

JOEL STAMATAKIS
STEVE STAMATAKIS

IBLA 87-122

Decided May 29, 1987

Appeal from a decision of the Moab, Utah, District Office, Bureau of Land Management, rejecting appellants' application for change in grazing use. U 66.

Appeal dismissed as premature, case referred to Hearings Division.

1. Grazing Permits and Licenses: Appeals -- Grazing Permits and Licenses: Hearings

Decisions regarding adoption or amendment of resource management plans or management framework plans, which are not subject to administrative review by the Board of Land Appeals, are properly distinguished from decisions adjudicating grazing applications. An appeal from a final BLM decision affirming a proposed decision denying a grazing permittee's application for change in grazing use is properly referred to the Hearings Division of the Office of Hearings and Appeals for assignment to an administrative law judge pursuant to the regulations at 43 CFR 4.470 and 43 CFR 4160.4, notwithstanding the fact BLM based its decision on a planning determination not to amend the relevant plan.

APPEARANCES: Nick Sampinos, Esq., Price, Utah, for appellants

OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for appellants filed a timely notice of appeal from the September 24, 1986, final decision of the Manager, Moab, Utah, District Office, Bureau of Land Management (BLM), rejecting appellants' request for change in grazing-use authorization from sheep use to cattle/sheep dual use on the Elliot Mountain, Bighorn River, and Pack Trail Allotments. As a basis for the decision, BLM explained that the requested change was not in accordance with the Management Framework Plan (MFP) (decision RM-1.5) for the area. The BLM decision further explained an evaluation of the proposal had been completed and "This analysis indicates that the management framework plan, decision RM-1.5, is still appropriate and that there is no basis for completing a planning amendment to consider a change in kind of livestock from sheep to dual use."

The decision of BLM noted that regulations governing the implementation of land-use plans require that "resource management authorizations * * * conform to the approved plan," citing 43 CFR 1610.5-3(a). Further, BLM held that, pursuant to the grazing regulations, grazing use is governed by the "land use plan objectives," citing 43 CFR 4130.6. Accordingly, the BLM District Manager affirmed the earlier proposed decision of the BLM Area Manager 1/ and rejected appellants' request for a change in kind of livestock. The BLM decision recited a right of appeal to the Interior Board of Land Appeals.

Appellants' initial notice of appeal 2/ in this case manifested an intent to appeal the rejection of the change in use "for the purpose of obtaining a hearing before an administrative law judge." This appeal incorporated by reference the reasons stated in a letter dated November 12, 1985, from counsel for appellants to the BLM District Manager in support of the protest of the proposed decision. After issuance of the revised final decision and appellants' subsequent notice of appeal filed October 15, 1986, the appeal was transmitted to the Board of Land Appeals (rather than the Hearings Division) as a "grazing (planning amendment)" appeal.

This appeal raises a threshold issue of the jurisdiction of the Interior Board of Land Appeals. Accordingly, we have sua sponte accorded this case expedited consideration. Jurisdiction over the appeal in this case hinges on whether the case is characterized as an appeal of a planning-amendment decision or an appeal of a grazing-management decision.

The regulations governing resource-management planning are found at 43 CFR Subpart 1610. These regulations detail procedures for approval and amendment of resource-management plans as well as for administrative appeals of these decisions. As recognized by the BLM decision appealed from, the regulations direct that "resource management authorizations * * * shall conform to the approved plan." 43 CFR 1610.5-3(a). This requirement is restated

1/ Appellants' request for change in livestock use was the subject of a proposed decision dated Oct. 30, 1985, issued by the BLM Area Manager, Price River Resource Area. This earlier decision was similar to the final decision in that it rejected the change in use based on the fact appellants' request was inconsistent with the land-use plan. However, unlike the final decision, the earlier decision did not entail a detailed analysis of the proposed change and whether it is appropriate to amend the land-use plan to allow the change.

2/ BLM generated some confusion by issuing an earlier "Notice of Final Decision" dated Aug. 13, 1986. This decision was substantively identical to the Sept. 24, 1986, decision in the basis given for rejecting appellants' requested change, but recited that it was issued pursuant to 43 CFR 4160.3(b) and purported to recognize a right of appeal to an administrative law judge for a hearing pursuant to 43 CFR 4.470(a). This decision was withdrawn as being in error by letter dated Sept. 11, 1986, the same day the initial notice of appeal was received by BLM. Subsequently, the revised final decision was issued recognizing a right of appeal to the Board of Land Appeals rather than an administrative law judge.

in the grazing-use regulations where it is required that grazing permits and leases contain terms and conditions necessary to achieve the management objectives identified in land use plans. 43 CFR 4130.6.

