



HANLEY RANCH PARTNERSHIP *ET AL.* v. BUREAU OF LAND MANAGEMENT

183 IBLA 184

Decided March 12, 2013



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

HANLEY RANCH PARTNERSHIP *ET AL.*
v.
BUREAU OF LAND MANAGEMENT

IBLA 2011-147

Decided March 12, 2013

Appeal from an order of Administrative Law Judge Robert G. Holt affirming a decision not to renew a grazing permit. ID-BD-3000-2010-004.

Affirmed.

1. Administrative Procedure: Hearings--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Hearings--Grazing Permits and Licenses: Adjudication

When BLM and a grazing permittee file cross-motions for summary judgment in an appeal of a grazing decision before the Hearings Division, and the permittee fails to discharge its burden to produce evidence supporting specific allegations that demonstrate the existence of a genuine issue of material fact, and the evidence and administrative record confirm that there is no such genuine issue of material fact, the Board properly denies a request for a hearing based on an affidavit asserting the existence of issues of material fact that were or could have been raised before the Administrative Law Judge.

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

Under 43 C.F.R. § 4110.1(b), BLM properly denies an application to renew a grazing permit or lease upon determining that the applicant does not to have a satisfactory record of performance under 43 C.F.R. § 4130.1-1(b)(1). In evaluating whether the applicant has a satisfactory record of performance, *i.e.*, whether the

applicant is in substantial compliance with the terms and conditions of the existing Federal grazing permit or lease, and with the rules and regulations applicable to the permit or lease, the authorized officer properly considers the applicant's entire record of performance, including incidents of noncompliance adjudicated by BLM and those of repeated noncompliance apparent from the Actual Use Reports filed annually by the applicant.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for appellants; Robert B. Firpo, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management; Charles L. Saari, Esq., Owyhee, Idaho, *amicus curiae*.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Hanley Ranch Partnership and others (collectively, HRP) have appealed from Administrative Law Judge (ALJ) Robert G. Holt's April 6, 2011, Order (April 2011 ALJ Order),¹ affirming a December 16, 2009, decision (December 2009 Decision) by the Field Manager, Owyhee (Idaho) Field Office, Boise District, Bureau of Land Management (BLM),² declining to renew HRP's 10-year grazing permit in the Trout Springs Allotment (TSA) (#0539) and the Hanley Fenced Federal Range (Hanley FFR) Allotment (#0453) (collectively, Allotments). For the following reasons, we affirm ALJ Holt's Order.

¹ The appeal to the Board from ALJ Holt's Order was filed by HRP, together with Michael F. Hanley, IV, and Linda Lee Hanley, husband and wife, who make up the partnership. HRP sought a partial stay of ALJ Holt's Order during the pendency of its appeal to the Board. By Order dated Sept. 8, 2011, the Board denied HRP's petition.

² HRP originally brought an appeal from BLM's December 2009 Decision to the Hearings Division, Office of Hearings and Appeals (OHA), which docketed the appeal as ID-BD-3000-2010-004. The Western Watersheds Project (WWP) (formerly, Idaho Watersheds Project) was permitted by the ALJ to intervene in that appeal. The Board adjudicated HRP's interlocutory appeal from a Mar. 16, 2010, Order by ALJ Harvey C. Sweitzer granting a stay of the effect of BLM's December 2009 decision, thereby allowing grazing to occur during the pendency of the appeal to the Hearings Division as it had during the year preceding the decision. The Board affirmed ALJ Sweitzer's stay order. See Order, *HRP v. BLM*, IBLA 2010-114, dated July 9, 2010 (July 2010 Board Order), at 6, 11-12; ALJ Order, *HRP v. BLM*, ID-BD-3000-2010-004, dated Mar. 16, 2010 (March 2010 ALJ Order), at 5-6, 8.

I. BACKGROUND

The Allotments are situated in close proximity in Ts. 10-11 S., Rs. 4-6 W., Boise Meridian, Owyhee County, in the Owyhee Mountains, approximately 20 miles south of Jordan Valley, Oregon, in southwestern Idaho. They encompass intermingled public, State, and private lands.³ HRP's authorized grazing use for the Allotments has existed since before 1988, under longstanding grazing preferences owned or controlled by HRP. During the relevant time period, the grazing preference encompassed a total of 7 and 4,965 Animal Unit Months (AUMs)⁴ of grazing use, respectively, in the 662-acre Hanley FFR Allotment and the 29,511-acre TSA, not all of which has been authorized under relevant grazing permits. HRP operates a year-long cow/calf operation on public and private lands in the Allotments and elsewhere.⁵

In recent years, BLM authorized HRP to graze the Allotments under a 10-year permit issued for the period from March 1, 1997, through February 28, 2007.⁶ This

³ A high percentage of HRP's private land in the TSA is found in Pasture 5. See April 2011 ALJ Order at 3; Affidavit of Michael F. Hanley, IV (Hanley Affidavit), dated May 2, 2011 (attached to Statement of Reasons and Petition for Partial Stay (SOR)), ¶ 13, at 4; July 2010 Board Order at 4 n.6. Of the 1,589 acres of private land in the TSA, 1,368 acres are in Pasture 5, vastly exceeding the 207 acres of public land in the pasture. See Grazing Permit Renewal for the Trout Springs and Hanley FFR Allotments Environmental Assessment (ID-096-2004-001), dated November 2003 (November 2003 EA) (Ex. B-35), at 3 (Table 1 (Land ownership status (acres) for Trout Springs and Hanley FFR Allotments)). The public lands were not fenced apart from the private lands in Pasture 5, thus allowing livestock to migrate freely across the public/private boundaries. In the case of the Hanley FFR Allotment, of the 662 acres, only 63 were public lands. See *id.*

⁴ 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)*”).

⁵ HRP states that it initially places its cattle herd on public lands in Oregon in April of each year. HRP then moves the cattle in June to the TSA and Hanley FFR Allotments (as well as the Nickel Creek (#0548) and Nickel Creek FFR (#0657) Allotments, also in Idaho), where they remain until they are returned to HRP's private lands at its home ranch in Jordan Valley, Oregon, for the period from November to April. See SOR at 41; November 2003 EA at 37-38.

⁶ HRP was authorized to graze a total of 7 cattle from Dec. 1 to Dec. 31, totaling 7 AUMs, and 380 cattle from June 16 to November 15, totaling 1,911 AUMs, respectively, in the Hanley FFR Allotment and TSA. See Ex. A-7 (Notice of Final

(continued...)

permit was challenged, along with other permits, by WWP in *Idaho Watersheds Project v. Hahn*, No. 97-0519-S-BLW, *slip opinion* (D. Idaho Mar. 31, 1999), resulting in a determination that BLM had violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). The court, however, declined to enjoin grazing under any of the permits, but put in place certain interim measures designed to protect the environment, pending the completion of further NEPA review and issuance of new grazing decisions, which was to occur by December 31, 2003. See Hanley Affidavit ¶ 21, at 7 (citing Memorandum Decision and Order, *Idaho Watersheds Project v. Hahn*, No. 97-0519-S-BLW, *slip opinion* (D. Idaho Feb. 29, 2000) (Ex. A-10),⁷ at 8).

On March 12, 2002, following further NEPA review, BLM issued a Decision in which it issued a new 10-year permit for the period from March 1, 2002, through February 28, 2012. This Decision stated, in pertinent part: “It is my decision to issue you . . . a grazing permit for a period of ten years (from 03/01/2002 to 02/28/2012) on the Trout Springs (#0539) and Hanley [FFR] (#0453) allotments. Terms and conditions for the grazing permit are specified in this decision.”⁸ Notice of Field Manager’s Final Decision, dated Mar. 12, 2002 (Ex. A-11) (March 2002 Decision), at 1.

⁶ (...continued)

Decision, dated Feb. 18, 1997, and attached Permit), at 12, 15. Immediately prior to the Mar. 12, 2002, decision, the authorization for the TSA was slightly altered to allow 555 cattle from June 15 to November 15, totaling 2,813 AUMs. See November 2003 EA at 4.

⁷ HRP’s and BLM’s documents are denoted, respectively, with the prefix “A” and prefix “B,” followed by a number. See ALJ Order, *HRP v. BLM*, ID-BD-3000-2010-004, dated Sept. 29, 2010, at 3. They are found in separate binders in the file. In the case of duplicates, we have generally cited to HRP’s documents.

⁸ So far as we can determine, no 10-year permit was ever issued. See Ex. A-31 at 3 (Telefax Transmission to Hearings Division from Solicitor, dated Mar. 12, 2010 (“BLM’s records indicate that a permit was never ‘issued’ following the BLM’s March 12, 2002, final grazing decision.”)). However, both BLM and HRP have considered the 2002 permit to have been in effect throughout the 2002-2009 period. See Notice of Field Manager’s Proposed Decision, dated Dec. 16, 2009 (Ex. A-1) (December 2009 BLM Decision), at 3-4; Letter to Hearings Division from HRP dated Mar. 12, 2010, at 2 (“Given the totality of th[e] circumstances, a grazing permit was issued or was effectively issued by the BLM . . . in accordance with the decision dated March 12, 2002.”).

In the March 2002 Decision, BLM substantially changed the level of authorized use and the season of use. Such changes were based upon the fact that existing livestock grazing practices were, owing to a deterioration in upland and riparian areas, significant factors in failing to achieve standards for rangeland health. BLM responded to the need to make significant progress towards achievement of rangeland health standards, as required by 43 C.F.R. § 4180.2(c). *See* March 2002 Decision at 15. BLM authorized HRP to graze 1 head of cattle from June 1 to December 30, totaling 7 AUMs, in the case of the Hanley FFR Allotment, and 555 cattle from June 15 to August 30, totaling 1,405 AUMs, and 4 cattle from July 1 to December 31, totaling 25 AUMs, in the case of the TSA. *See id.* at 9. The 25 AUMs were restricted to Pasture 5,⁹ and the 1,405 AUMs were assigned to Pastures 1 through 3.¹⁰

BLM further stated, in the case of Pasture 5 of the TSA and the Hanley FFR Allotment, that, since livestock might freely travel onto the public lands from the extensive private lands in the Pasture/Allotment, “[l]ivestock numbers could vary but use may not exceed 50 percent utilization [of key forage species].” March 2002 Decision at 9. While the specified cattle numbers could vary during the specified seasons of use, at times rising above and falling below the specified number, there was no indication that they could result in a level of grazing use that would exceed the specified AUMs. Contrary to HRP’s views, nowhere was there any indication that AUMs could vary. *See* Hanley Affidavit ¶¶ 22-24 at 7-10. Above all, grazing use

⁹ It is undisputed that BLM’s annual grazing authorizations incorrectly designated Pasture 5 as Pasture 1B. *See* Answer at 6 n.5.

¹⁰ The March 2002 Decision provided, concerning the period from June 15 to August 30, cattle would be grazed, alternatively, in Pasture 1 or Pasture 3 (on a rest-rotation basis) from June 15 to July 15, followed by grazing in Pasture 2 from July 16 to August 30. The Decision also stated that, except for the July 15 ending date for Pastures 1 and 3, all of the beginning/ending dates could be adjusted, with BLM’s prior approval. *See* March 2002 Decision at 14. The ending date for Pasture 2 could not be later than October 15. *See id.* HRP sought and was granted such prior approval during the 2002 through 2009 grazing seasons, with the issuance of annual grazing authorizations. While these authorizations generally followed the March 2002 Decision, they did not strictly adhere to all of its directives.

Pasture 4 of the TSA, which is now included in the Pleasant Valley Allotment, is authorized for grazing by an entity other than HRP. *See* July 2010 Board Order at 2 n.2; March 2002 Decision at 10; Scoping Document for EA #ID-130-2009-EA-3680, dated Aug. 14, 2009 (Ex. B-10) (Scoping Document), at 7.

could not adversely affect the Federal range by causing forage utilization to exceed 50 percent, even if that meant grazing use at less than the specified AUMs.¹¹

HRP appealed BLM's March 2002 Decision, resulting in a March 21, 2003, settlement whereby BLM agreed, in return for withdrawal of the appeal, to issue a new grazing decision prior to the start of the next grazing season (2004), which would revisit its March 2002 Decision. Based on withdrawal of the appeal, ALJ James H. Heffernan dismissed HRP's appeal by Order dated March 24, 2003 (Ex. A-16). *See* Ex. A-14 (Notice of Withdrawal of Appeals, dated Mar. 21, 2003, and attached Agreement; and Clarification of Agreement, dated Mar. 25, 2003); Ex. A-25 (Notice of Non-Opposition to Withdrawal of Appeals, dated Mar. 24, 2003).

In the absence of a new grazing decision, grazing use continued under the settlement agreement in accordance with the March 2002 Decision through the 2009 grazing season. *See* April 6 ALJ Order at 2, 3; Hanley Affidavit ¶¶ 26, 27, and 35, at 10, 13; BLM Motion for Summary Judgment (MSJ) at 4 (“[F]rom 2002-2009, [HRP] continued to graze according to the March 12, 2002, final grazing decision”). The annual grazing authorizations each specifically stated, in their terms and conditions, that livestock grazing was to be in accordance with BLM's March 2002 Decision. *See* Ex. A-34 (2002) at 2; Ex. A-36 (2003) at 2; Ex. A-44 (2004) at 2; Ex. A-47 (2005) at 2; Ex. A-49 (2006) at 2; Ex. A-51 (2007) at 2; Ex. A-53 (2009) at 2.

In 2005, 2006, and 2007, BLM engaged in rangeland health monitoring on the TSA, which revealed excessive utilization of the allotment. In a full force and effect (FFE) decision dated May 5, 2008 (May 2008 FFE Decision) (Ex. A-26), BLM closed Pastures 1 through 3 to any grazing, because of excessive forage utilization, which BLM now partially attributes to HRP's trespass violations during the 2002 through 2007 grazing seasons. In this FFE Decision, BLM explained that during the 2005 through 2007 grazing seasons it had “monitored and acquired monitoring data and photos that demonstrate 50 percent utilization levels were exceeded in the TSA, both in the uplands and riparian areas,” and that it had “determined that due to these excessive utilization levels, both the uplands and the riparian wetlands [in the TSA]

¹¹ BLM notes, on appeal, that the annual authorizations did not carry forward the prescription from the March 2002 Decision that livestock numbers could vary in both the Hanley FFR Allotment and Pasture 5 of the TSA. BLM asserts that the numbers could vary only in the case of the Hanley FFR Allotment, but could not vary in Pasture 5 of the TSA. *See* Answer at 7, 9, 11, 13, 14, 16. HRP disputes this view. Even if we were to agree with HRP, its authorized use still would be no more than 25 AUMs for Pasture 5 of the TSA, with a variance of 50% utilization of key forage species.

now require immediate protection, . . . specifically all public lands in pastures 1, 2, and 3 of the [TSA] (#0539).” May 2008 FFE Decision at 2. BLM determined to “close pastures 1, 2, and 3 of the [TSA] (#0539), including all livestock trailing in these pastures, for the 2008 and 2009 grazing seasons.” *Id.* at 3.

HRP appealed BLM’s grazing decision to the Hearings Division. On July 8, 2008, ALJ Sweitzer stayed further proceedings, pending issuance of a new grazing decision for the TSA before December 31, 2009, whereupon the appeal could be dismissed. *See* Exs. A-27, A-28. While HRP maintained its objections to the May 2008 FFE Decision, it agreed to take voluntary non-use and not graze Pastures 1 through 3, in accordance with the Decision, before December 31, 2009.

During this time period, WWP filed a complaint in U.S. District Court, asserting that BLM had “failed to correct many of the resource harms and legal violations that were identified a decade ago” with regard to 31 permits with no final decisions, and arguing specifically, with respect to the TSA, that BLM has authorized and the permittees have used the allotments in excess of the permitted levels identified in the March 2002 Decision. *WWP v. Dyer*, Civ. No. 97-0519-S-BLW, *First Amended Supplemental Complaint*, at 2-3, 31-36 (D. Idaho filed Apr. 23, 2008). On May 15, 2008, BLM and WWP entered into a settlement of that litigation whereby BLM agreed not to allow livestock grazing in Pastures 1 through 3 of the TSA, pending issuance of a new grazing decision and permit for the TSA, following NEPA review.¹² *See* Exs. A-20 through A-25.

Shortly thereafter, BLM and HRP agreed to an interim resolution of HRP’s administrative appeal of the May 2008 FFE Decision, pursuant to which the hearing proceedings would be stayed “pending issuance of a new grazing decision for the [TSA] before December 31, 2009.” Order dated July 8, 2008. The consequence of

¹² The first settlement, approved on May 7, resulted in the withdrawal of WWP’s outstanding motion for a preliminary injunction, and the second settlement, approved on June 26, resolved WWP’s lawsuit.

While HRP was not a party to the court settlement, it was a party to the administrative settlement, which left the closure of Pastures 1 through 3 in effect, under BLM’s May 2008 FFE Decision. It was anticipated that the closure would continue only for the 2008 and 2009 grazing seasons, but the decision did not provide for automatic expiration of the closure on any particular date or circumstance. Rather, it allowed the closure to continue pending issuance of a new grazing decision and permit. We note that on Mar. 4, 2010, upon agreement of the parties, ALJ Sweitzer vacated BLM’s May 2008 Decision, following issuance of BLM’s December 2009 Decision declining to renew a permit for the TSA and Hanley FFR Allotment. *See* Order, *HRP v. BLM*, ID-130-2008-130, dated Mar. 4, 2010 (Ex. A-33).

these orders and agreements was that for the 2008 and 2009 grazing seasons, BLM authorized HRP's grazing use of the public lands within the Hanley FFR Allotment and Pasture 5 of the TSA, but not in Pastures 1, 2, or 3 of the TSA.

