

Editor's note: Reconsideration denied by Order dated Jan. 15, 1985

CLYDE L. DORIUS
DOUGLAS L. BOWN
v.
BUREAU OF LAND MANAGEMENT

IBLA 84-198, 84-208

Decided September 24, 1984

Consolidated appeals from decisions of Administrative Law Judge Robert W. Mesch reversing in part and affirming in part Bureau of Land Management decisions reducing appellants' active grazing privileges. Utah 050-82-4 and Utah 050-82-5.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Grazing and Grazing Lands -- Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Appeals -- Rules of Practice: Appeals: Burden of Proof

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

2. Regulations: Applicability -- Grazing Permits and Licenses: Range Surveys

Where 43 CFR 4110.3-2 was amended to require supporting data prior to decision in certain cases involving changes in grazing use of the public lands, and the amended regulation became effective prior to decision by the Administrative Law Judge assigned to consider the decision on appeal, the amended rule was properly applied where the basis for the declared policy of the Department respecting grazing decisions rests upon a determination that the amended rule is required by known facts.

3. Regulations: Applicability -- Grazing Permits and Licenses: Range Surveys

A regulation promulgated following decision by the Bureau of Land Management in 1982 is applicable to

require use of trend studies to supplement a 1978 range survey where the 1978 survey alone, without trend studies made in intervening years, is an inadequate basis for decision pursuant to 43 CFR 4110.3-2(c) (1983).

4. Regulations: Applicability -- Grazing Permits and Licenses: Range Surveys

Where the Bureau of Land Management uses a 1978 range survey as the sole basis for a 1982 decision limiting range cattle carrying capacity, the decision is not adequately supported where circumstances indicate the single survey may be inconclusive as to the true condition of the range under 42 CFR 4110.3-2(c) (1983).

APPEARANCES: Dale M. Dorius, Esq., Brigham City, Utah, for appellants; Reid W. Nielson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM), Clyde L. Dorius, and Douglas L. Bown have appealed from two separate decisions of Administrative Law Judge Robert W. Mesch, both dated November 17, 1983. The decisions followed a consolidated hearing held by Judge Mesch on June 28 and 29 at Richfield, Utah.

Hearing was held following appeals filed by Dorius and Bown from two decisions of the Area Manager for the Sevier River Resource Area of the Richfield Grazing District of BLM, dated February 17 and 25, 1982, respectively. In these decisions the Area Manager reduced Dorius' active grazing preference in the Red Canyon Allotment (Utah 050-82-4) from 702 animal unit months (AUM's) to 173 AUM's effective March 1, 1982, the reduction to be completed over a 5-year period in three stages with a reduction to 524 AUM's in 1982, then to 348 AUM's in 1984, and finally to 173 AUM's in 1986. The Area Manager also rejected a request by Dorius to reinstate 893 AUM's of active grazing preference that had been placed in suspended nonuse in 1967.

As to Bown's grazing use in the Rock Canyon Allotment (Utah 050-82-5) the Area Manager reduced the active grazing preference, as amended at the hearing, from 1,200 AUM's to 440 AUM's effective April 1, 1982, the reduction to be completed over a 5-year period in three stages with a reduction to 980 AUM's in 1982, then to 712 AUM's, and finally to 440 AUM's in 1986. The Area Manager also shortened Bown's grazing season of use and established a period of use in the allotment from May 1 to August 31 in accordance with 43 CFR 4120.2-1(a) (1981).

Citing 43 CFR 4110.3-2(b) (1981) and 43 CFR 4130.2(d)3 (1981), the Area Manager concluded that the level of grazing use for both allotments exceeded the livestock carrying capacity of the allotments based on a 1978 Ocular Reconnaissance Survey and the Mountain Valley Environmental Impact Statement (EIS). Both decisions required monitoring studies to determine whether the

amount of the reductions projected for the third and fifth years should be modified. As a result of the reductions, the Area Manager canceled 10-year permits issued to appellants on March 1, 1979, and notified appellants they would be offered annual grazing permits for each year of the scheduled reduction through 1985 and for a term of 10 years beginning in 1986.

