

NATIONAL WILDLIFE FEDERATION,
SOUTHERN UTAH WILDERNESS ALLIANCE,
and JOSEPH M. FELLER,
Appellants-Appellees

v.

BUREAU OF LAND MANAGEMENT,
Respondent-Appellant

AMERICAN FARM BUREAU FEDERATION,
UTAH FARM BUREAU FEDERATION, and
UTE MOUNTAIN UTE INDIAN TRIBE,
Intervenors-Appellants

IBLA 94-264

Decided March 1, 1994

Appeals from a decision by District Chief Administrative Law Judge John R. Rampton, Jr., addressing appeals from decisions of the Moab District Manager and the San Juan Resource Area Manager relating to grazing in the Comb Wash Allotment. Hearings Division Docket Nos. UT-06-91-01 and UT-06-93-01.

Petition for stay denied; request to put decision into effect granted; motion to dismiss for lack of standing taken under advisement; response to motion directed; extensions of time granted.

1. Rules of Practice: Appeals: Effect of--Rules of Practice: Appeals: Stay

In promulgating a revision to 43 CFR 4.21 in 1993, the Department intended that the revised procedure involving the petitioning for a stay of a decision would apply to appeals filed on or after the effective date of that revision, i.e., Feb. 18, 1993.

2. Grazing and Grazing Lands--Rules of Practice: Appeals: Stay

The provisions of revised 43 CFR 4.21(a) govern the effect of a decision pending appeal, "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing grazing procedures contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 4.477(a), an appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal unless the decision appealed from is made immediately effective.

3. Grazing and Grazing Lands--Grazing Permits and Licenses: Appeals--Rules of Practice: Appeals: Board of Land Appeals--Rules of Practice: Appeals: Effect of

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. For purposes of making that determination, the word "resource" is considered to include all rangeland values that might be subject to degradation.

APPEARANCES: David H. Israel, Esq., Scottsdale, Arizona, for the Ute Mountain Ute Indian Tribe; Glen E. Davies, Esq., Salt Lake City, Utah, for the American Farm Bureau Federation and the Utah Farm Bureau Federation; David K. Grayson, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; J. Jay Tutchton, Esq., Thomas D. Lustig, Esq., Boulder, Colorado, and Joseph M. Feller, Esq., Tempe, Arizona, for National Wildlife Federation, Southern Utah Wilderness Alliance, and Joseph M. Feller.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On December 20, 1993, District Chief Administrative Law Judge John R. Rampton, Jr., issued a decision involving appeals (Hearings Division Docket Nos. UT-06-91-01 and UT-06-93-01) concerning a grazing permit and annual grazing authorizations for the Comb Wash Allotment in southern Utah. ^{1/} The crux of the case presented to Judge Rampton during the 18 days of hearings was designed to show the impact of grazing on five canyons (Arch, Mule, Fish Creek, Owl Creek, and Road Canyons) within the allotment, which contain approximately 10 percent of the forage in that allotment. In his decision, Judge Rampton ordered, *inter alia*, that BLM was "prohibited from allowing any grazing in the canyons until an adequate EIS [environmental impact statement] is prepared and considered" and that it was also prohibited from allowing grazing in the canyons until it "makes a reasoned and informed decision that grazing the canyons is in the public interest" (Decision at 36).

Three appeals have been taken from Judge Rampton's decision--one by the Bureau of Land Management (BLM), one by the Ute Mountain Ute Indian Tribe (Tribe), and one by the American Farm Bureau Federation and Utah Farm Bureau Federation (Bureaus). Together with its notice of appeal, the Tribe filed a petition for stay and a request for an extension of time to file

^{1/} Hearings Division Docket No. UT-06-91-01 is an appeal of the Mar. 6, 1991, final decision of the Moab District Manager, BLM, involving grazing in the Comb Wash Allotment. Hearings Division Docket No. UT-06-93-01 is an appeal of the San Juan Resource Area Manager's issuance of a grazing permit and schedule for the 1992-1993 season on the Comb Wash Allotment.

a statement of reasons in the case. Neither BLM nor the Bureaus filed a request for stay.

On February 4, 1994, National Wildlife Federation, Southern Utah Wilderness Alliance, and Joseph M. Feller (NWF, et al.) filed a document styled as an opposition to the petition for stay or, in the alternative, a request to place Judge Rampton's decision into full force and effect or, in the alternative, a request for expedited consideration and opposition to the Tribe's request for an extension of time. Their most pressing concern is that "an immediate cessation of grazing in the canyons is needed until the Bureau of Land Management ('BLM') complies with the law, as required by Judge Rampton's orders" (Opposition at 1).