Following these administrative and judicial proceedings, BLM began work on the environmental analysis and final grazing decision for the TSA, and, in August 2009, prepared and distributed a *Scoping Document* for Environmental Assessment #ID-130-2009-EA-3680, *Trout Springs Allotment Grazing Permit Renewal*. In addition, BLM sought input from current grazing permittees regarding whether they wished to continue grazing the TSA under the grazing decision in preparation, and, if so, invited their "proposed grazing management schemes." Answer at 5-6. HRP submitted such a proposal on August 4, 2009.¹³

BLM began meeting with HRP to initiate the renewal process that would lead to issuance of a new grazing decision, in compliance with the operative settlement agreements and court orders. BLM reviewed HRP's record of performance under 43 C.F.R. § 4110.1(b), as well as the capability of the lands in the TSA and Hanley FFR Allotment to sustain grazing use. See July 2010 Board Order at 4-5. Based on what he deemed an extensive record of noncompliance by HRP with the terms and conditions of its existing permit and applicable rules governing grazing on public lands in the Allotments dating back to the March 2002 Decision, the Field Manager issued his December 2009 Decision, declining to renew HRP's existing grazing permit for the Allotments. He stated: "[I]t is my proposed decision to . . . [d]eny the Hanley Ranch Partnership's grazing management proposal (application) for permit renewal received on August 4, 2009[,] and to not re-issue a grazing permit with authorization to graze livestock in the Trout Springs and Hanley FFR Allotments."¹⁴ December 2009 Decision at 4 (emphasis added). He stated that his

¹³ BLM considers this Aug. 4, 2009, filing by HRP, which sets forth its proposed grazing management scheme for the Allotments, to be HRP's application for renewal of its existing grazing permit. See December 2009 Decision at 1, 2, 4. In his Apr. 6, 2011, Order, ALJ Holt agreed that HRP had applied for renewal of its permit. See April 2011 ALJ Order at 5-10. HRP denies having formally applied for renewal, but, for purposes of the present appeal to the Board, concedes that it made such an application. See SOR at 2 n.2; Hanley Affidavit ¶¶ 37-41, at 13-14.

We conclude that HRP submitted, and BLM and the ALJ adjudicated, HRP's application for renewal of its 10-year grazing permit, issued Mar. 12, 2002, covering the period from Mar. 1, 2002, through Feb. 28, 2012. See BLM MSJ at 9 n.8, 33-35; BLM Reply, dated Feb. 24, 2011, at 11.

¹⁴ BLM considered HRP's existing grazing permit to be BLM's March 2002 Decision, as later modified by BLM's May 2008 FFE Decision, which closed Pastures 1 through

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decision not to renew was based upon his review, “[i]n accordance with 43 CFR 4110.1(b),” of HRP’s record of performance during the period from 2002 through 2009, and his resulting determination that the record was “unsatisfactory,” since HRP had not been in “substantial compliance” with its existing permit and applicable regulations. December 2009 Decision at 3, 4.

The Field Manager specifically referred to HRP’s repeated acts of grazing trespass on the public lands by grazing cattle in excess of approved numbers and AUMs in the TSA throughout the period from 2002 through 2007, and grazing cattle in Pastures 1 through 3 of the TSA in 2009, when the entire range was closed to any grazing, and other acts of noncompliance in 2003 arising under 43 C.F.R. §§ 4140.1(a)(4) and (b)(3).¹⁵ See December 2009 Decision at 4-10. He noted, at page 9 of the Decision, that BLM’s records reflected the absence of any trespass or other acts of noncompliance by HRP during 2008, which was later noted by ALJ Holt. See April 2011 ALJ Order at 18; Answer at 17. A number of the cited acts of noncompliance were based upon BLM’s comparison of HRP’s Actual Use Reports with its annual grazing authorizations for the years in question (2002-2007), which disclosed livestock numbers and/or AUMs in excess of those authorized during part or all of the grazing season. See, e.g., HRP Reply, dated Feb. 3, 2011, at 3 n.1. The Field Manager also relied upon specific observations of trespass in 2003, 2004, and 2009, and a failure to comply with a July 7, 2003, Cooperative Range Improvement Agreement (CRIA) (Ex. A-41) in 2003. He concluded that HRP had failed to substantially comply with the regulations and the terms and conditions of its existing permit, and thus did not have a satisfactory record of performance under 43 C.F.R. § 4110.1(b). He specifically stated that HRP “has not been in substantial compliance with the March 12, 2002[,] Final Grazing Decision and the May 5, 2008[,] FFE Decision because of repeated violations of season of use, trespasses, the taking of unauthorized AUMs, and other instances of non-compliance.” December 2009 Decision at 10.

HRP did not file a protest, and the proposed decision became a final decision pursuant to 43 C.F.R. §§ 4160.2 and 4160.3. HRP timely appealed to the Hearings

¹⁴ (...continued)

3 of the TSA to grazing use. See Answer at 5 (“The parties agree that the BLM’s March 12, 2002, grazing decision, as modified and implemented by the BLM, constitutes the relevant grazing permit in this case for the purpose of BLM’s record of performance review”); December 2009 Decision at 3-4.

¹⁵ BLM has referred to past acts of trespass and other noncompliance on HRP’s part during the period from 1992 through 2001, but did not rely upon any such acts in declining to renew HRP’s permit. See December 2009 Decision at 10; Letter to HRP from the Solicitor’s Office, dated Sept. 21, 2010 (Ex. A-3), at 2.

Division on February 3, 2012. Following discovery, the parties filed cross-motions for summary judgment. While both parties argued the absence of any issue of material fact, HRP sought a ruling that BLM could not consider or rely upon “alleged violations” that had not been adjudicated or on HRP’s Actual Use Reports in determining that HRP was in noncompliance for the years 2003 through 2007, and that BLM therefore was without justification in deciding not to renew HRP’s permit. HRP MSJ at 40-41. BLM sought a ruling that the undisputed facts set forth in HRP’s Actual Use Reports and adjudicated violations established a history of noncompliance that supported denying permit renewal, because they showed an unsatisfactory record of performance. See BLM’s MSJ, Exs. B-1 to B-68; Declaration of Jenna Whitlock (Whitlock Declaration); Declaration of Robert Arnold, Range Technician, Owyhee Field Office, dated Jan. 27, 2011 (Arnold Declaration); Declaration of Raul Trevino, Rangeland Management Specialist, Owyhee Field Office, dated Jan. 27, 2011; Declaration of Jacob Vialpando, formerly Supervisory Rangeland Management Specialist, Owyhee Field Office, dated Jan. 27, 2011 (Vialpando Declaration).

The matter at hand was decided by ALJ Holt based on the competing MSJs on the existing record, since, in requesting summary judgment, both parties maintained that there was no disputed issue of material fact warranting a hearing. See *Larson v. BLM (On Reconsideration)*, 129 IBLA 250, 252 (1994); *Stamatakis v. BLM*, 115 IBLA 69, 74-75 (1990). The ALJ specifically held, with regard to noncompliance reflected in HRP’s Actual Use Reports, that “BLM ha[d] established the [] acts of non-compliance with documents and declarations of its employees.” April 2011 Order at 21. He further ruled that there was no factual question regarding whether BLM had established HRP’s 2003 trespass (*id.* at 11), the 2004 trespass (*id.* at 14), the 2003 violation of the CRIA (*id.* at 12-13), and what BLM properly refers to in its Motion to Strike as “the blatant 2009 trespass incidents” (*id.* at 18-20). See Motion to Strike at 5.

On appeal, HRP requested the Board to partially stay the Order and the underlying December 2009 BLM Decision, under which it had been allowed to graze in Pasture 5 (but not Pastures 1 through 3) of the TSA and all of the Hanley FFR Allotment.¹⁶ Overall, it seeks *de novo* review of the Order, based on the entire administrative record, and challenges ALJ Holt’s decision to uphold BLM’s decision not to renew its 10-year grazing permit. HRP asks the Board to set aside the ALJ’s April 2011 Order, or to at least refer the matter back to the Hearings Division for a hearing on factual issues raised by the Actual Use Reports and the Hanley Affidavit.

We turn first to a motion to intervene in the present appeal filed by Owyhee County, Idaho (County), acting through its Prosecutor’s Office.

¹⁶ By Order dated Sept. 8, 2011, the Board denied HRP’s request for a partial stay.

II. THE COUNTY'S MOTION TO INTERVENE

The County has moved to intervene in this appeal on behalf of HRP. The County asserts that it will be adversely affected were the Board to uphold the procedural (but not the substantive) rulings by the ALJ.¹⁷ The County states: “Intervention status is *not* sought to defend the trespass allegations, but rather to voice the county’s concern on the use of *non-adjudicated trespass violations* to improperly terminate a grazing permit.” Motion to Intervene at 5. The County argues that such rulings would, if applied across-the-board, generally deprive ranching interests of their access to public lands for grazing, thereby shutting down grazing on private lands, which depends on access to public lands, and promoting residential and other development of private lands.

More specifically, the County argues that ALJ Holt erred in relying on a series of “*non-adjudicated trespass violations*” in declining to renew HRP’s grazing permit, given that BLM had failed to determine the degree of the trespass as either non-willful, willful, or repeated willful pursuant to 43 C.F.R. § 4150.1(a), failed to provide notice of the trespass charge pursuant to 43 C.F.R. § 4150.2(a), failed to afford HRP the opportunity to settle the trespass charge pursuant to 43 C.F.R. §§ 4150.2(a) and 4150.3, failed to issue a proposed and final decision pursuant to 43 C.F.R. §§ 4160.1 and 4160.3, and/or failed to afford HRP a right to a hearing under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (2006), and 43 C.F.R. §§ 4.473 and 4160.4. Motion to Intervene at 7; *see id.* at 6-9. The County concludes that “BLM failed to follow the processes which must occur before considering any trespass action.” *Id.* at 9.

Under 43 C.F.R. § 4.406 (*see* 75 Fed. Reg. at 64665) the Board may allow intervention in a pending appeal as a matter of right where the party seeking intervention shows that it either had a right to appeal the decision at issue under 43 C.F.R. § 4.410, and thus is a party to the case who is adversely affected by the decision, or, as here asserted, “would be adversely affected if the Board reversed, vacated, set aside, or modified the decision.” 43 C.F.R. § 4.406(b).

The County offers no evidence, and nothing in the record suggests, that other ranching interests or even the ranching industry as a whole in the county will suffer as a consequence of a decision by the Board upholding the ALJ’s procedural rulings. Absent such evidence, we are not persuaded that the County “would be adversely affected” by our upholding ALJ Holt’s rulings. 43 C.F.R. § 4.406(b); *see Las Vegas*

¹⁷ BLM does not oppose the County’s motion, asserting that the Board should consider the views of “interested groups” in such a case of first impression, especially given “the importance of the issues raised.” Response to Motion to Intervene at 2, 8.

Valley Action Committee, 156 IBLA 110, 112 (2001) (“[It is] the practice of the Board to grant intervention to a person having an interest that would be adversely affected if the Board overturned BLM’s action.”); *Bales Ranch, Inc.*, 151 IBLA 353, 355 (2000); *Sierra Club–Rocky Mountain Chapter*, 75 IBLA 220, 221-22 n.2 (1983). We therefore deny the County’s motion to intervene, but afford it *amicus curiae* status, and thus consider its views in the course of resolving HRP’s appeal. See 43 C.F.R. § 4.406(d)(2).

III. HRP’S REQUEST FOR A HEARING;

BLM has moved to strike the Hanley Affidavit, arguing that HRP had “ample opportunity to put forth evidence in opposition to BLM’s MSJ before ALJ Holt,” and that HRP “spurned BLM’s attempts to discover relevant documents, and . . . relied solely upon legal argument to counter the overwhelming evidence presented against it.” Motion to Strike at 2. Hanley indicated in a letter to BLM that “he was withholding certain documents based upon his assertion of his Fifth Amendment right to be free of self incrimination.” *Id.* The record verifies BLM’s statement that, despite having “every opportunity to do so,” HRP failed to present or proffer an affidavit from Hanley or, indeed, any evidence in support of a factual challenge to the trespass and other acts of noncompliance upon which BLM relied in declining to renew HRP’s permit. *Id.* BLM notes that HRP decided, instead, to rest its challenge to the decision “on legal grounds alone.” *Id.* BLM argues that for the first time on appeal to the Board, Hanley finally makes certain factual assertions which have never before been made, thereby seeking to create disputed issues of material fact about which there has previously been no dispute. See *id.* at 5, 8-13. BLM concludes: “Because [HRP] cannot use new evidence to show that the ALJ erred in finding no disputed issues of material fact, the Hanley Affidavit must be stricken.” *Id.* at 8.

The record is abundantly clear that HRP’s MSJ before ALJ Holt was based upon *its* argument that “[m]aterial facts [were] not in dispute” and that HRP was “entitled to judgment as a matter of law based on legal issues.” HRP MSJ at 35-36; see also *id.* at 36-41. As noted, BLM filed an opposition and cross-MSJ explaining HRP’s long history of noncompliance and supported its claims with dozens of exhibits and four declarations. See, e.g., Exs. B-1 to B-68. In responding to BLM’s MSJ, HRP denied the claims of noncompliance but offered no evidence to support the denial. See HRP Response/Reply at 3. HRP employed what BLM referred to as the “risky strategy of refusing to challenge the mounting evidence against it.” BLM Motion to Strike at 4 (quoting HRP Response/Reply at 3).

BLM argues that on appeal from ALJ Holt’s Order, HRP “for the first time . . . primarily challenges evidence that was undisputed below—for example, that Hanley Ranch Partnership violated its Cooperative Range Improvement Agreement in 2003.”

Id.; see ALJ Order at 12-13. BLM states that HRP now claims that HRP was not responsible for the 2003 violation of the CRIA, but “instead blames another grazing permittee.” Motion to Strike at 5; see Hanley Affidavit ¶¶ 106-112, at 34-35. BLM points to other examples of HRP’s current challenge to evidence that was undisputed below, including the facts establishing HRP’s 2009 trespass incidents (Hanley Affidavit ¶¶ 106-112), and HRP’s new assertion that it was permitted to take unlimited AUMs and graze cattle in unlimited numbers on Pasture 5 (Hanley Affidavit ¶¶ 51, 58, 72, 82, 90, at 16-17, 17-19, 22-23, 26, 29). Our review of the record confirms BLM’s assertion that “[n]one of these factual issues was raised during the summary judgment briefing.” Motion to Strike at 5. In fact, HRP affirmatively argued that there were no facts in dispute. HRP MSJ at 35-36; see also *id.* at 36-41.

HRP now claims that ALJ Holt erred in his “conclusions that there existed no disputed issues of material fact as to the non-adjudicated trespass violations.” HRP’s SOR at 19. We agree with BLM that HRP should not find it “surprising that the ALJ also came to the conclusion that there were no genuine issues of material fact.” Motion to Strike at 14. BLM argues adamantly that the Board “cannot consider new evidence submitted *for the purpose of creating a genuine issue of material fact for the first time on appeal of a summary judgment order,*” and, based upon that newly argued material fact, remand the case for a hearing. Motion to Strike at 7 (emphasis added).

[1] As movants for summary judgment, HRP and BLM were requested to identify the specific material facts each contended did not need to be tried to support the claim that each was entitled to judgment as a matter of law; as the non-moving opponent of the other’s motion, both also had an affirmative burden to identify any facts that were material, genuine, and disputed. On February 3, 2011, HRP filed a Response/Reply in opposition to BLM’s MSJ, denying the claims of noncompliance. However, HRP offered no evidence to support the denial. See HRP Response/Reply at 3; BLM Reply of Feb. 22, 2011 (BLM Reply), at 12-13.

The judge’s task in considering the respective MSJs was to review the evidence in the administrative record and the submissions of each party, giving each the benefit of any reasonable inferences to be drawn from such evidence, to reach conclusions about whether the specific facts enumerated by each were genuine, material, and undisputed. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (construing Rule 56 of the Federal Rules of Civil Procedure); *Coca-Cola Enterprises, Inc. v. ATS Enterprises, Inc.*, 670 F.3d 771, 774 (7th Cir. 2012); *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1088-89 (9th Cir. 2011); *Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007); see also *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Accordingly, in his April 6, 2011, order, ALJ Holt concluded that the material facts supporting BLM's MSJ were undisputed; that they showed that BLM was justified in declining to renew HRP's grazing permit; and that they established an extensive history of grazing trespass/noncompliance, which demonstrated a failure to substantially comply with 43 C.F.R. § 4140.1, within the meaning of 43 C.F.R. § 4110.1(b). See April 2011 ALJ Order at 2, 10-21, 26-27. Noting that HRP relied on the same record as BLM, he expressly determined that HRP had not presented any countering evidence to demonstrate the existence of a disputed issue of material fact that warranted denial of BLM's MSJ in whole or in part.¹⁸ *Id.* at 2, 10; see *Martinez-Rodriguez v. Guevara*, 597 F.3d 414, 419 (1st Cir. 2010); *Maymi v. Puerto Ports Authority*, 515 F.3d 20, 25 (1st Cir. 2008). To the contrary, HRP insisted that no material issues of fact were presented in the record, and ALJ Holt agreed. There was no need and no further right to proceed to a hearing. See *Celotex Corp. v. Catrett*, 477 U.S. at 324. HRP cannot now complain that the case proceeded in the manner that it requested. See *Aera Energy LLC v. Salazar*, 642 F.3d 212, 219 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 252 (2011) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his

¹⁸ We note that ALJ Holt recognized that there had been no hearing on the record pursuant to section 9 of the Taylor Grazing Act and 43 C.F.R. §§ 4.473 and 4160.4, and/or the Department's procedural rules at 43 C.F.R. Subparts 4150 and 4160. However, he held:

BLM has given written notice to [HRP] of the acts BLM considered to be non-compliant in the [December 2009] Decision itself. And HRP's appeal [to the Hearings Division] has provided it with the opportunity to demonstrate that these acts of non-compliance did not occur.