Both Dorius and Bown appealed every finding of the decisions and requested hearings, claiming the reductions resulting from the Mountain Valley EIS were based on a forage survey made in 1978 which was inaccurate, incomplete, and unfair, and was not a valid survey method system to determine forage inventories regarding grazing capacity or land use planning in the Great Basin. They allege the 1978 forage inventory was not consistent with previous range surveys made in approximately 1954 and 1966. They challenge the accuracy of the 1978 survey because the preceding year was an extremely dry year. They contend the only valid, fair, and accurate method of determining forage available in the Great Basin is by use of a system including yearly monitoring. They also allege inaccuracies in the allotted AUM's for big game because big game only use the allotments during the winter months and do not consume any measurable amount of the forage used by cattle in the summer months.

The permittees, Dorius and Bown, presented evidence to show that the 1978 forage survey, by itself, was no longer a reliable method to determine current grazing capacity of their allotments. They rely upon a change in Departmental policy which resulted in amendment of the grazing regulations at 43 CFR 4110.3-2, effective October 21, 1982. The regulations governing decrease in forage in effect when the Area Manager issued these decisions in February and March 1982 provided in pertinent part:

(b) When authorized grazing use exceeds the amount of forage available and allocated for livestock grazing within an allotment or where reduced grazing use is necessary to facilitate achieving of objectives in the land use plans, grazing authorized under grazing permits or leases shall be reduced to the livestock grazing capacity. The difference between the authorized grazing use and the grazing preference shall be held in suspension.

(c) Suspensions under paragraph (b) of this section shall be implemented over a 5-year period, with an initial reduction taken on the effective date of the decision and the balance taken in the third and fifth years following the effective date of the decision, except as provided in paragraphs (d) and (e) of this section. The initial reduction, in combination with other management actions specified in the decision, shall be sufficient to achieve significant progress toward achieving the vegetation objectives set forth in the land use plan for the five-year period. * * *

* * * * *

(e) Prior to implementation of each step of a phased suspension, the authorized officer shall review available information to determine whether the amount of the suspension should

be modified (either increased or decreased). If the authorized officer determines that monitoring data indicate that the amount of a scheduled suspension should be modified, a new decision shall be issued under Subpart 4160 of this title. However, the new decision shall not extend a phase-in period established in a previous decision.

43 CFR 4110.3-2 (1981). Changes in this regulation were published in the Federal Register as final rulemaking, effective October 21, 1982 (47 FR 41702). Section (c) of the regulation was changed to require an additional step in the decisionmaking as follows:

(c) Provisions in paragraph (b) of this section shall be implemented over a 5-year period through mutual agreement documented in the Rangeland Program Summary, or by decision. If data acceptable to the authorized officer are available, an initial reduction shall be taken on the effective date of the decision and the balance taken in the third and fifth years following that effective date, except as provided in paragraphs (d) and (e) of this section. If data acceptable to the authorized officer to support an initial reduction are not available, a decision will be issued identifying the data needed and procedures to be used for arriving at the adjustments in authorized grazing use. Adjustments based on the additional data shall be implemented by a decision that will initiate the 5-year implementation period. [Emphasis added.]

43 CFR 4110.3-2 (1983).

At the hearing held by Judge Mesch on June 28 and 29, 1983, when asked to comment on the change in policy which led to the proposed amendment to the regulation, the Utah State Director, BLM, acknowledged the changes (Tr. 29-30). He read the following comment to final rulemaking published in the Federal Register on September 21, 1982 (47 FR 41704), which accompanied the amendment to 43 CFR 4110.3-2(c):

The second change [43 CFR 4110.3-2(c)] would allow authorized officers to issue decisions providing for monitoring to collect adequate, reliable data prior to the initiation of a five-year adjustment period. This recognizes that a one-point-in-time survey or forage inventory without monitoring support is not considered adequate, reliable data to serve as a basis for forage allocation decisions.

The State Director was then asked (Tr. 30):

Q (By Mr. Dorius) Based on that statement would you agree that a one-point-in-time survey is considered -- is not considered adequate or reliable to serve as a basis for a forage allocation decision? Would you agree with that?

* * * * *

THE WITNESS: The statement very clearly said that a one-point-in-time survey for forage inventory without monitoring support is not considered adequate.

JUDGE MESCH: And I gather from your testimony that is the present feeling or policy of the BLM?

THE WITNESS: It is.

He later testified: "It would be our position that the old information is not unreliable. It is different than the information required under present policy" (Tr. 47). He stated that the policy which relates to the use of a single survey and subsequent monitoring came into effect after these decisions on appeal had been made. He also stated: "In these particular cases, as I understand the matter and policy directions we have received, is that we should not go back in time and attempt to apply the policy retroactively" (Tr. 49).

To show how the change in the regulations would affect adjudications of their grazing privileges, the permittees introduced into evidence BLM instructional memoranda (No. 82-644, dated September 1, 1982 (Exh. D), and No. 82-650, dated September 3, 1982 (Exh. C) (Tr. 44). Both documents pointed out the limitations on use of vegetation inventory data from an EIS without the support of monitoring studies. Instruction Memorandum No. 82-650, states: "Effective with EIS's completed in FY 1982, grazing preference adjustments, either upward or downward, following the grazing EIS shall not be based solely on vegetation production surveys, but shall be based on monitoring or a combination of monitoring and range surveys. * * * (Ex. No. C)." (Emphasis added.)

Questioned concerning whether, had he received this Instruction Memorandum prior to reducing the permits held by Dorius and Bown, he would have acted as he did or withheld his decision, the BLM Area Manager testified he would have "[w]ithheld the decision pending monitoring of the studies" (Tr. 122). The range conservationist who supervises these permit areas testified also that the basis for the decisions to reduce appellants' permitted numbers of AUM's was solely the 1978 forage study (Tr. 158).

The permittees testified concerning range agreements executed in 1967 by Evart Jensen, Clyde Dorius, and Wesley Johnson, and approved by BLM (Exhs. F, I). According to their testimony, these agreements should have been also considered in the decisionmaking process. On cross-examination, the Area Manager, who issued the decisions appealed from, testified he did not consider these agreements directly when rating the allotments (Tr. 98). He concluded, however, the agreements would not have affected the accuracy of the range survey made in 1978 (Tr. 99), as no more AUM's could be issued than the current carrying capacity of the range could handle no matter what was agreed to in 1967 (Tr. 100-02).

The permittees offered testimony to show that, based on these 1967 agreements, water was developed on the allotment which was not properly accounted for in the survey (Tr. 100). The Area Manager contended that all water sources were considered as part of the EIS and were not material in

regard to the conduct of the 1978 survey (Tr. 108). A BLM range conservationist in the district since 1975 testified that the 1978 study gave proper credit for water development because minimum deductions were taken for absence of water (Tr. 135-36).

The permittees offered evidence that the 1978 survey was not representative of true range conditions since it was conducted after a drought year in 1977. The conservationist testified that 1977 was a dry year (Tr. 181). He also stated, however, that the winters of 1977 and 1978 both had a lot of snow with plenty of water for reseeding of vegetation, and that the spring of 1978 was good with good forage produced because of good moisture (Tr. 182-84). He also indicated that when a forage survey is conducted in a dry period, lack of moisture is taken into account and adjustments are made to bring the survey up to normal forage production (Tr. 184). It was later confirmed by a member of the survey crew that spring 1978 was cool and wet with adequate growth at the time of survey (Tr. 377). Clyde Dorius testified to the contrary that there was little snow in winter 1977 and that there was little rain in 1978 until late summer and, therefore, there was little grass and vegetation in the early part of 1978 (Tr. 258). BLM exhibits 5 and 6 showing weather bureau recorded precipitation at nearby stations for the years 1976-80 confirmed that early 1978 spring precipitation exceeded the average precipitation for 1976 and 1980 (Tr. 455).

Appellants also questioned the location of the areas within the allotments where the 1978 survey was conducted. Clyde Dorius complained he was not consulted before the study was made. After reviewing exhibit H, a map showing where BLM crews made a field inspection to survey the growing vegetation on the allotment, he stated two of the sampled areas were in places "where no cattle would ever get" and were outside his allotment area (Tr. 243-45). He was unsure, however, whether these areas were representative of the allotment (Tr. 246). He asserted another area sampled by BLM was situated near a road not far from a pond, where cattle tended to congregate and overgraze (Tr. 248).