In its petition, the Tribe argues that Judge Rampton's decision should be stayed, citing alternative grounds in support of such a result. First, it contends that 43 CFR 4.21, promulgated on January 19, 1993 (58 FR 4942-43) is not effective because the case in question was pending before the Office of Hearings and Appeals at that time and according to the preamble to that rulemaking, the regulatory change was not to be given retroactive effect.^{2/} Thus, the Tribe contends that the pre-amendment language of 43 CFR 4.21 should be applicable, which provides that decisions are stayed during the pendency of any appeal. Second, and in the alternative, it claims that since Judge Rampton's decision addresses grazing procedures, any appeal therefrom is controlled by 43 CFR 4.477, and that under that regulation, a decision is effective only if so provided by the Administrative Law Judge. Since Judge Rampton did not specifically state that his decision was effective, the Tribe argues that his decision is stayed under 43 CFR 4.477. Finally, and also in the alternative, the Tribe contends that if revised 43 CFR 4.21 is applicable, it has shown, based on the standards therein, that a stay should be granted.

In their opposition, NWF, et al. argue that "the retroactivity preclusion only reaches those matters pending before the Board on January 19, 1993 and does not apply to post-January 19th appeals from already pending ALJ [Administrative Law Judge] decisions" (Opposition at 7). Thus, they claim that revised 43 CFR 4.21 would be applicable. However, they point out that 43 CFR 4.21 is a general regulation which applies unless there is a special rule applicable to a particular type of case. They assert that there is such a rule, 43 CFR 4.477, and that even though in a recent

^{2/} The language to which the Tribe makes reference is as follows:

"Given that the rule will require the Office of Hearings and Appeals to begin ruling on petitions for stay of decision, the Department believes it would be unwise to overwhelm the Office at the outset by encouraging an inundation of petitions for cases that are currently pending before the Office of Hearings and Appeals. Further, it would be unfair to change the rules in mid-appeal for existing appellants. The Department, after giving much consideration to the matter, has concluded that the new rule shall not be given retroactive effect."
58 FR 4940 (Jan. 19, 1993).

order the Board denied a request for stay in a grazing case without citation to 43 CFR 4.477, that regulation should be controlling. NWF, et al. urge that Judge Rampton's decision should be placed in full force and effect by the Board in accordance with 43 CFR 4.477(b)(3) or the case should be remanded to Judge Rampton for his determination under 43 CFR 4.477(b)(2). In either event, NWF, et al. claim that the appropriate standard to be utilized is whether an emergency situation exists involving resource deterioration. Finally, NWF, et al. asks that if Judge Rampton's decision is not placed in full force and effect, the Board should expedite consideration of this case and deny the Tribe's request for an extension of time in which to file a statement of reasons.

[1] As noted above, on January 19, 1993, the Department revised the general procedural regulations at 43 CFR 4.21 governing the effect of decisions pending appeal before the Department's Office of Hearings and Appeals. Those regulations had an effective date of February 18, 1993. Prior to revision, 4.21(a) stated that a decision would not be effective during the appeal period, and, if an appeal were filed, during the pendency of the appeal.

Under revised 43 CFR 4.21(a)(2), a decision is effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal, unless a petition for stay pending appeal is filed together with a timely notice of appeal. Where a petition for stay is filed, it is to be considered based upon the standards set forth in 43 CFR 4.21(b).

The preamble language, cited by the Tribe, spoke in terms of not wanting to "overwhelm the Office at the outset by encouraging an inundation of petitions for cases that are currently pending before the Office of Hearings and Appeals." The intent was clearly to preclude the filing of petitions for pending appeals and only to impose the new procedure of revised 43 CFR 4.21 on those appeals filed on or after the effective date of the regulation, i.e., February 18, 1993. See Committee for Idaho's High Desert, 125 IBLA 301, 302 (1993). The fact that the Hearings Division of the Office of Hearings and Appeals had pending before it on February 18, 1993, the case in question does not mean, as urged by the Tribe, that when it filed its appeal of Judge Rampton's decision on January 19, 1994, the "old rule" applied to stay Judge Rampton's decision. Accordingly, in determining the effect of the appeal filed by the Tribe on January 19, 1994, we must first look to revised 43 CFR 4.21, not to the "old rule."

[2] However, regardless of whether the new regulation or the old regulation is effective, each contain the same exception, i.e., 43 CFR 4.21 applies "[e]xcept as otherwise provided by law or other pertinent regulation."

The Board has recently held that other pertinent regulations fall within the exception to revised 43 CFR 4.21. In In re Eastside Salvage

Timber Sale, 128 IBLA 114 (1993), involving an appeal from the denial of a protest to a timber sale, the Board held at page 115:

Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f). In this case, the authorized officer determined, upon denial of ONRC's protest, to proceed with the timber sale. 43 CFR 4.21(a) does not apply in this case and the provisions thereof relating to the filing of petitions for a stay are inapplicable.

In addition, in Michael Blake, 127 IBLA 109, 110 (1993), the Board concluded that revised 43 CFR 4.21(a) did not apply to decisions to remove wild horses or burros from public lands because 43 CFR 4770.3(c) contained a specific provision governing the effect of such decisions. ^{3/}

Likewise, in this case there is another "pertinent regulation." That regulation, 43 CFR 4.477, included in Subpart E, Special Rules Applicable to Public Land Hearings and Appeals, Grazing Procedures, provides, in relevant part, as follows:

(a) An appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal unless the decision appealed from is made immediately effective.

(b) Consistent with the provisions of § 4160.3 of this title, (1) the authorized officer may provide initially in his decision that it shall be in full force and effect pending decision on an appeal therefrom; (2) the administrative law judge may provide in the decision on an appeal before such officer that it shall be in full force and effect pending decision on any further appeal; (3) the Board may provide by interim order that any decision from which an appeal is taken shall be in full force and effect pending final decision on the appeal.

The Tribe stated in its petition at page 3 that under 43 CFR 4.477, "a decision shall be in full force and effect pending appeal only if the Administrative Law Judge so provides. Because the December 20, 1993, decision does not so provide, the decision should not be in full force and effect." The Tribe makes no reference to 43 CFR 4.477(b)(3), which provides that the

^{3/} As we noted in Blake, in Blake v. Babbitt, No. 93-0726(RCL) (Nov. 18, 1993), the United States District Court for the District of Columbia dismissed a challenge to the validity of 43 CFR 4770.3. Therein, it found at page 6, footnote 1, that 43 CFR 4770.3 was a "pertinent regulation" falling within the exception provided in 43 CFR 4.21(a).

Board may put a decision into full force and effect. Thus, the fact that Judge Rampton failed to put his decision into effect is not ultimately controlling. The Board may do so, as urged by NWF, et al., if the record supports a conclusion that the standard for doing so has been met.

[3] In William J. Thoman, 120 IBLA 302, 304 (1991), the Board announced the controlling standard for placing grazing decisions into full force and effect:

[A] decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists.

That conclusion was based on the Board's analysis that the applicable standard is found in 43 CFR 4160.3(c), which is cross-referenced in 43 CFR 4.477(b), and which provides in pertinent part:

A period of 30 days after receipt of the final decision is provided for filing an appeal. Decisions that are appealed shall be suspended pending final action except as otherwise provided in this section. * * * The authorized officer may place the final decision in full force and effect in an emergency to stop resource deterioration. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. [4/] [Emphasis added.]

Therefore, in this case, in accordance with 43 CFR 4.477(a), Judge Rampton's decision is stayed pending resolution of the appeal, unless, under 43 CFR 4.477(b)(3), this Board issues an order, as urged by NWF, et al., putting that decision into effect based upon a determination that an emergency situation involving resource deterioration exists.

While, as NWF, et al. points out, "[t]here is no clear-cut definition of what constitutes 'an emergency situation involving resource deterioration'" (Opposition at 10), clearly, an emergency situation is one involving a problem requiring immediate attention, and not some potential crisis.

4/ NWF, et al. directs our attention to a Dec. 14, 1993, one-Judge order of this Board in Oregon Natural Resources Council, IBLA 93-672, in which the Board did not treat a decision in a grazing case as being automatically stayed under 43 CFR 4.477, and denied the stay based on an application of the criteria in revised 43 CFR 4.21, without a citation to revised 43 CFR 4.21. In that case, Oregon Natural Resources Council (ONRC) and Oregon Natural Desert Association (ONDA) filed an appeal of a BLM decision to reissue a 10-year grazing permit. The Administrative Law Judge dismissed the appeal as frivolous and without merit. ONRC and ONDA requested a stay of BLM's decision to reissue the permit, and the Board denied that request. ONRC and ONDA have petitioned for reconsideration of that order and that reconsideration is presently pending with this Board.

The BLM Manual states that the authorized officer may place a grazing decision into immediate effect "if there is an immediate need to stop resource deterioration" (BLM Manual 4160-1.34 A).

With regard to determining what is meant by the word "resource," NWF, et al. argue that one should look to section 2 of the Public Rangelands Improvement Act, which requires BLM to "manage, maintain, and improve the conditions of the public rangelands so that they become as productive as feasible for all rangeland values." 43 U.S.C. § 1901(b)(2) (1988). They assert, citing section 2(a)(1) of that Act, that "rangeland values" include livestock, wildlife habitat, recreation, forage, soil, and water. 43 U.S.C. § 1901(a)(1) (1988). "Resource," they concluded, encompasses all rangeland values, including recreation, wildlife, and soil. We agree that the word "resource" should be interpreted broadly to include all rangeland values that might be subject to degradation.

Based upon a preliminary review of the record, including Judge Rampton's decision, and the initial pleadings filed to date by the parties, we find that NWF, et al. have shown that grazing has created a problem in the five canyons in question that requires immediate attention because rangeland values, including soil, water, wildlife habitat, recreation resources, and archaeological resources, are being degraded. Accordingly, we find that an emergency situation involving resource deterioration exists in the canyons, and we place Judge Rampton's decision into full force and effect and, thus, grazing is prohibited in those canyons pending resolution of the appeals on their merits. 5/

On February 15, 1994, NWF, et al. filed a motion to dismiss the appeal filed by the Bureaus for lack of standing. They assert that the Bureaus have failed to show how they are adversely affected by Judge Rampton's

5/ Rather than stating a position regarding the applicability of the revised 43 CFR 4.21(a) or 43 CFR 4.477, BLM appears to have attempted to implement, at least partially, Judge Rampton's prohibition of grazing in the canyons through issuance of a decision. On Feb. 14, 1994, the Board received a copy of a Feb. 7, 1994, decision of the Moab District Manager, BLM, stating that

"[b]ecause there is some uncertainty of whether Judge Rampton's decision has been stayed by appeals filed subsequent to that decision, the BLM feels it would be inappropriate to graze the canyons until the question of the Motion to Stay is clarified in a response from the Interior Board of Land Appeals (IBLA).

The BLM hereby prohibits grazing in Mule Canyon until IBLA rules on the Ute Mountain Ute's Motion to Stay Judge Rampton's decision."
(Decision at 1).

The District Manager placed his decision in full force and effect "pen-ding a ruling by IBLA on the Motion to Stay" (Decision at 2). The question whether BLM had any authority to issue such a decision while the case was on appeal to this Board is mooted by our present decision which prohibits grazing in the canyons during the pendency of the appeals. See Sierra Club, 57 IBLA 288, 291 (1981).

decision. That motion is taken under advisement, and the Bureaus are granted 30 days from their receipt of a copy of that motion in which to file a response thereto. Upon receipt of that response, the Board will address the motion to dismiss. The Bureaus need not file a statement of reasons in this case until the Board resolves the motion to dismiss. Should the Board deny the motion, the Board will establish a time for the Bureaus to file a statement of reasons.

In addition, the Tribe's request for an extension of time to file a statement of reasons in this case is granted. Finally, on February 22, 1994, counsel for BLM filed a document styled "Request by the Bureau of Land Management for Extension of Time to Answer Appellants' Statement of Reasons." Appellants before the Board are the Tribe, the Bureaus, and BLM. Thus, the first pleading to be filed by BLM in this case would be a statement of reasons in support of its appeal of Judge Rampton's decision. An extension of time to make such a filing is granted. The statements of reasons to be filed by the Tribe and BLM shall be filed on or before March 31, 1994.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is denied; Judge Rampton's decision is placed in full force and effect and grazing is prohibited in the canyons pending resolution of the appeals in this case; the motion to dismiss for lack of standing is taken under advisement and the Bureaus are directed to file a response thereto within 30 days of their receipt of a copy of that motion; and the statements of reasons to be filed by the Tribe and BLM shall be filed on or before March 31, 1994.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge