



ROBERT C. LEWIS v. BUREAU OF LAND MANAGEMENT

173 IBLA 284

Decided January 23, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

ROBERT C. LEWIS

v.

BUREAU OF LAND MANAGEMENT

IBLA 2007-62

Decided January 23, 2008

Appeal from a decision of Administrative Law Judge Robert G. Holt affirming a Final Decision of the Ely (Nevada) Field Office, Bureau of Land Management, adjusting authorized livestock grazing use. NV-04-01-03

Decision affirmed in part; appeal dismissed in part as moot.

1. Administrative Procedure: Administrative Review

An appeal will be dismissed as moot where, as a result of events occurring after an appeal is filed, there is no effective relief which the Board could grant and any future dispute between the parties in regard to the subject of the appeal is hypothetical.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

Where a land use plan authorizes but does not compel construction of fences along the boundary of a grazing allotment after that boundary is adjusted, an administrative law judge's decision finding that BLM had a rational basis for not constructing a new fence or reconstructing an existing fence will be upheld when the permittee fails to show that finding to be in error.

APPEARANCES: Robert C. Lewis, Moapa, Nevada, *pro se*; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HEATH

Robert C. Lewis has appealed from a November 27, 2006, decision of Administrative Law Judge (ALJ) Robert G. Holt, affirming a July 30, 2001, Notice of Final Decision (Final Decision) of the Assistant Field Manager, Renewable Resources, Ely (Nevada) Field Office, Bureau of Land Management (BLM). BLM's July 2001 Final Decision adjusted Lewis' authorized livestock grazing use in the Breedlove, Grapevine, and Henrie Complex Allotments, situated northeast of Las Vegas, Nevada.<sup>1</sup> The Final Decision was designed to assist in promoting the recovery and de-listing of the Mojave population of the desert tortoise, *Gopherus agassizii*, a Federally-listed threatened species protected by the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2000), by implementing the specific land-use planning directives of the September 2000 Caliente Management Framework Plan Amendment (MFP Amendment). For the reasons explained below, we affirm the decision in part and dismiss the appeal in part as moot.

*FACTUAL AND LEGAL BACKGROUND**A. The Caliente Management Framework Plan Amendment*

On June 11, 1999, BLM issued the "Proposed Caliente Management Framework Plan Amendment and Final Environmental Impact Statement for the Management of Desert Tortoise Habitat" (Proposed MFP Amendment and EIS). The Caliente Management Framework Plan is a land use plan. See 43 C.F.R. §§ 1610.8, 2920.0-5(f). The planning area encompasses all of the desert tortoise habitat under BLM's jurisdiction in the Ely District, totaling approximately 754,600 acres, including 244,900 acres which have been designated by the Fish and Wildlife Service (FWS), U.S. Department of the Interior, as critical habitat for the desert tortoise, in Lincoln County, Nevada. The Proposed MFP Amendment and EIS incorporated numerous multiple use management actions concerning livestock grazing, wild horses, off-highway vehicle use, rights-of-way, minerals, land disposal and acquisition, and other activities, which were generally intended to promote the recovery and de-listing of the desert tortoise.

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<sup>1</sup> BLM's July 2001 Final Decision was issued to Robert C. and Vivian Lewis, who are husband and wife. The appeal from the BLM Final Decision was filed by Mr. Lewis, with no separate reference to Mrs. Lewis. However, Mrs. Lewis participated actively along with her husband at the hearing, and was a co-signatory on several of the filings submitted to the ALJ. Throughout this proceeding, the Lewises have appeared *pro sese*. Judge Holt referred to Mr. Lewis as the "Appellant" at page 1 of his Nov. 27, 2006, decision.

In the Proposed MFP Amendment and EIS, BLM proposed the designation of three Areas of Critical Environmental Concern (ACECs), namely, Mormon Mesa, Kane Springs, and Beaver Dam Slope, encompassing a total of approximately 212,500 acres (332 square miles) of public land in the planning area that FWS had designated as critical habitat for the desert tortoise.<sup>2</sup> BLM further proposed specific management prescriptions for multiple use activities inside and outside the ACECs. In the case of livestock grazing, BLM proposed, *inter alia*, closing allotments to grazing to the extent they overlap the three ACECs.

On July 30, 1999, Lewis filed a protest challenging the Proposed MFP Amendment and EIS. Lewis cited economic harm from shortened grazing periods and reduction in the number of cattle authorized for grazing, and questioned the scientific reasoning behind the reductions in the area of the grazing allotments.

As required under section 7 of the ESA, 16 U.S.C. § 1536 (2000), BLM formally consulted with FWS concerning the potential adverse effects of the Proposed MFP Amendment on the desert tortoise and its critical habitat. That consultation resulted in FWS' issuance of a March 2, 2000, "Final Biological Opinion for the Proposed Caliente Management Framework Plan Amendment" (No. 1-5-99-F-450) (BO).<sup>3</sup> The BO concluded that implementation of the Proposed MFP Amendment was not likely to jeopardize the continued existence of the desert tortoise or destroy or adversely modify its critical habitat, in violation of section 7(a) of the ESA, 16 U.S.C. § 1536(a) (2000). BO at 73.

In the BO, however, FWS concluded that the Proposed MFP Amendment was likely to result in the incidental "take" of desert tortoise.<sup>4</sup> BO at 74-76. Under section 7(b)(4) and (o)(2) of the ESA, 16 U.S.C. § 1536(b)(4) and (o)(2) (2000), FWS adopted "reasonable and prudent measures" that it considered necessary and appropriate to minimize the likelihood of an incidental take, and implementing "terms and conditions," compliance with which was required to avoid violating the taking prohibition of section 9 of the ESA, 16 U.S.C. § 1538 (2000). With respect to livestock grazing, FWS generally directed that measures be taken "to eliminate or minimize the take of desert tortoises and destruction of tortoise habitat resulting from licensing of livestock grazing." BO at 76. FWS specifically required BLM to comply

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<sup>2</sup> The Mormon Mesa ACEC covers 109,700 acres, the Kane Springs ACEC covers 65,900 acres, and the Beaver Dam Slope ACEC covers 36,900 acres.

<sup>3</sup> The BO was introduced as both Exhibits (Ex.) G-7 and A-25 at the hearing before the ALJ.

<sup>4</sup> Section 3(19) of the ESA, 16 U.S.C. § 1532(19) (2000), defines a "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [a threatened or endangered species], or to attempt to engage in any such conduct." See BO at 73.

with several “non-discretionary” terms and conditions, which implement the reasonable and prudent measures. One of these was:

Any livestock that move into areas closed to grazing shall be promptly captured and moved back to the allotment within 72 hours of notification of straying. The authorized officer may approve some other time frame based on extraordinary circumstances whenever the permittee discovers cattle have strayed, or when notified by the Bureau [BLM] or other entity. If straying of livestock becomes problematic, the Bureau, in consultation with the Service [FWS], shall take measures to ensure straying is prevented.

BO at 78. FWS also required BLM to “begin to issue decisions to close all livestock grazing allotments that occur within desert tortoise ACECs in the Ely District, upon approval of the CMFPA [Caliente MFP Amendment].” *Id.* at 79.

On June 22, 2000, approximately 3½ months after FWS issued the BO, the BLM Assistant Director for Renewable Resources and Planning, acting on behalf of the BLM Director, issued a decision dismissing Lewis’ protest of the Proposed MFP Amendment and EIS as untimely filed.<sup>5</sup>

On September 19, 2000, the BLM State Director for Nevada executed the “Approved Caliente Management Framework Plan Amendment and Record of Decision for the Management of Desert Tortoise Habitat,” *i.e.*, the MFP Amendment. Exs. G-1 and A-27. The MFP Amendment, *inter alia*, designated three ACECs (Mormon Mesa, Kane Springs, and Beaver Dam Slope). The ACECs overlap, in whole or in part, nine allotments, including the Breedlove and Grapevine Allotments. Of the 121,500 acres in the Breedlove Allotment, 32,000 acres are within the Mormon Mesa (31,600 acres) and Kane Springs (400 acres) ACECs. Two small areas of the Kane Springs ACEC extend into the northwest corner of the allotment. A larger but still relatively small portion of the Mormon Mesa ACEC covers the far southwestern part of the allotment, and a much larger part of the Mormon Mesa ACEC covers the eastern portion of the allotment. Of the 34,200 acres in the Grapevine Allotment, 12,200 acres are within the Kane Springs ACEC, which covers roughly the southern

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<sup>5</sup> Under 43 C.F.R. § 1610.5-2(b), that decision was the final decision of the Department of the Interior. It was therefore subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2000). There is no allegation that Lewis sought judicial review of the Assistant Director’s decision.

third of the allotment area. In the Grapevine Allotment, the Kane Springs ACEC boundary runs roughly east-west across the allotment.<sup>6</sup>

The MFP Amendment, under “Management Direction,” stated “[c]lose all allotments or portions of allotments within the ACECs to livestock grazing.” MFP Amendment at 10. It then stated that all or portions of the allotments “outside of the ACECs” would “remain open” to grazing. *Id.* at 13. It thus required closure of the portions of the Breedlove and Grapevine Allotments within the ACECs to grazing. The result was to decrease Breedlove Allotment authorized grazing use by 166 animal unit months (AUMs),<sup>7</sup> specifically, from 864 to 698 AUMs (or from 72 to 58 cattle). The MFP Amendment decreased Grapevine Allotment grazing use by 211 AUMs (from 560 to 349 AUMs, or from 47 to 29 cattle). *Id.* at 14, 15 (Table 2 (Current and Permitted Use Within the ACECs) and Table 3 (Seasons of Use and Permitted Use Outside of ACECs)).

With respect to range improvements within the ACECs, the MFP Amendment directed BLM as follows: “Construct improvements only as needed to facilitate multiple use and to exclude livestock from the Kane Springs, Mormon Mesa, and Beaver Dam Slope ACECs.” *Id.* at 13. The MFP Amendment also adopted specific terms and conditions established by FWS in its March 2000 BO for the purpose of implementing its reasonable and prudent measures. *See* MFP Amendment at 16-18. The terms and conditions included the following requirement: “The permit[t]ee is required to take action to remove any livestock that move into areas closed to grazing back into the open acres of the allotment. If straying of livestock becomes problematic, the Bureau, in consultation with the Service, shall take measures to ensure straying is prevented.” *Id.* at 17. Further, the MFP Amendment stated that BLM “will issue decisions to close all livestock grazing allotments that occur within desert tortoise ACECs in the Ely District within 120 days of the State Director signing of this Approved Plan Amendment and Record of Decision.” *Id.* at 18.

#### B. *BLM’s July 2001 Final Decision*

BLM issued a Notice of Proposed Decision on May 22, 2001, proposing to reduce Lewis’ grazing use in the Breedlove and Grapevine Allotments. Two days later, Lewis protested that reduction on the ground of adverse economic effects to his grazing operation. Lewis also stated that the proposed decision “disallows me from

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<sup>6</sup> The Beaver Dam Slope ACEC is situated somewhat distant from the allotments at issue here, and therefore is not involved in this decision.

<sup>7</sup> An AUM is the amount of forage necessary to sustain one cow or its equivalent for one month. 43 C.F.R. § 4100.0-5 (“*Animal unit month (AUM)*”).

using portions of my existing allotments without providing adequate fencing to keep my cattle out of the ACEC[s].” Protest, dated May 24, 2001, Ex. G-4.

In issuing its July 30, 2001, Final Decision, BLM decided to go forward with “the modifications to the terms and conditions for grazing use as presented in the Proposed Decision . . . unchanged[.]” Final Decision at 1. It thus modified the terms and conditions of Lewis’ authorized grazing use of the Breedlove and Grapevine Allotments for the purpose of implementing the MFP Amendment.<sup>8</sup> It closed the Breedlove and Grapevine Allotments to livestock grazing to the extent that they encompassed public lands in the ACECs, which were designated as critical habitat for the desert tortoise.<sup>9</sup> The Final Decision correspondingly decreased Lewis’ authorized grazing use in the two allotments to the extent specified in the MFP Amendment, as described above, under 43 C.F.R. § 4110.3 (2001).<sup>10</sup> Final Decision at 2-4.

BLM also adopted new grazing prescriptions for all of the public lands in the allotments which were outside the ACECs. *See* Final Decision at 4-6. This included terms and conditions for Lewis’ new modified grazing permit, which consisted of the terms and conditions established by FWS in its March 2000 BO, and then adopted by BLM in its September 2000 MFP Amendment, including the requirement that the permittee remove straying livestock from “areas closed to grazing,” and that BLM “take measures to ensure straying is prevented,” if it “becomes problematic[.]” *Id.* at 5. BLM stated that the Final Decision would be implemented at the conclusion of the 30-day appeal period, with the issuance of a new modified 10-year grazing permit reflecting the changes in authorized grazing use. On August 1, 2001, BLM issued a new modified 10-year grazing permit to Lewis for the Henrie Complex, Breedlove, and Grapevine Allotments, in accordance with the Final Decision.

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<sup>8</sup> BLM’s July 2001 Final Decision concerned a total of four allotments for which Lewis is the authorized grazing permittee: Henrie Complex (No. 11034), Breedlove (No. 11010), Grapevine (No. 11032), and Cottonwood (No. 21021). BLM decreased authorized use in the case of the Breedlove and Grapevine Allotments, but increased such use in the case of the Henrie Complex Allotment. BLM made no change to use in the case of the Cottonwood Allotment. The Henrie Complex and Cottonwood Allotments therefore are not at issue here.

<sup>9</sup> BLM provided that the allotment boundaries would be changed, pursuant to 43 C.F.R. § 4110.2-4 (2001), to reflect the closure to grazing, adding that “[t]he closure areas will revert back to the Breedlove and Grapevine allotments . . . if and when livestock grazing is resumed in the future.” Final Decision at 3.

<sup>10</sup> The decreased AUMs would be designated “Suspended Non-Use[.]” Final Decision at 4.

C. *Lewis' Appeal and the ALJ's Decision*

Lewis appealed the July 2001 Final Decision to the Hearings Division on August 21, 2001. Echoing his protest to the proposed decision, Lewis said that the Final Decision caused economic harm to his grazing operations due to reduction in the total AUMs and allotment acreage. Lewis further stated that the Final Decision “disallows me from using portions of my existing allotments without providing adequate fencing to keep my cattle out of the ACEC[s].” Notice of Appeal (Ex. G-6).

Lewis also asked for a stay of the effect of the Final Decision during the pendency of his appeal before the Hearings Division. The applicable rules gave the Board the authority to resolve a petition to stay a BLM grazing decision appealed to the Hearings Division, while providing to the Hearings Division the authority to resolve the underlying appeal on its merits. *See* 43 C.F.R. §§ 4.21(b), 4110.3-3(b), 4160.3(c), and 4160.4 (2003); *W. Wesley Wallace*, 156 IBLA 274, 275 (2002). On June 14, 2004, the Board denied Lewis’ petition for a stay.

On May 22, 2006, BLM filed a Motion to Dismiss and a Motion for Summary Judgment (BLM Motion). BLM moved to dismiss on the grounds that (1) Lewis’ appeal in actuality constituted a challenge to the MFP Amendment that requires closure of parts of the Breedlove and Grapevine Allotments, which is not cognizable before the Board; and (2) Lewis had no standing to raise the issue of whether BLM should replace a fence in the Breedlove Allotment since Lewis had not made any application for construction of a fence and BLM had not issued any decision either approving or prohibiting construction of a fence. BLM Motion at 4-7. In the event that the ALJ determined that Lewis was appealing the decision implementing the MFP Amendment rather than the MFP Amendment itself, BLM said that the challenge to the closure of portions of the allotments and reductions in AUMs and modifications to Lewis’ grazing permit should be dismissed as a matter of law on summary judgment. Lewis filed an “Answer” to BLM’s motion on June 6, 2006.

On June 16, 2006, Judge Holt entered an order limiting the issues for the hearing. The ALJ determined to keep BLM’s motion under continued review except for the portion which sought to dismiss Lewis’ objection to the Final Decision’s closure of parts of the allotments “without providing adequate fencing to keep my cattle out of the ACEC.” June 16, 2006, Order at 1 (quoting Lewis’ Notice of Appeal). He therefore limited the hearing to consideration of evidence on “whether the decision of the Ely Field Office, dated July 30, 2001, prevents Lewis from using portions of his existing allotments without providing adequate fencing to keep livestock out of the ACECs.” *Id.* at 2.

On June 23, 2006, ALJ Holt granted BLM’s motion for summary judgment as to closure of parts of the Breedlove and Grapevine Allotments and the associated

reduction in acreage and authorized AUMs on the ground that BLM's Final Decision correctly implements the MFP Amendment. Judge Holt first noted that the MFP Amendment is not reviewable by this Board or by the Hearings Division because it is a type of land use plan (citing *The Wilderness Society*, 109 IBLA 175, 178 (1989), and 43 C.F.R. § 1610.5-2). June 23, 2006, Order at 3. Judge Holt then held that while BLM's implementing decision is reviewable by the Board, summary judgment was appropriate because the Final Decision implemented the MFP Amendment correctly and without variances. *Id.* at 4-5. Lewis did not appeal the grant of summary judgment on this issue.<sup>11</sup>

After considering the testimony and evidence introduced during a three-day hearing on July 11-13, 2006, and the parties' post-hearing briefs, Judge Holt concluded in his November 27, 2006, decision (ALJ Decision) that the MFP Amendment "did not require BLM to construct fences along the ACEC borders sufficient to absolutely exclude cattle from the ACECs," but, rather, that BLM "need only take measures that minimize cattle straying into the ACECs." ALJ Decision at 15. Judge Holt found that BLM had a rational basis for finding that existing fencing, terrain, and lack of water availability minimized the straying of livestock into the ACECs, in conformance with the MFP Amendment, and that Lewis had failed to demonstrate error by a preponderance of the evidence. *Id.* He therefore held: "I must affirm that part of BLM's decision that does not require new fencing on the borders of the ACECs." *Id.*

#### *D. The Instant Appeal and Subsequent Events*

Lewis filed a Notice of Appeal and Petition for Stay on January 3, 2007. BLM filed a response to Lewis' petition for stay on January 16, 2007, to which Lewis responded on February 8. Lewis filed his Statement of Reasons (SOR) on February 2, 2007.

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<sup>11</sup> The June 23, 2006, Order, as corrected by a subsequent Order dated Aug. 17, 2006, also vacated the July 2001 Final Decision in part to the extent that the decision had improperly held that 100 percent of the Breedlove Allotment was Federal land. That conclusion was based on an incorrect understanding that Lewis' private land within the allotment was completely fenced. Judge Holt remanded the matter to BLM for a determination of the correct percentage. He recognized this prior order in his Nov. 27, 2006, decision (at 15) discussed below, noting that BLM's Final Decision was affirmed except to the extent that it had been previously vacated. Since Lewis did not appeal the August 2006 Order, the question of the percentage of the Breedlove Allotment that constitutes Federal land is not at issue.

By Order dated March 13, 2007, this Board denied Lewis' petition for stay. The Order (at 3) held that Lewis had not shown any likelihood of immediate and irreparable harm in the absence of a stay. The Board explained:

A stay would not require that any fences be built. It would simply stay the effect of the judge's conclusion that BLM properly decided not to construct fences. Although Lewis alleges that he is harmed because there is the "threat of trespass" (Petition at 6), a stay would not lift such a threat if Lewis' cattle were to stray into an ACEC during the pendency of the appeal.

March 13, 2007, Order at 4. The Board further held that Lewis had not shown a likelihood of success on the merits of the argument that BLM can comply with the MFP Amendment only by fencing the ACECs. The Board also rejected Lewis' argument that the public interest favors granting a stay to protect the desert tortoise because the granting of a stay would not result in any greater protections for the desert tortoise. *Id.*

On March 19, 2007, BLM filed its response to Lewis' SOR. By Order dated March 29, 2007, the Board directed the parties to engage in settlement discussions, and advise the Board regarding the status of those discussions within 90 days.

On June 27, 2007, counsel for BLM advised the Board that the Union Pacific Railroad (UPRR) had recently completed construction of a fence along the entire length of its railroad right-of-way in the Breedlove Allotment.<sup>12</sup> (The UPRR right-of-way runs along the boundary of the Mormon Mesa ACEC in the eastern portion of the Breedlove Allotment.) BLM asserted that the fence effectively prevented livestock from drifting over the railroad tracks onto lands closed to grazing in that ACEC. On that basis, BLM moved to dismiss that part of Lewis' appeal regarding fencing in the Breedlove Allotment as moot. BLM also advised that discussions between the parties had not been fruitful and requested that the Board resolve the remaining issues.

Following an extension of time granted on July 30, 2007, Lewis responded to BLM's motion on August 15, 2007. Lewis acknowledged construction of the fence along the UPRR right-of-way that restricts livestock from the Mormon Mesa ACEC. Lewis nevertheless opposed BLM's motion to dismiss in part, asserting that the fence "obstructs Lewis's use of his water, and a portion of his land . . . ." Appellant's

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<sup>12</sup> See "Status of Settlement Discussions Ordered by Board; Motion to Dismiss Appeal as to Fence Along Eastern Boundary of the Breedlove Allotment as Moot; Request for Ruling on Remaining Appeal Issues," dated June 27, 2007, and attached declaration of Domenic A. Bolognani, BLM Range Management Specialist, Caliente Field Station, and exhibits.

Response at 3. Lewis further argued that the fence “is located in the Meadow Valley Wash, a large, wide, and highly active drainage area, susceptible to violent flooding which frequently washes out portions of UPRR’s fence . . . .” *Id.* at 4. Lewis asserted that his appeal is not moot because the fence “is a temporary barrier at best” (*id.* at 6), and issues that would arise in the event of a washout remain unresolved. Lewis also moved to consolidate alternative dispute resolution (ADR) discussions in the instant appeal with discussions in two grazing trespass appeals pending before the Hearings Division (NV-04-06-01 and NV-04-07-01).

BLM filed a response dated August 23, 2007. BLM opposed consolidation for ADR purposes, noting that the hearing had already been held in the instant appeal and the ALJ Decision issued, while the grazing trespass appeals had not yet been scheduled for hearing. BLM also asserted that consolidation would be improper in the absence of common issues. BLM observed that the two grazing trespass appeals involve issues of grazing fee payment and use allegedly inconsistent with Lewis’ permit, which are unrelated to issues in this appeal. In view of the disposition of this appeal as explained below, the motion to consolidate for ADR purposes is denied.

Against this background, two issues remain to be decided in this appeal, namely:

1. Is Lewis’ appeal moot with respect to claims regarding the Breedlove Allotment?
2. Is BLM required to construct a new fence or reconstruct an existing fence along the ACEC boundary in the Grapevine Allotment to implement the MFP Amendment? This general issue has two components, namely:
  - a. Does the MFP Amendment require BLM to construct fences?
  - b. Did the ALJ properly find that BLM had a rational basis for not constructing a new fence or reconstructing an existing fence on the ACEC boundary in the Grapevine Allotment?

#### *DISCUSSION*

##### *I. Claims Regarding the Breedlove Allotment Are Now Moot.*

[1] In view of the UPRR’s construction of a fence that Lewis concedes restricts cattle from straying into the Mormon Mesa ACEC in the Breedlove Allotment, any further dispute between BLM and Lewis is merely hypothetical and is dependent on future events that may or may not occur. Neither BLM nor Lewis has any idea of when or if another flood down the Meadow Valley Wash would occur that would

destroy all or part of the UPRR fence. If that does happen, issues regarding fence repair or reconstruction may have to be addressed, but for purposes of this appeal Lewis presently has no claim that BLM cannot comply with the MFP Amendment unless BLM builds a fence. The fence that Lewis claimed was necessary to prevent his cattle from straying is now in place.