April 2011 ALJ Order at 25 (emphasis added). Had HRP requested it, or chosen to adduce the evidence and specific facts that were necessary to overcome BLM's MSJ by showing that there were genuine disputes as to material facts, it would have received a hearing. HRP is therefore disingenuous when it states that "BLM provided HRP with no hearing to adjudicate the trespass violations." SOR at 15.

In the analogous situation in which an Alaska Native applicant had an opportunity to request a hearing but declined to do so, and then subsequently requested the Board to grant a hearing, the Ninth Circuit affirmed the Board's denial of such a hearing, stating: "That [the applicant] chose not to exercise that right is not the fault of the Secretary." *Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir. 1996), *affirming Franklin Silas*, 129 IBLA 15 (1994). Like Hanley, Silas had also submitted an affidavit in support of an argument that there was a disputed issue of fact. The Court observed: "One cannot create an issue of fact by simply contradicting one's own previous statement." *Id.*; see generally *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999).

interests have changed, assume a contrary position. . . .”) (internal quotation marks omitted)). The request for an additional opportunity for hearing is properly denied. We deny BLM’s Motion to Strike the Hanley Affidavit as moot.¹⁹

What remains are HRP’s two principal bases for appeal: whether BLM was required to conform to the notice and decision-making rules of 43 C.F.R. Part 4100, and therefore BLM erred by relying on *non-adjudicated trespass violations* in deciding not to renew the permit, and whether BLM failed to afford HRP any path by which to renew its permit. See SOR at 2-4 (emphasis added) (citing *Glanville Farms, Inc. v. BLM*, 122 IBLA 77, 85 (1992)). We turn to those issues now.

IV. ANALYSIS—THE MERITS OF HRP’S APPEAL

Management of the public lands, in accordance with the Taylor Grazing Act, 43 U.S.C. §§ 315-315r (2006), and its implementing regulations, is committed to the broad discretion of BLM, which, as the delegate of the Secretary of the Interior, is instructed “to provide for the orderly use, improvement, and development of the [Federal] range,” and “to preserve the land and its resources from destruction or unnecessary injury[.]” 43 U.S.C. § 315a (2006); see, e.g., *Foianini v. BLM*, 171 IBLA 244, 249, 251 (2007); *Glanville Farms, Inc. v. BLM*, 122 IBLA at 87. In challenging a BLM decision adjudicating grazing privileges, an appellant bears the burden to establish that the decision fails to substantially comply with the Department’s grazing regulations or that, by a preponderance of the evidence, the decision is unreasonable and thus lacks a rational basis. See 43 C.F.R. § 4.480(b); *Foianini v. BLM*, 171 IBLA at 250-51; *Mercer v. BLM*, 159 IBLA 17, 29 (2003); *Yardley v. BLM*, 123 IBLA 80, 90 (1992).

[2] The regulation at 43 C.F.R. § 4110.1 generally sets forth the “[m]andatory qualifications” for issuance or renewal of a grazing permit. Subsection (b) of the regulation provides that an applicant for renewal of a permit “must be determined by the authorized [BLM] officer to have a satisfactory record of performance,” which will be deemed to exist where the officer determines the applicant is “in substantial compliance with the terms and conditions of the existing Federal grazing permit . . . for which renewal is sought, and with the rules and regulations applicable to the

¹⁹ It follows that HRP’s decision to proceed on the basis of its MSJ cannot now be revived by the submission of the Hanley Affidavit purporting to raise material issues of disputed fact. The time for doing so was before ALJ Holt in opposition to BLM’s MSJ. *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968).

permit[.]”²⁰ See also 43 C.F.R. § 4130.2(e) (“Permittees . . . holding expiring grazing permits . . . shall be given first priority for new permits . . . if . . . [t]he permittee . . . is in compliance with the rules and regulations and the terms and conditions in the permit [and other conditions are met]”).

“[S]ubstantial compliance” is to be determined by considering both “the number of prior incidents of noncompliance,” and “the nature and seriousness of any noncompliances,” recognizing that the ultimate aim of a BLM decision regarding renewal is to use the record of performance “to confirm the ability” of a permittee “to be a [good] steward of the public land,” and thus “to ensure that permittees . . . are good stewards of the land,” thereby “protect[ing] [the land] from destruction or unnecessary injury and provid[ing] for orderly use, improvement, and development of resources.” 60 Fed. Reg. 9925; see 59 Fed. Reg. 14314, 14330 (Mar. 25, 1994). Further, any act of “noncompliance with the requirements of 43 CFR Part 4100,” whether unauthorized grazing use or some other noncompliance, is relevant to a performance review under 43 C.F.R. § 4110.1(b). 60 Fed. Reg. at 9925. The regulations do not excuse and the preamble evidences no intent to limit BLM to adjudicated trespass violations in reviewing a permittee’s record of compliance under 43 C.F.R. § 4110.1(b).

“[W]here there is a record of prior noncompliance, the burden of proof is on the permittee. The record of compliance will be determined based upon a review of the public record. If there are any extenuating circumstances to be considered, it will be the responsibility of the permittee to support them.” *Id.* at 9926. “The information used to evaluate historical performance will be established records that are available to the public.” *Id.* This is because “[i]t is not feasible to require the authorized officer to investigate [permittees] to identify *unrecorded instances of noncompliance*.” *Id.* (emphasis added). BLM will adjudicate applications “on a case-by-case basis,” subject to the right of appeal under 43 C.F.R. Subpart 4160. *Id.*

A. “Non-Adjudicated Trespass Violations”

HRP’s challenge to BLM’s decision not to renew its grazing permit, as argued before ALJ Holt, was that BLM improperly relied upon instances of noncompliance that were not formally adjudicated in concluding that HRP was not in substantial

²⁰ Citations herein to the Department’s grazing regulations in 43 C.F.R. Part 4100 are to the regulations in effect as of Oct. 1, 2005, given the injunction of a subsequent extensive revision of the regulations, imposed by the Federal District Court in *WWP v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff’d in relevant part, vacated in part, and remanded*, 632 F.3d 472 (9th Cir. 2011). See 60 Fed. Reg. 9894, 9927 (Feb. 22, 1995).

compliance under 43 C.F.R. § 4110.1(b). HRP again argues before the Board that “BLM had no authority to deny HRP its *statutory right* to have a hearing to contest the non-adjudicated trespass violations” upon which BLM relied in determining that HRP had an unsatisfactory record of performance. SOR at 15 (emphasis added).

The obvious fallacy in HRP’s argument is that, while it certainly had a *statutory right* to a hearing on the question of renewal of its permit, it declined a hearing, adopting the strategy of moving for summary judgment based on the existing factual record. See *Esperanza Grazing Association*, 154 IBLA 47, 54-56 (2000); *William N. Brailsford*, 140 IBLA 57, 59 (1997); *Lundgren v. BLM*, 126 IBLA 238, 241 (1993). By issuing its December 2009 Decision, BLM afforded HRP notice and an opportunity for a hearing as to each and every one of the trespass violations relied upon in the decision. HRP is disingenuous when it states that “BLM provided HRP with no hearing to adjudicate [the] trespass violations.” SOR at 15. Rather, it is HRP that chose not to pursue a hearing following issuance of BLM’s December 2009 Decision. Had it requested a hearing, it would have been entitled to challenge the merits of each of the trespass violations that were relied upon by BLM in denying permit renewal, since they had not been the subject of a hearing in accordance with section 9 of the Taylor Grazing Act. However, once HRP declined a hearing on the question of permit renewal, the ALJ was entitled to consider whether BLM’s decision to not renew HRP’s permit was supported by the existing record, pursuant to the cross-MSJs filed by HRP and BLM. This is a predicament of HRP’s election. We find no error on the part of BLM or the ALJ.

In order to resolve whether to renew HRP’s grazing permit for the TSA and Hanley FFR Allotment, BLM is instructed by 43 C.F.R. § 4110.1(b) to consider whether the applicant has a satisfactory record of performance, and thus whether it has substantially complied with the regulations in 43 C.F.R. Part 4100 and with its existing permit. BLM properly looked to past instances of unauthorized grazing use deemed violative of 43 C.F.R. § 4140.1(b). BLM’s finding that HRP’s record from 2002 through 2009 showed substantial noncompliance was based, in part, upon a comparison of the annual authorizations with HRP’s own annual grazing reports. Based upon those records, as well as instances of trespass that were in fact adjudicated, BLM concluded that HRP had failed to substantially comply with the grazing regulations and has an unsatisfactory record of performance within the meaning of 43 C.F.R. § 4110.1(b).

BLM notes correctly that the performance review undertaken pursuant to 43 C.F.R. § 4110.1(b) is designed to determine only whether a permit is properly renewed, *i.e.*, whether, based upon the public record, BLM can conclude that the permittee has a satisfactory record of performance, looking back over the permittee’s compliance history. “The [performance] review . . . requires that the BLM look at all

evidence that bears on whether the permittee substantially complied with the terms and conditions of its last permit.” Answer at 27. To adopt HRP’s argument would require BLM to turn a blind eye to matters that necessarily bear directly on the question of whether or not a permittee should be entrusted with the privilege of continuing to graze the public lands. We agree with BLM’s assertion that because “BLM effectively gave [HRP] a break over the years does not mean that [HRP’s] noncompliant acts never occurred, nor does it mean BLM had to ignore those acts when deciding whether to issue [HRP] another ten-year permit.” BLM Reply at 3.²¹

HRP further argues that the ALJ erred in upholding BLM’s December 2009 Decision on the basis of the non-adjudicated trespass violations because BLM failed to follow the proper “mandatory” administrative procedures under 43 C.F.R. Part 4100 in determining the validity of these violations. SOR at 18. According to HRP, by not following those mandatory procedures, BLM failed to notify HRP of the degree of the trespass, whether nonwillful, willful, or repeated willful, since, in deciding whether a permit renewal applicant has a satisfactory record of performance, BLM is instructed by 43 C.F.R. § 4110.1(b)(2) to “take into consideration circumstances beyond the control of the applicant.” See SOR at 17. The error in HRP’s reasoning is that the nonwillful/willful nature of unauthorized grazing reflected in HRP’s Actual Use Reports is not always based upon whether the circumstances surrounding the trespasses were outside HRP’s control. A nonwillful/willful determination establishes whether or not a trespass was intended by the trespasser, having been undertaken with full knowledge that the violation was occurring, or, at least, was undertaken with a reckless disregard for, or indifference to, whether a violation was occurring. See, e.g., *Granite Trust Organization v. BLM*, 169 IBLA 237, 242 (2006); *Baltzor Cattle Co. v. BLM*, 141 IBLA 10, 21-22 (1997). We see no requirement that BLM must have formally determined the degree of any of the instances of trespass relied upon in deciding whether HRP was in substantial compliance under 43 C.F.R. § 4140.1(b).

HRP contends that ALJ Holt failed to consider “‘evidence’ in the form of BLM documents” that established that it had not engaged in any trespass, or at least raised a question of material fact regarding a trespass, which warranted a hearing before the

²¹ BLM explains that it often decides not to pursue formal trespass charges, given the substantial time and expense involved, and, were we to preclude its consideration of non-adjudicated trespass violations, even where documented, this would either negatively affect the adequacy of its performance review, or would compel BLM to formally charge each and every trespass, resulting in an unnecessary burden on the agency. See Answer at 31. We agree that non-adjudicated violations, such as shown on the face of Actual Use Reports submitted by the permittee, are properly considered in reviewing a permittee’s record of performance, so long as the administrative record adequately documents such violations.

judge ruled on the question of permit renewal. SOR at 20. However, the hearing option was one that HRP eschewed by insisting that the record raised no issue of material fact with regard to the instances of trespass. Nonetheless, ALJ Holt's decision clearly shows that he considered the evidence provided by both HRP and BLM in deciding whether the record evidence supported the trespass charges and whether there was, as to each trespass charge, a material issue of fact that required him to hold a hearing. See April 6 ALJ Order at 10-21. He concluded, however, that no material issue of fact existed in the case of each finding of noncompliance and trespass relied upon by BLM in reaching its decision.

1. Trespass Established by Actual Use Reports

We first review the group of what HRP calls the "non-adjudicated" instances of noncompliance relied upon by BLM in denying renewal of HRP's permit. Those instances were identified through BLM's comparison of HRP's Actual Use Reports with its annual grazing authorizations.

BLM determined HRP's noncompliance by comparing the required Actual Use Reports submitted annually by HRP with the authorizations reflected in the annual grazing bills which HRP signed. HRP agrees with BLM's and ALJ Holt's assessment that once paid, the annual grazing authorizations are contained in the annual grazing bills. See, e.g., April 2011 ALJ Order at 11, 13, 14, 16; Answer at 6. In each instance, HRP applied for annual grazing use, and BLM issued a grazing bill for the specified authorized use, which HRP paid for, receiving a grazing bill receipt. We note that the Grazing Application (Form 4130-1 (January 2006)) states, in relevant part: "Livestock grazing use that is different from that authorized by a permit . . . must be applied for prior to the grazing period and must be filed with and approved by the BLM before grazing use can be made. . . . Billing notices are issued which specify fees due. *Billing notices, when paid, become a part of the grazing permit[.]*" Ex. A-29 at 2 (emphasis added).

HRP understood that once the bills were paid they each became, in effect, the annual grazing authorization. See 43 C.F.R. § 4130.8-1(e) ("Fees are due on due date specified on the grazing fee bill. Payment will be made prior to grazing use."), and § 4140.1(b)(1) (Prohibited acts include grazing "[w]ithout a permit . . . and an annual grazing authorization," adding that "grazing bills for which payment has not been received do not constitute grazing authorization"). In the present case, the record confirms that HRP paid the grazing bills, and accordingly received its annual authorization specifying the grazing use for each of the grazing seasons at issue. See Exs. B-15 and B-17 (2002), B-22 (2003), B-34 (2004), B-42 (2005), B-45 at 5 (2006), and B-50 (2007). As discussed below, HRP understood that it was bound to comply with the authorizations granted in the annual billing notices, as evidenced by

HRP's requested variances from the governing permit (the March 2002 Decision) during certain grazing seasons.

2002 Grazing Season

On or about November 27, 2002, HRP submitted two signed letters to BLM along with the required Actual Use Report. *See* Exs. B-18 and B-19. In the first letter responding to claims of trespass against HRP, Hanley stated the following: "I'm not saying I don't have cattle wandering around somewhere. . . ." Ex. B-18 at 1. The second letter and corresponding Actual Use Report reported that HRP turned out 456 cattle in mid-June of 2002, and gathered 447 by November 19, 2002. According to HRP's annual use report, HRP overwintered 9 head of cattle on the TSA, and 28 cattle remained on the TSA after the off-date of November 15, 2002, whereas the terms and conditions clearly stated that a maximum of 4 cattle could remain on the TSA after that date.²² *See* April 2011 ALJ Order at 11. HRP was grazing 28 (and lesser numbers) after November 15, and 9 after November 19, thus exceeding authorized use in Pasture 5 by 24 (and lesser numbers) from November 15 to November 19, and by 5 in Pasture 5 after November 19. *See* Ex. A-35 at 3; December 2009 BLM Decision at 5.

2003 Grazing Season

In preparation for the 2003 grazing season, HRP submitted a grazing application requesting changes to HRP's grazing authorization. *See* Ex. B-20. Hanley,²³ on behalf of HRP, sought relief from the September 30, 2003, off-date for livestock on TSA Pastures 1 and 2. He stated:

Due to conditions beyond my control, primarily juniper invasion, I cannot completely gather all cattle from the allotment until weather conditions in the fall and early winter force them to leave the allotment. However, I can gather the majority but will make a maximum effort to get the remainder. I believe that once the Stauffer fence is in place that it will expedite gathering.

Ex. B-20 at 1-2. This request demonstrates Hanley's awareness of how many cattle he was allowed to graze on Pastures 1 and 2 as well as the specified off-date for

²² We note that the 4 cattle in Pasture 5 were generally authorized, each season throughout the 2002-2007 period, to start grazing in that pasture near the initial turnout date in the TSA, and to continue grazing to the Dec. 31 end of the season.

²³ Subsequent references to Hanley are to Michael F. Hanley, IV.

those head of cattle.²⁴ In response to Hanley's request to modify HRP's grazing authorization, BLM's Owyhee Field Manager called Hanley and informed him that he could not unilaterally reject the September 30, 2003, off-date for livestock. Ex. B-20 at 4 (Conversation Record); Whitlock Declaration ¶¶ 2-4 (attached to BLM MSJ). She explained to Hanley that the off-date was important to ensure re-growth of vegetation. Ex. B-20 at 4; Whitlock Declaration ¶¶ 2-4. According to the conversation notes, Hanley agreed to abide by the September 30, 2003, off-date, confirmed by the paid grazing bill. Exs. B-21, B-22.

According to HRP's 2003 required Actual Use Report for the TSA, HRP turned out 489 cattle in mid-to-later June. Ex. B-23. Despite the September 30, 2003, off-date Hanley had discussed with BLM, HRP did not begin substantially gathering cattle until September 25, 2003. *Id.* HRP's Actual Use Report showed that HRP was grazing a total of 222 cattle on the TSA after the September 30 off-date, that more than 200 cattle remained on the TSA in mid-October, and that more than 50 remained there on October 30, 2003, one month after the required off-date. HRP exceeded the authorized use in Pasture 5 by 218 (and lesser numbers) from September 30 to December 10, and by 4 in Pasture 5 after December 10. Ex. B-25; April 2011 ALJ Order at 11. Further, 8 cattle overwintered on the TSA, despite the requirement that all cattle be removed therefrom.²⁵

We note that the grazing bill for 2003 specifically noted that "livestock numbers and kind in the Hanley FFR [Allotment] (#0453) may vary," but the bill did not allow numbers to "vary" in any pasture of the TSA (#0539), including Pasture 5. Ex. B-21 at 2. Rather, with respect to Pasture 5, the bill stated: "25 AUMs will be permitted in Pasture 5. Use may occur between 6/1 and 12/31 as long as utilization does not exceed 50%." *Id.*

2004 Grazing Season

The grazing authorization for 2004 shows that HRP was required to remove most of the 489 cattle that had been turned out on June 7 (in Pasture 1, later moved to Pasture 2) by September 10, leaving 112 (in Pasture 2) and 4 (in Pasture 5) until September 30, and then only 4 (in Pasture 5) until December 31. However, according to its Actual Use Reports, HRP was grazing a total of 463 (and lesser

²⁴ There was no suggestion that the cattle to be left after the off-date of Sept. 30, 2003, would all be confined to the private lands of Pasture 5, as later argued.

²⁵ In a letter to Myra Black, Owyhee Field Office, dated Oct. 7, 2003, Hanley stated, with regard to the requirement that he gather 100% of the cattle in the TSA: "It can't be done" Ex. A-24 at 1. This statement makes clear that Hanley understood that all of the cattle should have been removed from the TSA.

numbers) after September 10, and 68 after November 12 (last removal date), thus exceeding the authorized use by 347 (and lesser numbers) in Pastures 2 and 5 from September 10 to September 30, by 265 (and lesser numbers) in Pasture 5 from September 30 to November 12, and by 64 in Pasture 5 after November 12. *See* April 2011 ALJ Order at 13. HRP stopped gathering cattle on November 12, 2004, and allowed 68 cattle to overwinter on the TSA.

2005 Grazing Season

According to HRP's grazing authorization for 2005, HRP was required to remove most of the 550 cattle that had been turned out in June (in Pasture 2, later moved to Pasture 3) by September 10, leaving only 4 (in Pasture 5) until December 31, 2005. Ex. B-43. However, according to its Actual Use Report, submitted on or about December 20, 2005, HRP was grazing a total of 550 (and lesser numbers) after September 10, and 1 after December 6 (last removal date), thus exceeding the authorized use by 546 (and lesser numbers) from September 10 to December 6.²⁶ *See* April 2011 ALJ Order at 14-15. The Actual Use Report establishes that HRP stopped gathering cattle on December 6, 2005, approximately 86 days after the primary off-date of September 10, 2005, for the TSA. *See* Ex. B-43.

It is important to note that the 2005 grazing authorization stated that livestock grazing was to be in accordance with "the Interim Management of the March 12, 2002, Final Decision issued by the Owyhee Field Manager to Hanley Ranch Partnership." Ex. B-41. The grazing authorization allowed HRP to use a total of 1,780 AUMs on the TSA, and while the authorization specifically permitted livestock numbers to "vary" on the Hanley FFR Allotment (#0453), the authorization did not include a similar variance for any pasture of the TSA (#0539).

2006 Grazing Season

HRP was required by its grazing authorization to remove most of the 549 cattle that had been turned out in mid-June (in Pasture 1, later moved to Pasture 3) by September 10, leaving only 112 (in Pasture 3) and 4 (in Pasture 5) until September 30, and then only 4 (in Pasture 5) until December 31, 2006. Ex. B-46. HRP began gathering cattle on June 19, 2006, and stopped gathering cattle on December 3, 2006. *Id.* As of September 11, 2006, the day after the first major off-date when HRP was supposed to have no more than 112 cattle on the TSA, 518 cattle remained on the TSA—more than 400 in excess of that authorized. As of

²⁶ HRP's Actual Use Report (Ex. A-48) reflected a steady reduction in livestock numbers, through successive removals, starting on Sept. 12, 2005, and continuing through Dec. 6, 2005.

October 1, 2006, the day after the second major off-date when HRP was supposed to have no more than 4 cattle on the TSA, 377 cattle remained on the TSA—more than 370 cattle in excess of that authorized. *Id.* As of December 3, 2006, the day HRP stopped gathering livestock on the TSA, a total of 67 cattle remained to overwinter on the TSA. Hanley admitted the following on the Actual Use Report: “I don’t have the total turned out accounted for but they may have come in or could come in later but I doubt it. Probably some died.” *Id.*; see April 2011 ALJ Order at 16.

The grazing application and the grazing authorization for 2006 again indicated that livestock grazing was to be in accordance with “the Interim Management of the March 12, 2002, Final Decision.” Exs. B-44 at 1, B-45 at 2. Both the application and authorization specifically allowed livestock numbers to “vary” on the Hanley FFR Allotment (#0453), but in neither document were livestock numbers permitted to “vary” on any portion of the TSA, including Pasture 5. The 2006 grazing authorization allowed HRP to use a total of 1,850 AUMs on the TSA.

2007 Grazing Season

According to its Actual Use Report for 2007, HRP acknowledged turning out 492 cattle onto the TSA in late June of 2007. Ex. B-51. The Actual Use Report establishes that HRP began gathering and moving cattle off the allotment on June 30, 2007, and stopped gathering and moving cattle off the TSA on December 3, 2007. As of September 11, 2007, the day after the primary off-date when no more than 112 cattle were permitted on the TSA, 462 cattle remained. As of October 1, 2007, the day after the secondary off-date of September 30, 2007, when no more than 4 cattle were permitted on the TSA, 305 cattle remained. *Id.* A total of 16 cattle remained after December 3, 2007, the last removal date, thus exceeding the authorized use in Pasture 5 by 12. *Id.*; see April 2011 ALJ Order at 16-17. This substantial overgrazing of the TSA negatively impacted the condition of the range and contributed to BLM’s determination to close Pastures 1, 2, and 3 of the TSA in the May 2008 FFE Decision. See May 2008 FFE Decision (Ex. B-4) and Stipulated Settlement Agreement (Ex. B-5).

Again, the 2007 application and authorization both noted that livestock grazing was to be in accordance with “the Interim Management of the March 12, 2002[,] Final Decision.” Exs. B-48 at 1, B-49 at 2. The 2007 authorization allowed HRP to use a total of 1,850 AUMs on the TSA. Ex. B-49. Both the application and authorization allowed livestock numbers to vary on the Hanley FFR Allotment, but neither allowed such variance on any pasture of the TSA, including Pasture 5. Exs. B-48 and B-49.

We note that the Actual Use Report for 2007 bears a handwritten note by Hanley stating: “I didn’t take my total number to allotment because of the drought. I also left gates open onto private land so they could come in on their own. . . . The gates were opened into Trout Springs from Bull Basin [Allotment] during the summer fire.” Ex. B-51 at 2.

2008 Grazing Season

BLM closed Pastures 1, 2, and 3 of the TSA in 2008 and 2009. *See* May 2008 FFE Decision (Ex. B-4) and Stipulated Settlement Agreement (Ex. B-5). Accordingly, HRP was allowed to graze only the Hanley FFR Allotment and Pasture 5 of the TSA in 2008. BLM’s review of HRP’s grazing file reflected compliance in 2008. December 2009 BLM Decision (Ex. B-47).

2. HRP’s Overall Challenge to Trespass Findings for 2002 through 2007

HRP does not challenge the numbers of cattle grazing in the Allotments during any of the 2002 through 2007 grazing seasons, since those numbers were derived from the Actual Use Reports submitted by HRP. In reviewing those reports, ALJ Holt noted that according to BLM’s calculations, HRP had admittedly exceeded the authorized AUMs for the TSA during certain grazing seasons (144 more than the authorized 1,854 in 2004; 399 more than the authorized 1,780 in 2005; and 283 more than the authorized 1,850 in 2006). *See* April 2011 Order at 13, 15, 16; December 2009 Decision at 6, 7, 8. HRP challenges each of these conclusions, asserting only that “AUMs ‘could vary[,]’ as long as use did not ‘exceed 50 [percent] utilization[.]’” SOR at 27, 30, 33.

HRP’s argument that the number of AUMs could vary is contrary to the 2002 Permit and the annual authorizations pursuant to which HRP grazed the TSA. The grazing permit allowed cattle numbers to vary, provided that forage utilization did not exceed 50 percent, but expressly limited the numbers of AUMs allowable during the grazing season, and the annual authorizations provided for no variance at all for AUMs in Pasture 5 of the TSA. HRP points to nothing in its permit or authorizations that allowed grazing to exceed the specified AUMs on any basis. *See* Motion to Strike at 12-13. The record thus supports the conclusion that HRP exceeded the grazing authorization by 144, 399, and 283 AUMs, for each of the respective grazing seasons.

HRP rejects ALJ Holt’s stated restriction on grazing use, arguing that it was not limited to only 4 cattle in Pasture 5 (from November 15 to December 31 (2002),

September 30 to December 31 (2003, 2004, 2006, 2007),²⁷ or September 10 to December 31 (2005)), since, in each year, the annual grazing authorization did not specify any limitation on livestock numbers, stating that they could vary so long as grazing utilization did not exceed 50 percent.²⁸ See SOR at 21, 22-23, 26-27, 29-30, 32, 34-35. HRP asserts that the annual authorizations incorporated BLM's March 2002 Decision, which provided, at page 9, that "[l]ivestock numbers could vary but use may not exceed 50 percent utilization' within the Hanley FFR Allotment and within Pasture 5 of the Trout Springs Allotment." SOR at 21, 23, 26-27, 30, 32, 35 (emphasis deleted). HRP intimates that, since utilization did not exceed 50 percent, grazing could exceed 4 cattle after the various removal dates. HRP recognizes that the grazing authorization restricted grazing use to particular pastures, at particular times during the grazing season, allowing cattle numbers to vary only in Pasture 5 during the specified final grazing period. However, HRP argues that, since its Actual Use Reports were not specific as to pasture, it cannot be said that the report disclosed the presence of cattle outside Pasture 5, in areas where variances were not permitted, at any particular times during the grazing season.²⁹ See SOR at 21-22, 23-24, 27-28, 30-31, 33, 35. It further notes that BLM does not offer any independent evidence regarding the location of the reported cattle. HRP thus concludes that no trespass has been shown to have occurred by comparing the Actual Use Reports against the annual grazing authorizations.

The short answer to HRP's argument is that, according to HRP's own Actual Use Reports, as just reviewed, not all of the cattle exceeding the allowed number were grazing on Pasture 5. Grazing cattle far in excess of what was allowed on Pastures 1, 2, and 3, as shown on HRP's Actual Use Reports, essentially nullifies HRP's argument that they were all grazing on Pasture 5 and therefore allowed, since those numbers were allowed to vary.

²⁷ While HRP argues that it was permitted to vary livestock numbers in Pasture 5 after the September 30 removal date, it does not argue that it was permitted to vary numbers in Pasture 2 (2004) or 3 (2006 and 2007) after the initial September 10 removal date. Nothing in the annual authorizations provided for such variance, and the March 2002 decision only referred to the variance permitted in the case of the final grazing permitted in Pasture 5 after September 30. Thus, HRP clearly engaged in a trespass by grazing in excess of the authorized numbers in Pasture 2 or 3, from September 10 to September 30.

²⁸ HRP cites to the various annual grazing authorizations (2002 (Ex. A-34); 2003 (Ex. A-36); 2004 (Ex. A-44); 2005 (Ex. A-47); 2006 (Ex. A-49); and 2007 (Ex. A-51)).

²⁹ HRP cites to the various Actual Use Reports (2002 (Ex. A-35); 2003 (Ex. A-37); 2004 (Ex. A-45); 2005 (Ex. A-48); 2006 (Ex. A-50); and 2007 (Ex. A-52)).

However, there are also logistical and legal problems with HRP's argument that it could graze unlimited numbers of cattle on Pasture 5. We agree with BLM that none of the annual grazing authorizations allowed livestock numbers to vary, and that HRP's conclusion to the contrary is based on a misreading of the authorizations. See Motion to Strike at 10-11; Answer at 51-54. BLM notes that nothing in any of the annual authorizations specifically allowed cattle numbers to vary in the case of Pasture 5 of the TSA, although they allowed numbers to vary in the case of the Hanley FFR Allotment. BLM also looked to its March 2002 Decision, which was incorporated into each of the succeeding authorizations. BLM found that the 2002 Decision provided, at page 9, that livestock numbers could vary in Pasture 5 so long as forage utilization did not exceed 50 percent, but that this provision was not actually set forth as part of the "Interim Management" scheme adopted by BLM and then incorporated in the authorization for the 2002 season, and all subsequent seasons.³⁰

Importantly, in the case of Pasture 5, each annual scheme provided for concluding the season of use with 4 cattle, totaling 25 AUMs. However, while the ending date was always December 31, as envisioned in the March 2002 Decision, the beginning date varied from June 1 (2002, 2004, and 2005) to June 25 (2003) to July 1 (2006 and 2007). None of the authorizations stated that livestock numbers might vary in Pasture 5, although, as we have seen, the March 2002 Decision had

³⁰ As we have noted, the 2005 through 2007 annual authorizations expressly provided that grazing in the TSA was to be in accordance with "the Interim Management of the March 12, 2002[,] Final Decision." Answer at 53 (quoting Exs. A-47 at 2, A-49 at 2, and A-51 at 2). BLM argues that, since the Interim Management portion of the 2002 Decision does not contain the language appearing earlier in the decision allowing livestock numbers to vary in the TSA, that language is not applicable. *Id.* We do not attribute such significance to the reference to "Interim Management," which does not appear in the 2002 through 2004 authorizations. The Interim Management contained in the 2002 decision provided for phasing in, over a 2-year period, the reduction in grazing use adopted for the TSA, recognizing that the decision had significantly reduced authorized use, from 2,813 to 1,430 AUMs, and required extensive fencing before it could be fully implemented. The Interim Management initially authorized grazing totaling 1,977 AUMs in the 2002 season. See March 2002 Decision at 14-15. It did not, however, change the authorized use thereafter, which was set forth in the general provisions of the decision, applicable to grazing during the entire 10-year term of the permit. The general provisions included the variance language.

provided for a variance.³¹ Plainly, it is the annual authorizations that established the specific grazing prescriptions for the Allotments for each of the grazing seasons. Thus, we conclude that HRP was not permitted to vary livestock numbers at any time during the 2002 through 2007 grazing seasons.³²

ALJ Holt likewise concluded that authorized grazing use was controlled by “the terms of the 2002 permit *as modified by annual grazing bills issued for 2002-2007.*” April 2011 Order at 2 (emphasis added). He made no effort to ascertain whether cattle were grazing specific pastures, but considered only whether the total number reported as having grazed the Allotment exceeded the total number authorized for the Allotment, for any specific time period.³³ *See id.* at 10 (“BLM based its findings for each year on the aggregate yearly authorization for the entire allotment. Therefore *individual cattle numbers for each pasture are not material.*” (emphasis added)). He never addressed the question of whether the variance language of the March 2002 Decision allowed cattle to graze in Pasture 5 after certain dates. However, the effect of his decision was that this variance language was modified by the annual grazing authorizations such that it no longer applied to Pasture 5 of the TSA. Indeed, ALJ Holt noted that the violation consisted of HRP’s failure to abide by the authorized season of use identified in its annual billing statements or grazing authorizations, thus violating its permit and 43 C.F.R. § 4140.1(b). *See id.* at 11, 12, 14, 15, 16, 17.

³¹ The grazing scheme for the Hanley FFR Allotment was identical in each of the annual authorizations, and each of the authorizations stated that livestock numbers might vary, as had the March 2002 Decision.

³² We also note that, even were HRP allowed to vary the specified livestock numbers in Pasture 5, its additional numbers resulted in AUMs plainly in excess of those authorized by the permit and the annual authorizations. *See* December 2009 BLM Decision at 5 (5 AUMs (2002)), 6 (151 AUMs (2003)), 7 (385 AUMs (2004), and 450 AUMs (2005)), 8 (533 AUMs (2006)), 9 (362 AUMs (2007)). Since we find nothing that allows a variance in AUMs, HRP was clearly in trespass, in terms of the forage consumed.

³³ For instance, in the case of the 2002 season, ALJ Holt relied on BLM’s determination, from reviewing the Actual Use Report, that 19 and 9 cattle were grazing the TSA when only 4 were supposed to be grazing (respectively, after November 15 and after November 19). *See* April 2011 ALJ Order at 11. Whether the trespassing cattle were in Pasture 5 or elsewhere in the allotment was deemed irrelevant, since the act of trespass was the fact that they were grazing in excess of the number permitted anywhere in the allotment at the times specified. *See* BLM Reply at 14-16. We agree with ALJ Holt.

HRP's argument that it could graze an unlimited number of cattle on Pasture 5, and that BLM had not shown that at any given time all of the cattle found on the TSA were not on Pasture 5, is specious from several angles. The TSA consists of 29,511 acres; 1,368 acres of the TSA are in Pasture 5; and 207 acres of Pasture 5 are public land. To use HRP's 2006 Actual Use Report as an example, HRP turned out 549 cattle on the TSA in mid-June 2006; HRP's Actual Use Report shows that on September 11, 2006, the off-date when HRP was to have no more than 112 cattle on the allotment, HRP had 518 cattle on the TSA—over 400 more than the number authorized; as of October 1, 2006, the day after the second major off-date when HRP was supposed to have no more than 4 cattle on the TSA, 377 cattle remained on the allotment; and as of December 3, 2006, the day after HRP stopped gathering livestock on the TSA, 67 cattle remained to overwinter or die on the TSA. Ex. B-46. HRP would have us believe that *any and all* of the excess cattle it reported grazing on the 29,511-acre allotment were confined on the 1,368 acres of Pasture 5 on any given operative off-date. If we assume, *arguendo*, that this was how HRP managed its cattle during the 2002 through 2007 grazing years, we would be compelled to find that practice incompatible with rangeland health standards reflected in the various administrative and judicial settlements and orders that affected the TSA.

HRP's proposition that it was authorized to routinely, year after year, herd all of its allowed cattle for the entire 29,511-acre TSA, at the height of the grazing season, onto the 1,368-acre Pasture 5 in the fall and winter, when range conditions are most fragile, is untenable. The argument is not that HRP has herded its cattle onto Pasture 5 for brief periods. To accept HRP's scenario as true, substantial numbers of the allowed 550 cattle would be confined to Pasture 5 for months of the grazing season. That practice alone would provide a rational basis for BLM's decision to deny permit renewal to HRP.

HRP's new argument, *i.e.*, that the Actual Use Reports do not show noncompliance, since they do not show that the cattle were not on Pasture 5, is belied by the record. As reported elsewhere in this opinion, there are numerous examples of HRP's acknowledgment of the difficulty it experienced in gathering and removing cattle from the TSA. In light of such repeated assertions by HRP that it could not account for its cattle, we reject its argument that all of the excess cattle at any given time were on Pasture 5 of the TSA. The scenario argued by HRP is flatly inconsistent with HRP's record, as reflected in HRP's own Actual Use Reports, which showed excess cattle on Pastures 1 through 3. Given the sheer numbers of excess cattle involved during a given permit year, HRP's explanation is so factually improbable and legally irrelevant that we must agree that ALJ Holt properly held that identifying which pasture was involved would make no material difference.

B. 2003, 2004, & 2009 Trespass & 2003 Noncompliance

Even if we were to agree with HRP that BLM improperly relied upon HRP's Actual Use Reports as evidence in declining to renew HRP's grazing permit, we would still find that there was a rational basis for BLM's decision due to the incidents of trespass that were adjudicated in 2003, 2004, and 2009, as well as HRP's violation of the 2003 CRIA.

2003 Trespass

ALJ Holt agreed with BLM's finding that HRP had committed trespass in 2003, based upon a comparison of the Actual Use Report and the 2003 grazing authorization. He also found that evidence disclosed that HRP had, in fact, settled nonwillful trespass charges for 3 AUMs of unauthorized grazing use, determined by direct observation to have occurred on October 3, 8, and 23, 2003, during the overall trespass period of September 30-December 31. *See* SOR at 24 (citing ALJ Order at 12); Ex. B-31. HRP does not deny that it was charged with and settled this nonwillful trespass, but regards it as a minor exception to its overall record of compliance. *See* SOR at 24-25, 25-26; Hanley Affidavit ¶ 62, at 20.

HRP also acknowledges that BLM found, and ALJ Holt noted, an additional instance of noncompliance in 2003 attributable to its failure to adhere to the CRIA for the "Stauffer Flat Fence" and removing vegetation without authorization, in violation, respectively, of 43 C.F.R. §§ 4140.1(a)(4) and 4140.1(b)(3), by using heavy equipment to clear vegetation outside the presence of a BLM representative, in wooded and ceanothus areas, and in such a manner as to create a fence line corridor greater than 10 feet wide in sagebrush areas.³⁴ *See* SOR at 25 (citing April 2011 ALJ Order at 12-13). HRP does not deny that it was charged with the two acts of noncompliance in 2003, but states that the construction work was undertaken by a third party not associated with HRP, and, in any event, that HRP timely and satisfactorily complied with the ordered mitigation by recontouring and reseeding the fence line corridor where it exceeded the 10-foot width. *See* SOR at 25; Hanley Affidavit ¶¶ 64-66, at 21.

³⁴ The Fence is a 3-strand barbed wire fence that runs approximately 3 miles in secs. 12, 13, 24, and 25, T. 11 S., R. 5 W., Boise Meridian, Owyhee County, Idaho, between Pastures 1 and 3 of the TSA. It was one of several fences, which, along with spring developments, were approved as part of the March 2002 Decision, in order to improve cattle distribution in the TSA. *See* March 2002 Decision at 12-13. It was to be "built and maintained by the permittee ([HRP])." *Id.* at 12.

BLM responds that HRP was originally charged with the Fence violation by letter dated August 18, 2003 (Ex. A-42), but that HRP never asserted that it did not undertake the fence construction work, or was otherwise not responsible for the violation, either immediately after receipt of the August 18 letter, or even later, while appealing to the ALJ, or in briefing its MSJ. *See* Motion to Strike at 9-10; *e.g.*, Letter to BLM from HRP, dated Oct. 7, 2003 (Ex. A-43). We agree with BLM that, having failed to raise its lack of responsibility for the violation in bringing its appeal, HRP waived this defense pursuant to 43 C.F.R. § 4.470(c).³⁵ *See* Motion to Strike at 9-10. Even if the defense were not waived, we also agree with BLM that HRP was still responsible for the violation, since it was required to ensure compliance with the CRIA and regulations concerning the fence line. *See* Motion to Strike at 10 n.6; Answer at 45.

2004 Trespass

In addition to the evidence of noncompliance based upon HRP's Actual Use Reports, ALJ Holt found that BLM properly considered evidence of trespass in 2004 disclosing that HRP had, in fact, settled nonwillful trespass charges for 4 AUMs of unauthorized grazing use, determined by direct observation to be occurring on August 4, 10, 11, and 19, 2004, prior to the overall trespass period of September 10-December 31. *See* SOR at 28 (citing April 2011 ALJ Order at 14); Ex. B-38. HRP does not deny that it was charged with and settled this nonwillful trespass, but regards it as a minor exception to its overall record of compliance. *See* SOR at 28; Hanley Affidavit, ¶ 76, at 24-25.

2009 Trespass

BLM determined that despite the May 5, 2008, closure of Pastures 1 through 3 of the TSA, HRP had been found, by direct observations of BLM employees, to be grazing cattle on these pastures during the 2009 season.³⁶ *See* April 2011 ALJ Order at 18-20. ALJ Holt noted that, based on ground trips and aerial flights, BLM claimed

³⁵ Under 43 C.F.R. § 4.470(c), concerning appeals from final BLM grazing decisions to ALJs, “[a]ny ground for appeal not included in the appeal is waived. The appellant may not present a waived ground for appeal at the hearing unless permitted or ordered to do so by the administrative law judge.” Since no hearing occurred here, no opportunity was afforded for ALJ Holt to agree to consider any waived ground for appeal.

³⁶ It seems clear that BLM has yet to fully adjudicate any of the 2009 trespass violations, through a trespass notice and/or proposed/final decision, with the right to appeal to an ALJ. *See* Hanley Affidavit ¶¶ 112-119, at 35-37; Order, *HRP v. BLM*, ID-BD-3000-2009-003, dated Feb. 4, 2010 (Ex. A-79).

cattle in trespass during six periods: 17 on September 17-24; 6 on September 22-24; 18 on October 14-26; 4 on October 27 to November 4; 12 on November 5-13; and 1 on November 9-13. See April 2011 ALJ Order at 18-19; December 2009 BLM Decision at 9; Grazing Bill, dated Nov. 13, 2009 (Ex. A-75); Answer at 18-20 (citing Vialpando Declaration ¶¶ 2-3, at 1-2, and Attachment 1; Trevino Declaration at ¶¶ 2-3, at 1-2, and Attachment 1; Arnold Declaration ¶¶ 2-4 at 1-2, and Attachment 2 (all attached to BLM's MSJ). All of the cattle were identified by HRP's brand, and Hanley acknowledged, on several occasions, that he was removing HRP cattle in trespass on the closed pastures. See Exs. B-52 through B-54, B-56 through B-59, B-61, B-63, B-64.

HRP does not dispute that these trespasses took place, but argues that it was caused by unknown third part(ies) who left gates open or even cut or damaged gates to the point that, unbeknownst to HRP, cattle strayed from its private lands onto the public lands in the TSA. See SOR at 36-37 (citing Hanley Affidavit ¶¶ 109-111 at 34-35). We find little or nothing in the Hanley Affidavit to negate the existing record, since it does not, *inter alia*, specify when the gates were open, cut, or damaged, whether this occurred reasonably close in time to the BLM observations, or the physical relationship between the open/cut/damaged gates and the locations of trespassing cattle, and thus does not begin to substantiate that open/cut/damaged gates were, in fact, responsible for the specific acts of trespass observed by BLM in 2009. See Hanley Affidavit ¶ 110, at 35 ("I believe that this gate issue was one of the reasons for the observations by the BLM of some of HRP's cattle that the BLM made in the fall of 2009."); Letter to BLM from HRP, dated Oct. 31, 2009 (Ex. A-71).

HRP also does not, for the most part, speak to when it became aware, or even whether it was ever aware prior to the 2009 season, that its gates were being opened, although it suggests that the problem of gates being left open was a matter of general knowledge to BLM and the public in southwestern Owyhee County in 2009. See Hanley Affidavit ¶ 109, at 35; Letter to BLM from HRP, dated Oct. 31, 2009. Even if BLM was aware, HRP does not assert that it ever took steps to ensure that its gates remained closed, or that cattle straying onto public lands were promptly recovered. In fact, as we have noted, Hanley admitted in 2007 that he "left gates open onto private land so they could come in on their own." Ex. B-51 at 2. Having failed to adequately address the situation regarding open/cut/damaged gates, HRP has not demonstrated that it is not responsible for any or all of the 2009 trespass incidents.

HRP concedes that "BLM could rely upon [the] 'settlement(s)' [and the 'adjudication(s)'] to rationalize a determination of lack of 'substantial compliance.'" SOR at 17, 18. However, HRP appears to argue that the settlements should not count against it since it was not aware, when they were entered into, that they are part of a record of performance. We do not agree. HRP was certainly aware, by

virtue of promulgation of 43 C.F.R. § 4110.1(b), that its overall “record of performance” would bear upon any future renewal decision. *See, e.g., William Jenkins*, 131 IBLA 166, 168 (1994) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947)). Such a “record” necessarily consists of every instance of noncompliance with the terms and conditions of permits and applicable regulations, either as finally determined by the Department, through settlement or adjudication, or as documented by BLM. 43 C.F.R. § 4110.1(b).

We agree with ALJ Holt’s conclusion that BLM could rely upon settled acts of noncompliance in denying permit renewal. He correctly notes that

nothing in the performance review regulations at 43 C.F.R. § 4110.1 suggests that settled, mitigated, or paid violations may not be used in a performance review, and nothing in the documents related to the violations suggests that [HRP] denied liability of the violations or that BLM agreed not to use them for other purposes.

April 2011 Order at 26. HRP had the opportunity to challenge each of the trespass charges, and, having decided not to do so, cannot now seek to avoid the consequences of its admission of the charges.

C. Whether the Record Supports Denial of Permit Renewal

In sum, the record abundantly supports BLM’s determination that HRP failed to have a satisfactory record of performance, as required by 43 C.F.R. § 4110.1(b). HRP’s Actual Use Reports showed repeated noncompliance with HRP’s permit and annual use authorizations from 2002 through 2009, and those seasons of noncompliance were punctuated by several instances of adjudicated trespass and noncompliance. Most egregiously, the excessive livestock numbers, which occurred every year from 2002 through 2007, happened primarily during the late fall/early winter months, when BLM had specifically provided for allowing regrowth of the forage consumed earlier in the season, and undoubtedly contributed to BLM’s decision to close Pastures 1 through 3 of the TSA in 2008. Further, even after closure, the trespass continued in 2009. The actual record of trespass/noncompliance is exactly the record relied upon by BLM in its deciding not to renew HRP’s permit.

Further, what was critical to ensuring proper use of the range was not simply livestock numbers *per se*, but also the level of forage consumption, measured by AUMs, and the degree of forage utilization, measured by percent of forage utilization. We find absolutely no justification for HRP’s position that BLM did not require HRP to closely adhere to the specified AUMs and percent of forage utilization, generally set forth in the March 2002 Decision, and more specifically defined in subsequent

annual grazing authorizations. If HRP were to ignore these standards, excessive grazing and the destructive effects on the available forage and the range generally, which BLM sought to avoid, would inevitably occur. Thus, to the extent that BLM determined that HRP's grazing had consumed forage in amounts in excess of the specified AUMs for the grazing season as a whole, we are persuaded that it has substantiated the trespass violations that clearly bear on the question of permit renewal.

V. FUTURE PERMIT RENEWAL

HRP contends that BLM violated the Administrative Procedure Act (APA), 5 U.S.C. § 558(c) (2006), and/or the Board's decision in *Eldon Brinkerhoff*, 24 IBLA 324, 83 I.D. 185 (1976), by not providing a path to renewal of the permit. See SOR at 37-38. HRP argues that BLM's decision not to renew its grazing permit effectively provides for "an indefinite withholding/suspension" of its grazing privileges. *Id.* at 38. It notes that the APA, 5 U.S.C. § 558(c) (2006), provides, in relevant part, that "the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given . . . notice by the agency in writing of the facts or conduct which may warrant the action; and . . . opportunity to demonstrate or achieve compliance with all lawful requirements." *Id.* HRP argues that BLM's December 2009 Decision does not constitute the notice required by the APA. See *id.* It also argues that BLM afforded HRP "no 'opportunity to demonstrate or achieve compliance with all lawful requirements[,] either before the denial to renew HRP's grazing permit or after the denial to renew HRP's grazing permit.'" *Id.*

The provision regarding procedural requirements upon which HRP relies pertains only to sanctions (withdrawal, suspension, revocation, or annulment) that require notice and an opportunity to achieve compliance. It does not apply to renewals of licenses.³⁷ See, e.g., *Bankers Life & Cas. Co. v. Callaway*, 530 F.2d 625, 634-35 (5th Cir. 1976); *Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Comm'n*, 357 F.2d 632, 638 (6th Cir. 1966) (5 U.S.C. § 558(c) procedures do not apply to denial of application to renew license). In any event, at this point HRP could not achieve compliance with respect to past acts of noncompliance, and it has already had ample opportunity to demonstrate that no noncompliance occurred.

³⁷ BLM properly notes that *Anchustegui v. Department of Agriculture*, 257 F.3d 1124 (9th Cir. 2001), which HRP cites in support of its appeal, involved cancellation of a grazing permit, to which 5 U.S.C. § 558(c) is applicable, and thus does not pertain to a permit renewal. See Answer at 40 n.18; 257 F.3d at 1129.

Once again construing BLM's December 2009 decision as "an *indefinite* withholding/suspension of HRP's grazing permit," HRP argues that BLM erred by failing to assess the appropriateness of such a penalty under the factors enunciated in *Brinkerhoff*:

Generally, the Department has limited *severe* reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass. [Citations omitted.]

SOR at 39 (quoting 24 IBLA at 337, 83 I.D. at 190).³⁸ HRP argues that applying the *Brinkerhoff* factors, BLM was required to decide whether, under the circumstances at issue, an indefinite withholding/suspension was warranted, "as opposed to a 1-year, or 3-year withholding/suspension." *Id.*

The *Brinkerhoff* factors apply solely to a determination by BLM, pursuant to 43 C.F.R. § 4170.1-1(a) and (b), to suspend or cancel an existing permit, and thus impose "severe reductions" in grazing privileges, where the permittee has engaged in unauthorized grazing use or other acts of noncompliance on one or more occasions. *See, e.g., Holmgren v. BLM*, 175 IBLA 321, 353-54 (2008); *Granite Trust Org. v. BLM*, 169 IBLA at 256-57; *Baltzor Cattle Co. v. BLM*, 141 IBLA at 23-24. They are intended to ensure that BLM takes actions commensurate with the nature of the trespass/noncompliance at issue, taking into account the nature and severity of the offense(s) and the likelihood that the corresponding penalty will bring the permittee back into compliance.

