

DELMER AND JO MCLEAN

v.

BUREAU OF LAND MANAGEMENT

IBLA 90-332

Decided August 3, 1995

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., affirming a decision of the Three Rivers Resource Area Manager, Burns District, partially denying a grazing permit. OR-025-88-2.

Administrative Law Judge decision adopted, as modified.

1. Grazing and Grazing Lands—Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals

The 1978 amendments to the grazing regulations effected such substantial changes in what was formerly known as the Federal Range Code that the precedential value of Departmental adjudications rendered prior to these amendments has been significantly reduced, particularly with respect to the issuance and administration of grazing permits under sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1988).

2. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Apportionment of Federal Range

With respect to the allocation in an allotment of additional forage available on a sustained yield basis, the applicable regulation, 43 CFR 4110.3-1, first requires that the additional forage be used to satisfy existing grazing preferences of those authorized to graze within the allotment and then authorizes the allocation of the remaining forage either in recognition of the contribution and efforts of individual permittees in increasing forage production or to permittees in the proportion of their authorized use within the allotment or to other qualified applicants.

3. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses:
Apportionment of Federal Range

While the Department will normally respect and give effect to range-line and allotment agreements, the Department always retains the authority to override such agreements where they are found to be incompatible with the proper administration of the Federal range.

4. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses:
Apportionment of Federal Range

In determining the extent to which a grazing permittee's contributions and efforts have contributed to an increase in available forage within an allotment, all expenditures which have benefitted forage production, including those made by BLM, are properly considered. A permittee has no right to receive more than a proportionate share of the forage increase as determined by comparing the permittee's contributions to the total contributions made.

APPEARANCES: William D. Cramer, Esq., Burns, Oregon, for appellants; Barry Stein, Esq., Office of the Regional Solicitor, Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management; Stephen D. Finlayson, Esq., Burns, Oregon, for intervenors.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Delmer and Jo McLean have appealed from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., dated March 27, 1990, which affirmed a July 1, 1988, decision of the Three Rivers Resource Area Manager, Burns District, Bureau of Land Management (BLM). In response to the McLeans' application for 5,250 animal unit months (AUM's) in the Dry Lake allotment, the Area Manager had granted them a preference of 506 AUM's to be used in the newly created Barnes Well allotment but had denied the remainder of the 5,250 AUM's for which application had been made. In a lengthy and well-reasoned decision, Judge Rampton essentially affirmed the actions of the Area Manager. Inasmuch as we find ourselves in agreement with Judge Rampton's analysis, a copy of which is appended hereto, we adopt his decision subject to certain limited modifications delineated below.

We will limit our consideration herein to certain legal arguments made on appeal which we believe are deserving of particular attention. In order to place these arguments in focus, we will first briefly review certain undisputed facts which serve as the backdrop against which the legal contentions must be viewed.

This appeal finds its genesis in the existence and allocation of surplus forage in Dry Lake and certain adjacent allotments. Appellants' historic grazing use was exercised in an area known as the Diamond Community allotment, located in the southern portion of the Drewsey Resource Area (Drewsey). See Tr. 229-30; Exh. D. The Diamond Community allotment, however, was split into nine separate allotments pursuant to a July 10, 1970, Allotment Agreement, to which appellants were parties. See Exh. 26. The 1970 Agreement recited that appellants had class 1 qualifications of 2,450 AUM's ^{1/} which could be exercised in the Dry Lake allotment established pursuant thereto (Exh. 26 at 3). It should be noted that, while no other parties were shown as exercising class 1 qualifications within the Dry Lake allotment, the Dry Lake allotment has frequently been used to provide short-term emergency flood and fire assistance to other grazers. ^{2/}

In addition to authorizing appellants' use of the Dry Lake allotment, the Allotment Agreement also recognized that McLean cattle would make some use of the Diamond Craters allotment as they drifted into the area. This, however, was not considered to be part of the McLeans' allotment. The 1970 Agreement also provided that the Crows Nest allotment was to be set aside for use at the discretion of BLM to relieve areas needing rest because of over-grazing or emergencies, such as fire (Exh. 26 at 4). Finally, the 1970 Agreement declared that "any surplus forage developed within these allotments above class 1 privileges shall be apportioned in accordance with grazing regulations for the public lands" (Exh. 26 at 4).

Appellants acquired additional preference AUM's after the 1970 Agreement. In 1974, they acquired 625 AUM's preference from Carl McKee that he exercised in the Square Butte allotment, which allotment was subsequently incorporated into the Dry Lake allotment (Tr. 136). Then, in 1979, appellants acquired 1,675 AUM's preference from Lyle Vickers which had been based in the Mountain allotment located north of Dry Lake in the Drewsey Resource Area (Exh. E; Tr. 231). The Vickers' preference was for 1,083 AUM's active use and 592 AUM's suspended use. Appellants transferred the entire 1,675 AUM's into Dry Lake where all of it was allowed as active use (Exh. E; Tr. 231-32). A similar preference transfer in 1981 from the Miller Canyon allotment, also in the northern portion of Drewsey, added an additional 475 AUM's to appellants' Dry Lake preference, giving appellants a total preference of 5,228 AUM's, all active use, in the Dry Lake allotment (Exh. F; Tr. 232-33). Moreover, beginning in 1980, appellants were authorized supplemental use in the Dry Lake and Crows Nest allotments on a temporary nonrenewable basis (Exh. I; Tr. 238). While in 1981 appellants'

^{1/} While the 1970 Agreement provides that the McLeans had 2,450 AUM's in Dry Lake, Exhibit I indicates that, as early as 1971, they were exercising 2,453 AUM's. Similarly, the 1977 Analysis and Recommendations on Dry Lake Allotment prepared by the Area Manager notes that there were class 1 privileges aggregating 2,453 AUM's at that time (Exh. X at 22).

^{2/} From 1983 to 1988, BLM participated in the State Emergency Flood Relief Program. During that program, numerous ranchers eligible to receive assistance were brought into Dry Lake (Exhs. P, Q; Tr. 244).

authorized use was 556 AUM's less than their class 1 preference, from 1982 to the time of their appeal the amount of forage which appellants were permitted to utilize was significantly in excess of their established preference in Dry Lake. The supplemental use which was authorized ranged from a low of 2,128 AUM's in 1988 to a high of 7,980 AUM's in 1987. See Exh. I.

In April 1987, appellants transferred 5,000 AUM's preference in Dry Lake to Norman Ranches in conjunction with the sale of a portion of their ranching operation (Exh. G). 3/ This left the McLeans with 228 AUM's preference in the Dry Lake Allotment. Notwithstanding this transfer, however, the McLeans made application on February 5, 1988, for approval of the use of 5,250 AUM's within the Dry Lake allotment.

On March 16, 1988, the Area Manager issued a proposed decision in which he reviewed much of the foregoing and pointed out that, given the transfer of 5,000 AUM's to Norman Ranches, the McLean's present base property had only 228 AUM's attached to it. He noted, however, that studies had indicated that the estimated grazing capacity of the Dry Lake allotment was 8,700 AUM's on a sustained yield basis. 4/ Given the fact that the total preference in Dry Lake was 5,228 AUM's, the Area Manager determined that 3,472 AUM's were available for future allocation which, he informed appellants, he intended to allocate in conformity with the regulations found at 43 CFR 4110.3-1, as interpreted and supplemented by the "Oregon Policy for Allocation of Additional Forage Permanently Available for Livestock Use" (Oregon Policy).

Noting that all of appellants' outstanding preference (228 AUM's) had been allowed as active use, 5/ the Area Manager proceeded to apply 43 CFR 4110.3-1(c) which provided for the allocation of additional permanently available forage to permittees or lessees in proportion to the contribution or efforts which resulted in increased forage production. Applying this provision, the Area Manager concluded that appellants would be allowed an additional preference of 278 active AUM's which represented 8 percent of the permanent increase in forage. This 8-percent figure was, itself, derived by comparing appellants' allowed contributions (\$32,876.15) 6/ with

3/ Norman Ranches intervened and participated in the hearing before Judge Rampton but did not appeal his decision.

4/ The Area Manager differentiated between forage which he believed was available on a sustained yield basis and other forage which had been available during a number of years in the mid-1980's because of unusually heavy rains and the presence of old carryover forage which was no longer available.

5/ Under 43 CFR 4110.3-1(b), additional forage available on a sustained yield basis must first be apportioned to satisfy the existing grazing preferences of lessees and permittees authorized to graze in the allotment from which the forage is available.

6/ The Area Manager disallowed the overwhelming majority of contributions claimed by appellants on the grounds that they involved expenditures for

those made by BLM to stimulate forage production (\$384,000). The decision noted that the total recognized preference (506 AUMs) would be allowed in an area to be known as the Barnes Well allotment, which would consist of the Fisher Flat and Barnes Well pastures formerly within the Dry Lake allotment. Insofar as the remaining forage increase was concerned, the Area Manager noted that it was his intention to ultimately make this forage available to other grazing permittees within the Drewsey Resource Area whose established grazing preferences could not be satisfied in the allotments to which they were assigned.

