences may be adjusted accordingly. Such adjustments will be equitably apportioned by the authorized officer or as agreed to among authorized users and the authorized officer.

41 FR 31506 (July 28, 1976). During the comment period, the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. §§ 1701-1782 (1976), was signed into law. Therefore, on July 8, 1977, grazing regulations were reproposed. In the reproposal 43 CFR 4110.3-2 was changed to require mandatory cancellation, stating in pertinent part: "When authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment or where reduced grazing use is necessary to facilitate achieving the objectives in the land use plans, grazing permits or grazing leases and grazing preferences shall be cancelled in whole or in part." 42 FR 35338 (July 8, 1977).

On July 5, 1978, final grazing regulations were published in the Federal Register. 43 CFR 4110.3-2 was separated into three subsections. Most importantly for the purposes of this case, 43 CFR 4110.3-2(a) was changed to provide for discretionary suspension "[w]hen authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment on a temporary basis: (1) due to drought, fire, or other natural causes." 43 FR 29069 (July 5, 1978).

As explained in the preamble to the regulations, this change was made in response to a comment:

> The proposed regulations provided for cancellation of grazing permits or grazing leases and grazing preferences in whole or in part under § 4110.3-2 when the authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment. It was suggested that this should not apply when the amount of forage available is reduced on a temporary basis in the case of drought, fire, or other short term situation. In response to these suggestions, the regulations have been changed to provide for suspension of grazing permits or leases, instead of cancellation, when the authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment on a temporary basis.

43 FR 29058 (July 5, 1978).

The regulatory history of the language of 43 CFR 4110.3-2(a) indicates that the Department intended to provide flexibility in the management of the range when "in the case of drought, fire, or other short term situation" the authorized grazing use exceeded the amount of available forage on a temporary basis. (Emphasis added). The emphasis of the

regulation is on the discretionary ability of BLM to act when necessary to protect the range from possible deterioration. 43 CFR 4110.3-2(a) provides for suspensions, rather than cancellations, when the threat to the range is a temporary one.

In addition, 43 CFR 4110.3-2(a) takes its authority in part from the Federal Land Policy and Management Act of 1976 (FLPMA), supra, which provides for land management "under principles of multiple use." 43 CFR 4100.0-3(b); see also 43 CFR 4100.0-2. The concept of multiple use was interpreted by the court in American Horse Protection Association, Inc. v. Frizzell, 403 F. Supp. 1206, 1221 (D. Nev. 1975), involving a conflict between the grazing rights of wild horses and cattle, to mean "that neither wild horses nor cattle possess any higher status than the other on the public lands." 5/ The court concluded that "[u]nder the multiple use * * * concept, then, the BLM had various alternatives available to them to alleviate the overgrazing on Stone Cabin Valley"; it could either act pursuant to the Act of December 15, 1971, as amended, supra, to remove wild horses or act pursuant to the Taylor Grazing Act, as amended, supra, to restrict livestock grazing on overgrazed land. In the latter regard, the court cites the predecessor of 43 CFR 4110.3-2(a), i.e., 43 CFR 4125.1-1(i)(8) (1977). The applicable regulation, 43 CFR 4110.3-2(a), also takes its authority from the Taylor Grazing Act, as amended, supra.

5/ While American Horse Protection Association, Inc. v. Frizzell, supra, applied the multiple use provisions of the Act of Sept. 19, 1964, 43 U.S.C. § 1411 (1970), the concept of multiple use was carried over into FLPMA, supra. See 43 U.S.C. §§ 1701(a)(7) and 1702(c) (1976).

Appellees argue that once BLM determines that there is "an excess population [of wild horses] and a need for removal, the [Public Rangelands Improvement Act of 1978, supra] only gives [the District Manager] one course of action, to immediately remove the excess horses in the priority and order stated" (Appellees' Answer at 15). 6/ Appellees argue not that the District Manager abused his discretion in taking the suspension action, but that "under the command of Congress in circumstances

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6/ Section 14(b)(2) of the Public Rangelands Improvement Act of 1978, 16 U.S.C. § 1333(b)(2) (Supp. II 1978), provides:

"(2) Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning completed pursuant to section 1712 of title 43; (iii) information contained in court ordered environmental impact statements as defined in section 1902 of title 43; and (iv) such additional information as becomes available to him from time to time, including that information developed in the research study mandated by this section, or in the absence of the information contained in (i-iv) above on the basis of all information currently available to him, that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation:

"(A) The Secretary shall order old, sick, or lame animals to be destroyed in the most humane manner possible;

"(B) The Secretary shall cause such number of additional excess wild free-roaming horses and burros to be humanely captured and removed for private maintenance and care for which he determines an adoption demand exists by qualified individuals, and for which he determines he can assure humane treatment and care (including proper transportation, feeding, and handling): Provided, That, not more than four animals may be adopted per year by any individual unless the Secretary determines in writing that such individual is capable of humanely caring for more than four animals, including the transportation of such animals by the adopting party; and

"(C) The Secretary shall cause additional excess wild free-roaming horses and burros for which an adoption demand by qualified individuals does not exist to be destroyed in the most humane and cost efficient manner possible."

such as this, where he has made certain determinations, he is without discretion" (Appellees' Answer at 18).

We cannot agree with appellees. While section 14(b)(2) of the Public Rangelands Improvement Act of 1978, supra, dictates the immediate removal of excess animals, there is no indication that removal is the exclusive remedy for an overpopulation of wild horses. In addition, despite the specific directions in that section, the Act is not self-executing. Surely, until implementation of provisions for removal, BLM is not foreclosed from taking actions to preserve the quality of the Federal range. We find that 43 CFR 4110.3-2(a) provided the District Manager with an alternative method of dealing with the over-population problem.

Appellees have also argued that (1) the District Manager's decision was arbitrary, capricious, and an abuse of discretion because no time limit was set on the temporary suspension; (2) an environmental impact statement (EIS) was not prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 (1976), assessing the environmental impact of a temporary suspension of grazing preferences; and (3) the District Manager's decisions with respect to holders of grazing preferences in the Continental Peak allotment 7/ were

7/ In their notice of appeal, dated Apr. 30, 1979, appellants therein (appellees) indicated that Erramouspe Brothers and Magagna Brothers were pressing the appeal in this regard.

arbitrary, capricious, and an abuse of discretion because no rationale was provided for placing the decisions in full force and effect.

There appears to be no requirement in the law that a decision providing for a temporary suspension of grazing preferences specify a time limit for such suspensions. See 43 U.S.C. § 315b (1976); 43 CFR 4110.3-2(a). The suspension is by its nature dependent on causes whose duration is difficult to determine. The necessary implication of a suspension under 43 CFR 4110.3-2(a) must be that the suspension will be effective at least so long as the situation persists which gave rise to the action.

NEPA, supra, requires the preparation of an EIS with regard to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (1976). The record discloses that an EIS, known as the Sandy Grazing EIS, was prepared with respect to the subject allotments, in part assessing the balance between livestock and wild horse grazing (Tr. 91-92). However, a basic assumption in the EIS was the maintenance of the wild horse population at "management levels" and no consideration was given to temporarily allocating forage to excess wild horses (Tr. 90). Nevertheless, we do not believe that temporarily suspending the grazing preferences involved in this case can be construed as "a major Federal action significantly affecting the quality of the human environment." Appellees have failed to provide any evidence to support their claim that an individual EIS is needed, especially in view

of the EIS already prepared. See Julie Adams, 45 IBLA 252 (1980); Headwaters, 33 IBLA 91 (1977). We cannot find that BLM was required to prepare an EIS prior to its actions in this case.

Finally, the question is presented whether the District Manager properly placed the decisions affecting the Continental Peak Allotment in full force and effect. At the time the decisions were made, the District Manager had the authority pursuant to 43 CFR 4160.3(c) to place the decisions in full force and effect "pending decision on appeal therefrom. * * * only if required for the orderly administration of the range or for the protection of other resource values." The regulations do not require that the District Manager specifically detail the reasons for such a determination. In this case the reasoning of the District Manager is implicit in his decisions. We find no error in the District Manager's determination to place the decisions in full force and effect.

We have carefully reviewed the record and it discloses a rational basis for the decisions to suspend temporarily livestock grazing preferences and to place those decisions in full force and effect at that time. Therefore, they will not be disturbed. See Bert N. Smith, 48 IBLA 385 (1980), and cases cited therein. The burden is on the one challenging the decision to show by substantial evidence that the decision is unreasonable. Id. In the present case, appellees have failed to do

so. Accordingly, we hold that the District Manager properly issued decisions temporarily suspending appellees' grazing preferences.

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.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge