

ROBERT E. MILLER, JR., AND DONALD E. ROWLETT  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 90-266

Decided March 14, 1991

Appeal from a decision by Chief Administrative Law Judge Parlen L. McKenna granting increases in grazing preferences on Soda Mountain grazing allotment 0110.

Reversed.

1. Grazing Leases: Generally--Grazing Leases: Apportionment of Land--  
Grazing Leases: Cancellation or Reduction--Grazing Leases:  
Preference Right Applicants

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decisionmaker chose to reject data gathered by a preliminary study using discredited sampling methods.

2. Grazing Leases: Apportionment of Land--Grazing Leases: Preference  
Right Applicants

Holders of existing permanent grazing preference rights who seek increased grazing preferences must show that sufficient forage exists to support the requested increases. Generally, to be allowed, such increases must be supported by continuing rangeland studies.

APPEARANCES: William J. Thomas, Esq., Sacramento, California, for appellants; Marc E. Prevost, Ashland, Oregon, Chairperson for Intervenor Soda Mountain Wilderness Council; Intervenor Suzy Courtney, pro se, Ashland, Oregon; Lorin Moench, Englewood, Colorado, Chairman, Public Lands Committee, for Amicus American Sheep Industry Association; James S. Burling, Esq., Sacramento, California, for Amicus California Cattlemen's Association; Marianne King, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM) has appealed from a decision issued on February 15, 1990, by Chief Administrative Law Judge Parlen L. McKenna, setting aside two February 19, 1989, decisions by the Klamath Resource Area Manager, BLM, that had denied Robert E. Miller, Jr., and Donald E. Rowlett

permanent increases in grazing preferences on Soda Mountain grazing allotment 0110 located in BLM's Medford, Oregon, district. The February 15, 1990, decision granted Miller an additional 718 animal unit months (AUM's) of forage and increased Rowlett's permanent grazing preference by 210 AUM's.

Prior to July 1, 1985, Miller was allotted 470 permanent AUM's on the Soda Mountain allotment, Rowlett had 324 AUM's, Larry Lemos held 400 AUM's, and John Mosby had 2,835 AUM's, for an allotment total of 4,029 AUM's. On July 1, 1985, Mosby's allotment was cancelled and reallocated to the other grazers on the allotment, with Miller receiving 1,944, Rowlett 784, and Lemos 1,250 AUM's. Mosby appealed the decision cancelling his preference, however, and regained a permanent preference, albeit in a reduced amount of 1,500 AUM's, as a result. As part of this reinstatement, the grazing preferences of Miller, Rowlett, and Lemos were returned to their previous levels. Rowlett then applied for an increase of 210 AUM's and Miller applied for an increase of 718 AUM's. Both applications were denied in separate decisions dated February 19, 1988, which gave identical reasons for denial, as follows:

The Federal range code specifically states that authorized livestock grazing use shall not exceed the livestock grazing capacity and may be limited or excluded to the extent necessary to achieve the objectives established for the allotment [43 CFR 4130.6-1(a)].

Further, grazing preference shall be allocated to qualified applicants following the allocation of vegetation resources among livestock grazing, wild free-roaming horses and burros, wildlife, and other uses in the land use plan [43 CFR 4110.2-2(a)]. As you know, this office is presently conducting monitoring studies following issuance of the Medford Grazing Management Program [Environmental Impact Study] EIS to establish allocation to competing uses.

Applications for temporary non-renewable AUMs within the Soda Mountain Allotment will be considered on an annual basis, prior to turn-out, up to the level of the present recognized preference of 2,694 AUMs. The AUMs available for temporary non-renewable [grazing preference] will consist of AUMs temporarily held in suspension as a result of the Mosby decision/agreement and approved non-use by the permittees within the Soda Mountain Allotment.

Actual use records, utilization and precipitation data will be the primary studies used to determine capacity of the Soda Mountain Allotment. The permittees are encouraged to assist and cooperate in gathering this data. It is anticipated that licensing of temporary non-renewable AUMs up to the level of the present active preference will stabilize livestock numbers and thereby

improve the quality and consistency of monitoring data. [Emphasis in original.]

(Miller Decision at 3).

Appellants disputed that the present active preference of the allotment when the decisions were issued was 2,694 AUM's, as found by the Klamath Area Manager, contending that a total initial allotment preference of 4,011 AUM's more accurately corresponded to the forage available for grazing, and that this previously established grazing level entitled them to increased forage in the amounts they had applied for, since it would result in total allotted preference rights within the initial level of allotment.