By letter dated May 19, 1988, the McLeans protested the Area Manager's proposed decision. This protest challenged, *inter alia*, the computation of BLM's and appellants' relative contributions as well as the appropriateness of any comparison between the expenditures made by BLM and those made by appellants as a basis for the allocation of forage within the Dry Lake allotment. Further, the protest asserted that, as a result of their approved use for a number of years of significant amounts of forage above their established preference (5,228 AUMs), the McLeans had acquired a total preference to the extent of more than 10,000 AUMs per year, notwithstanding the fact that all use in excess of their established preference was expressly made "temporary" and "non-renewable." These limitations were of no effect, the protest argued, since the forage involved was not forage "temporarily available" but was, in fact, forage permanently available on a sustained yield basis and, thus, could not properly be the subject of temporary, nonrenewable permits under 43 CFR 4110.3-1(a). As additional ground for protest, the McLeans asserted that, under 43 CFR 4110.3-1(b), any increase in forage within an allotment must first be made available to those permittees authorized to graze within the allotment and, since the permittees (the McLeans and Norman Ranches) desired to utilize all forage within the allotment, there was no additional forage available for allocation to other permittees who did not have preferences exercisable within the Dry Lake allotment.

By decision dated July 1, 1988, the Area Manager rejected the McLeans' protest and reaffirmed his original decision awarding them 506 preference AUMs to be exercised in the new Barnes Well allotment. Whereupon the McLeans' pursued an appeal to Judge Rampton, asserting that they should have been granted the entire preference for which they applied. ^{7/} As

fn. 6 (continued)

which there were no receipts (\$4,980), involved projects not in Dry Lake (\$2,075), or consisted of the routine costs of running a livestock operation (\$104,524).

^{7/} The McLeans also asserted that their use should not be limited to the area included within the Barnes Well allotment. Before Judge Rampton, the parties stipulated that the ultimate resolution of this issue would be contingent upon how much preference appellants were ultimately granted (Tr. 42-43).

noted above, by decision dated March 27, 1990, Judge Rampton affirmed the determination of the Area Manager in all essential respects.

In brief, Judge Rampton held that Dry Lake was not a private allotment established for the exclusive use and control of appellants and that the temporary nonrenewable AUMs granted to them established no permanent rights in either Dry Lake or Crows Nest. He held that the regulations at 43 CFR 4110.3-1 and 4130.1-2 gave the authorized officer discretionary authority to allocate additional forage in a manner which met the needs of the particular resource area. He also held that while the regulations grant appellants additional permanent forage which resulted from their contributions or efforts, the expenditures which BLM made for the express purpose of increasing forage in the allotment must be considered in proportion to those made by appellants. Finally, he affirmed BLM's determination that expenditures which were part of the appellants' normal operating expenses, particularly expenditures for electricity and routine maintenance costs, could not be considered as contributions which increased forage production.

On appeal to this Board, appellants make numerous assertions of error. They argue that the Judge erred not only on the issues which he decided but by failing to consider other issues which, appellants contend, have a direct bearing on the proper disposition of their appeal. We will not burden this opinion with a full catalogue of all of the arguments which appellants make, since it is our view that many of them are thoroughly answered in Judge Rampton's cogent analysis. We do, however, wish to address two specific issues which, we believe, can fairly be said to form the core of appellants' contentions. Appellants argue: (1) that the Area Manager's allocation of surplus forage violates both the Federal Range Code and the terms of the 1970 Allotment Agreement; and (2) that there is no basis for permitting BLM to offset its contributions against those of appellants for the purpose of determining the amount of the increase in forage attributable to their contributions and efforts under 43 CFR 4110.3-1(b).

One of appellants' primary assertions is that either under the Federal Range Code §/ or the terms of the 1970 Allotment Agreement, they

§/ The "Range Code," of course, was merely a shorthand method of referring to the regulations applicable to grazing activities inside grazing districts. It was derived from the 1938 regulations promulgated by the Grazing Service to implement section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1988), which were entitled "The Federal Range Code." See 3 FR 604 (Mar. 22, 1938). This title was included in the original promulgation of the Code of Federal Regulations in 1938 (see 43 CFR Part 501 (1938)), and continued through the consolidation of the Grazing Service and the General Land Office into the Bureau of Land Management in 1946 (see, e.g., 43 CFR Part 161 (1963)). However, it was relegated to parenthetical status in the revisions of 1964 (see 43 CFR Part 4110 and 4110.0-5(f) (1964)) and disappeared completely in the 1978 revisions. See 43 CFR Part 4100 (1979). Despite this regulatory rejection, many of those involved in grazing

are entitled to all surplus forage within the Dry Lake allotment. With respect to the Federal Range Code, appellants argue that, under the applicable regulations, 43 CFR 4110.3-1 and 4130.1-2, they are entitled to have first opportunity to use any forage available within, what they refer to, as their "private" allotment. Critical to their analysis of the provisions of 43 CFR 4110.3-1 is their attack on the issuance to them of temporary nonrenewable permits for use above the levels of their recognized grazing preference in the years between 1982 and 1988. They note that 43 CFR 4110.3-1(a) only authorizes the issuance of nonrenewable permits for "[a]dditional forage temporarily available for livestock grazing use" and argue that the forage which the Area Manager made available to them on a temporary nonrenewable basis was, in fact, forage which was available on a sustained yield basis and should have been allocated pursuant to the provisions of 43 CFR 4110.3-1(b). Since they were awarded what was, in fact, the use of forage available on a sustained yield basis, appellants argue that their preference should be adjusted to reflect the actual use already permitted in the Dry Lake allotment, either on a class 1 or class 2 basis. ^{9/} Once such a preference is recognized, appellants contend that,

fn. 8 (continued)

matters continue to refer to the "Range Code" as the regulatory basis for grazing management. We will use the term to refer to the grazing regulations as they existed prior to 1978, particularly with reference to provisions which no longer exist in the regulations.

^{9/} As noted subsequently in the text, the distinction between class 1 and class 2 preferences, to which appellants allude, did not survive the 1978 revisions. However, an understanding of these classes is helpful in comprehending the significance of the changes effected by the 1978 revisions. In brief, section 3 of the Taylor Grazing Act, 43 U.S.C. § 315(b) (1988), provides, in part, that:

"Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights, owned, occupied, or leased by them."

In implementing this provision, the Department devised two categories of preference. The first, class 1, was referred to as land dependent by use, which meant that the base property offered had been used in conjunction with the Federal range during the requisite priority period (usually the 5-year period preceding 1934). Class 2 land, described as dependent by location, consisted of other base properties which had not established dependency by use during the priority period. Base property for either class was defined as "property used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent

of a license or permit is computed." 43 CFR 4110.0-5(h) (1977). Under the Federal Range Code, all class 1 priorities were required to be met before forage could be allocated to individuals offering class 2 lands. See, e.g., Nick Choumos, I.G.D. 568 (1952); Joseph F. Livingston, 56 I.D. 305 (1938); William A. Nelson, I.G.D. 18 (1937).

under the provisions of 43 CFR 4110.3-1(b), they should be awarded their full request for AUM's. Appellants' argument is flawed in a number of critical aspects.

[1] First of all, as a historic matter, increased forage production on the Federal range had absolutely no effect on grazing preferences under the Federal Range Code. Preferences were based not on the capacity of the Federal range but on the historic (class 1) and present (class 2) forage productive capacity of offered base lands, i.e., their commensurability. 10/ An increase in the forage production on the Federal range merely meant that those who had established grazing preferences could exercise more of those preferences or be awarded additional use. It did not provide a basis for increasing the grazing preferences attached to the base property. 11/

Moreover, as a technical matter, there was virtually no way to increase class 1 preferences above their adjudicated levels since that preference was, itself, dependent upon the amount of forage produced from the base properties which was needed to sustain the use of the Federal range during the priority period. See 43 CFR 4110.0-5(k)(3)(ii) (1971). The effect of this limitation was that, barring an error in the original determination of base property qualifications or the acquisition of additional base properties, class 1 preference could not be increased, even if forage production on the base properties was improved. Indeed, the Federal Range Code expressly recognized that

[w]here the base property provides forage in excess of that necessary for the proper support of the number of livestock used in creating the dependency by use (class 1) the base property to the extent of such excess forage capacity, may be treated as dependent by location (class 2) if so qualified.

43 CFR 4110.0-5(k)(3)(ii) (1971). Thus, under the Federal Range Code as it historically existed, even if appellants were able to show an increase in the forage production of their base property, such an increase could only serve as a basis for increasing class 2 qualifications. 12/

10/ Commensurability was defined as "the number of livestock which can be properly supported for a designated period of time from the forage and feed produced on dependent base property." Arthur v. Heller, 66 I.D. 65, 68 (1959).

11/ This could be contrasted with 43 CFR 4110.3-1(c) which clearly contemplates an increase in grazing preferences by providing authority to "apportion" additional forage of grazing licensees and permittees above their established preference.

12/ There is no mention, whatsoever, of any distinction between class 1 and class 2 preferences in the new regulations and, in the absence of any distinction between the two, it appears that class 1 and class 2 preferences have merged into a single preference category. The extent to which

More importantly, however, appellants' argument fails to take into account the substantial changes in allocation of grazing preferences effected by the 1978 revisions. As a comparison of the post-1978 regulations with the previously-existing Federal Range Code makes clear, the entire basis upon which grazing preferences were determined was drastically altered. The preamble to the 1978 amendments noted that "[s]erious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands," but asserted that "[t]heir adjudicated grazing use, their base properties and their areas of use (allotments) will be recognized under these grazing regulations." 43 FR 29058 (July 5, 1978). What the preamble failed to point out, however, was that future adjudications of grazing use would be based on criteria vastly different than those provided in the Federal Range Code.

The 1978 revisions eradicated the distinction between class 1 and class 2 preferences, 13/ virtually eliminated the relevance of commensurability in the award of grazing privileges, 14/ and established entirely

fn. 12 (continued)

class 2 preferences were preserved under the 1978 revisions, however, is more problematic.

While, presumably, class 2 preferences were among those which the Department intended to recognize and protect in promulgating the 1978 amendments, whether all of these preferences were protected is not entirely clear. Thus, under the present regulations, grazing preference is defined as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 CFR 4100.0-5. While this would presumably protect all previously adjudicated class 1 and class 2 preferences, the regulations further provide that the authorized officer shall find property to be base property if "[i]t serves as a base for a livestock operation which utilizes public lands within a grazing district." 43 CFR 4110.2-1(a)(1). This regulation effectively requires an on-going operation which utilizes the Federal range as a prerequisite to recognition of base property. It is therefore possible that an individual, who had established class 2 qualifications for base property but who did not actually obtain use of the Federal range prior to 1978, would see his class 2 rights lapse since his property could no longer be considered base under the new regulations. See *Hutchings v. BLM*, 116 IBLA 55, 59-60 (1990). Class 2 rights held by those who also possessed class 1 rights or class 2 rights which had actually been exercised prior to 1978 would seemingly not be affected.

13/ See note 12, *supra*.

14/ In its original proposal, the Department actually planned to completely remove any commensurability requirement, ostensibly for the purpose of increasing operational flexibility. See 41 FR 31504 (July 28, 1976). However, after many commentators objected to this approach, the Department re-proposed the regulations, asserting that the concept of commensurability was now included, though in a "modified" form. The preamble to the proposal explained that "[b]ase property must be capable of

new procedures for the allocation of forage increases on the Federal Range. ^{15/} Indeed, considering the radical nature of the changes effectuated by the 1978 amendments, we must conclude that the precedential value of Departmental adjudications rendered prior thereto, decisions which were

fn. 14 (continued)

producing crops or forage that can be used to support livestock but the new proposed regulations do not require the crops or forage to actually be produced." 42 FR 35334 (July 8, 1977). This approach was essentially adopted in the 1978 revisions in the definition of base property. See 43 CFR 4110.0-5.

While the regulatory preamble suggested that this was merely a modification of the traditional commensurability requirement, it was, in fact, a virtual eradication of the substance of the required showing of commensurability. Thus, under the Federal Range Code, class 1 demand was determined by the lower of the figure derived for (a) dependency by use and (b) commensurability. As noted above, commensurability was defined as "the number of livestock which can be properly supported for a designated period of time from the forage and feed produced on dependent base property."

See note 10, *supra*. And, commensurability was not determined by the amount of forage that the land could produce but by the amount of forage which it did produce. See *William Sellas*, I.G.D. 526 (1950); 43 CFR 161.2(k)(3)(ii) (1964). While initial commensurability was established during the priority period (see *Ethel Cowgill Rayburn*, A-28866 (Sept. 6, 1962)), it was also necessary to maintain that level of commensurability in order to maintain the level of class 1 demand. See, e.g., *Midland Livestock Co.*, 10 IBLA 389, 395 n.5 (1973); *Arthur V. Heller*, *supra* at 66-68 (1959); *Grover C. Barton*, I.G.D. 394 (1944).

The obvious purpose of the commensurability requirement was to assure that sufficient forage existed on the permittee's private base property to adequately feed the livestock during the period when it was not on the Federal range. This approach was completely consistent with the entire concept of base property qualifications since the quantum of grazing rights granted was dependent not upon the amount of Federal range land that an individual could properly use but on the amount needed to permit the proper use of the private lands. See note 9, *supra*. To simply require that the permittee show that the land is capable of producing the necessary forage is to effectively abolish the requirement that a permittee show present commensurability, as that requirement was historically understood, as well as to divorce the grant of grazing privileges from the ratio decidendi of the Taylor Grazing Act, viz., the proper use of privately-held lands for grazing purposes. While the 1978 revisions may have sought to retain the appearance of a commensurability requirement, it is clear that the substance was erased.

^{15/} The Federal Range Code's initial reference to allocation of forage increases consisted of only a single line: "Increases in carrying capacity will be participated in by existing licensees and permittees to the extent of their respective qualifications." 43 CFR 161.6(d) (1949).

based on the Federal Range Code, has, necessarily, been greatly reduced. Insofar as the issues herein presented with respect to the allocation of forage increases are concerned, scant reliance on prior Departmental precedents is justified. ^{16/} Rather, the sole real determinant of the sustainability of the decision of the Area Manager are the existing regulations promulgated in 1978.

To the extent that appellants attempted to base their claim to the additional forage within the Dry Lake allotment on the issuance to them of temporary nonrenewable permits over a period of years, we must conclude that they can find no support for this argument either in the Federal Range Code as it existed prior to 1978 or in the post-1978 grazing regulations. It may be that the refusal, over a period of years, of the authorized officer to allocate additional forage available on a sustained yield basis could be successfully challenged by a party seeking a permanent allocation of such forage. But this is not what appellants are attempting herein. Rather, having obtained the annual use of the forage, under an agreement

fn. 15 (continued)

This provision remained essentially unchanged until 1961, at which time the Federal Range Code was revised to include the following provision:

"Increases in grazing capacity, when conditions warrant, and after recommendations of the advisory board and approval of the district manager, will be apportioned in a manner that will assist in the stabilization of livestock operations controlling qualified base property, with emphasis being given to the restoration of reductions that have been imposed to reach the grazing capacity of a particular allotment or range area, and to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases."

43 CFR 161.6(g)(2).

This language was carried down, unchanged, until the 1978 revisions. *See, e.g.*, 43 CFR 4111.4-2 (1975). It was in interpreting this language that decisions such as Max Tanner, 2 IBLA 183, 195-97, 78 I.D. 134, 139-40 (1971), found that the authorized officer was vested with broad discretionary authority in allocating increases in grazing capacity. As noted in Judge Rampton's decision, however, the criteria adopted in 1978 is significantly more restrictive.

^{16/} We note that appellants rely on a number of decisions issued by Administrative Law Judges to support their attack upon the authorized officer's allocation of additional forage. In this regard, we would point out that decisions of Administrative Law Judges, while certainly worthy of respectful consideration, are not Departmental precedents and are not binding on this Board nor are they binding upon other Administrative Law Judges, unless they are adopted by the Board in adjudication of an appeal. *See, e.g., Cheyenne Resources, Inc.*, 46 IBLA 277, 282-84, 87 I.D. 110, 113-14 (1980). In any event, most of the Administrative Law Judge decisions cited by appellants were issued before the 1978 revisions and are, for the reasons delineated above, of limited relevance to the issues presented by this appeal.

which expressly warned them that "[a]ny use authorized in excess of your active preference is temporary nonrenewable and does not establish a priority" (Exh. 14 at 1), appellants are seeking to have that use transmogrified into a de facto allocation. In our view, having knowingly accepted the use on a "temporary nonrenewable" basis, appellants are properly estopped from asserting either that such use constituted a permanent allocation of additional forage or that such use established a preference to any future allocation. Cf. *United States v. Haskins*, 59 IBLA 1, 91-93, 88 I.D. 925, 970-71 (1981). Thus, appellants' rights to the increased forage, if any, must proceed from application of the post-1978 regulations.

[2] Judge Rampton's analysis of the post-1978 regulations regarding allocations of increased forage (and the Oregon Policy as well) is set forth on pages 8-12 of his decision. We agree with his interpretation of the relevant regulations as (1) requiring that any additional forage available on a sustained yield basis first be used to satisfy existing grazing preferences of those authorized to graze within the allotment, and (2) authorizing the allocation of the remaining additional forage either in recognition of the contribution and efforts of individual permittees in increasing forage production or to permittees in the proportion of their authorized use within the allotment or to other qualified applicants under 43 CFR 4130.1-2.

However, while we agree with Judge Rampton that, once the grazing preferences of those authorized to graze within the allotment have been met, the authorized officer has broad discretion under the regulations in allocating any remaining forage, it is also true that the Board has, in the past, indicated that, as a general rule, those parties who have contributed to an increase in forage should be awarded a proportionate increase in their grazing preference prior to the allocation of additional forage to those who have not so contributed. See, e.g., *Max Tanner*, 2 IBLA 183, 195-97, 78 I.D. 134, 139-40 (1971). While we agree with Judge Rampton that the authorized officer has the discretion to deviate from this allocation, we would expect that such action would occur in only the most unusual circumstances and with clearly sufficient justification appearing in the record. Of course, it must be noted that BLM contends that it has, in fact, recognized appellants' contributions to increased forage production by awarding them an additional preference of 278 active AUM's. Appellants, for their part, argue that recognition of their contributions would result in the full grant of 5,260 AUM's as they requested. However, before turning to the contribution question, we wish to briefly address one other facet of appellants' challenge to the Area Manager's allocation of the additional forage, namely, that it violates their rights as established by the 1970 Allotment Agreement.

[3] Appellants assert that, under the 1970 Allotment Agreement, they acquired a private allotment and that any increase in forage within that allotment should, under the Agreement, be first made available to them. BLM responds by challenging appellants' claim to a private allotment, noting that numerous other parties have historically been allowed to graze

within the allotment boundaries. Further, BLM points out that the Allotment Agreement provides that "[a]ny surplus forage developed within these allotments above Class I privileges shall be apportioned in accordance with Grazing Regulations for the Public Lands" (Exh. 26 at 4). BLM argues that it has followed the grazing regulations and, therefore, necessarily its actions are not in conflict with any rights which may flow from the 1970 Allotment Agreement.

Initially, we would suggest that appellants' reference to "private" allotments, a reference replicated in a few Board decisions (see, e.g., W. Dalton La Rue, Sr., 9 IBLA 208 (1973)), is a misnomer which carries with it the seeds of misunderstanding. Rather than being "private" allotments, such allotments are properly known as "individual" allotments. See Miller v. BLM, 118 IBLA 354 (1991); Briggs v. BLM, 99 IBLA 137, 144 (1987); E. L. Cord, 9 IBLA 178, 179 (1973); BLM Manual 4112.13B (Release 4-27). The danger which this mis-characterization presents is that it can foster the erroneous notion that an allotment with only a single user is that user's "private" range to use as he or she sees fit. This is not the case.

That being said, however, it seems relatively clear to us that the intent of the 1970 Allotment Agreement was to grant appellants an "individual" allotment. The problem with appellants' position is that they assume that, having obtained an "individual" allotment, they have a vested right to all forage increases which occur within that allotment. In reality, however, while the Department has long held that valid range-line and allotment agreements are in the nature of contracts and will generally be enforced against the parties 17/ signatory thereto (see generally BLM v. Spring Creek Ranch, 96 IBLA 4, 10 (1987); Evart Jensen, 5 IBLA 96, 99 (1972); Mrs. Dulcie S. Williams, I.G.D. 280, 281 (1942)), the Department has also consistently noted that it retains the authority to ignore any such agreement where "it is incompatible with the proper administration of the Federal range." Mrs. Dulcie S. Williams, *supra*. Indeed, even where an allotment management plan (AMP) was in effect, this Board has noted that the existence of an AMP did not preclude any action contrary thereto by the authorized officer so long as such action had a sufficient basis. As we noted:

Such a plan may be consistent with the responsibilities delineated in the Taylor Grazing Act at the time the plan is developed, but it cannot, however, be viewed as permanently binding. Changed circumstances or the passage of a reasonable period of time certainly warrant evaluation of the continued effectiveness of any AMP. If the AMP no longer meets its objectives

^{17/} While the approval of BLM was generally obtained in range-line and allotment agreements (as it was herein), BLM was technically not a party to those agreements.

with respect to good range management, a rational basis for change exists, and BLM has an obligation to revise or vacate it.

Smith v. BLM, 48 IBLA 385, 390 (1980).

It is clear, therefore, that the mere fact that appellants may have obtained an "individual" allotment in the 1970 Allotment Agreement would not preclude BLM from altering the terms of the arrangement upon a finding, rationally based, that the plan was inconsistent with BLM objectives and good range management. Moreover, insofar as the specific issues raised by this appeal are concerned, as BLM noted, the 1970 Allotment Agreement expressly provides that increases in the available forage within an allotment above class 1 preferences would be allocated in conformity with the grazing regulations. Thus, to the extent that we have affirmed the actions of the Area Manager as in accord with the regulations, it necessarily follows that those actions are consistent with the 1970 Allotment Agreement as well.

[4] The final issue which we wish to specifically address relates to appellants' assertion that, in determining the relative contributions of the parties in increasing available forage, the monies expended by BLM are not properly considered. Appellants phrase this question as "[s]hould the BLM offset its contributions against those of appellants?" (SOR at 23). In our view, this is a significant misformulation of the point in controversy. We believe that the question is more properly phrased as "[h]ow do you quantify the effect of contributions and efforts made by a permittee for the purpose of allocating additional forage within an allotment?" This is the real issue since the regulation expressly provides for the allocation of additional AUM's to permittees "in proportion to the contribution or efforts which resulted in increased forage production." 43 CFR 4110.3-1(c)(1).

The clear intent of the regulations is to authorize a reward for those whose efforts have contributed to an increase in available forage within an allotment by permitting the authorized officer to increase grazing preferences, once outstanding preferences have been satisfied, at a rate which disproportionately benefits those contributing parties. However, it seems obvious that, as a precondition for determining the quantum of benefits which might be awarded, the authorized officer must initially determine the total amount expended to increase the available forage and then compute those contributions, in money and efforts, which each permittee made to effectuate this result. This is not a process of offsetting BLM's contributions as appellants suggest; rather, it is a process which quantifies the relative contributions of all parties with respect to the total expenditures made to achieve the increase in forage.

Appellants' theory that only the relative contributions of permittees or lessees should be compared would achieve truly ludicrous results. First

of all, in any individual allotment such an approach would, necessarily, result in allocation of all increased forage to the permittee so long as that permittee had expended a single dollar which might be said to have contributed to an increase in forage. This would be true even in those situations in which the Government had expended hundreds of thousands of dollars of taxpayers' money in improving the Federal range. This would be not so much a reward as a totally unjustified windfall. The same result could occur in group allotments where, after the Government had expended massive amounts of tax money, individual permittees whose contributions might be characterized as minimal would be in a position to demand increases in grazing preference wholly out of proportion to their contributions to increasing the available forage.

The Department's goal is to foster contributions and efforts from permittees to improve the Federal range and reward those who do so. Appellants' approach would not only result in vast windfalls for those who made only minuscule contributions but would also generate endless disputes among permittees concerning the expenditure of taxpayer money to improve the Federal range, since the situs of the improvements would determine who received the benefits therefrom. Indeed, BLM might ultimately be forced to parcel out range improvement expenditures to all permittees on a pro rata basis, even though this was clearly shown not to be in the best interest of proper range management. Appellants' interpretation, far from stimulating permittees to contribute to improving the range, would ultimately result in undermining proper range practices and wasting Federal funds. It is an interpretation which would subvert the very goals which the regulation is obviously aimed to achieve.

Appellants point to actions taken in other grazing districts 18/ and argue that past allocations of additional forage support their interpretation of the regulations. We do not agree. While there is little question that the authorized officer in other grazing districts may have seen fit to allocate all additional forage to those authorized to graze within an allotment even though a significant proportion of the increase was attributable to the expenditure of tax receipts, the question is not what the authorized officer can do but what the authorized officer is required to do. Numerous decisions have noted the broad discretion which the authorized officer has in administering the Federal range. See, e.g., Klump v. BLM, 124 IBLA 176, 182 (1992); Fasselin v. BLM, 102 IBLA 9, 14 (1988); Hugh A. Tipton, 55 IBLA 68 (1981). The fact that the authorized officer in one situation deemed it appropriate to award all increases in forage to those authorized to use the allotment, regardless of whether or not their

18/ In particular, appellants point to actions undertaken with respect to the Ruby Springs allotment. See Tr. 215-20.

expenditures were the causative factor in the increase in forage, represents merely one of numerous possible alternatives which might be acceptable under good range management practices. It is not our intention to forestall such a choice in the future. All we hold is that what the regulations require is recompense for those increases which can be directly related to the efforts and contributions of the permittee. Beyond that, additional allocations are committed to the sound discretion of the authorized officer, and a permittee, having received full recognition of outstanding grazing preferences and been fully compensated for his or her efforts in increasing the forage, has no cause for complaint. See Briggs v. BLM, supra at 154; Midland Livestock Co., 10 IBLA 389, 404 (1973); M. P. Depaoli & Sons, A-25978 (Mar. 29, 1951).

Appellants, however, also challenge the computations used in determining the weight which their contributions were given arguing both that their contributions were undervalued and the Government's were overvalued (SOR at 31-33). Judge Rampton's analysis of these arguments, with which we agree subject to one modification, are set forth in the attached decision at pages 13 to 17, and will not be repeated here. The one area in which we believe modification of the decision below is warranted relates to the computation of the Government's contribution.

A review of Exhibit B of the decision of the Area Manager indicates that, in computing the Government's expenditures which contributed to the forage increase, expenditures from as far back as 1950 were included. However, absent some indication in the record which would provide a basis for concluding that expenditures made almost 30 years earlier had a causative relationship to the increase in forage which is only now being allocated, we do not believe it proper to include Government expenditures which were made decades ago. Our review of the record convinces us that, in the absence of such a showing, only those expenditures made since 1970 should be included. This has the effect of lowering creditable Government expenditures by \$100,399 to a total recognized contribution by the Government of \$284,164. Those contributions properly credited to appellants therefore approximate 10.4 percent of the total contributions and, applying this percentage to the 3,472 AUM's being allocated, ^{19/} we find that appellants are properly granted a total of 361 preference AUM's in addition to their presently recognized grazing preference of 228 AUM's. Subject to this modification, however, the decision of Judge Rampton is affirmed in all other respects.

^{19/} We recognize that BLM agreed that if it were ultimately determined that the Dry Lake allotment contained more than 3,472 AUM's in additional forage capable of production on a sustained yield basis that appellants would receive their pro rata share. See Tr. 12-15. Consistent with this decision, appellants should receive 10.4 percent of any such increase.

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 adopted as modified.

James L. Burski
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

March 27, 1990

DELMER AND JO MC LEAN,	:	OR-025-88-2
	:	
Appellants	:	Appeal from a decision
	:	issued July 1, 1988, by
NORMAN RANCHES,	:	the Three Rivers Resource
	:	Area Manager, Burns
Intervenor	:	District, Oregon
	:	
V.	:	
	:	
BUREAU OF LAND MANAGEMENT,	:	
	:	
Respondent	:	
	:	
VAN G, DECKER, HARVEY HATT,	:	
JAMES SITZF TERRY WILLIAMS,	:	
CONLY MARSHALL, ROTH A	:	
FRENCH, ANNE CLARK, WALT	:	
MC EWEN, PERRY OTT, WES	:	
TYLER, BARBARA ARNOLD,	:	
ALLAN OTLEY, DONALD A. DRYER,	:	
PATRICK OTOOLE, KENNY	:	
ARNOLD, BYRON E. DUNTEN,	:	
CHARLES DUNTEN and WILLIAM A.	:	
ROBERTSON,	:	
	:	
Intervenors	:	

DECISION

Appearances: William D. Cramer, Esq., Cramer & Cramer,
Burns, Oregon, for appellants;

William F. Schroeder, Esq., Vale, Oregon,
for intervenor, Norman Ranches;

Barry Stein, Esq., Office of the Field
Solicitor, U.S. Dept. of the Interior,
Portland, Oregon, for respondent;

Stephen D. Finlayson, Esq., Burns, Oregon,
for intervenors, Van G. Decker, Terry
Williams, Rotha French, Kenny Arnold,

Barbara Arnold, Donald A. Dryer, Byron E. Dunten, Charles Dunten, and William A. Robertson;

All remaining intervenors appeared pro se.

Before: Administrative Law Judge Rampton.

Introduction

This case involves an appeal by Delmer and Jo McLean (appellants) of a final Bureau of Land Management (BLM) decision dated July 1, 1988, affirming a proposed decision dated March 16, 1988. The decision was issued in response to the appellants' application for 5,250 AUM's preference in the Dry Lake Allotment (Ex. B). BLM's decision granted the appellants a preference of 506 AUM's to be used in the newly created Barnes Well Allotment. In contesting the decision, the appellants assert that they should have been granted the entire preference requested and that their use should not be limited to the area encompassed by the Barnes Well Allotment. By stipulation, the BLM and the appellants recognized that the ultimate resolution of the issue of restricting the appellants' use to the Barnes Well Allotment is contingent upon how much preference the appellants are ultimately adjudicated in this matter (Tr. 42-43). ^{1/}

Post-hearing briefs were filed by the appellants, the respondent and by nine of the intervenors. Appropriate portions of the briefs are incorporated verbatim into this decision without attribution.

Background

The events leading to this appeal are not in dispute and are a culmination of a long simmering controversy between the appellants and the Burns District Office concerning the

^{1/} The stipulation, basically recognized that the Barnes Well Allotment was established to be in line with BLM's determination that the appellants were only entitled to 506 AUM's preference. If BLM's 506 AUM's preference determination is upheld, then the appellants do not contest the limitation of use to the Barnes Well Allotment. Conversely, if appellants' contention is accepted that they are entitled to a significantly greater preference, then such use could clearly not be limited to the Barnes Well Allotment,

allocation of the surplus forage in the Dry Lake Grazing Allotment and certain adjacent allotments. The appellants' historical preference and grazing use has been in an area which was originally known as the Diamond Community Allotment, located in the southern portion of the Drewsey Resource Area (Tr. 229-230; Ex. D). By a July 10, 1970, Agreement to which the appellants were a party, the Diamond Community Allotment was split into nine separate private allotments, including Dry Lake and Crows Nest (Ex. 26). The Agreement provided the appellants 2,450 AUM's preference in the Dry Lake Allotment (Ex. 26, p. 3). The Dry Lake Allotment has been used since for short-term emergency flood and fire assistance, but primarily is divided between appellants and Norman Ranches as two private allotments.

For Crows Nest, the Agreement provided as follows: "This allotment is set aside for use at the discretion of the Bureau of Land Management. This area will be used to relieve areas needing rest because of over-grazing or emergencies such as fire" (Ex. 26, p. 4). Furthermore, the agreement stated that "any surplus forage developed within these allotments above Class I privileges shall be apportioned in accordance with grazing regulations for the Public Lands." (Ex. 26, p. 4)

In 1974, the appellants acquired 625 AUM's preference from Carl McKee in the Square Butte Allotment, which was subsequently made a part of the Dry Lake Allotment (Tr. 136). Then in 1979, the appellants acquired 1,675 AUM's preference from Lyle Vickers in the Mountain Allotment located north of Dry Lake in the Drewsey Resource Area (Ex. E; Tr. 231). The Vickers' preference in the Mountain Allotment was for 1,083 AUM's active use and 592 AUM's suspended use. The appellants transferred the entire 1,675 AUM's into Dry Lake as active use (Tr. 231-232). A similar preference transfer in 1981 from the Miller Canyon Allotment, also in the northern portion of Drewsey, added another 475 AUM's to the appellants' Dry Lake preference (Ex. F; Tr. 232-233).

After the Miller Canyon transfer, the appellants had a total preference of 5,228 AUM'S, all active use, in the Dry Lake Allotment. This preference is recognized in the November 19, 1981, Notice of Proposed Decision issued to the appellants (Ex. 4). ^{2/} A final transfer occurred in

^{2/} The Notice of Proposed Decision thereafter became a final decision. The November 14, 1981, Notice of Proposed Decision (Ex. 4) superseded and replaced an earlier December 16, 1980, Notice of Proposed Decision (Ex. 15) to reflect the preference added by the Miller Canyon transfer.

April 1987 when the appellants transferred 5,000-AUM's preference in Dry Lake to Norman Ranches in conjunction with the sale of a portion of their ranching operation (Ex. G). This transfer left the McLeans with 228 AUM's preference in the Dry Lake Allotment.

In addition to their established preference, the appellants have been authorized supplemental use in the Dry Lake and Crows Nest Allotments on a temporary nonrenewable basis (Ex. I; Tr. 238). The only significant supplemental use prior to 1982 was in 1972 and 1973. After the appellants transferred the Vickers' preference to the Dry Lake Allotment in 1979, there was a 3-year period in which the authorized use in Dry Lake was actually less than their total preference (Ex. I).

From 1982 to the present, the appellants were authorized to use a significant amount of forage in excess of their established preference in Dry Lake on a temporary nonrenewable basis. This fact was communicated to the appellants. (See Exs. H-12 through H-17, and S; Tr. 145, 344-345.) For instance, the March 23, 1984, letter authorizing the appellants temporary nonrenewable AUM's in the Dry Lake contained the following paragraph:

WARNING: The above use represents 2546 AUMs in excess of your active preference. Any use authorized in excess of your active preference is temporary nonrenewable and does not establish a priority. Such use cannot be guaranteed on a permanent basis.

Exhibit 14, p. 1.

Testimony was given that forage was available for temporary use in Dry Lake by the appellants for several reasons. First, new seedings were brought into production starting with the 1982 grazing season (Tr. 239). Secondly, precipitation was significantly above normal during this time period (Tr. 239). Finally, the shifts of suspended AUM's from other allotments in the Drewsey Resource Area, which were the bases for significant BLM investment in developing Dry Lake, had not been implemented (Tr. 243).

It is undisputed that there are currently several thousand AUM's of sustained yield carrying capacity above Class I rights available in the Dry Lake Allotment and more in adjoining allotments, which comprise the Diamond Seeding area. Appellants estimate the total of all classes of AUM's available in the Dry Lake Allotment to be 14,000-year in and year out. The BLM witnesses conceded 8,700 of such AUM'S, or 3,472 over the established preference of

5,228 AUMs (Tr. 277). Starting in 1980, and continuing to date, the appellants have applied for and received the following additional temporary nonrenewable AUMs in the Dry Lake Seeding:

<u>Year</u>	<u>McLean</u>			<u>McLean</u> <u>of Use</u>	<u>Total</u> <u>Exchange</u> <u>AUMs Used</u>	<u>McLean</u>	<u>Total</u>
	<u>McLean</u> <u>Preference</u>	<u>Norman</u> <u>Preference</u>	<u>Pd.</u> <u>Surplus</u>				
1980	4,753	—		232		600	5,460
1981	5,228	—		-0-		600	5,938
1982	50,228	—		3,248	600	9,259	
1983	51,228	—		3,081	10,441		
1984	50,228	—		4,071		12,168	
1985	5,228	—		3,930		9,470	
1986	5,228	—		7,921		13,149	
1987	5,228	5,000		7,980		8,208	
1988	228	5,000		2,128		2,128	
1989	228	5,000		2,274			

In the past, the BLM has also allocated some of this additional forage on an emergency basis to the appellants and to operators who had lost much pasture to flooding of Malheur and Harney Lakes and also to operators who had suffered range losses due to fire. For each year of BLM's participation in the State Emergency Flood Relief Program, which lasted from 1983 to 1988, an Emergency Board would submit to the BLM a list of ranchers eligible to receive assistance from the BLM (Exs. P. Q; Tr. 244). Numerous ranchers were brought into Dry Lake during the course of BLM's participation in the now concluded Flood Relief Program. However, it is the Burns District's position that the district will keep all of the increase in forage in the "temporary" category until it makes a new adjudication of the Drewsey Environmental Study area. This policy was the basis for the decision which was appealed.

Issues

The primary issue in this appeal is whether the appellants are entitled to more than the 506 AUM's grazing preference granted in the July 1, 1988, decision. To determine this issue, the following sub-issues must be considered.

1. Have the appellants and intervenor Norman Ranches acquired a preferential right to all of the surplus AUM's in the Dry Lake Allotment by virtue of historical use and contribution rights to the exclusion of owners of suspended Class I privileges in another area who have never made application?

2. Does the BLM have the right to offset its contributions for increased forage against the contributions made by the appellants?
3. If so, what BLM and appellants' contributions can be taken into account in dispositions of the surplus forage obtained by reason of the contributions made.

DISCUSSION

Was the BLM's Method of Allocations of Additional Forage Consistent with Applicable Regulations?

Essential to the BLM's determination to deny preferential grazing privileges to appellants in excess of the 506 AUMs allowed is a review of the land use planning for the Drewsey Resource Area made by the BLM. Initial planning for this area began in the early 1970's and culminated in a 1974 Management Framework Plan (MFP) (Ex. W; Tr. 462). The 1974 MFP contained a Recommendation Area #11, which included Dry Lake and Crows Nest Allotments (Ex. W, p. 1). The multiple use recommendation for Area #11 was as follows:

It is recommended that Area #11 be used for maximum livestock forage production. Use it to absorb to the extent possible Class I qualifications that cannot be satisfied in other allotments of the Drewsey Resource Area.

Ex. W, p. 17. A subsequent MFP for the Drewsey Area, completed in 1978, made similar recommendations for Dry Lake (Ex. S, pp. 22-34). The rationale for these recommendations for Dry Lake is spelled out in the 1978 MFP:

Some allotments in the Drewsey Resource Area lack potential to meet Class I with reasonable development and allocations for other uses.

It is only reasonable that this use should be transferred to an area such as this with a surplus that can be developed with little conflict with other uses.

The BLM has a great cost in the present allotment and it will cost a great deal more to bring the allotment to potential. This expenditure should be used to meet Class I rather than to increase the use of an operation that has Class I satisfied.

Exhibit X, p. 27.

The recommendations of the MFP's have been used by the BLM as the guiding plans for the "Diamond Seedings" area, which included Dry Lake (Tr. 241, 373-374). There was public involvement throughout the process, and ranchers in the Drewsey Area, including the appellants, were invited to meet with the BLM to discuss management options (Tr. 139, 418-419, 430)

Following the MFP, the Drewsey Resource Area Environmental Impact Statement (EIS) was prepared which assessed the impacts of the MFP recommendations to increase forage production in the Drewsey Area (Ex. Y, pp. 1-7, 3-67). The preferred alternative projected a long-term increase, up to 10 years after full implementation, of 16,191 AUM's for livestock use (Ex. y, pp. 1-7). The projected increase was expected to allow many, but not all permittees, to regain suspended AUM's (Ex. 4, pp. 3-67).

Following the completion of the EIS, the Drewsey Rangeland Management Program was adopted (Ex. Z). ^{3/} The purpose of the Management Program was described as follows:

The objective of the program is to manage the vegetation resource which provides the foundation for wildlife habitat, livestock and wild horse forage, soil protection, and recreation. The program is expected to meet this general objective by increasing the total annual vegetative production available for all purposes from 79,167 AUM's to 101,773 AUM's within ten years after complete implementation.

The Management Program called for a 5-year implementation period for a variety of range improvements, monitoring, grazing systems, and other actions which encompassed the program (Ex. Z, p. 12). It recognized that grazing adjustments would include transfer of use to areas with excess forage (Ex. Z, p. 13).

Implementation of the shifts of grazing use contemplated throughout the land use planning process was delayed because of the BLM's participation in the State's Emergency Relief Flood Program (Tr. 243).

^{3/} Appellants claim that the Drewsey Management Plan was not adopted and can provide no legal basis for actions taken. (Appellants' Brief, p. 31) This is not a correct statement as described by the document itself under the heading "Background."

All of the actions taken by the BLM respecting the Drewsey Resource Area were guided by the directives of the "Oregon Policy for Allocation of Additional Forage Permanently Available for Livestock Use" (Oregon Policy). The priorities for forage allocation as established by the policy are as follows:

First Priority (43 CFR 4110.3-1(b))

Additional forage permanently available for livestock grazing use shall first be allocated in satisfaction of grazing preferences to the permittee(s) or lessee(s) authorized to graze in the allotment in which the forage is available.

Second Priority (43 CFR 4110.3-1(c) and 43 CFR 4130.1-2)

After consultation, cooperation and coordination, additional forage permanently available for livestock grazing use over and above the preferences of the permittee(s) or lessee(s) in an allotment may be allocated in the following priority to:

- (1) Permittee(s) or lessee(s) in proportion to their contribution or efforts which resulted in increased forage production;
- (2) Permittee(s) or lessee(s) authorized to graze in the allotment in proportion to their preference, or to permittee(s) or lessee(s) in other allotments by shifting preference from one allotment to another.
- (3) other qualified applicants under 43 CFR 4130.1-2,

Exhibit R, p. 2. The applicable regulations cited by the policy are:

§ 4110.3-1 Increasing active use.

Additional forage may be apportioned to qualified-applicants for livestock grazing use consistent with multiple-use management objectives.

(a) Additional forage temporarily available for livestock grazing use, including forage which is temporarily available within an allotment because of a change in grazing use under § 4130.1-1, may be apportioned on a nonrenewable basis.

(b) Additional forage available on a sustained yield basis for livestock grazing use shall first be apportioned in satisfaction of grazing preferences to the permittee(s) or lessee(s)

authorized to graze in the allotment in which the forage is available.

(c) After consultation, cooperation, and coordination, additional forage on a sustained yield basis available for livestock grazing use over and above the preferences) of the permittee(s) or lessee(s) in an allotment may be apportioned in the following priority to:

- (1) Permittee(s) or lessee(s) in proportion to the contribution or efforts which results in increased forage production;
- (2) Permittee(s) or lessee(s) in proportion to the amount of their grazing preference; and/or
- (3) Other qualified applicants under 5 4130.1-2 of this title.

§ 4130.1-2 Conflicting applications.

When more than one qualified applicant applies for livestock grazing use of the same public lands and/or where additional forage for livestock or additional acreage becomes available, the authorized officer may authorize grazing use of such land or forage on the basis of § 4130.3-1 of this title or on the basis of any of the following factors:

- (a) Historical use of the public land (see § 4130.2(d));
- (b) Proper range management use of water for livestock;
- (c) General needs of the applicant's, livestock operations;
- (d) Public ingress or egress across privately owned or controlled land to public lands;
- (e) Topography; and
- (f) other land use requirement unique to the situation.

A comparison of the Oregon Policy with the Range Code reveals no inconsistencies. The regulations require that additional forage available on a sustained yield basis shall "first be apportioned in satisfaction of grazing preferences to the permittee(s) or lessee(s) authorized to graze in the allotment in which the forage is available." 43 CFR 41 10.3-1. This provision is mirrored in the Oregon Policy as the first priority. Thus, any permittee or lessee with unsatisfied preference (suspended use) within an allotment has the first priority to any additional forage available within the allotment (Tr. 324-330, 335). In this case appellant, nor any other permittee, has suspended grazing preference in the Dry Lake Allotment (Tr. 335).

While 43 CFR 4110.3-1 contains a mandatory directive, "shall," for the first priority allocation of additional forage, the remaining regulatory provisions provide that additional forage "may be apportioned in the following priority to * * *" and "the authorized officer may authorize grazing use of such land or forage on the basis of section 4110.3-2 of this title or on the basis of any of the following factors * * *." (Emphasis supplied) Thus, there is no mandatory direction for the BLM to apportion additional forage precisely as outlined in 43 CFR 4110.3-1. The use of the word "may" is permissive only, not mandatory. Clearly, BLM has been accorded flexibility to allocate surplus forage in a manner which best serves the needs of a particular area.

The flexibility allowed for a decision on allocating additional forage is particularly evident by the plain language in 43 CFR 4130.1-2. This section set forth two alternate schemes which an authorized officer may follow in allocating additional forage. The authorized officer can follow the priorities set forth in 43 CFR 4110.3-1 or he can consider any of the six factors listed in 43 CFR 4130.1-2. The purpose for this flexibility is quite evident. Common sense dictates that the BLM must have the ability to allocate additional forage in a manner which best meets the needs of a variety multiple use management objectives and land use planning goals. See 43 CFR 4100.0-8 which provides as follows:

The authorized officer shall manage livestock grazing on public lands under the principle of multiple use and sustained yield, and in accordance with applicable land use plans. Land use plans shall establish allowable resource uses (either singly or in combination), related levels of production or use to be maintained, areas of use, and resource condition goals and objectives to be obtained. The plans also set forth program constraints and general management practices needed to achieve management objectives. Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan as defined at 43 CFR 1601.0-5(b).

A strict formula for allocating additional forage would not provide the needed flexibility to meet the differing needs of each particular resource area.

While not identical, the Oregon Policy closely follows 43 CFR 4110.3-1. Satisfaction of existing grazing preferences within an allotment is the first priority. The

second priority is allocation to "permittee(s) or lessee(s) in proportion to their contribution or efforts which resulted in increased forage production." The major difference between section 4110.3-2 and the Oregon Policy is found in the priority which follows allocation based on contributions or efforts. The Oregon Policy allows allocation to 'permittee(s) or lessee(s) authorized to graze in the allotment in proportion to their preference or to permittee(s) or lessee(s) in other allotments by shifting preference from one allotment to another," and this language is not found in section 4110.3-2.

The appellants challenge the validity of the Oregon Policy allowing the authorized officer to allocate forage to either permittees in proportion to their preference within the allotment or to shift suspended preference from another allotment. Section 4110.3-1 does not specifically include shifting of preference as one of the priorities for allocating additional forage. The applicable regulations provide no required priority, absent unsatisfied preference within an allotment, for allocating additional forage. The flexibility allowed in the regulations clearly authorizes allocation of additional forage by shifting preferences if the circumstances are appropriate. Under section 4130.12(f), the authorized office may allocate additional forage based on "land use requirements unique to the situation." This is exactly the situation in the Drewsey Resource Area (Tr. 407). More importantly, BLM has interpreted the Oregon Policy to be consistent with the regulations. Reasonable agency interpretations of their own regulations are given great deference by reviewing courts.

In this case, the land use planning called for the shifting of preference from allotments in northern Drewsey to the more productive Diamond Seeding areas which include Dry Lake. Under the Oregon Policy, such shifting is appropriate for "existing preference from allotments with low potentials for restoring suspended non-use (SNU) to allotments with high productivity." (Ex. R)

Should appellants' arguments concerning the allocation of additional forage be accepted, BLM's range management program, would be frustrated. Dry Lake and the other Diamond Seeding areas had conditions favorable to an economically viable forage production program which could be used to alleviate shortages in other allotments where conditions were not so favorable. Therefore, resources were concentrated in those allotments most conducive to increased forage production consistent with range management objectives.

Under the appellants' theory, in order to embark on programs to restore suspended preference, the BLM would have to concentrate its efforts only in those allotments which have the suspended use, even though other allotments may be more conducive to economical forage production, otherwise, appellants' theory would allow only the permittee(s) within each allotment to claim priority to additional forage within the allotment even though their preference is fully satisfied while others suffer with suspended nonuse. Furthermore, the BLM would probably be reluctant to accept contributions under such programs, since the appellants' theory would allow only the contributors priority to all the forage produced as a result of BLM contributions, in sum, the acceptance of the appellants' interpretation of the grazing regulations would make cost effective programs to restore suspended use difficult or impossible to implement. Such a result is contrary to any reasonable interpretation of the grazing regulations.

Appropriateness of BLM's "Contributions"
When Allocating Additional Forage

The appellants contend that the contributions or efforts of the BLM should not be weighed when allocating forage to permittees in proportion to their contributions or efforts which resulted in increased forage production. Their argument is that, since forage is not allocated to the BLM only the contributions or efforts of other permittees or lessees should be considered. This interpretation has no rational basis. The purpose of the regulation is to give a permittee additional forage which results from his contributions or efforts. Logically, the only reasonable way to make such an allocation is to (1) assess what contributions or efforts can be identified as producing additional forage and (2) determine the proportion of those contributions or efforts which are attributable to a particular permittee. If a permittee provides contributions or efforts which produce 10 percent of additional forage produced in an allotment, then he is entitled to 10 percent of that forage. Whether the other 90 percent of effort or contribution comes from the BLM or other permittees makes no difference in regards to meeting the equitable purpose of the regulation.

Under the appellants' theory, a permittee who contributes 10 percent to the production of increased forage would receive 100 percent of the additional forage if the remaining contributions were made by the BLM, yet would receive only 10 percent if other permittees had made the remaining contributions. Such a result would not serve the purpose of the regulation, and would provide a bonanza to permittees who are lucky enough to be in allotments which

receive substantial BLM contributions to increase forage production.

Appropriateness of Method Used to Determine
Contributions for Increased Forage

The appellants contest the method used by the BLM to determine their proportion of contributions or efforts which resulted in increased forage production. Initially, the appellants filed a set of supporting documents, notes and receipts, along with their application for additional forage in the Dry Lake Allotment. The entire set of materials submitted by the appellants to the BLM prior to this hearing are contained in Exhibits A, B and C (Tr. 251).

Table A of the final decision contains a column titled "McLean Submission" which lists the contributions the appellants submitted for a variety of projects (Ex. 8, Table A). ^{4/} These "projects" are described on the left hand side of Table A. Another column, "Amount Allowed," reflects the amount of the "McLean Submission" which the BLM considered to determine the proportion of increased forage to be received by the appellants based on their contributions. Finally, the "Remarks" column provides the reason why certain submissions were not considered, in part or in whole, as such contributions.

Eleven of the "McLean Submissions" were rejected because there was no receipt for the claims and the work was not called for in the cooperative agreement for the particular project (Tr. 252, Ex. 8, Table A). These eleven claims accounted for only \$1,829 of the total contributions submitted by the appellants. For the Old Crater Fence and the Fischer Flat Well, a portion of the "McLean Submissions" were rejected since the submitted costs did not reflect the actual costs incurred by the appellants for the project (Tr. 253-254). The "McLean Submission" for the Mountain Fence was disallowed because the fence was not located in the Dry Lake Allotment (Ex. 8, Table A).

The significant "McLean Submissions" not allowed by the BLM in its final decision were (1) labor and travel and (2) maintenance and electricity. For the \$38,524 of labor and travel "efforts," the appellants submitted handwritten notes with no supporting receipts (Ex. C). The BLM assumed that

^{4/} To avoid confusion, the tables labeled as Exhibits A and B of the final decision will be referred to as Tables A and B.

these efforts were attributable to "the routine permittee cost of checking their livestock on the range" and "related costs of doing business by owning a public permit" (Tr. 255). Mr. McLean did not clearly identify the supporting basis for the \$38F524 submission, although he did testify that it included the cost of taking trips to the BLM office (Tr. 154-162).

The \$66,000 maintenance and electricity claim was based on the appellants' contributions to the BLM's electricity and maintenance accounts (Exs. 5a and 5b). Bill Anderson, BLM's Range Conservationist testified that the electricity account was set up to aid the permittees in the Diamond Seedings in paying their electric bills for running wells and pumps to the Hamey Coop because it would be easier for them to contribute to one BLM account. The BLM collected their money and paid it over to Hamey Coop.

Bill Anderson also testified that the maintenance account is a similar account in that all the users in the seeding complex contributed to the BLM to maintain their pump lines and well systems. They were to check the well and troughs to see if their cattle had water; if they did not, they would call the BLM who would do the necessary maintenance (Tr. 256).

The BLM did not consider the appellants' expenditures for routine travel, maintenance and electricity as contributions or efforts which resulted in increased forage production in Dry Lake. These expenditures, required of all users of the public range, were classified as normal operating expenses (Tr. 257, 341). ^{5/} The contributions which the BLM did consider were capital investment projects which created "a base for forage" to be available for livestock use (Tr. 337). Under this criteria, the total contributions made by the appellants were computed at \$32,876.15 (Ex. 8).

The next step for arriving at the proportion of the appellants' contributions which resulted in increased forage production was the computation of similar BLM investments in the Dry Lake Allotment. BLM's investments are set forth in Table B ("BLM Investments for Projects in the Dry Lake Allotment") of the Final Decision (Ex. 8). Table B was established in the following manner. For each project in Dry Lake, BLM recorded its costs on a job documentation

^{5/} The cost of maintenance and operation of all range improvements is the responsibility of those who receive the direct benefits. This policy is reflected in the BLM Manual (Ex. U, p. 11).

report, examples of which are shown in Exhibits K-1 through K-6 (To 27OF 314). In some cases, a project served Dry Lake and one or more other allotments. For these projects, BLM used several methods, depending on the type of project, to allocate the cost attributable as an investment in Dry Lake. For fences and cattle guards on the boundary of two allotments, only 50 percent of the investment was attributed for Dry Lake (Tr. 260-261). Where a pipeline served several allotments, the total cost of the project was divided by the number of pipeline miles to arrive at a cost per mile. The cost per mile was then multiplied by the mileage of pipeline serving Dry Lake to determine the BLM investment for the allotment (Tr. 263-264). The same formula was used for fences which crossed through several allotments. ^{6/} A similar formula was used to establish a cost per acre for seedings and brush treatments which covered several allotments. The cost per acre was likewise multiplied by the acres served within Dry Lake to determine the allocable BLM investment for that allotment (Tr. 268-269).

Using the above described method, the BLM contributions in Dry Lake were calculated to be \$384,585. ^{7/} This amount was added to the appellants' similar contributions to determine the total contributions which resulted in increased forage production in Dry Lake. The appellants' share of contributions was calculated at 8 percent. Therefore, the appellants were granted 8 percent of the AUM's determined by BLM to be the amount of total additional forage in the Dry Lake Allotment (Tr. 278).

At the hearing, the appellants submitted, for the first time, additional "contributions" and "efforts" which they now claim should be considered by the BLM. These expenses are presented in Exhibit 6 and were explained by Arlie Oster, the appellants' accountant. Basically, the newly submitted contributions are prorated costs from the appellants' operating expenses submitted on their tax returns, Schedule F, for the years 1981 through 1988. These expenses include legal fees, accounting fees, supplies, taxes, insurance and all other expenses associated with the

^{6/} Appellants have argued that expenditures for cattle guards do not benefit the range. In fact, they are an integral part of a fence and if fences can be considered beneficial so must cattle guards.

^{7/} Bill Anderson, BLM's Range Conservationist, reviewed each and every job completion report and actually found that BLM's expenditures for the listed projects were a little greater than \$384,585 (Ex. J; Tr. 272-274).

appellants' ranching operation (Ex. 6; Tr. 203-205), included in these expenses were some costs such as electricity which had been previously submitted to the BLM (Tr. 207-208). No satisfactory explanation is provided by the appellant to show how these expenses in any way increased forage production in the Dry Lake Allotment. Although Mr. Oster's computations had not been presented to the BLM prior to the hearing, these submissions provide no basis for allocating any additional forage to the appellants. The newly submitted costs appear to be nothing more than the normal operating expenses of a ranching operation and do not produce additional forage.

BLM's determination to disallow certain expenditures as "contributions" or "efforts" must be reasonable and supported by a rational basis. While determining what contributions or efforts result in increased forage production cannot be considered an exact science, there is a rational basis for allowing capital improvement costs and not allowing year to year operating costs. To make forage usable on certain rangelands, capital improvements must be made. Without water from some source or from wells and pipelines, forage cannot be used. There is, however, a fundamental distinction between a capital outlay for initial construction of a well or pipeline, and the costs for year-to-year use of these same facilities. The initial expenditure provides the foundation for forage use over a long period of time for both present and future range users. On the other hand, routine operating expenses are simply necessary costs of doing business so that the forage can be used in the short term. Thus, when a permittee contributes to the initial construction of a well or pipeline, he has made an expenditure which serves to benefit any and all present and future range users by providing the necessary foundation for distributing water to the range. However, operating costs such as routine Maintenance and electricity cover the cost of doing business for the particular grazing season. These expenditures, apportioned yearly to each and every range user, provide a direct benefit only to the particular permittee who uses the forage for that particular year. The electricity fund provides the energy costs to pump water to his cattle. The maintenance fund covers the wear and tear which is incidental to his use of the facilities.