At no time have we ever held that such factors apply when BLM is deciding whether to renew a permit. The applicable regulation in the case of permit renewal, 43 C.F.R. § 4110.1(b), provides that renewal may occur only where the permittee has a "satisfactory record of performance," and thus has substantially complied with the Taylor Grazing Act, implementing regulations, and/or the terms and conditions of its permit. BLM's only function is to determine whether such a record exists. To the extent that BLM was required, in doing so, to consider the nature and severity of the

³⁸ HRP also argues that, since BLM's decision to not renew its permit acted as a suspension of the permit, under 43 C.F.R. § 4170.1-1, BLM violated 43 C.F.R. § 4160.4 by not affording HRP a hearing "to contest the suspension." SOR at 38. Non-renewal is not a suspension.

acts of trespass/noncompliance, we think that BLM fulfilled its obligation in the present case.

In general, we are simply not persuaded that BLM is required, in deciding not to renew a grazing permit, pursuant to 43 C.F.R. § 4110.1(b), to lay out the course of conduct that the permittee must follow in order to have its grazing privileges restored. We find no statutory, regulatory, or policy support for such a holding. When BLM is deciding whether or not to renew a permit, it is concerned solely with whether the permittee's past conduct warrants the continuation of its grazing privileges, and not with what sanction BLM might impose in order to bring the permittee's future conduct into compliance, by "reform[ing] [its] grazing practices[.]" *Baltzor Cattle Co. v. BLM*, 141 IBLA at 24.

Having said that, we find nothing that suggests that HRP may not, in the future, apply for restoration of its grazing privileges in the TSA and Hanley FFR Allotment, in accordance with applicable law, demonstrating that it is prepared to fully comply with the Taylor Grazing Act, implementing regulations, and the terms and conditions of any permit. At that time, BLM may take action on the application, subject to review by the Board.

VI. JUDGE JACKSON'S DISSENT

Judge Jackson posits that BLM impermissibly changed HRP's permit through annual grazing bills and authorizations, citing *Granite Trust Organization v. BLM*, 169 IBLA at 237 n.9. We disagree. The 2002 Permit set the number of cattle that Hanley could graze on the TSA. What the annual grazing authorizations did was to specify which pastures the cattle could graze at any given period in the season. The rotation schedule set in the grazing bills and authorizations was dictated by range conditions. The degradation of the range as the result of HRP's grazing practices played a significant part in the litigation brought by WWP and the resulting settlement agreements that prescribed the grazing numbers and rotation schedules that Judge Jackson claims were unilaterally imposed upon HRP. Even after Pastures 1 and 3 were closed to grazing, as a result of a court-approved settlement agreement, Hanley continued to graze cattle on those Pastures. HRP's allegation that some unknown third party was responsible for leaving gates open and tearing down HRP's fences, even if true, does not rise to the level of extenuating circumstances that would justify HRP's repeated grazing violations over a period of years.

What HRP's record shows was cogently summarized by BLM on page 31 of its Opposition to HRP's MSJ: "On a yearly basis the partnership ignored the mandated seasons of use and number of livestock terms and conditions, often took more AUMs than it paid for, and did it all during the late fall and early winter months when vegetation was supposed to be regrowing." HRP argues that the Actual Use Reports

do not show where the cattle were grazing. HRP's position is that as long as its cattle were grazing on Pasture 5 at the end of any given grazing season, such grazing was allowed, since the 2002 Permit provided that livestock numbers could vary in Pasture 5. We have noted that the annual authorizations do not allow cattle numbers to vary in Pasture 5. However, according to Judge Jackson, the annual authorizations are of no consequence to the extent they differ from the governing permit. Even if we were to agree that the number of cattle allowed to graze Pasture 5 could vary, there is no such provision allowing the number of AUMs to vary. As recounted in the December 2009 Decision on review before ALJ Holt, even if HRP were allowed to vary livestock numbers in Pasture 5, the numbers shown on HRP's Actual Use Reports showed use far in excess of the allowed maximum of 25 AUMs for Pasture 5. *See supra* note 30. ALJ Holt correctly held that given the numbers of cattle HRP was grazing on the TSA, according to HRP's own Actual Use Reports, a hearing to determine which pasture was being grazed would make no difference, since under any scenario HRP was in violation of the 2002 Permit and annual authorizations.

In discussing HRP's record for 2004, Judge Jackson neglects to mention that BLM cited HRP for trespass in that year and that the parties settled that violation. With regard to HRP's Actual Use Report, he propounds a novel formula to correct for what he calls BLM's "obvious errors" to somehow conclude that HRP actually grazed fewer AUMs than was authorized. His analysis is inconsistent with the record. In their MSJs and Post-Hearing Briefs, both BLM and HRP examined in detail HRP's Actual Use Reports for all relevant periods, including 2004. HRP seeks through the Hanley Affidavit to manufacture an issue of fact where none exists.

Judge Jackson magnifies the error in HRP's approach. He generalizes that nothing in the record suggests that HRP moved and gathered cattle any differently during other years than it actually did in 2004. ALJ Holt found, correctly, that HRP's 2004 Actual Use Report showed it to be in noncompliance with its grazing authorization. Applying the formula of his own devising, Judge Jackson makes a series of unsubstantiated assumptions, based upon hypothetical BLM error, as well as upon how HRP was "likely" to have managed its cattle on the TSA during grazing years 2002, 2003, 2005, 2006, and 2007, to conclude that HRP used "less" than its authorized use or that its actual use was "only" some few AUMs over the limit. We respectfully view such reasoning as unsustainable.

We assume that Judge Jackson's analysis is meant to identify potential factual issues that undermine ALJ Holt's order granting BLM's MSJ. However, he mentions no issue that was not briefed in detail before ALJ Holt. The Cross-MSJs and Replies filed by both sides show that the effect to be given HRP's Actual Use Reports was of paramount concern to both BLM and HRP, particularly the issue of whether the number of cattle allowed to graze Pasture 5 could vary and the location of the cattle reported by HRP. Judge Jackson cannot by formula or surmise create genuine issues

of fact where HRP insisted that the “material facts [underlying those issues were] not in dispute.” Hanley MSJ at 35. ALJ Holt agreed that the undisputed facts showed that BLM was entitled to judgment as a matter of law and, therefore, denied HRP’s MSJ. Moreover, even if we agreed, *arguendo*, with HRP’s argument that its practice was to graze *all* of its allowed cattle at any given time on the single Pasture 5, thereby grazing at all times in compliance with its permit, we fail to see how this raises a genuine issue of material fact, when use of any AUM over 25 would be a violation of the 2002 Permit.

We offer two final observations.

Judge Jackson would accept HRP’s claim of “extenuating circumstances” in connection with the 2009 trespasses issued to HRP for grazing cattle on Pastures 1 through 3 even though those Pastures had been closed. We perhaps could give more credence to the argument that the trespass resulted when unknown part(ies) left gates open or damaged those gates, allowing the cattle to stray onto Pastures 1 through 3, if the Actual Use Report for 2007 did not bear Hanley’s handwritten note stating: “I also left gates open onto private land so they [the cattle] could come in on their own. . . . The gates were opened into Trout Springs from Bull Basin [Allotment] during the summer fire.” Ex. B-51 at 2.

The second regards HRP’s new-found conviction that there are material factual issues that require a hearing after all. During discovery, Hanley’s counsel felt compelled to withhold what BLM refers to as “relevant and discoverable documents,” namely letters authored by Hanley, because “under the rules” BLM may “advance criminal sanctions (43 C.F.R. [§] 4150.3(d)) against my client and I cannot advise my client to waive any 5th Amendment rights he may have which may be implicated by the disclosure.” Letter to Counsel for BLM dated Dec. 14, 2010 (attached to BLM’s Motion to Strike), at 2. It is clear that HRP made the calculated decision to move for summary judgment, insisting that it was entitled to judgment based upon the record before the ALJ. There is no basis for now granting HRP’s request for a hearing.

VII. CONCLUSION

HRP has not carried its burden to establish either that BLM failed, in its December 2009 decision, to substantially comply with the Department’s grazing regulations or that, by a preponderance of the evidence, the decision is unreasonable and thus lacks a rational basis. Based upon our review of the record, we conclude that HRP’s history of grazing the TSA, as reflected in its own Actual Use Reports, demonstrates a pattern of noncompliance upon which BLM could justifiably rely to deny HRP’s permit renewal. Alternatively, the adjudicated incidents of trespass would alone provide a rational basis for denying HRP’s permit renewal. We therefore hold that ALJ Holt properly affirmed BLM’s December 2009 Decision,

concluding that HRP failed to substantially comply with the grazing regulations and thus had an unsatisfactory record of performance within the meaning of 43 C.F.R. § 4110.1(b), justifying denial of permit renewal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the County's motion to intervene in the pending appeal is denied, the motion to strike is denied as moot, and ALJ Holt's April 6, 2011, Order is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

ADMINISTRATIVE JUDGE JACKSON DISSENTING:

I must respectfully dissent because I find it was error for ALJ Holt to grant summary judgment to BLM and believe this matter should be remanded to BLM for further proceedings.¹

BLM's December 2009 decision not to renew Hanley's grazing permit was based largely (albeit not exclusively) on alleged noncompliance with its annual grazing bills. Hanley moved for summary judgment, claiming BLM could not rely on those incidents without first providing it with notice and an opportunity for a hearing on those alleged violations. ALJ Holt ruled BLM could rely on unadjudicated noncompliance under 43 C.F.R. subparts 4150 and 4160 when determining whether to renew a grazing permit under 43 C.F.R. subpart 4110 and that Hanley had been given "appropriate notice by the Decision itself" and an opportunity for a hearing to contest those allegations "through its appeal" of that decision. ALJ Decision at 25; *see id.* at 22-25. Since he found Hanley had not met its "burden to show that 'the decision is unreasonable or improper,'" he denied its motion for summary judgment. *Id.* at 26 (quoting *Kelly v. BLM*, 131 IBLA 146, 151 (1994)). I do not disagree with ALJ Holt's denial of Hanley's motion, but where I and the majority disagree is whether he properly granted BLM's motion for summary judgment. Whereas the majority affirms his order granting that motion, I would reverse because I find there were and are disputed issues of material fact regarding most (but not all) of the noncompliance identified and relied on by BLM in its December 2009 decision. To place my disagreement and dissent into perspective, I first illuminate the legal and factual background for this appeal, including Hanley's 1997 grazing permit, BLM's 2002 grazing decision, its 2003 agreement to settle Hanley's challenge to that decision, BLM's breach of that settlement for the 2004-2007 grazing seasons, and also its 2008 grazing decision.

LEGAL AND FACTUAL BACKGROUND

Grazing public lands is authorized under rules implementing the Taylor Grazing Act, 43 U.S.C. § 315b (2006). Pursuant to its 2005 rules, BLM issues grazing permits for 10-year terms that establish permitted use, expressed in Animal Unit Months (AUMs) that are defined as the forage necessary to sustain one cow for one month, and such other terms and conditions as may assist in proper range management (*e.g.*, annual

¹ The record on appeal includes the parties' motions for summary judgement and their attached, supporting exhibits, which BLM identified by an "A" and Hanley identified with a "B". For ease of reference, these documents are cited by that numbering convention (*e.g.*, BLM Motion for Summary Judgement, Exhibit 19, is cited as Ex. B-19).

grazing reports by the permittee). See 43 C.F.R. §§ 4100.0-5, 4110.2-2, 4130.2, 4130.2-1, 4130.3-2. A permittee is authorized to graze under its permit upon prior payment of annual grazing fees required by 43 C.F.R. § 4130.8-1. See 43 C.F.R. § 4130.8-1(g) (“Grazing use that occurs prior to payment of a bill . . . is unauthorized and may be dealt with under subparts 4150 and 4170”); 43 C.F.R. § 4140.1(b)(1)(ii). While payment of a grazing bill authorizes grazing under a grazing permit, a grazing bill cannot modify permit terms or conditions. As noted in *Granite Trust Organization v. BLM*, 169 IBLA 237 (2006), which was also an appeal from a decision by ALJ Holt:

Judge Holt considered annual grazing bills as reflective of authorized use. The terms and conditions applicable to the grazing use of public lands are reflected in applicable permits, allotment management plans and other similar undertakings. See 43 CFR 4100.5. Although the payment of annual grazing bills is a condition precedent to authorized use, 43 CFR 4130.8-2(e) and 4140.1(b)(1), such bills do not establish the terms and conditions of such use. To hold otherwise would empower BLM unilaterally to change the terms and conditions of authorized use through billing and without complying with applicable procedural requirements.

169 IBLA at 245-46 n.8 (record citations omitted). Applicable permitting rules specify that before BLM can modify a grazing permit, it must first consult with the permittee and provide an opportunity for review and comment on any “reports that evaluate monitoring and other data that the authorized officer uses as a basis for making decisions to increase or decrease grazing use, or otherwise to change the terms and conditions of a permit.” 43 C.F.R. § 4130.3-3 (Modification of permits or leases). Moreover and in any event, a grazing bill is not identified in 43 C.F.R. § 4130.6 (Other grazing authorizations) and does not constitute an appealable decision that determines rights, takes or prevents action, or otherwise adjudicates grazing privileges. See *Defenders of Wildlife*, 144 IBLA 250, 255 (1998) (citing *Headwaters, Inc.*, 101 IBLA 234, 239 (1988)).

1. *The 1997 Grazing Permit*

The record shows Trout Springs Allotment #0539 (TSA) and Hanley Fenced Federal Range Allotment #0453 (FFRA) encompass intermingled public lands and private lands in Owyhee County, Oregon and that Hanley has long operated a year-long cattle operation in the area. Hanley was issued a 10-year permit on February 18, 1997, which permitted 555 of its cattle to graze public lands in the TSA between June 15 and November 15 and specified permitted use at 2808 AUMs, plus 7 AUMs for grazing public lands in the FFRA every December. This and several other grazing permits were the objects of judicial review, wherein the court ruled BLM failed to comply with

section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and then established a schedule for its NEPA review of these permits. *See* Decisions and Orders dated Feb. 29 and Mar. 31, 1999, *IWP v. Hahn*, No. 97-0519-S-BLW (D. Idaho). BLM thereafter prepared an environmental assessment under NEPA and a separate rangeland health assessment to inform its actions on judicial remand of Hanley's 1997 grazing permit.

2. *The 2002 Grazing Decision*

BLM decided to reissue a grazing permit to Hanley for the TSA and FFRA on March 12, 2002 (2002 Decision), which determined that TSA Pastures 1, 2, and 3 were not then meeting applicable rangeland health standards, reduced Hanley's permitted use of those pastures by half (from 2,788 AUMs to 1,405 AUMs),² retained the same permitted use for Pasture 5 (25 AUMs) and the FFRA (7 AUMs), and shortened the grazing season for Pastures 1, 2, and 3 by at least a month from the date specified in the 1997 permit.³ 2002 Decision at 7, 9-10. The decision also specified that Hanley would be allowed to turn out 555 cattle into either Pasture 1 (5,261 acres) or Pasture 3 (3,402 acres), must remove them from those pastures by the end of July, after which they could graze Pasture 2 (12,016 acres) until September 30 (or October 15 based on prior BLM approval), and until December 31 on 207 acres of public land in Pasture 5 (1,575 acres) and 63 public acres in the FFRA (662 acres). *Id.* at 10.

Pasture 5 and the FFRA contain intermingled public and private lands that are unfenced, which allows cattle to move freely between those lands and renders it impossible for BLM to monitor compliance with public land AUM limits that assumed 4 Hanley cattle grazing on public lands in Pasture 5 for 6 months and 1 head of its cattle grazing such lands for 7 months in the FFRA. *See* Affidavit of Michael Hanley dated

² These reductions and that determination were based on rangeland health assessments of the TSA and FFRA that were completed on July 6, 2001. 2002 Decision at 7. However, BLM elected not to include them as part of its record for this appeal. In any event, due to this drastic reduction in permitted use, BLM provided for a 2-year phase-in period and interim management for the 2002 and 2003 grazing seasons, which extended the grazing season for Pasture 2 and increased permitted use of the TSA to 1,952 AUMs (an additional 547 AUMs). *Id.* at 15.

³ BLM stated the grazing season on Pasture 2 would end on August 30, could be extended through October 15 "by reducing cattle numbers and not exceeding 839 AUMs," but that such an extension "will require prior approval from the BLM." 2002 Decision at 10, 14.

May 2, 2011 (Hanley Affidavit) at 4. In apparent recognition of these circumstances in Pasture 5 and the FFRA, BLM specified that their “[l]ivestock numbers could vary but use may not exceed 50 percent utilization,” which was defined as “50 percent of the current year’s growth as determined by the Qualitative Assessment Landscape Appearance Method or the Key Species Method.” 2002 Decision at 10, 11; *see* Hanley Affidavit at 4.