While Lewis expresses some belief that the UPRR fence isn't good enough to last in the event of another serious flood event, it is not at all clear — and Lewis has not explained — what type of fence he thinks would be sufficient. There appears to be no actual conflict between the parties regarding necessary actions in the Breedlove Allotment, and there is no decision that this Board needs to make.

In the absence of an existing controversy between the parties, we will dismiss an appeal for mootness. *State of Alaska*, 85 IBLA 170, 172 (1985), and cases cited. As this Board held in *In re Jamison Cove Fire Salvage Timber Sale*, 114 IBLA 51 (1990):

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. *The Hopi Tribe v. OSMRE*, 109 IBLA 374, 381 (1989); *The Sierra Club*, 104 IBLA 17, 19 (1988); see *Blackhawk Coal Co. (On Reconsideration)*, 92 IBLA 365, 93 I.D. 285 (1986).

114 IBLA at 53-54. That is precisely the case here. Even if Lewis' argument that the MFP Amendment requires fence construction were correct (see discussion in part II.A. below), there is no effective relief that the Board could grant (or that would be necessary) with respect to the Breedlove Allotment in view of UPRR's construction of the fence along its right-of-way.

The Board also explained in *State of Alaska, supra*:

The State urges that the appeal is not moot because the possibility exists that future disputes will occur . . . . It is the Board's duty to decide actual controversies by a decision that can be carried into effect and not to give opinions on moot questions or abstract propositions. See *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp.*, 394 F.2d 36, 41 (6th Cir. 1968). The Board does not render advisory opinions in hypothetical cases. *Edgar W. White*, 85 IBLA 161 (1985).

85 IBLA at 172. In this case, similarly, the possibility that a dispute may occur in the event that a future flood washes out some part of the UPRR fence does not mean that

this part of the appeal is not moot.<sup>13</sup> Therefore, dismissal of the appeal with respect to the Breedlove Allotment is proper.

Taken together, Lewis' insistence that his appeal is not moot as to the Breedlove Allotment; his desire to pursue the appeal notwithstanding UPRR's construction of the fence; his earlier express disclaimer of an intent to compel BLM to construct a fence;<sup>14</sup> his requests for a stay even though a stay would not result in construction of a fence; and his repeated expressions of concern and dissatisfaction regarding the reduction in the number of cattle he may graze and the resulting adverse economic effect<sup>15</sup> indicate that the ultimate purpose of the appeal is something other than to compel BLM to build a fence. This confusion as to what relief Lewis is seeking or would seek, or that the Board could grant, indicates that Lewis may believe that the reduction in allotment acreage and authorized AUMs is invalid or unenforceable — at least as long as BLM does not build a fence.

To the extent that Lewis is arguing that BLM's not building a fence renders the Final Decision invalid or unenforceable, his argument is illogical. The validity of the reductions in allotment acreage and authorized AUMs is independent of whether BLM is required to build a fence. If Lewis simply wanted BLM to construct a fence rather than objecting to the contraction of the allotment areas, and if he believed that BLM had a legal duty to construct a fence, Lewis could have simply petitioned BLM to construct a fence, rather than appealing the July 30, 2001, Final Decision adjusting the boundaries of the allotment areas. Even if the BLM were legally obligated to construct a fence at the government's expense (discussed in part II.A. below), failure to fulfill that obligation would not render the portion of the July 30, 2001, Final

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<sup>13</sup> Moreover, dismissal in this case would not tend to preclude review by the Board should the issue arise again. This case does not fall within the exception to mootness for cases that are "capable of repetition, yet evading review." See, e.g., *Southern Utah Wilderness Alliance*, 111 IBLA 207, 209-210 (1989), and cases cited.

<sup>14</sup> In his Oct. 3, 2006, Response to BLM's Post-Hearing Brief (at 2), Lewis stated:

Appellant is not asking this forum to tell the BLM that they [sic] are going to have to build a fence to exclude livestock from an ACEC. However, this forum has the decision-making power to tell the BLM that it is their responsibility to protect the Desert Tortoise. The Final Decision is in error because the BLM did not protect the Desert Tortoise and attempted to force Lewis to do so on his own . . . .

<sup>15</sup> E.g., Aug. 21, 2001, Notice of Appeal (Ex. A-34); Transcript of Hearing, July 11-13, 2006 (Tr.) 423-24; Feb. 2, 2007, SOR at 5, 15-17; Feb. 8, 2007, Answer to BLM's Response to Appellant's Petition for Stay at 4.

Decision that contracted the allotment boundaries and reduced authorized use in the Breedlove and Grapevine Allotments invalid or unenforceable.

Further, a challenge to the MFP Amendment's adjustment of the allotment acreage and the reduction in AUMs is not within this Board's authority to adjudicate. Decisions made in the context of amending a land use plan are not appealable to the Board. 43 C.F.R. § 1610.5-2(b) (the decision of the BLM Director on a protest of a resource management plan (RMP) amendment "shall be the final decision of the Department of the Interior").<sup>16</sup> The same principle applies to MFPs. See *Franklyn Dorhofer*, 155 IBLA 51, 56 (2001) (43 C.F.R. § 1610.5-2(b) applies to both MFPs and RMPs); *Harold E. Carrasco*, 90 IBLA 39, 41 (1985); *Oregon Natural Resources Council*, 78 IBLA 124, 127 (1983); *Oregon Shores Conservation Coalition*, 83 IBLA 1, 2 (1984) ("The Board has held that the BLM review procedures are equally applicable to protests filed against management framework plans (MFP)").

The Board does have jurisdiction to review BLM's implementing Final Decision.<sup>17</sup> However, in this case the July 30, 2001, Final Decision implemented the allotment acreage reductions and adjustments in authorized AUMs in the MFP Amendment without change or variance.<sup>18</sup> A challenge to the legal validity of those parts of the Final Decision is in substance a challenge to the MFP Amendment. If

<sup>16</sup> Section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2000), requires the Secretary of the Interior to manage the public lands "in accordance with the land use plans developed by him under section 1712 of this title . . ." In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004), the Supreme Court noted that this statutory directive "prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan." See 43 C.F.R. § 4100.0-8 ("[BLM] shall manage livestock grazing on public lands . . . in accordance with applicable land use plans"). The Court noted that "the Board . . . does not review the approval of a [resource management] plan, since it regards a plan as a policy determination, not an implementation decision." 542 U.S. at 70.

<sup>17</sup> See *Franklyn Dorhofer*, 155 IBLA at 57; *Joel Stamatakis*, 98 IBLA 4, 7 (1987); 43 C.F.R. § 1610.5-3(b); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 70 ("Appeal to the Department's Board of Land Appeals is available for 'a specific action being proposed to implement some portion of a resource management plan or amendment.' 43 CFR § 1610.5-3(b).").

<sup>18</sup> In his June 23, 2006, Order granting BLM's motion for summary judgment as to closure of parts of the allotments and the associated reduction in acreage and authorized AUMs, Judge Holt ruled that "BLM's decision correctly implements the MFP Amendment. . . . Lewis . . . has not pointed to any instance where BLM incorrectly applied the Amendment's reduction of AUMs [or] allotment acreage . . ." June 23, 2006, Order at 2-4. Lewis did not appeal that ruling.

Lewis believed the acreage adjustments and reductions in authorized AUMs were unlawful, his remedy was to timely protest the Proposed MFP Amendment and EIS, and then, if the protest were denied, seek judicial review of the BLM Director's decision on the protest. Lewis' July 30, 1999, protest of the Proposed MFP Amendment and EIS was not timely, and he did not pursue judicial review. Further, Lewis did not appeal the ALJ's grant of summary judgment on this issue.<sup>19</sup>

Finally, if Lewis claims that UPRR's fence interferes with Lewis' use of water rights or a portion of his land, he must take up that issue with the railroad.

II. *BLM Is Not Required to Construct or Reconstruct a Fence in the Grapevine Allotment.*

In the Grapevine Allotment, there is an existing fence that runs in a generally east-west direction along the northern boundary of the Kane Springs ACEC between higher terrain on the east and west. It predates the ACEC designation and was originally built as a pasture rotation fence. However, the fence did not uniformly prevent cattle from straying into the ACEC, due to factors including a portion of the fence being washed out and gates occasionally being left open (presumably by hunters who use the area).<sup>20</sup> As noted previously, the question of whether BLM is required to construct (or, in this instance, reconstruct) the fence poses two separate questions, namely (1) does the MFP Amendment require BLM to construct fences?; and (2) was BLM's not acting to construct a fence or reconstruct the existing fence arbitrary or capricious under the particular circumstances of this case?

A. *The MFP Amendment Does Not Require BLM to Construct Fences.*

In the MFP Amendment, BLM closed the ACECs to livestock grazing. Recognizing the potential that livestock that graze on the adjacent and nearby public lands might enter the ACECs, the MFP Amendment required BLM to "[c]onstruct improvements only as needed to facilitate multiple use and to exclude livestock from the Kane Springs, Mormon Mesa, and Beaver Dam Slope ACECs." MFP Amendment at 13. The MFP Amendment thus required BLM to take appropriate measures, as

<sup>19</sup> To the extent Lewis disputes the legal validity of the closure of areas of the allotments within the ACECs, which the BO required, his remedy was to file suit under section 11(g) of the ESA, 16 U.S.C. § 1540(g) (2000). This Board has no jurisdiction to review the BO's requirements, which BLM is required to implement. See *Blake v. BLM*, 145 IBLA 154, 161 (1998), *affirmed on reconsideration*, 156 IBLA 280 (2002).

<sup>20</sup> ALJ Decision at 7-8; Exs. G-2, G-13, and G-14; see Tr. 124, 222-25, 263-64, 287-88, 334-36, 433-38, 649-52, 690, 726-27.

necessary, to generally prevent livestock from moving into the ACECs. Both in his Notice of Appeal and Petition for Stay and in his SOR, Lewis argues, “Does the phrase mean: Construct improvements to exclude livestock from the ACECs, or does it mean; Construct improvements only as needed to exclude livestock from the ACECs? The first is definitive the latter is subjective.” Notice of Appeal and Petition for Stay at 7; SOR at 9. In other words, Lewis suggests that the phrase “as needed” modifies only the phrase “to facilitate multiple use” and does not modify the phrase “to exclude livestock.” Lewis reads the latter phrase as an absolute command; he argues that “if exclude still means exclude then the directive was clear that the BLM was to construct improvements that would exclude or keep out livestock from the ACECs.” SOR at 9.

We do not believe that Lewis’ interpretation of the quoted MFP language reflects either correct grammar or the MFP’s intent. First, the phrase “as needed” applies to both of the succeeding “to” clauses, which are joined by the conjunctive “and.” Lewis’ attempt to read the modifier “as needed” as applying only to “facilitat[ing] multiple use” and to read the remainder of the sentence as an absolute requirement to construct improvements to exclude livestock is contrary to the ordinary sense of the words.

Second, the MFP Amendment contemplated the possibility that livestock might, despite the closure, stray into the ACEC-portions of the affected allotments. Judge Holt first quoted the BO’s requirement that BLM undertake reasonable and prudent measures, including “[m]easures . . . to *eliminate or minimize*” the take of desert tortoise as a result of grazing. ALJ Decision at 5, quoting BO at 76 (emphasis in ALJ Decision). Judge Holt then observed: “The MFP Amendment includes provisions required by the Biological Opinion that anticipate some cattle straying into the ACECs,” quoting the MFP’s requirements that the permittee “take action to remove any livestock that move into areas closed to grazing” and that “[i]f straying of livestock becomes problematic, the [BLM] in consultation with the [FWS], shall take measures to ensure straying is prevented.” ALJ Decision at 5-6, footnote omitted and quoting MFP Amendment at 17. BLM thus acknowledged that there would be some livestock straying into the ACECs. The MFP Amendment’s language regarding BLM taking additional “measures to ensure straying is prevented” is conditional, not absolute.<sup>21</sup>

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<sup>21</sup> Nor does the BO compel BLM to construct fences, either generally or in particular instances. The BO (at 35) described “Bureau Projects,” which “are generally undertaken by the Bureau to aid in better management of the public lands for such programs as licensing of livestock grazing . . . includ[ing] fence and corral construction, water development, and installation of cattle guards.” It specifically stated that “[l]ivestock projects (fences) *could* be constructed along the boundary of  
(continued...)

The MFP Amendment did not specify the manner in which BLM was to preclude grazing in the ACECs, whether by fencing or other means, stating only that BLM should take such measures as were “needed” to exclude livestock. MFP Amendment at 13; *see also* Tr. 60, 180-81, 238, 281, 331-32. We find no indication that BLM was required, at the outset, to take the most drastic measures to exclude livestock from the ACECs, particularly in light of the MFP Amendment’s requirement that the permittee retrieve straying livestock. We therefore agree with Judge Holt that the MFP Amendment and the BO “do[] not require that BLM initially take measures to absolutely prevent cattle from entering the ACECs. Only if straying becomes ‘problematic’ must BLM take more stringent measures.” ALJ Decision at 6. We conclude that BLM may, consistent with the dictates of the MFP Amendment, take a graduated approach to the problem of excluding livestock from the ACECs, escalating the level of improvements constructed for that purpose, depending on what is considered necessary at the time and given the existing circumstances regarding the extent to which livestock are entering the ACECs and the adequacy of the measures already adopted. In the end, the MFP Amendment left the matter of whether and what improvements are “needed” to BLM’s discretion.

We therefore agree with Judge Holt that “Lewis has not shown that BLM was wrong when it concluded that the MFP Amendment did not require new construction of impenetrable fences along the boundaries of the ACECs.” ALJ Decision at 7.

B. *BLM’s Not Acting to Build a New Fence or Reconstruct the Existing Fence in the Grapevine Allotment Was Rational and Not Arbitrary or Capricious.*

[2] BLM possesses considerable discretion in implementing land use plans (such as the MFP Amendment). *See, e.g., Southern Utah Wilderness Alliance*, 128 IBLA 382, 389 (1994); *Hutchings v. BLM*, 116 IBLA 55 (1990) (involving an assertion that lack of fencing to separate a grazing allotment from adjacent private land constituted unreasonable management under a resource management plan). Further, the MFP Amendment itself allows BLM discretion in determining whether to construct fences. Consequently, in a circumstance where the MFP Amendment does not require BLM to construct fences, this Board will not restrict BLM’s discretion and

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<sup>21</sup> (...continued)

ACECs,” identifying in Table 6 “53 miles” of “Range Fence.” *Id.* at 35, 36 (emphasis added). The BO noted generally that “[t]he construction of fences are [*sic*] necessary to control livestock and wild horse and burro movements throughout the allotments, and exclude ungulates from ACECs.” *Id.* at 35. This is not a mandate for BLM to fence all ACECs or a mandate for BLM to fence the boundary between Lewis’ particular allotments and adjacent ACECs. *See also* Tr. 172-79 (testimony of Kyle Teel, BLM Fire Ecologist).

require it to construct a fence or reconstruct an existing fence unless not doing so is not rationally supportable (and, therefore, would be arbitrary or capricious).

The ALJ found that “BLM had a rational basis for deciding not to provide for any new fencing along the ACEC boundary” in the Grapevine Allotment. ALJ Decision at 9.<sup>22</sup> As noted above, the existing fence along most of the ACEC boundary in the Grapevine Allotment did not completely prevent straying of cattle into the ACEC. However, BLM offered considerable evidence to the effect that the fence, the steep terrain at the ends of the fence and along the remainder of the boundary, and the location of the best forage and perennial water sources were sufficiently effective in keeping cattle out of the portion of the Kane Springs ACEC in the Grapevine Allotment.<sup>23</sup>

Further, the testimony and evidence at the hearing showed only three instances over a 3½-year period in which BLM personnel had observed cattle in the Kane Springs ACEC. BLM witness Christopher Mayer testified that he had seen 13 head of cattle in the Kane Springs ACEC in the Grapevine Allotment on October 1, 2001, but that there were no other incidents in the 2001 - 2004 period. Tr. 222-24. Exhibit G-13 indicates that 27 head were found within the ACEC on January 20, 2004, apparently having entered through a small portion of the fence that was down near the spring. BLM witness Domenic Bolognani testified that he observed cattle in the ACEC on March 7, 2005, but that this was the only time in 12 visits to the Grapevine Allotment since 2005 that he saw cattle in the ACEC. Tr. 432-37. In both the 2001 and 2005 incidents, the cattle apparently entered the ACEC through a temporary gap in the fence caused by a washout. Tr. 222-23 and 434. (Bolognani also testified that no cattle were in the ACEC on January 25, 2005, two weeks after the washout had occurred on January 11. Tr. 436-37.)

Lewis offered his own testimony that the fence and the natural features in the Grapevine Allotment were unlikely to completely prevent cattle from entering the

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<sup>22</sup> We note that BLM has not issued any formal or written decision not to construct a fence. Neither has it expressed a position that it would never construct a fence. Nor has Lewis petitioned BLM to construct a fence and had such a petition denied. The import of the ALJ’s decision, however, is that BLM had a rational basis for not constructing a new fence or reconstructing the existing fence in the Grapevine Allotment. The ALJ upheld the BLM’s not acting in that respect, and the ALJ’s decision is before us on appeal here. Thus, the question under the present circumstances is whether Lewis has shown error in the ALJ’s determination regarding fencing.

<sup>23</sup> See Tr. 49, 124, 125-26, 211-12, 224-25, 263-64, 332-36, 359-60, 375-77, 432-33, and 719-28; Ex. G-2 (Map of Grapevine Allotment and ACEC).