Following the evidentiary hearing before the Chief Administrative Law Judge on September 18, 1989, the parties were encouraged to seek to settle this dispute. Appellants' position was stated in a letter to counsel for BLM dated October 16, 1989, where they asserted that

the Rangeland Summary (RPS) states that 4,011 AUM's of forage is available for livestock grazing on the Soda Mountain Allotment. Even though Mr. Jacobs [a BLM employee called as a witness by BLM] testified that the 4,011 figure only represented the total preference at the time that the RPS was created, Mr. Drewien [another BLM employee called as a witness by appellants] who was in the area throughout all relevant times and has been personally familiar with the range, provided his expert opinion that available forage meets or exceeds the 4,011 figure.

This statement was analyzed by BLM in a memorandum dated October 26, 1989, as follows:

We disagree with the statement by [appellants] that the Bureau does not contend that there are fewer than 4,011 AUMs on the Soda Mountain Allotment available for livestock. Review of the [administrative hearing] record will show: (a) that distribution problems are known to exist, (b) that approximately 85% of the allotment is in poor ecological condition, (c) that the management plan for the Soda Mountain Allotment has not been fully implemented, (d) that concerns were expressed about providing adequate forage for wildlife and protecting critical deer winter ranges, (e) that present cattle numbers are causing problems and complaints within livestock herd districts [where cattle are prohibited], (f) that concern has been expressed over possible impairment of wilderness values within the proposed study area, (g) that concern was expressed about [the effect of grazing on] proposed areas of critical environmental concern (ACEC's), and finally (h) that cattle beyond present numbers may conflict with recreation use.

Even with all other resource values considered in the final decision and the [administrative hearing] record set aside, the

fact that range condition is poor on the majority of the allotment in conjunction with distribution problems and the absence of an operational grazing system would preclude consideration of an increase at this time. Policy and regulations are as one in the requirement for demonstration through monitoring data, that excess forage is permanently available and objectives must be met prior to increases in grazing preference. [Emphasis in original.]

(Memorandum at 2).

On February 15, 1990, after the parties failed to reach an agreed settlement of their dispute, the Chief Administrative Law Judge issued his decision now under review, finding that:

BLM's decision to allocate only 2,694 AUMs for grazing within the Soda Mountain Allotment is contrary to the land use plan for the Medford District and therefore in violation of the applicable grazing regulations. A decision to significantly reduce the available grazing forage can only be accomplished by an amendment to the land use plan for the area. See 43 CFR 1610.5-3(c) (1988).

There are provisions for the temporary suspension of active use within an allotment where, "monitoring shows current use is causing an unacceptable level or pattern of utilization." 43 CFR 4110.3-2 (1988) (emphasis added). Indeed, BLM's own grazing manual requires continual monitoring on all grazing allotments to determine if grazing adjustments are necessary. See Respondents Exhibit 5. BLM has admitted, however, that proper monitoring studies, which might support a suspension of active use, have yet to be conducted. [Footnotes omitted.]

(Decision at 6). BLM was ordered by the Chief Administrative Law Judge to increase the permanent grazing preferences of Miller and Rowlett in the amounts applied for by them (Decision at 8).

On appeal to this Board the parties repeat the positions taken by them after their evidentiary hearing. In so doing, BLM contends that the Chief Administrative Law Judge erred when he found that the land use plan compelled an increase in appellants' grazing preferences. This finding, BLM argues, undercuts the discretionary authority conferred by law on the Secretary and improperly delegates that authority to Miller and Rowlett (Statement of Reasons (SOR) at 4-7). Miller and Rowlett contend that the Chief Administrative Law Judge's decision is supported on the record by his finding that there were 4,011 AUM's available on the allotment, and that his decision rests on his estimation of witness credibility, which places an "enormous burden upon the agency to document reversible error" (Answer at 16, 22, and 26). The parties agree that this appeal is subject to the arbitrary and capricious standard of review: that is, that if the action taken by the District Manager when he denied the applications for increase in grazing preferences had a rational basis, it was not arbitrary

and capricious, and therefore should be sustained. United States v. Maher, 5 IBLA 209, 218 (1972); Smith v. BLM, 48 IBLA 385 (1985).

The principal land planning document at issue on appeal, Exhibit 17 at hearing, is a document prepared in installments by BLM beginning in September 1983 with a draft environmental impact statement for the Medford Grazing Management Program (DEIS). Preparation of this document led to issuance of the final Medford Grazing Management Program Environmental impact statement (FEIS) in April 1984. The FEIS incorporated the DEIS by reference and analyzed comments to the DEIS and changes required by information received during the comment period. In September 1984, Exhibit 17, the rangeland program summary record of decision (RPS), was issued. This third planning document is the focus of the principal arguments of the parties. It contains the outline of the Medford Grazing Program developed by agency planning, and incorporates and amends prior planning documents. This sort of tiered planning is encouraged by regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332-4361 (1988). 40 CFR 1508.28. See generally Headwaters, Inc., 116 IBLA 129, 138-39 (1990).

The RPS declares that the continuing planning described "enables BLM to meet the multiple use mandates and agency mission spelled out in the Federal Land Policy and Management Act (FLPMA, 1976), the Public Rangeland Improvement Act (PRIA, 1978), O&C Act of 1937, and the National Environmental Policy Act (NEPA, 1969)" (RPS at 3). Information published at Appendix 2, RPS Forage Use, establishes that the Soda Mountain grazing allotment is in selective management category I, and was assigned an initial livestock grazing level of 4,011 AUM's, with a short term management goal of 4,775 AUM's and a long term goal of 4,870 AUM's. According to RPS, allotments in management category I are to be managed so as to improve them: "I" stands for "improve." Those allotments in the "I category will receive first priority for expenditure of range improvement funds. These allotments have been selected because of their high potential and/or resource conflicts" (RPS at 6, 8). The planning period contemplated by the FEIS is 5 years (FEIS at 38). Implementation of the RPS, assuming that funding is provided as scheduled for planned improvements, is planned to occur over a 10-year period, or by September 1994 (RPS at 2).

Although appellants complained, and the Chief Administrative Law Judge found, that there was a reduction in grazing when their applications for increase in preference were denied, nonetheless their grazing preferences have not been reduced, but remain at their historic level. Their argument that a reduction in grazing preference was made was nonetheless adopted by language appearing in the decision under review, as follows:

One final point, Suzy Courtney has requested that, if this court [sic] determines the full 4,011 AUMs is [sic] available for grazing, all four operators be allowed to apply for the outstanding 1,300 AUMs. Suzy Courtney's entire grazing preference, of course, is limited by an agreement with BLM to 1,500 AUMs. Therefore, Ms. Courtney cannot increase the amount of AUMs which she leases from Dr. Mosby beyond its present level of 1,500 AUMs.

Larry Lemos, the only other operator eligible to receive an increase in preference, was apparently aware of the potentially available 1,300 AUMs, but chose not to apply for it. Nor did he seek to intervene in these proceedings. Miller and Rowlett timely filed for an increase in preference and [it] would be unfair to deny them that increase because others might have applied as well, but did not. It should be noted that Miller and Rowlett have

only applied for 918 AUMs, leaving almost 400 AUMs still available to be allocated on the Soda Mountain Allotment. Larry Lemos, in addition to Mr. Miller and Mr. Rowlett, retains the option of applying for that outstanding 400 AUMs in the future. Suzy Courtney would also be eligible to apply should she acquire qualifying base property of her own or lease preference from someone other than Dr. Mosby.

(Decision at 8). This quoted paragraph contains a number of conclusions for which there is no support in the record and which require that we reverse the decision under review.

[1] The first error considered is the implicit finding that there are 4,011 AUM's available for grazing in the Soda Mountain allotment. Testimony at the 1989 hearing established that, while 4,011 AUM's was the allotted level for Soda Mountain in 1984, this level of use did not reflect the allowable grazing on the allotment. On cross-examination of BLM employee Tom Jacobs the following exchange took place:

Q [By counsel for Miller and Rowlett] This number, 4,011, also appears in the RPS document, doesn't it?

A I believe that's correct. Yes.

Q Is that supposed to be the allowable [grazing] then?

A No. It states in the RPS that that's the initial livestock AUM's, which at the time this was written, that was the grazing preference on the Soda Mountain Allotment.

Q Doesn't the record of decision or the RPS reflect what the allowable grazing is supposed to be on the Soda Mountain Allotment?

A No, it does not.

Q Where is that figure reflected? Where could I go to find the allowable grazing in the land use plan required under the Federal Land Management Policy Act?