3. *BLM Breach of the 2003 Settlement Agreement on the 2002 Grazing Decision*

Hanley appealed from the 2002 Decision’s drastic reduction in permitted use for Pastures 1-3 and asserted its grazing use had not caused the failure of those pastures to meet rangeland health standards, claiming that failure was due to trespassing cattle owned by others that BLM was aware of but had done nothing to stop. We granted Hanley’s petition for a stay, observed that the issues it raised were “so serious as to require that they be the subject of more deliberate investigation before the Administrative Law Judge, who will have the benefit of conducting a hearing on the allegations,” and then referred the matter to the Hearings Division by Order dated May 31, 2002 (IBLA 2002-321), at 6. BLM then issued a grazing bill for the permitted use of 2,808 AUMs in the TSA, which was at the level specified in and authorized under the 1997 permit. *See* 43 C.F.R. § 4160.4(d). Hanley paid that bill, grazed the TSA, and reported on December 2, 2002, that it turned out 456 cattle in June and had gathered 447 of them by November 15, the date specified in the 1997 permit for its removal of cattle from public lands in the TSA. BLM calculated during its 2009 review of Hanley’s performance that it actually used 792 fewer AUMs than it had paid for. Ex. B-19 at 4.

Hanley entered into a settlement agreement of its appeal from the 2002 Decision on March 21, 2003, whereby it agreed to withdraw that appeal and “abide by” the 2002 Decision for the 2003 grazing season in return for BLM agreeing to propose a new decision by October 31 and a final grazing decision “prior to the start of the [2004] grazing season,” which was consistent with the March 31, 1999, court order in *IWP v. Hahn*. Ex. A-14 (2003 Settlement) at 3. After Hanley withdrew its appeal, it was dismissed by ALJ James H. Heffernan on March 24, 2003. *See* Ex. A-16.

Hanley requested that it be allowed to graze Pastures 1 and 2 after September 30, 2003, but BLM denied that request because it determined Hanley could not unilaterally modify that date. *See* Exs. B-20 at 1-2, 4, B-21, B-22. Hanley then paid its 2003 bill for the permitted use of 1,996 AUMs in the TSA under the 2002 Decision’s interim management provisions.⁴ *See supra* note 2. In writing to express its concern with BLM’s

⁴ Hanley received a letter from BLM on Aug. 18, 2003, which stated that a fence had
(continued...)

lack of action to comply with their settlement agreement, Hanley stated that fencing delays under the 2002 Decision had allowed up to 200 cattle owned by others “to invade the allotment,” resulting in overgrazing and threatening “all we’ve accomplished in the past 30 years.” Ex. B-24 at 1, 2-3. Hanley reported on December 16, 2003, that most of its cattle were gathered from the TSA in September. Ex. B-23 at 2. BLM calculated during its 2009 performance review that Hanley actually used 145 fewer AUMs than it had paid for. Ex. B-23 at 4, 6.

BLM belatedly issued a proposed grazing decision under its settlement agreement, which identified its proposed action as extending the Pasture 2 grazing season until October 15 and setting the permitted use of public lands in the TSA at 1,999 AUMs. See Ex. B-35 (Environmental Assessment #ID-096-2004-001) at 5-23. This proposal was protested,⁵ but rather than issue a final decision that would have been consistent with the March 31, 1999, court order in *IWP v. Hahn*, BLM simply billed Hanley for its permitted use of 1,854 AUMs. See Exs. B-32, B-33, B-34. Hanley grazed the TSA during 2004 and reported that cattle turned out in June were moved to Pasture 2 in mid-July and that it had gathered most of them by October 15, 2004, the date BLM had proposed for the final removal of cattle from Pastures 1-3.⁶ See Ex. B-37 at 1.

BLM never issued Hanley a grazing permit under its 2002 Decision or the final grazing decision it had agreed to issue in return for Hanley dismissing its appeal of the 2002 Decision. See Ex. A-31. Instead, it simply continued issuing grazing bills for the permitted use of public lands during the 2005, 2006, and 2007 grazing seasons. See, e.g., Exs. B-41, B-42, B-44, B-45, B-49, B-50. Nor did BLM ever issue a timely notice claiming that Hanley was in noncompliance with its grazing bills for any grazing season.

⁴ (...continued)

been constructed in noncompliance with applicable BLM specifications, but this issue was apparently resolved to BLM’s satisfaction. See Exs. B-26, B-27; Hanley Affidavit at 21. BLM issued a notice of trespass for Hanley cattle being in Pastures 1 and 3 on Oct. 3, 8, and 23, 2003, which was resolved by its paying for the additional use of 3 AUMs. See Ex. B-31 at 3, 7, 8, 11, 17-23.

⁵ Neither that protest nor BLM’s proposed decision are part of the record on appeal.

⁶ Hanley received a Notice of Trespass because its cattle were in Pasture 1 after July 15, 2004, but that trespass incident was closed by BLM when Hanley paid for the additional use of 4 AUMs in that pasture. See Exs. B-38 at 18, B-39 at 2, B-40.

4. *The 2008 Grazing Decision*

BLM closed Pastures 1, 2, and 3 by decision dated May 5, 2008 (2008 Decision), based on monitoring data and other available information, but expressed no concern over whether Pasture 5 or the FFRA were then meeting applicable rangeland health standards. Hanley appealed that decision and agreed to a stipulated stay of proceedings in return for BLM agreeing to issue a new grazing decision by December 31, 2009; Hanley also agreed to “take voluntary non-use [of Pastures 1-3]” until that decision issued or December 31, 2009, whichever first occurred. Ex. A-27 at 2.⁷ Thus, Hanley was permitted to continue grazing unfenced public lands in Pasture 5 and the FFRA under the 2002 Decision, and BLM records show that Hanley complied with the 2002 Decision and 2008 Decision in 2008 but that six trespasses occurred in 2009,⁸ which were appealed by Hanley on December 10, 2009. Exs. A-74, A-75, A-76.

5. *BLM’s Decision not to Renew Hanley’s Grazing Permit and Related Proceedings*

BLM decided not to reissue Hanley a new grazing permit on December 16, 2009 (2009 Decision), which became a final decision on January 15, 2010. It deemed a proposal Hanley made for BLM to consider during its NEPA review for a new grazing decision to be a request for permit renewal, which triggered a BLM review of Hanley’s compliance with the 2002 Decision and 2008 Decision. 2009 Decision at 2, 3; see 43 C.F.R. § 4110.1(b), (d). From its compliance review, BLM concluded that grazing by Hanley of the TSA was “not in conformance with the season of use identified on the

⁷ ALJ Sweitzer stayed proceedings based on that agreement, but after Hanley appealed from BLM’s decision not to renew its grazing permit, he vacated the 2008 Decision on Mar. 4, 2010, based on the joint representation of the parties. Ex. A-33.

⁸ One Hanley cow was observed with other cattle in Pasture 2 on Sept. 17, and on Sept. 22, 6 cattle were observed in that pasture and promptly removed by Hanley. Exs. B-52, B-53, B-54, B-59. A total of 18 cattle were observed on Oct. 14 and 27, of which 8 were Hanley cattle that had drifted into Pasture 2 and were promptly removed by Hanley. See Exs. B-56, B-57, B-58, B-59, B-63, B-64. Hanley wrote to BLM on Oct. 31, complaining that he closed gates to Pasture 2 and had to reclose them repeatedly after they were intentionally left open by others, which made the Oct. 27 incident “the fourth time this season gates have been opened allowing cows to enter [Pasture 2].” Ex. B-64. Additional Hanley cattle were in Pasture 2 on Nov. 5 and may have been observed in that pasture during an overflight on Nov. 9. See Exs. A-72, B-60 at 6. BLM issued a Notice of Trespass for the Sept. 22 incident and presented Hanley with a “preview” grazing bill on Nov. 13, 2009, for its cattle being in Pasture 2 on each of the above-described dates.

annual billing” for the 2002, 2003, 2004, 2005, 2006, and 2007 grazing seasons. 2009 Decision at 5; *see id.* at 7-9. Notwithstanding then-pending Hanley appeals of the 2008 Decision and 2009 trespasses,⁹ BLM found it grazed Pasture 1 in trespass during 2009 and that the public record showed Hanley cattle were observed in trespass on Pasture 1 on 3 days in 2003 and 4 days in 2004 and that it was responsible for constructing a noncompliant fence in August 2003. *See id.* at 6-9; *supra* notes 5, 7, 8. Having determined Hanley was not “in substantial compliance” with the 2002 Decision and 2008 Decision, BLM concluded it could not renew Hanley’s grazing permit under 43 C.F.R. § 4110.1(b). 2009 Decision at 10, 11.

Hanley timely appealed and petitioned for a stay of the 2009 Decision, which BLM opposed on February 16, 2010 (BLM Opposition), after it had earlier moved to dismiss Hanley’s appeal of the 2009 trespasses. Ex. A-77.¹⁰ BLM represented to ALJ Sweitzer that since it “has no management authority on State or private land,” Hanley would suffer little or no harm if a stay was denied because it will continue to have access to private lands in Pasture 5 and the FFRA, could “easily” fence and segregate those lands from intermingled public lands, and continue “obtaining replacement forage due to the closure of pastures 1, 2, and 3.” BLM Opposition at 3. However, it did not then claim only 4 cattle were permitted to graze Pasture 5, grazing use of more than 24 AUMs, or consumption of more than 50% of the current year’s growth in that pasture during either 2008 or 2009. Hanley replied on March 12, 2012 (Reply), by asserting that fencing and associated costs to segregate its lands from the public lands in Pasture 5 and the FFRA would significantly exceed \$20,000 and that it could no longer rely on replacement forage “due to a change in circumstances” in 2009. Reply at 5. Hanley also contended that if its stay request was granted, it should be allowed to resume grazing of Pastures 1, 2, and 3 under the 2002 Decision, pursuant to 43 C.F.R. § 4160.3(d) and (e), and the Board’s order in *Fallini Living Trust*, IBLA 2002-130 (March 4, 2002). *Id.* at 2.

⁹ Hanley submitted a verified notice of appeal and statement of reasons on Dec. 10, 2009 (Verified NOA). It was personally signed by Hanley family members who stated that Hanley cattle found in Pasture 1 were there due to the unlawful conduct of third parties who had pulled back fencing and left gates open to allow their cattle to drift from Pasture 5 into that pasture. Verified NOA at 4.

¹⁰ Hanley opposed dismissing its appeal of those trespasses, claiming it needed an adjudication of them because they had been “ratified and relied” on in the 2009 Decision. Ex. A-78 at 7. ALJ Sweitzer granted BLM’s motion and dismissed that appeal, ruling that Hanley would nonetheless have an opportunity to adjudicate those trespasses in its appeal from the 2009 Decision. Ex. A-79.

ALJ Sweitzer granted Hanley's stay request on March 16, 2010 (Stay Order). He found the balance of harms tipped decidedly in Hanley's favor because if a stay were denied, it would be required to "survey for and construct fencing to keep its cattle grazing its private lands out of [the public lands in Pasture 5 and the FFRA]" at a cost of "many thousands of dollars," whereas little or no harm would befall BLM if a stay was granted because grazing would remain restricted to private and public lands in Pasture 5 and the FFRA and there "appears to be no threat of harm to range resources unless Hanley's cattle graze in an unauthorized area or manner [under BLM's 2002 and 2008 grazing decisions]." Stay Order at 6, 7. He also found Hanley was likely to succeed in showing BLM acted improperly by treating an August 2009 Hanley proposal, made in the context of a NEPA review for a grazing decision, as an application for renewal of its 2002 grazing permit that would not expire until February 28, 2012. *Id.* As such, giving immediate effect to the 2009 Decision, as argued by BLM, would be the functional equivalent of cancelling that permit, for which there should be "a full hearing on the merits . . . where, as here, most of the alleged trespasses have never been noticed and resolved." *Id.* at 7, 8. ALJ Sweitzer limited his stay to the level of use Hanley was authorized for 2008, which restricted its grazing to Pasture 5 and the FFRA. *Id.* at 6 (citing 43 C.F.R. § 4160.3(d) (2005)), 8. Hanley appealed, claiming ALJ Sweitzer should have allowed it to resume grazing Pastures 1-3, but we affirmed his Stay Order by order dated July 9, 2010, *Hanley Ranch Partnership v. BLM*, IBLA 2010-114.

ALJ DECISION GRANTING SUMMARY JUDGMENT TO BLM

ALJ Sweitzer's stay remained in effect until BLM's motion for summary judgment was granted by ALJ Holt, to whom this appeal was transferred for hearing and a decision. By Order dated September 29, 2010, ALJ Holt directed that all dispositive motions be filed by January 28, 2011, and scheduled his hearing of this matter for May 17, 2011. Hanley and BLM each moved for summary judgment based, in significant part, on their fundamentally different views of what was permitted under the 2002 Decision.¹¹

BLM asserted that Hanley was never permitted to graze more than 4 cattle in Pasture 5 because its grazing bills did not authorize Hanley to vary its livestock numbers in that pasture, whereas Hanley contended it was expressly permitted to vary those

¹¹ Hanley filed a motion for summary judgment on Dec. 30, 2010 (Hanley Motion), and a combined reply and response to BLM's motion on Feb. 7, 2011 (Hanley Response); BLM filed its motion on Jan. 31, 2011 (BLM Motion), and its reply on Feb. 24, 2011 (BLM Reply). As noted, I here address only whether BLM's motion was properly granted by ALJ Holt.

livestock numbers in the 2002 Decision, provided they consumed no more than 50% of the current year's growth. Based on these radically different views, they disagreed over whether Hanley's annual use reports showed it was in permit noncompliance. Hanley maintained they did not support a BLM finding of noncompliance as a matter of law because its reports did not show cattle were gathered from Pastures 1, 2, or 3 after the end of their grazing seasons, when they were expressly permitted to be in Pasture 5. See Hanley Motion at 17, 18, 22, 25, 27, 28-29; Hanley Reply at 2, 3. BLM claimed these reports supported its findings because they showed more than 4 Hanley cattle were in the TSA at the end of the Pasture 1-3 grazing seasons for 2002, 2003, 2004, 2005, 2006, and 2007. BLM Motion at 11, 13-14, 17, 19, 20-21, 23.¹² According to BLM, it was an "irrefutable" fact that Hanley's annual grazing bills authorized it to graze "no more than 4 head of livestock on any portion of the Trout Springs Allotment" when the grazing season for Pastures 1-3 ended, making it "completely irrelevant" whether Hanley cattle were thereafter gathered from Pasture 5 or any other TSA pasture. Reply at 15, 16.

Hanley also contended BLM could not properly consider and rely on trespasses that occurred in 2009 until after a hearing. Hanley Motion at 31-35 (quoting ALJ Sweitzer's order dismissing its appeal of those trespasses and citing its verified representations to ALJ Sweitzer); see *supra* note 9. BLM argued that, even if it prematurely relied on those trespasses (before first adjudicating them) or improperly found Hanley was in noncompliance with terms it added to Hanley's annual grazing bills/authorizations, ALJ Holt should defer to BLM's judgment and affirm its "highly discretionary decision to not renew [Hanley's] grazing permit." BLM Motion at 46.

BLM's motion for summary judgment was granted by order dated April 6, 2011 (ALJ Decision). ALJ Holt stated, without discussion or analysis, that Hanley had grazed the TSA "under the terms of the 2002 permit as modified by annual grazing bills issued for 2002-2007," agreed with BLM's view that they precluded Hanley from grazing more than 4 head of cattle in Pasture 5, and rejected Hanley's view that it was permitted to graze more than that number under the 2002 Decision. ALJ Decision at 2; see *id.* at 10-18. He therefore found that so long as more than 4 cattle were in the TSA, including Pasture 5 and its 1,575 acres, after the end of the grazing seasons for Pastures 1, 2, and 3, it was legally irrelevant and factually immaterial whether they were then gathered from Pasture 5 or Pastures 1-3. *Id.* at 10. ALJ Holt also rejected Hanley's claim it was entitled to a hearing on the 2009 trespasses under ALJ Sweitzer's order

¹² BLM discounts Hanley's claim that it should have earlier received notice that its grazing of Pasture 5 was not in compliance with grazing bills/authorizations because to impose such a notice requirement on it would "unnecessarily burden" and distract BLM from "its other land-management obligations." BLM Reply at 4, 6, 7.

because he found Hanley waived its right to a hearing by failing to proffer affidavits or documentary evidence “to demonstrate that these acts of non-compliance did not occur,” as had been suggested by BLM.¹³ *Id.* at 20, 25. This appeal timely followed.

DISCUSSION

The parties each moved for summary judgment based on separately identified facts supportive of their respective positions, but they did not agree to have this matter decided on cross motions for summary judgment on either stipulated facts or the record submitted by BLM.¹⁴ Nor did Hanley “decline” to exercise its right to a hearing under the Taylor Grazing Act “by moving for summary judgement,” as asserted by the majority, 183 IBLA at 200, because even if its motion were denied, it would simply proceed to a statutory hearing on its challenge to the BLM decision not to renew its grazing permit.¹⁵

¹³ BLM characterized these 2009 trespasses as “egregious” and “the worst conduct” engaged in by Hanley and asserted they were properly relied on in the decision not to renew Hanley’s grazing permit. BLM Motion at 37. Hanley maintained the issue was not whether those trespasses occurred, but whether it was in substantial compliance with the 2008 Decision closing those pastures and whether BLM acted unreasonably in refusing to renew its grazing permit based on incidents for which it had a right to a hearing. Hanley Response at 2-3 (quoting ALJ Sweitzer’s order dismissing its appeal of those trespasses). BLM replied by stating that to show its 2009 Decision was unreasonable, Hanley must present “evidence” demonstrating compliance or a sworn declaration “denying wrongdoing.” BLM Reply at 12. As the Hanley Affidavit does so, it is unclear why BLM opposed its request that the Board remand this matter for a hearing.