BLM responded that the procedures followed by BLM in carrying out the 1978 range survey complied with the accepted standards of the BLM manual. A BLM range conservationist who was in charge of the crews that surveyed both allotments testified that the crews worked 1 week on each allotment to make an estimate of the vegetative composition (Tr. 280-84). On each allotment the crews performed on-the-ground surveys of vegetation using the "ocular reconnaissance range survey method" following procedures set forth in the BLM manual (Tr. 282). The crews, each composed of two men, walked across the ground to be surveyed and recorded plants found. They prepared a map showing type designations, and the boundaries of the different vegetative types. Together with the field sheets on which they had recorded the percent of density and the vegetative composition for each vegetative type, these maps were turned over to other BLM employees who ultimately calculated grazing capacity (Tr. 284).

The permittees asserted that the areas surveyed did not come from the most representative areas and had not considered areas near the Sevier River (Tr. 325). However, it was not established that the land near the river was within the allotment (Tr. 329-30). The BLM conservationist further testified

that the vegetation surveys were made in typical areas that were representative of the range, but the surveys were only part of the observation areas for each vegetative type of forage (Tr. 334-36).

A BLM employee who worked on the range inventory crew confirmed that the vegetation surveys were made in representative areas of the different vegetative types after working over a whole area defined as a certain vegetative type and that the surveys were then used to calibrate forage density estimations (Tr. 354-55). This information was recorded on field sheets for various types of plants, brush species, grass species, and forb species. These data were considered with a list of proper use factors developed by Utah State University to calculate range capacity. He testified allowances were made in order to estimate all plants at full production and to rebuild for utilization (Tr. 374, 378).

From the evidence of record the Judge concluded that the Area Manager's decisions were based exclusively on the 1978 survey without any monitoring support or without adequate monitoring support. Based upon changes to the regulations he interpreted to require additional statistical support, he found the decisions could not be construed to be supported by adequate reliable data. He overturned these decisions as to both appellants stating:

I construe the amendment of 43 CFR 4110.3-2(c) and the comments of the Assistant Secretary accompanying that amendment as a clear expression of a finding and, in effect, a ruling by the Department that a one-point-in-time forage survey without proper monitoring support is not adequate, reliable data to support or justify a forage allocation decision.

(Decision at 6).

Although he observed BLM policy was to apply this new approach prospectively, he found he was not so bound in the adjudicative process, stating: "[I]t must be concluded that the present position of the Department is applicable in this proceeding and operates to destroy the historical concept or presumption that a forage survey conducted in accordance with BLM prescribed procedures is accurate and reliable" (Decision at 6).

He also found the record established error in BLM's determination of the carrying capacity for the Rock Canyon and Red Canyon allotments at issue, stating:

I simply do not understand how any ruling can be made in this case other than one that recognizes that error was made in the Area Manager's findings concerning carrying capacity. I take this position because (1) the findings were based on a onepoint-in-time forage survey without proper monitoring support, (2) the Department has found and, in effect, ruled, that a onepoint-in-time forage survey without proper monitoring support is not sufficiently adequate or reliable to support or justify a forage allocation decision, and (3) the Department has consistently held that error in the BLM findings of carrying capacity can be

established by showing that the range survey method was incapable of yielding accurate information.

(Decision at 7).

In the Dorius decision the Judge additionally found that the request to reinstate 893 AUM's of acting grazing preference that had been placed in suspended nonuse since 1967 was properly denied. He concluded:

The vague, generalized evidence presented by the appellant to the effect that the allotment has been improved since 1967 by supplying and distributing water is not sufficient to support the conclusion that the allotment can, at the present time, carry an additional 893 AUM's of active use or a total of 1,595 AUM's of active use. The appellant's evidence is not, in my opinion, as clear and convincing as the 1978 forage survey which showed a carrying capacity in a normal year and on a sustained basis of only 173 AUM's. The Area Manager should not be compelled to increase the appellant's active grazing preference from the present 702 AUM's in the absence of adequate, reliable data to serve as a basis for a forage allocation decision.

(Decision at 7-8).

In the Bown decision the Judge additionally affirmed the Area Manager's shortening of the grazing season of use and establishing a period of use from May 1 to August 31, stating: "This action was not questioned in the appellant's appeal, and no evidence was presented in an effort to show that the Area Manager had erred in establishing the new season of use" (Decision at 8).