ACEC. *See, e.g.*, Tr. 651 (“[P]ast experience had told me that the cattle, on [a] regular basis, would go up and around to get to the spring, or just go through the fence. And time and time again I had that problem.”), 652-53, 656-57, 659.<sup>24</sup> Notably, however, many of the incidents of cattle straying into what is now the ACEC to which Lewis refers in his testimony apparently occurred during the 1990s, when grazing was permitted on the southern portion of the Grapevine Allotment but was subject to seasonal restrictions. In discussing his views as to the structural deficiency of the fence and the prior occasions when he had moved cattle out of the portion of the allotment south of the fence, Lewis testified:

Before this was designated as an ACEC designation, it was designated as a Provision I grazing. And what that meant was that my cattle could not be in that pasture from the first of March until the fifteenth of June.

And so the, *throughout most of the '90s*, I had this problem of trying to keep my cattle from crossing through this fence and getting into this pasture. . . .

Tr. 651-52 (emphasis added). In his testimony, Lewis offered no specific evidence regarding the extent (in terms of numbers, occasions, or frequency) to which the cattle had actually strayed into the ACEC since the MFP Amendment was adopted in 2000.

The ALJ found that “[e]ven though these events [described by Lewis] could allow cattle to enter the ACEC, the evidence did not show that they occurred frequently enough to render the fence ineffective” and that the evidence “did not demonstrate that these events occurred frequently enough to make the fence an ineffective measure to minimize cattle straying into the ACEC.” ALJ Decision at 9. We agree.<sup>25</sup>

<sup>24</sup> Floyd Rathbun, testifying on Lewis’ behalf, stated that in his opinion, based on the specific characteristics of the fence, it would keep some cattle from crossing into the ACEC, “but it won’t keep them all from crossing the fence.” Tr. 546.

<sup>25</sup> Contrary to Lewis’ argument (Jan. 3, 2007, Notice of Appeal and Petition for Stay at 4), we do not believe it is logically sound to extrapolate — based on the frequency of BLM’s visits to the allotment and the number of cattle observed to be grazing inside the ACEC on those occasions — the number of cattle that may have entered the ACEC over any given period of time. This does not establish the *actual* incidence of cattle straying into the ACEC. We also do not believe the record supports Lewis’ assertions that “livestock have open access at any time . . . to the desert tortoise and its habitat and . . . may at any time enter the ACECs” (*id.* at 10), and that “livestock  
(continued...) ”

Indeed, in his February 8, 2007, Answer to BLM's Response to Appellant's Petition for Stay (at 14), Lewis conceded that "[t]he ALJ did provide a reasoned basis for rejecting Appellant's assertions *after the fact, but not at the time of the Lewis Protest/Appeal.*" (Emphasis in original.) This argument appears to be an attempt to apply the APA principle that judicial review is limited to the administrative record before the agency<sup>26</sup> to the appeal of BLM's decision to the Hearings Division and this Board. But the Hearings Division is not a Federal court whose review of BLM's decision would be limited to the record before BLM. Thus, if the ALJ provided a reasoned basis for rejecting Lewis' assertions, it necessarily follows that Lewis cannot prevail in his appeal.

We therefore conclude that BLM's not acting, up to this point, to construct or reconstruct the fence in the Grapevine Allotment is rational and is not arbitrary or capricious.

Finally, Lewis contends that all the costs of protecting the desert tortoise will be imposed on him, enforced through BLM trespass procedures: "Lewis will be solely liable for keeping his livestock out of the ACECs and it will be assumed to be correct under his permit and MFP Amendment that he is liable for trespass and associated fines . . ." SOR at 7. He notes that he "has been trespassed and paid non-willful trespass fines . . ." *Id.* at 5. The record contains three notices of trespass for cattle straying into the ACECs — one involving the Grapevine Allotment and two involving the Breedlove Allotment — issued on October 2, 2001, November 1, 2001, and June 25, 2003, respectively. Exs. G-15, G-16, and G-17.<sup>27</sup> We believe that Lewis has a legitimate concern in this regard. It was within BLM's authority to close the southern portion of the Grapevine Allotment to grazing and reduce the authorized AUMs on that allotment. Lewis is responsible for managing his herd so as to comply with the terms of his grazing permits, and he therefore must act reasonably to not graze his livestock on public land that is closed to grazing. At the same time, BLM, for governmental purposes unrelated to grazing management, has closed lands on which livestock historically have ranged and on which the animals have been accustomed to grazing — but it has not closed the allotments altogether or simply revoked the grazier's permits. Both the BO (at 78) and the July 30, 2001, Final Decision (at 5) require that BLM "shall take measures to ensure straying is prevented"

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<sup>25</sup> (...continued)

can, at any time, freely move into an ACEC" (SOR at 7). He has not demonstrated that the intrusion by cattle into the ACEC has been more than occasional or incidental.

<sup>26</sup> *E.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973).

<sup>27</sup> *See also* Tr. 234-37 (testimony of Christopher Mayer) and Lewis' Oct. 20, 2006, Response to BLM's Post-Hearing Brief at 2, 17, and 27.

if straying becomes “problematic.” The Final Decision does not specify what those measures are (or the extent to which they might include requiring graziers to take particular actions). Nor does the Final Decision define “problematic.”<sup>28</sup> These ambiguities leave considerable room for further disputes to arise. Under these circumstances, we do not believe that the intent of the MFP Amendment is for BLM to effectively transfer all costs or expenses necessary to accomplish the government’s purposes to the grazier by forcing the grazier to choose between paying fines or penalties whenever livestock may find a way onto the closed lands or incurring out-of-pocket expenses to do more than what is reasonable under the circumstances to keep livestock within the authorized grazing area.

#### CONCLUSION

For the reasons explained above, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed as moot with regard to the Breedlove Allotment and the decision appealed from is affirmed with regard to the Grapevine Allotment.

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce R. Harris  
Deputy Chief Administrative Judge

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<sup>28</sup> The MFP Amendment directs BLM (at 13) to “[c]onstruct improvements only as needed to facilitate multiple use and to exclude livestock from the Kane Springs, Mormon Mesa, and Beaver Dam Slope ACEC.” At the hearing, BLM’s witness Mayer testified that if BLM believed that a fence was necessary to exclude livestock from the ACEC and was the only mechanism available, BLM potentially would fund the full cost. Tr. 732.