In this case the relevant land-use plan decision (RM-1.5) provides:

Do not allow conversion from sheep to cattle in the River or Last Chance Allotments or on those portions of the Elliot Mountain or Woodside Allotments that lay [sic] east of the Book Cliffs. [3/]

* * * * *

Rationale

The River, Last Chance and subject portions of the Elliot Mountain and Woodside Allotments are generally unsuitable to livestock grazing due to slope and water availability. Water sources are rivers and streams in narrow canyon bottoms. The plateau areas which comprise the majority of the acreage and forage production cannot be reached by cattle watering in the bottoms. Development of artificial water is probably not feasible. The area is generally not accessible by motorized vehicle and is within a WSA [Wilderness Study Area]. Costs incurred in getting equipment into the area if IMP [Interim Management Plan]/Wilderness restrictions are lifted would probably exceed the value of the water project to be developed.

In those cases where a proposed action is not in conformity with the land-use plan and warrants further consideration before a plan revision is scheduled, alteration of the plan to allow the activity may be considered pursuant to the procedures for plan amendment. 43 CFR 1610.5-3(c). Consideration of an amendment precipitated by a proposed nonconforming use may be undertaken through an environmental analysis of the proposed change. 43 CFR 1610.5-5. Until MFP's for the relevant area are superseded by Resource Management Plans (RMP's), decisions on whether the proposed action is in conformity with the MFP and whether to amend the MFP pursuant to the regulation at 43 CFR 1610.5-5 may be made by the District Manager. 43 CFR 1610.8(a)(3). Appellants' proposal was the subject of a detailed analysis by BLM set forth in a 33-page staff report appearing in the record. This analysis formed the basis for the conclusion of BLM in the final decision not to amend the plan to authorize a change in kind of livestock use.

Pursuant to the regulations governing resource-management planning at 43 CFR Subpart 1610, a person who participates in the resource-management planning process and has an interest which is or may be adversely affected by

3/ The proposed decision of BLM disclosed that at the time the land-use plan was written the Big Horn Allotment was part of the Last Chance Allotment and Pack Trail Allotment was the portion of the Woodside Allotment that is east of the Book Cliffs.

approval or amendment of a RMP may protest such approval or amendment. 43 CFR 1610.5-2(a); Wilderness Society, 90 IBLA 221, 224 (1986); Oregon Natural Resources Council, 78 IBLA 124, 127 (1983). Protests are filed with the Director, BLM. 43 CFR 1610.5-2(a)(1). The decision of the Director, on such protests "shall be the final decision of the Department of the Interior." 43 CFR 1610.5-2(b). Thus, decisions regarding approval and amendment of RMP's (or MFP's) are not subject to appellate review by this Board. Wilderness Society, *supra*; Oregon Natural Resource Council, *supra*. This principle has expressly been applied to decisions of BLM declining to amend a RMP (or MFP) at the request of a party seeking a change in grazing-use authorization. Harold E. Carrasco, 90 IBLA 39 (1985).

[1] However, decisions regarding approval or amendment of RMP's or MFP's are properly distinguished from decisions implementing those plans. The planning regulations themselves expressly recognize that any person adversely affected by an action being proposed to implement some portion of a RMP may appeal the decision implementing the plan pursuant to the appeal procedures at 43 CFR Part 4. 43 CFR 1610.5-3(b); see Wilderness Society, *supra* at 224. This Board in Harold E. Carrasco, *supra*, expressly recognized this distinction and held the right of appeal to an administrative law judge for a hearing and, ultimately, to the Board, pursuant to the regulations at 43 CFR Part 4, arose when the decision issued denying appellants' request to authorize grazing use. *Id.* at 41.

In the present case, unlike Carrasco, appellant never applied to amend the MFP. Rather, appellant appealed the decision denying his request for a change in grazing-use authorization from sheep to cattle/sheep dual use. The regulations governing grazing administration authorize the filing of applications for changes in grazing use which may be granted by the authorized officer. 43 CFR 4130.1-1. Proposed decisions regarding terms and conditions of permits are to be served on the permittee. 43 CFR 4160.1-1. The regulations further provide that if, as happened in this case, a protest is filed, the authorized officer shall reconsider his decision in light of the protest and of other pertinent information and serve his final decision on the protestant. 43 CFR 4160.3(b). Any person adversely affected by a final decision may appeal the decision for the purpose of a hearing before an administrative law judge pursuant to 43 CFR 4.470 by filing a notice of appeal within 30 days of receipt of the decision. 43 CFR 4160.4. ^{4/} Any party adversely affected by the decision of the administrative law judge has the right of appeal to the Board of Land Appeals. 43 CFR 4.476.

The right of appeal to an administrative law judge for a hearing is based on section 9 of the Taylor Grazing Act dealing with grazing administration which directs the Secretary of the Interior to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of

^{4/} This right of appeal to an administrative law judge for a hearing was expressly recognized by BLM in the final decision dated Aug. 13, 1986, which was subsequently withdrawn and superseded by the final decision of Sept. 24, 1986. See note 2, *supra*.

the administrative officer." 43 U.S.C. § 315h (1982). The right to a hearing on appeal from decisions of the authorized officer made in the administration of grazing districts has been recognized by the courts. See LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir.), cert. denied, 376 U.S. 907 (1964). It appears from the record BLM considered appellants' application in the framework of the planning-amendment procedures which led to their characterization of this case as a "planning amendment" appeal. However, this label applied by BLM cannot obscure the fact that this is an appeal by grazing permittees from a final decision after protest denying their request for a change in grazing use. This is correctly perceived as a decision adjudicating the application for change in grazing use rather than a planning decision. Accordingly, the appeal to the Board is premature as the case should have been referred to an administrative law judge for a hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal to the Board is dismissed as premature and the case is referred to the Hearings Division for assignment to an administrative law judge.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING:

Is the decision under appeal a planning-amendment decision or a grazing-management decision and what does it matter? BLM first indicated in its August 13, 1986, final decision that it was a grazing-management decision and provided the Stamatakis' the right to appeal to an administrative law judge pursuant to 43 CFR 4.470(a). BLM withdrew that decision, however, and on September 24, 1986, issued the decision now under appeal. Therein, BLM appeared to be issuing a planning-amendment decision and granted the Stamatakis' the right to appeal to this Board.

While I agree with the conclusion that this case is properly referred to the Hearings Division because BLM's September 24, 1986, decision was, in fact, final action on the Stamatakis' application for change of grazing use, I would like to examine further the relationship between the planning regulations and the grazing regulations in the adjudication of an application for a change in grazing use.

The grazing regulations provide that applications for changes in grazing use should be filed with the authorized officer. 43 CFR 4130.1-1(a). The authorized officer may grant changes in grazing use. 43 CFR 4130.1-1(b). In this case appellants filed an application seeking a change of grazing use from sheep only to mixed cattle and sheep use. The Price River Management Framework Plan (MFP) at RM-1.5, provides that there is to be no conversion from sheep to cattle in the area in question. Approximately 3 months after receipt of the application, the Price River Resource Area Manager issued a proposed decision on October 30, 1985, "in accordance with 43 CFR 4160.1-1" rejecting the application as being incompatible with the MFP. The decision accorded the Stamatakis' the right to protest in accordance with 43 CFR 4160.2, which they did.

Following receipt of the protest, BLM engaged in a comprehensive analysis of the Stamatakis' request resulting in a Staff Report dated July 30, 1986. Therein, BLM analyzed the anticipated impacts of the proposed action. The report made the following conclusions:

The proposed action would result in increased soil loss due to water and wind erosion [Staff Report at 20].

Sedimentation of the three perennial streams would be increased as a result of increased overland flows and bank erosion [Id. at 21].

There is no adequate forage to supply the proposed action grazing levels. Overstocking will result in severe utilization in some areas and eventually change the plant composition [Id. at 22].

The proposed action would adversely affect wildlife and wildlife habitats in and adjacent to the affected area [Id. at 23].

Aquatic habitat and fisheries in Range Creek will be negatively impacted under the proposed action [Id. at 25].

The visual appearance of campsite areas commonly used by livestock and people would be affected by the visibility of changes in vegetation and soil due to heavy livestock utilization. [Id.]

Because the proposed action would cause a declining trend in vegetation and soils, as described above, the proposed action would not meet IMP [Interim Management Policy and Guidelines for Lands under Wilderness Review] requirements for portions of the allotments within the WSA's [Wilderness Study Areas] [Id. at 26].

The Staff Report also stated that the proposed action would "require amendments to both the River Management Plan and the Price River MFP." Id. at 27.

Although the Staff Report does not include a summary section, the overall tenor of the report is clear -- the Stamatakis' request should be denied. That was the final action taken by BLM.

I turn now to BLM's Resource Management Plan (RMP) regulations at 43 CFR Subpart 1610. Those regulations contain a section entitled "Transition period." 43 CFR 1610.8. That regulation provides:

(a) Until superseded by resource management plans, management framework plans may be the basis for considering proposed actions as follows:

* * * * *

(3) For proposed actions * * *, determination shall be made by the District or Area Manager whether the proposed action is in conformance with the management framework plan. Such determination shall be in writing and shall explain the reasons for the determination.

* * * * *

(ii) If the proposed action is not in conformance with the management framework plan, and if the proposed action warrants further favorable consideration before a resource management plan is scheduled for preparation, such considerations shall be through a management framework plan amendment using the provisions by § 1610.5-5 of this title.

The amendment provisions provide in relevant part:

An amendment shall be initiated by * * * a proposed action that may result in a change in the scope of resource uses or a change

in the terms, conditions and decisions of the approved plan. An amendment shall be made through an environmental assessment of the proposed change, or an environmental impact statement, if necessary, public involvement as prescribed in § 1610.2 of this title, interagency coordination and consistency determination as prescribed in § 1610.3 of this title and any other data or analysis that may be appropriate. * * * If the amendment is being considered in response to a specific proposal, the analysis required for the proposal and for the amendment may occur simultaneously.

43 CFR 1610.5-5.

It is not clear from the record whether BLM intended that its Staff Report constitute a simultaneous analysis of the proposed action and an amendment in accordance with 43 CFR 1610.5-5. Despite its comprehensive nature, the Staff Report was not completed in the form of an environmental assessment or environmental impact statement; therefore, under 43 CFR 1610.5-5, it would not satisfy the requirement that an amendment be made through one of those documents.

It appears BLM's initial action in this case was in accordance with 43 CFR 1610.8(a)(3) and with the grazing regulations at 43 CFR Subpart 4160. Under 43 CFR 1610.8(a)(3), the Area Manager is to determine whether the proposed action is in conformance with the MFP. Herein, the Area Manager determined that it was not. Since the proposed action involved grazing, the Area Manager issued his decision as a proposed decision under 43 CFR 4160.1-1, and the Stamatakis' protested.

At that point I believe BLM could have issued a final decision rejecting the Stamatakis' application pursuant to 43 CFR 4160.3. That is what BLM did in its August 13, 1986, decision, which appropriately informed the Stamatakis' of their right to appeal to an administrative law judge. 43 CFR 4.470; 43 CFR 4160.4. This is in essence what transpired in the case of Harold E. Carrasco, 90 IBLA 39 (1985). Therein, the Carrascos requested that BLM open certain areas to grazing. BLM issued a decision denying that request on the basis that grazing was inconsistent with the management plan for the area and informing the Carrascos of their right to appeal to an administrative law judge in accordance with 43 CFR 4.470. The Carrascos did not appeal. However, in its decision BLM also informed the Carrascos that they could apply to amend the management plan to allow grazing. The Carrascos did so, and BLM rejected their application. On appeal to this Board we dismissed the appeal stating that denial of a request to amend an existing RMP or MFP is not subject to appeal to the Board, but only properly the subject of protest to the Director, BLM whose decision would be final for the Department.

Although not emphasized in the Carrasco case, the distinction between grazing decisions and planning-amendment decisions, vis-a-vis appeal rights, was touched upon. Here, the Stamatakis' made no formal request for a planning amendment nor did BLM solicit one. However, such a request does not appear to be necessary under the regulations. When a proposed action is not

in conformance with the MFP, but the proposed action "warrants further favorable consideration," BLM is to engage in the planning amendment process. 43 CFR 1610.8(a)(3)(ii).

It is not clear in this case that BLM determined that the Stamatakis' request warranted "further favorable consideration." What is clear is that BLM undertook a thorough analysis of the request and rejected it. Rejection of the change-of-use application triggered the appeal provisions of the grazing regulations.

BLM's subsequent action of withdrawing its August 13, 1986, decision and reissuing the September 24, 1986, decision providing a right of appeal to this Board was improper. Even if BLM believed its action constituted a planning-amendment decision, the identification of the Board as the entity that would review such a decision, as pointed out in Carrasco, was incorrect.

Under the circumstances, I find that BLM's action was, in fact, a grazing decision subject to administrative review in accordance with 43 CFR 4.470.

Bruce R. Harris,
Administrative Judge.