BLM has appealed that portion of both decisions rejecting the reliability of the 1978 range survey asserting: (1) The grazing decisions were issued in accordance with 43 CFR 4110.3-2(b), (c), and (e) (1981); (2) the authorized officer's decision was made in compliance with BLM's grazing reduction policy and precedent established by Departmental decisions; (3) use of range surveys is valid for determining initial stocking rates and is in conformity with current grazing regulations; and (4) the authorized officer's decision was reasonable and proper and the permittees failed to show that the survey was inaccurate or that the monitoring data did not support the reduction.

Dorius has appealed that portion of the Judge's decision refusing his request to reinstate 893 AUM's of active grazing preference, contending that when his original AUM's were reduced in 1967, BLM represented that they would be reinstated when water was developed and distributed throughout the allotment. He asserts this has now been done, he has expended \$30,000 in developing this water distribution system, and since the forage survey was found to be unreliable, he should also now receive the additional 893 AUM's acting grazing preference.

Bown has appealed that portion of the Judge's decision shortening his season of use by 30 days, contending that he had originally appealed the whole decision of the Area Manager on the reductions and specifically appealed

from every finding of that decision. He asserts that there was sufficient evidence presented concerning the season of use and that portion of the decision should also be set aside because it was based on the same 1978 range survey.

[1] Implementation of the Taylor Grazing Act of June 24, 1934 (the Act), as amended, 43 U.S.C. §§ 315, 315a-315r (1982), is committed to the discretion of the Secretary of the Interior. Ruskin Lines, Jr. v. BLM, 76 IBLA 170 (1983); Claridge v. BLM, 71 IBLA 46 (1983). Section 2 of the Act charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315a (1982). The Federal Land Policy and Management Act of 1976, amending the Taylor Grazing Act, reiterates the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1982). The BLM District Manager is responsible for making decreases in numbers of cattle allowed on existing grazing leases when necessary. 43 CFR 4110.3-2(b) (1983). A determination by a District Manager of the grazing capacity available for livestock use will not be overturned by this Board in the absence of a clear showing of error. Claridge v. BLM, supra at 50; 43 CFR 4.478(b). Where, as here, the parties question the accuracy of a range survey, it is not enough for a range user to show that the grazing capacity could be in error; he must show that it is erroneous. Briggs v. BLM, 75 IBLA 301, 302 (1983); Allen v. BLM, 65 IBLA 196, 200 (1982); Rachel Ballow, 28 IBLA 264 (1976).

As the Judge and the parties correctly observed, the Department has historically recognized certain elements that must be shown to overturn the results of a range survey:

There is inherent in * * * [the Bureau's range studies] an element of human judgment which cannot be eliminated by the most meticulous observance of established procedures for measuring range capacity. However, * * * [t]he fact that there is error in the Bureau's findings can be established only by showing that the Bureau's range survey methods are incapable of yielding accurate information, that there was material departure from prescribed procedures, or that a demonstrably more accurate survey has disclosed a different range capacity.

David Abel, 2 IBLA 87, 96, 78 I.D. 86, 93 (1971); O. J. Cooper, A-30974 (Apr. 29, 1969).

Applying this standard of review to the Judge's decision raises the question whether the amended regulations were properly applied in these appeals. Because the underlying rationale of 43 CFR 4110.3-2 was changed, and recognized by the Department to require an operative change in approach to grazing determinations, the Judge reasoned BLM could no longer provide for reductions based on a single survey without later monitoring support data in cases such as these. It is BLM's position that both these decisions issued

7 months prior to changes in 43 CFR 4110.3-2, which was declared to be effective on October 21, 1982, and the decisions are, therefore, entirely consistent with prior regulations. We agree with the Judge's conclusions that the proper standard for determining the carrying capacity of these grazing allotments is the current procedure required by the amended regulation, 43 CFR 4110.3-2(c) (1983).

[2] In this instance the language of the regulation and the published comments with the proposed rulemaking fail to specify whether the regulation was to be applied to cases pending before the announced effective date, October 21, 1982. BLM Instruction Memoranda Nos. 82-644 and 82-650 indicate the amended regulation should apply to cases arising under EIS's completed in fiscal year 1982. The EIS under which action was taken on appellants' permits was apparently completed prior to the beginning of the 1982 fiscal year, although both decisions were rendered in fiscal year 1982.

Where a regulation is amended in a way that benefits an applicant, the Department may in the absence of intervening rights of third parties, or prejudice to the interests of the United States, apply the amendment to pending cases. James E. Strong, 45 IBLA 386 (1980); Duncan Miller, 28 IBLA 292 (1976); Henry Offe, 64 I.D. 52, 55-56 (1957). Since in both these cases there are no competing private interests in the two allotment areas, there are no intervening third party rights to be adversely affected. The permittees will benefit by being able to continue their existing active grazing use under their permits. Further, there is no clear adverse impact on the interests of the United States, since it is not established by the record that these allotments would be overgrazed by allowing existing grazing use to continue until further trend studies are conducted to supplement a prior range survey as required by 43 CFR 4110.3-2(c) (1983). There was little or no evidence presented as to the condition of the range at the time of the hearing in 1983. We are, therefore, now asked by BLM to assume damage to the range will occur based on the 5-year-old range survey, the accuracy of which is challenged by appellants and denied by current BLM regulation. More to the point, however, as Judge Mesch observed, the 1982 change to 43 CFR 4110.3-2 was effective prior to the fact-finder's decision. It was his decision that the regulation currently in effect was, on the facts found and in the light of declarations by the Department published with the regulation, a statement of policy which required supporting data to be furnished with range surveys before a decision to reduce permitted grazing could be made. Judge Mesch found, as a consequence, "that the present position of the Department is applicable in this proceeding and operates to destroy the historical concept or presumption that a forage survey conducted in accordance with BLM prescribed procedures is accurate and reliable." This correctly applies the general rule that administrative decisions should apply the law in effect at the time of decision. ^{1/} See Bradley v. Richmond School Board, 416 U.S. 696, 711, 715 (1974).

^{1/} Contrary to the assertion by the dissent that there has been a "retroactive effect" given to the regulation, the application of the amended regulation in this case is not retroactive. It is the present application of a rule currently in effect, which is based upon policy declared publicly on Oct. 21, 1982.

[3] Because of the changes in the BLM range adjudication procedures which occurred in 1982 when 43 CFR 4110.3-2(c) (1983) was amended, which recognize an inherent error in using old, unsupported data, the 1978 range survey is an inaccurate and unreliable basis, by itself, upon which to reduce the AUM's in these grazing allotments. We, therefore, find the permittees have proven the BLM determinations of grazing capacity and subsequent forage allocation decisions are in error because the survey methods used were not capable of yielding accurate information, and because they departed materially from procedures required by 43 CFR 4110.3-2(c) (1983). See David Abel, supra, O. J. Cooper, supra. Although BLM personnel testified the 1978 range survey was conducted pursuant to the requirements of the BLM range manual then in effect (Tr. 282, 395), they did not refute appellants' showing that reductions would be inconsistent with the newly recognized BLM policy and procedure. The record is filled with evidence that the use of a 4-year old one-point-in-time ocular reconnaissance survey without proper monitoring support data is not in this case an adequate foundation upon which to issue forage allocation decisions. In response to interrogatories, James M. Parker, Associate Director, BLM, stated:

Current policy was developed to ensure that decisions are based upon the most scientifically sound data available. A decision based upon a one-point-in-time forage inventory would not be arbitrary in that it would neither arise from will or caprice nor would it be selected at random and without reason. Such a decision may, however, lack adequate basis in fact.

* * * * *

A one-point-in-time survey may be a good estimate, within tolerances, of production at the time it is done. Season-to-season and year-to-year variations in site productivity cannot be observed in the relatively short period of time involved in survey data collection. For long-term grazing capacity determinations, the survey will only be as good as the estimates and predictions made and considered to account for seasonal and annual variations in site productivity. The true measure of long-term grazing capacity should be based upon several years of accumulated data on weather, actual grazing use, forage utilization levels and range trend.

(Answer to Interrogatories by James M. Parker at 1, 2).

Public comments on this matter by former Secretary James Watt were acknowledged by BLM and submitted for the record by the permittees wherein Secretary Watt was quoted from published newspaper accounts to have stated: "We are most interested in results. No grazing decisions will be issued which are based on one-point-in-time inventories. We will monitor results to see whether forage is getting better or worse and making adjustments accordingly. Adjustments also can be made by mutual agreements" (Tr. 40).