Under the appellants' view, a permittee's "contribution" would grow each and every year he uses the range, even though no more forage is being produced. By following the assumption that routine operating expenses increase forage production, the amount of forage apportioned to a permittee would become a function of how many years accumulate before

his contributions or efforts are finally considered as a basis for allocating additional forage.

The BLM admits that the appellants have been good stewards of the public lands. (Opening Brief p. 27) However, while good range management practices can sustain or possibly increase forage production, there is nothing in the record which reflects any reasonable basis to attribute any measurable portion of the increased forage production, over and above the 278 AUM's granted, to the "efforts" of the appellants. Even the appellants' own expert noted how the seedings are the primary reason there is additional forage in Dry Lake (Tr. 221-222). These seedings projects were funded entirely by the BLM.

Did appellant's temporary nonrenewable grazing permits create a priority right for an increased permanent preference?

The appellants also contend that the "temporary non-renewable" AUM's granted by the BLM somehow created a vested right to a permanent preference for the additional forage. It is argued that since forage was available on a sustained yield basis in Dry Lake and Crows Nest, it should not have been granted on a "temporary nonrenewable" basis, but should now be considered as having established a permanent preference for the appellants. There is no legal or factual support for this position. No provision in the regulations mandates immediate and permanent allocation of any and all additional forage which is available on a sustained yield basis. The grazing regulations allow flexibility for allocating additional forage. Nonrenewable grazing permits are authorized under 43 CFR 4130-2 and 43 CFR 4110.3-1(a):

§ 4130.4-2 Nonrenewable grazing permits or leases.

Nonrenewable grazing permits or leases may be issued on an annual basis to qualified applicants when forage is temporarily available, provided this use is consistent with multiple-use objectives and does not interfere with existing livestock operations on the public lands.

4110.3-1 Increasing active use.

Additional forage may be apportioned to qualified applicants for livestock grazing use consistent with multiple-use management objectives.

(a) Additional forage temporarily available for livestock grazing use, including forage which is temporarily available within an allotment because

of a change in grazing use under § 4130.1-1, may be apportioned on a nonrenewable basis.

The appellants appear to believe that "temporarily available" forage cannot include forage which is available on a sustained yield basis. Such a narrow interpretation of the term "temporarily available" is inconsistent with the purpose of the law. There are a number of reasons why additional forage may be temporarily available for a nonrenewable permit. Favorable weather conditions can produce forage which could not be expected to be available on a sustained yield basis. Heavy rainfall was one factor which allowed for the significant supplemental use granted to the appellants during the 1980's. Sustained yield forage may be available for temporary use for one or more years by a particular permittee, even though the forage is ultimately obligated to another use or user. Such a scenario is recognized in 43 CFR 4110.3-1, which specifically allows additional forage which is available as a result of a change in grazing use under 43 CFR 4130.1-3 to be permitted or leased on a nonrenewable basis. ^{8/} In this case, the permanent shifts of use in the Drewsey Area had not been implemented. Therefore, although sustained yield forage was in the long term targeted for other users, the forage was available for temporary nonrenewable use by the appellants.

The appellants also believe they are entitled to a preference for the additional forage in Dry Lake and Crows Nest based on the provisions of 43 CFR 4130.2 which provide:

4130.2 Grazing permits or leases.

- (a) Grazing permits or leases shall be issued to authorize livestock grazing on the public lands and other lands under the administration of the Bureau of Land Management. These grazing permits or leases shall specify terms and conditions as required by § 4130.6 of this title.
- (b) Grazing permits or leases convey no right, title, or interest held by the United States in any lands or resources.
- (c) Grazing permits or leases authorizing livestock grazing on the public lands and other

^{8/} Under 43 CFR 4130.1-1, a permittee may apply for a change of grazing use for a given grazing year. If such a change results in less forage being utilized by the permittee, then obviously there could be forage available for temporary use by other permittees. The fact that such forage may be available on a sustained yield basis would not prohibit the BLM from granting the nonrenewable permit.

lands under administration of the Bureau of Land Management shall be issued for a term of 10 years, unless: (i) The land is pending disposal; (ii) the land will be devoted to a public purpose which precludes grazing prior to the end of 10 years; or (iii) it will be in the best interest of sound land management to specify a shorter term.

(d) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for new permits or leases if:

(i) The lands for which the permit or lease is issued remaining available for domestic livestock grazing:

(2) The permittee or lessee is in compliance with the rules and regulations and the terms and conditions in the permit or lease;

(3) The permittee or lessee accepts the terms and conditions to be included by the authorized officer in the new permit or lease.

(e) Permits or leases may incorporate the percentage of public land livestock use (see § 4130.6-2) or may include private land offered under exchange-of-use grazing agreements (see § 4130.4-1).

Appellants claim that under 43 CFR 4130.2(d), they hold expiring nonrenewable permits to the supplemental forage in Dry Lake and Crows Nest and, therefore, have a priority for not only continued temporary use, but for a permanent permit as well. Again, there is no legal rationale for the

appellants' argument. The regulation clearly addresses the long term permits and leases which are granted to preference holders. By its very terms, a "nonrenewable" permit is specifically issued so as to create no priority or expectation of continued use. Each and every year the appellants were granted supplemental use in Dry Lake and Crows Nest, the BLM informed the appellants that any use authorized above their established preference in no way established any priority for later use (Exs. H1-H17).

Exhibit 2, a September 2, 1982, letter from Joshua Warburton, Burns District Manager, sent to the appellants' attorney, Marc D. Blackman, makes this point clear. This letter spelled out the BLM's plans for allocating surplus forage in Dry Lake and noted how the land use plans targeted the forage for satisfaction of suspended use preference in the Drewsey Area (Ex. 2, pp. 1-2). The letter also stated:

All use of surplus forage, whether by a resident or non-resident permittee, is temporary and non-renewable. Temporary non-renewable may not be used to establish additional preference (Class II) or reinstate suspended non-use, and we do not

intend to address these issues until all land-use plans in the District are complete.

It follows then that temporary non-renewable may not be used to expand an existing dependent cow herd. The proper use is to extend the season of use and/or carry seasonal young or cull cattle to market. Both resident and non-resident permittees have taken advantage of this opportunity in a grazing management technique to pressure graze some crested wheatgrass fields for wolf plant control. We emphasize to all, permittees, that temporary non-renewable carries no guarantee as to the amount or quality of surplus forage and thus no long-term benefits can be accrued.

Exhibit 2, pp. 2-3.

Was Dry Lake a 'private' allotment allowing the appellants exclusive use and control of all the forage within the allotment?

The appellants argue that Dry Lake was established as a permanent private allotment for their exclusive use and control of the forage within the allotment under the July 10, 1970 Agreement (Ex. 26). Nothing in the agreement supports this claim. The agreement specifically notes how any surplus forage developed within these allotments above Class I privileges shall be apportioned in accordance with the grazing regulations for the public lands." The grazing regulations do not, and never have, allowed for public lands to be considered the "private" domain of any individual.

In addition, any claim for forage in Crows Nest is unfounded. The application filed by the appellants on February 5, 1988, did not request AUM's in Crows Nest (Ex. B) and the appellants have never applied for permanent forage in Crows Nest (Tr. 153). Nothing in the BLM's July 1, 1988, Decision addressed the issue, and it is therefore immaterial to the issues raised in the pleadings.

It is established law that decisions of the BLM made within its administrative discretion must be sustained unless they are found to be arbitrary, capricious or clearly erroneous as a matter of law. A decision may be regarded as arbitrary and capricious only if it is not supportable on any rational basis or if it is shown that it does not substantially comply with the grazing regulations. See e.g., Fasselin v. Bureau of Land Management, 102 IBLA 9 (1989); Webster v. Bureau of Land Management, 97 IBLA 1 (1987). Thus, a BLM decision regarding range management will be sustained as an exercise of the discretionary authority to manage grazing

lands where the record establishes a rational basis for that decision consistent with range management objectives. Hugh A. Tipton, 55 IBLA 68 (1981).

Summation

Basically, the appellants are asking me to interpret the regulations in a manner contrary to their purpose and the role of BLM in land use planning. The applicable regulations, 43 CFR 4110.3-1 and 43 CFR 4130.1-2, do not mandate a precise formula for allocating additional forage after suspended use within an allotment has been satisfied. The regulations give discretionary authority allowing the authorized officer the flexibility to allocate additional forage in a manner which meets the needs of the particular resource area. The Oregon Policy does not change the regulations; this policy is merely incident to the flexibility allowed by the regulations and emphasizes factors which are particularly relevant for the BLM districts in Oregon.

The regulations grant permittees additional forage resulting from their individual contributions or efforts, but the BLM contributions or efforts expended to produce forage for other users of the public range in accordance with long established land use also must be considered in proportion. Expenditures which were part of the appellants' normal operating expenses, particularly electricity and routine maintenance costs, can not be considered.

Dry Lake is not a private allotment established for exclusive use and control by the appellants. The temporary nonrenewable AUMs granted to the appellants established no permanent rights in either Dry Lake or Crows Nest. The appellants were so notified, and were so informed of the temporary nature of the allocation pending final implementation of the Drewsey Area shifts.

I conclude that the Area Manager's decision was rational and supported by the applicable law. It is therefore affirmed.

John R. Rampton, Jr.
District Chief
Administrative Law Judge