A Well, I'm not sure about that, but if you wanted to find the grazing preference for the Soda Mountain Allotment, you would go review each of the individual allotment files for

these parties, and the total of that is reflected on the top of the actual use chart over here, and it would tally 2,694 AUM's.

(Tr. 111-12). Earlier in his testimony, Jacobs had explained the factual foundation for the conclusion that 2,694 AUM's were available on the allotment:

Q [By counsel for BLM] You concurred in the decision to place an upper limit at 2,694 AUM's?

A Yes, I did.

Q Upon what did you base your concurrence?

A I based that concurrence upon the fact that the 13-year average was 2,200 AUM's. The current grazing preference that is recognized by the Bureau for that particular allotment is 2,694 AUM's. It seemed that the 2,694 level was slightly above the 13-year average. I did not believe it was reasonable to consider a 4,000 level when we were looking at a 13-year average of 2,200.

Q So the average is considerably under the grazing preferences that were dealt with on the basis of historical use in the RPS, is that right?

A Yes.

(Tr. 102). The testimony of Lance Nimmo, BLM Area Manager, supported this conclusion that increasing authorized grazing preference to 4,000 AUM's was unwise against this 13-year background of historic use (Tr. 34-35).

To counter this testimony, appellants offered testimony by another BLM employee, Bill Drewien, who had responsibility for preparation of a study using the soil vegetation inventory method (SVIM) from 1978 through 1983 (Tr. 169). Based on his SVIM work, it was his opinion that there was sufficient forage to support a finding that 4,011 AUM's were available at Soda Mountain (Tr. 173). After the SVIM survey had been prepared, however, it was decided that it could not be relied on by the agency (Tr. 179). Nonetheless, the witness felt the SVIM data should be used to test information about historic use that became the predicate for the final decision concerning the grazing capacity of the Soda Mountain range. In Drewien's opinion, the SVIM data was more realistic than the evidence concerning historic use for purposes of determining available forage (Tr. 190). It is apparently on his testimony that the Chief Administrative Law Judge based his finding that 4,011 AUM's were available for cattle on Soda Mountain, for no other evidence to support such a finding appears in the record before us. <sup>1/</sup> Drewien was the only witness to rely on the SVIM study.

<sup>1/</sup> While the Board may defer to findings concerning credibility made by finders-of-fact (see generally State Director for Utah v. Dunham, 3 IBLA 155, 160-63, 78 I.D. 272, 274-76 (1971)), no findings based on demeanor

The nature of a SVIM study was considered in some detail by the court in Natural Resources Defense Council, Inc. (NRDC) v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985), aff'd, 819 F.2d 927 (9th Cir. 1987). The NRDC court provided this information about the SVIM program:

BLM had accumulated a substantial body of inventory and trend data regarding the condition of the Reno planning area. One major source of this data was the Soil Vegetation Inventory Method (SVIM) of determining range condition. \* \* \* SVIM essentially involved sampling a number of small plots of ground (about 9 square feet), so as to learn the number of plant species and thus the vegetation condition and carrying capacity of the entire allotment through the use of a sophisticated computer program. [T]he SVIM data was not ultimately used by the BLM because it yielded inconsistent results. The meaning of these inconsistencies was explained by the BLM's experts, as being due in part to an insufficient number of samples, errors in identifying plant species, and assumptions built into the model. \* \* \* Essentially, the SVIM results were not accurate, when compared with what BLM staff knew to be the case on various allotments.

Id. at 1060-61. In NRDC the court found that it was not "irrational" to reject such data. Id. at 1062. We reach the same conclusion in this case.

BLM did not rely on the SVIM data and did not introduce evidence from the SVIM data except in rebuttal to the testimony offered by appellants, who did rely on the SVIM studies. In opposition, BLM relied on the explanation for rejection of the data which appears in NRDC. Under the circumstances, therefore, it was incumbent on appellants to show that BLM's refusal to use the SVIM study was wrong and that the explanation stated in the NRDC case quoted above was in error. While it is clear that Drewien disagreed with BLM about the validity of the studies he had performed, no reason was given for his contrary opinion. On the record before us, we must conclude that the NRDC opinion correctly summarized BLM's reasons for disregarding this work, that those reasons are valid, and that no reliance can reasonably be placed on the SVIM data. The Chief Administrative Law Judge's finding on this issue was therefore in error, being made in reliance upon discredited data introduced without a showing that there was, in fact, a sound foundation for it. 2/

fn. 1 (continued)

were made in the decision before us. Appellants relied on SVIM data; BLM rejected it. The demeanor of the various witnesses did not affect the nature of this evidence. 2/ Intervenor Courtney, at hearing, supported BLM's position that the agency should be allowed to complete range studies before allotment increases would be considered (Tr. 88). Conceding that changes in forage had taken place on the allotment, she nonetheless maintained that she should not be denied her right to the preference attached to her base property, whatever that might be (Tr. 87). Since the amount of preference attached to her base property was not an issue raised by the rejection

[2] Using historic grazing levels as a guide, BLM found that none of the canceled preference held by Mosby should be allotted until continuing monitoring of the allotment established that there was enough forage available to support such an action. This determination was supported by considerations of other competing uses within the allotment, including increased wildlife demands on the area, the presence of a wilderness study area, nominations for creations of areas of critical environmental concern, the presence of spotted owls, and an active timber sale (Tr. 31-33, 73). Lance Nimmo, testified that he used the NEPA planning documents as a decisionmaking tool, and that the NEPA documents did not require him to maintain initial levels of grazing, but that grazing was subject to adjustment to conform to agency monitoring studies (Tr. 26-27, 31). This testimony is consistent with Departmental regulation 43 CFR 4110.3, providing that:

The authorized officer shall periodically review the grazing preference specified in a grazing permit or grazing lease and may make changes in the grazing preference status. These changes shall be supported by monitoring, as evidenced by rangeland studies conducted over time, unless the change is either specified in an applicable land use plan or necessary to manage, maintain or improve rangeland productivity.

It is the contention of appellants that the final proviso of the quoted rule should control this appeal, that is, they argue that the land use plan, particularly the RPS, made the allotment decision for Soda Mountain, and that no change may be made in the allowed level of grazing preferences without an amendment to the RPS (Tr. 14). <sup>3/</sup> This argument assumes that the decision denying their applications made a change in the plan. No such change, however, has occurred. The punitive reduction in

fn. 2 (continued)

of appellants' applications for increased grazing preferences, the Chief Administrative Law Judge exceeded the scope of the case before him when he sought to adjudicate the extent of Courtney's rights and opined that she was not eligible for an increase in her preference because of action taken against her predecessor-in-interest. That question was not before him and is not before us. As we reverse his decision, this dicta is also reversed. On the record before us, no opinion is or can be expressed concerning the extent of Courtney's preference right. She has not applied for an increase. <sup>3/</sup> This argument rests on an assumption that there is some specified time for BLM to complete the monitoring studies, and that the time allowed has passed (Tr. 13). While some time limits are set in the NEPA documents, as explained in the text above, there is no established limit for completion of monitoring studies. The NRDC court commented on this circumstance, finding that the timetable for implementation of a plan must be flexible, although necessary studies should not be unreasonably delayed. Id. at 1059-60. Testimony at hearing in this case established that studies were in progress, but remained incomplete (Tr. 31, 62-63, 73, 80, 101-06). Instruction Memorandum No. OR-87-451 dated June 12, 1987, required that data be collected for at least 3 years before use in decisionmaking. This has not been shown to be an unreasonable requirement.

the grazing preference allotted to Mosby does not alter the fact that, at the time the planning documents were prepared, Mosby was allotted a larger preference than he used. The DEIS, FEIS, and RPS establish that the Soda

Mountain allotment was in the "I" for "improve" category. The objective of the plan, for this category of allotment, was to see to it that productivity was enhanced for all categories of use. The goal at all stages of

BLM planning completed so far has been to achieve this result by making improvements on the land and regulating its use. None of the planning documents before us indicates that maintenance alone (which is a separate management category "M") would be suitable for the Soda Mountain allotment. The RPS does not so provide. We conclude, therefore, that the RPS did not require maintenance of the initial preference levels allotted, but instead allowed informed decisionmaking, using monitoring studies, as appropriate, to determine proper levels of grazing preference consistent with use and precipitation levels. We find that BLM's decision requiring the use of monitoring data to support an increase in permanent grazing preference for appellants was rational, and that the refusal to increase the preferences, absent proof from monitoring studies to support such action, is supported on the record before us. See NRDC, supra.

Accordingly, pursuant to the authority delegated to the Board of Land appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Chief Administrative Law Judge is reversed, and the decision of the Klamath Resource Area Manager denying increased preference rights is affirmed.

Franklin D. Arness  
Administrative Judge

I concur:

C. Randall Grant, Jr.  
Administrative Judge