These statements, taken with the comments from the notice of final rulemaking at 47 FR 41704 (1982) and statements of the BLM Utah State Director, previously cited (Tr. 30-31), indicate current BLM policy requires

later trend studies to support changes in grazing permits where there is a lapse between the forage study and the decision to increase or decrease permitted numbers of grazing animals or where the decisionmaker is unable to decide whether to change grazing practices without more factual data. The record demonstrates that the basis for the new policy is a recognition that temperature and precipitation are so variable that only continuous trend studies can fairly be used to efficiently determine the grazing capacity of the Federal range.

[4] Finally, the testimony of the Area Manager, whose decision is under review, was, had he known of the change in the regulation when he issued his decisions in 1982, he would not have considered there to be enough data to make these decisions without later trend studies to substantiate the 1978 survey. He testified:

JUDGE MESCH: * * * My question is, if you'd received that instruction memo [the September 3, 1982, memorandum from the Director, BLM] prior to the time you issued your decisions in these two cases, would you have issued your decisions, or would you have withheld your decisions pending the outcome of monitoring studies?

THE WITNESS: Withheld the decision pending monitoring of the studies.

(Tr. 122). This is the crux of the matter. The decisionmaker tells us that, had he been aware of the 1982 regulatory change, he would not have made a decision without further studies of the range. Since these permittees are entitled to the benefit of the application of the standard set forth in 43 CFR 4110.3-2(c) (1983), BLM's adjudications did not meet that standard by providing a proper factual basis in the form of later trend studies showing the 1978 study to be valid.

BLM argues nonetheless that the record contains sufficient monitoring data (Tr. 442-48, 452-63) to support the Area Manager's decisions which now could be applied by the Board even though the data was not considered by the Area Manager. The data submitted does not, however, establish that the allotments are overgrazed, because it fails to show the range condition after 1978. There is some discussion of trend surveys on the Bown allotment, but these surveys are only partial, primarily consisting of precipitation reports and Bown's own reported usage, and are not current (Tr. 457-60). There is no information on the Dorius allotment until after 1981 (Tr. 453). As to the Dorius range, monitoring was virtually nonexistent and could provide no support for a finding the range was overgrazed. The significance and effect of this limited monitoring evidence on the BLM determinations is unclear at best. Since, in this case, there was no monitoring of the Dorius allotment and the studies done on the Bown allotment were not used by the decisionmaker (Tr. 122, 469, 470), there must be further consideration given to the matter, as Judge Mesch found in his decisions. Accordingly, we affirm the Judge's findings rejecting BLM's decreases in the permittees' active grazing privileges.

Concerning the Judge's refusal to reinstate 893 AUM's of active use to Clyde Dorius, appellant Dorius has not provided any substantial evidence that

this determination was in error and we affirm that denial. As to the decision to affirm BLM action to shorten Bown's season of use by 30 days to a period from May 1 to August 31, appellant Bown did not show error in the Area Manager's determination. Following the initial notice of appeal from the February 17, 1982, decision, to which Bown objected, no evidence was offered or appears of record to dispute the finding as to season of use. Accordingly, we affirm the Judge's finding limiting Bown's season of use.

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 affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING IN PART:

The October 1982 amendment of 43 CFR 4110.3-2(c) does not, in the words of the Administrative Law Judge's decision, "destroy the * * * presumption that a forage survey conducted in accordance with BLM prescribed procedures is accurate and reliable." Nor does it vitiate the 1978 forage survey that was the basis for BLM's February 1982 decisions sharply reducing appellants' allowable AUM's. The amendment only requires that such a survey must be supplemented before serving as the basis for an initial reduction in authorized grazing use.

Although this is a perfectly reasonable change in procedure, we are not to give retroactive effect to the amendment of a regulation where there are countervailing public policy reasons. James E. Strong, 45 IBLA 386, 388 (1980). The policies of the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Public Rangelands Improvement Act set forth in 43 U.S.C. § 315a, 1701(a)(8), (12), and 1903(b) (1982), strongly counsel against giving retroactive effect to a change in procedure when doing so subverts BLM's decisions implementing those policies. Especially is this so where the agency indicated that the change applied to EIS's completed in FY 1982 and afterwards and the Mountain Valley Environmental Impact Statement was completed well before then.

Will A. Irwin
Administrative Judge