¹⁴ It is clear from my reading of their pleadings before ALJ Holt that Hanley and BLM relied on different undisputed facts and their differing views as to what the undisputed facts showed (*e.g.*, whether the 2002 Decision was modified by BLM grazing bills and whether Hanley’s actual use reports showed noncompliance with the 2002 Decision and those bills).

¹⁵ The majority cites no precedent for its view that by moving for summary judgement a grazing permittee declines to exercise or somehow waives its statutory right to a hearing, as the trio of Board decisions it cites reaffirm that grazing permittees have a statutory right to a hearing but do not address whether that right has been declined or waived by their moving for summary judgement. *See* 183 IBLA at 200. To the contrary, each of their cited cases rejected BLM efforts to avoid a hearing by filing a motion to dismiss: (*Esperanza Grazing Association*, 154 IBLA 47 (2000) (rejected dismissal based on a

(continued...)

I therefore disagree with the majority view that “ALJ [Holt] was entitled to consider whether BLM’s decision to not renew HRP’s permit was supported by the existing record.” *Id.*

The issue presented to ALJ Holt (and the Board on appeal of his decision) was whether BLM was entitled to judgment as a matter of law based on the material facts it identified, which were based largely on affidavits by BLM employees. Hanley was required to show there was a dispute as to the material facts identified and relied on by BLM in its motion, but it was not required to do so by affidavit or other evidence, as it was permitted to rely on the factual record reflected in its permit file and any reasonable inferences drawn from those facts, which ALJ Holt was required to consider “in the light most favorable to [Hanley].” *Edwin Larson v. BLM (On Reconsideration)*, 129 IBLA 250, 252 (1994).

Viewing this record in the light most favorable to Hanley shows there are disputed issues of material fact on whether BLM properly found it was engaged in widespread and continuing noncompliance, which were the bases upon which it determined Hanley was not in “substantial compliance” with its grazing permit. As discussed below, the factual record and reasonable inferences drawn from its facts show only that Hanley exceeded the Pasture 5 grazing season by 4 days in 2002, a total of 7 Hanley cattle were observed in trespass during from 2003 through 2004, and that the Pasture 5 AUM limit was exceed by 23 AUMs in 2005 and 9 AUMs in 2006. The record also shows Hanley cattle were in a closed pasture during 2009 but that they were in that pasture because gates had been illegally left open by individuals Hanley believed were seeking to curtail his grazing in the area. While these instances of noncompliance are undisputed, they are but a small fraction of those found by BLM when it determined that Hanley was not in substantial compliance with its 2002 and 2008 Decisions. The issue to be decided by the Board is not whether BLM could have determined these limited instances show substantial noncompliance, but whether ALJ Holt properly granted BLM’s motion for summary judgment by his affirming each finding of noncompliance in its 2009 Decision, rather than hold a hearing to decide whether those findings were proper or should be set aside. Moreover, if ALJ Holt erred in ruling that certain facts were immaterial to those findings of noncompliance (*e.g.*, where Hanley gathered its cattle from between 2002 and 2007 and whether extenuating circumstances affected its compliance during 2009),

¹⁵ (...continued)

settlement the permittee was not a party to), *William N. Brailsford*, 140 IBLA 57 (1997) (rejected dismissal for lack of standing), and *Lundgren v. BLM*, 126 IBLA 238 (1993) (rejected dismissal for lack of jurisdiction over the central issue presented for decision).

I believe it necessarily follows his decision should be set aside and this matter remanded for further proceedings.

Hanley focuses its statement of reasons (SOR) on what it characterizes as the “heart” of ALJ Holt’s decision, his affirmance of all BLM findings of noncompliance with grazing bills issued by BLM between 2002 and 2007. SOR at 19. It also appeals from ALJ Holt’s denial of its right to a hearing on whether it substantially complied with the 2008 Decision due to extenuating circumstances surrounding its cattle being in closed pastures during 2009. My views on each of these issues are separately addressed below and also why I believe the ALJ Decision should be reversed and this matter remanded, either for a hearing before an ALJ or to BLM for it to make a proper determination under 43 C.F.R. § 4110.1(b)(1)(ii).¹⁶

1. Substantial Compliance with the 2002 Decision

Hanley states, as it did to ALJ Holt, that the 2002 Decision expressly permitted it to graze more than 4 cattle in Pasture 5, provided they did not consume more than 50% of the current year’s growth on public lands in that pasture. SOR at 21, 23, 26-27, 30, 32, 35. Since its actual use reports do not show Hanley cattle were gathered from Pasture 1, 2, or 3, it contends they do not show noncompliance with the 2002 Decision because at the end of their grazing seasons, its cattle were permitted to be in Pasture 5 and non-TSA lands. BLM responds, as it did to ALJ Holt (but not to ALJ Sweitzer), that Hanley was not permitted to graze more than 4 cattle in Pasture 5 because no “grazing bill/authorization” allowed its livestock numbers to vary, whereas its grazing bills did so for the FFRA. Answer at 51. The majority is persuaded by BLM’s view, but I am not.

The 2002 Decision is clear and unambiguous to me. It expressly permitted livestock numbers to vary in Pasture 5 and the FFRA and for a variance to extend the grazing season on Pasture 2, but only that grazing season variance required prior BLM approval.¹⁷ 2002 Decision at 10, 11, 14. BLM’s grazing bills repeated the decision’s

¹⁶ By relying on BLM to exercise its considerable expertise and experience in grazing the public lands in making that determination on remand, the Board would avoid relying on the expertise of an ALJ if remanded to the Hearing Division and our own limited expertise and experience in managing the grazing of the public lands and determining what is (or is not) “substantial compliance” under 43 C.F.R. § 4110.1(b)(1)(ii).

¹⁷ As discussed, the 2002 Decision established a rotation schedule for Pastures 1-3, with cattle turn out in Pasture 1 or 3 in alternating years, moved to and permitted to graze
(continued...)

variance language for the FFRA, but for whatever reason, it did not repeat that same language for Pasture 5. I place no importance on that omission in these grazing bills, because if BLM had intended to require prior approval to vary livestock numbers in that pasture, it would have so specified, as it clearly did for the Pasture 2 grazing season variance. Nor do I find Hanley understood it was required to apply for such a variance before it could graze more than 4 cattle in Pasture 5, simply because it requested permission to turn out cattle early for the 2003 grazing season. *See* 183 IBLA at 203-04; *but see* Hanley Affidavit at 10 (BLM authorized “use in excess of 4 head and 25 AUMs in Pasture 5 *as a whole* due to the significant amount of private lands therein”), 18-19. Hanley asserted to ALJ Holt that it believed it was permitted to graze more than 4 cattle in Pasture 5, notwithstanding the special terms BLM added to its grazing bills. Whether its belief was honestly held and reasonable are issues of fact I believe should be determined at hearing where the veracity and credibility of Hanley and its witnesses could be assessed by an ALJ.

To interpret Hanley’s grazing bills as imposing a limit on the number of cattle it was permitted to graze in Pasture 5, as ruled by ALJ Holt, necessarily modified the 2002 Decision and, by inference, Hanley’s grazing permit without the procedural protections afforded grazing permittees under 43 C.F.R. § 4130.3-3, as recognized by the Board in *Granite Trust*, 169 IBLA at 245-46 n.8. The majority purportedly distinguishes *Granite Trust* by suggesting that Hanley’s grazing bills properly limited its grazing of public lands in Pasture 5 to only 4 cattle because that limit “was dictated by range conditions,” 183 IBLA at 218, but there is no record support for that suggestion or any claim by BLM that it was then acting pursuant to 43 C.F.R. § 4130.3-3, which expressly requires notice and an opportunity to comment by the permittee before any such limit can be imposed. The majority also seems to suggest that the special terms BLM added to its grazing bills were somehow permissible due to “litigation brought by Western Watersheds Project and the resulting settlement agreements,” 183 IBLA at 218, but as noted, the 2002 Decision resolved that litigation and whatever concerns WWP may have had with grazing the TSA simply do not excuse BLM from affording permittees the protections specified in 43 C.F.R. § 4130.3-3, as identified and recognized in *Granite Trust*. *See Esperanza Grazing Association*, 154 IBLA at 54.

¹⁷ Pasture 2 during August through the end of September. 2002 Decision at 10. Hanley cattle were then permitted to graze Pasture 5, which contains 207 acres of unfenced public land intermingled with 1,368 acres of private land. These provisions, including the variance to extend the Pasture 2 grazing season, were based on BLM findings that Pastures 1-3 did not meet applicable rangeland health standards, and its 2002 Decision resolved WWP’s challenge to Hanley’s 1997 permit.

I also find BLM's breach of its 2003 settlement agreement with Hanley to be a relevant factor in addressing whether BLM properly determined that Hanley was not in substantial compliance with its 2002 Decision. BLM agreed to replace that decision in return for Hanley's immediately withdrawal of its appeal of the 2002 Decision and its agreeing to "abide by" that decision in 2003, which reflected an intent by BLM to take a voluntary remand of that decision when ALJ Sweitzer dismissed Hanley's appeal several days later. For BLM to breach that settlement agreement and modify the 2002 Decision without regard to 43 C.F.R. § 4130.3-3, and to do so with impunity and without consequences is, to me, simply unacceptable in our deciding this appeal for the Secretary. I therefore disagree with the majority view that since Hanley's grazing bills did not expressly state it could vary livestock numbers in Pasture 5, it was not permitted to do so and also dissent from their affirming ALJ Holt's ruling that Hanley's grazing of the TSA was under the 2002 Decision, "*as modified by annual grazing bills issued for 2002-2007,*" which rendered "*individual cattle numbers for each pasture . . . not material.*" 183 IBLA at 210 (quoting ALJ Decision at 2, 10). Moreover, if Hanley was permitted by the 2002 Decision to graze more than 4 cattle in Pasture 5 because it had not been modified by BLM grazing bills, *see Granite Trust*, 169 IBLA at 245-46 n.8, the record shows there were only a few, limited exceedences by a handful of cattle with its identified grazing seasons and permitted use of the TSA.

Hanley clarifies what is shown on its actual use report for 2004 by stating that "Fairy Lawn" is the common name for Pasture 5 and "Nichols Field" is not in the TSA. Hanley Affidavit at 24 (quoting Ex. A-45). A review of that report shows Hanley gathered 165 cattle from Pasture 5 in early October, 34 from the "Nichols Field" in mid-October, and another 85 cattle from Pasture 5 between October 18 and November 12, 2004 (none were gathered from Pastures 1-3). Ex. B-37. Since BLM deemed that no more than 4 cattle were permitted to graze Pasture 5, it found these 284 cattle consumed 193 AUMs on "100%" public lands after the end of the Pasture 1-3 grazing seasons for 2004. Ex. B-37 at 2-3.

BLM erroneously included cattle and AUMs consumed in another allotment during 2004 (*i.e.*, 34 of 284 cattle gathered by Hanley were from another allotment, whereas 250 were then in Pasture 5 (88%)) and also erred by basing its calculations of AUM use in Pasture 5 ("Fairy Lawn") as if it was 100% public land, whereas only 207 of its 1,575 acres are public lands (13%). The majority disregards both of these uncontested facts and resulting BLM errors by simply stating they are "inconsistent with the record" and that Hanley is seeking "through the Hanley Affidavit to manufacture an issue of fact where none exists." 183 IBLA at 219; *see id.* ("ALJ Holt found, correctly, that HRP's 2004 Actual Use Report showed it to be in noncompliance with its grazing authorization"). Rather than ignore the record and disregard these BLM errors, I believe their effect on compliance can be reasonably inferred by a simple formula: [AUMs

identified by BLM as being consumed after the end of the Pasture 1-3 grazing season] X [percentage of cattle grazing in and gathered from Pasture 5 (88%)] X [percentage of public lands in Pasture 5 (only 13% of its 1,575 acres)].

Excluding what BLM should have excluded during its review of Hanley's 2004 actual use report (cattle in the "Nichols Field," a non-TSA pasture) and including what it should have been included (only 13% public lands in Pasture 5), BLM should have found that only 250 cattle grazed Pasture 5 (commonly referred to as "Ferry Lawn") and consumed 22 AUMs on its public lands during October and November of 2004 ($193 \text{ AUMs} \times 0.88 \times 0.13 = 22.1 \text{ AUMs}$), which was less than its authorized grazing use of 28 AUMs. Ex. B-33 at 2. Hanley swears it complied with the 2002 Decision between 2002 and 2007, and while its actual use reports for 2002, 2003, and 2005-2007 are not as specific as the 2004 report, there is nothing in the record to suggest that Hanley grazed the TSA any differently in 2004 than during any other year. See Hanley Affidavit at 17, 21 (except for the settled 2003 trespasses), 25 (except for the settled 2004 trespasses), 27, 30, 33. Viewing the factual record and reasonable inferences drawn from those facts in the light most favorable to Hanley, I believe the record shows:

- **2002** Hanley was permitted and authorized to graze the TSA until November 15 (based on its 2001 authorization under the 1997 permit), but 19 cattle remained until 15 were gathered on November 17, 2 on November 18, and 2 others on November 19, 2002. See Ex. B-19 at 2-4. While exceeding that grazing season by 4 days and consuming 2 additional AUMs, Hanley did not exceed its permitted use because it paid for 2,804 AUMs in 2002 but actually used only 2,012 AUMs.
- **2003** Hanley was permitted to graze Pastures 1, 2, and 5 and authorized the grazing use of 1,996 AUMs in the TSA, including 28 AUMs for Pasture 5. Its actual use report shows it gathered 214 cattle after the end of the grazing season for Pastures 1 and 2. BLM assumed these cattle were in Pastures 1, 2, and 5 and calculated that they consumed 153 AUMs on 100% public lands. See Ex. B-23 at 4. But if they were moved and gathered similarly to what actually occurred the following year (2004), correcting for BLM's unsupported assumption to the contrary would show roughly 188 cattle remained in Pasture 5 and consumed 18 AUMs on its public lands after the end of the Pasture 1 and 2 grazing seasons ($153 \text{ AUMs} \times 0.88 \times 0.12 = 17.5 \text{ AUMs}$), which was less than its authorized grazing use of Pasture 5. BLM also found in 2009 that Hanley cattle used 1,768 AUMs on public lands in the TSA, less than the 1,996 AUMs it was authorized for 2003.
- **2004** Hanley's actual use report shows it complied the 2002 Decision.

- 2005** BLM inexplicably shortened the 2005 grazing season for Pastures 1 and 2 by 20 days, which reduced Hanley's authorized use to 1,780 AUMs (28 AUMs for Pasture 5). Ex. B-41 at 2. Using Hanley's actual use report, BLM again assumed that 500 of its cattle were gathered from and consumed 445 AUMs on 100% public lands in Pastures 1, 2, and 5 after September 10, 2005. See Ex. B-43 at 4-5. However, if they had been moved and gathered by Hanley, as had actually occurred the preceding year (2004), the record would show roughly 440 cattle remained in Pasture 5 and consumed 51 AUMs on its public lands (445 AUMs X 0.88 X 0.12 = 50.9 AUMs). So considered, the record shows Hanley exceeded its authorized grazing use of that pasture by 23 AUMs.¹⁸
- 2006 and 2007** Hanley was authorized the grazing use of 1,850 AUMs for both 2006 and 2007, which included 24 AUMs in Pasture 5. Ex. B-45 at 2; Ex. B-49 at 2. BLM assumed during its 2009 performance review that all cattle gathered after the end of the Pasture 1-3 grazing season (September 30) were grazing and consuming AUMs on public lands in those pastures and Pasture 5. It then found from Hanley's actual use reports that its cattle consumed 289 AUMs in 2006 on 100% public lands and 147 AUMs in 2007. Ex. B-46 at 10; Ex. B-51 at 6; see Ex. B-46 at 3; Ex. B-51 at 1-2. But if BLM's assumption was in error, which it clearly was for 2004, and the above-described formula is used to correct for that error, the record shows Hanley cattle consumed 33 AUMs in 2006 (289 AUMs X 0.88 X 0.13 = 33.1 AUMs), an exceedence of 9 AUMs, and that only 17 AUMs were used during 2007 (147 AUMs X 0.88 X 0.13 = 16.8 AUMs).

In sum, I find the facts of record and reasonable inferences from those facts show that while Hanley was permitted and authorized to graze roughly 500 cattle for 4 months on 20,000 acres of public lands for 6 years, it exceeded the 2002 grazing season by only 4 days (2 AUMs), exceeded its authorized grazing use of public lands in Pasture 5 by only 9 AUMs in 2006 and might have exceed its authorized grazing use of that pasture by 23 AUMs during 2005. While the record also shows a total of 7 Hanley cattle were observed in trespass during 2003 and 2004 and that a noncompliant fence was

¹⁸ However, if the inexplicable shortening of the grazing season for Pasture 2 is disregarded and the grazing season for 2004, 2006, and 2007 used instead, it can be gleaned from BLM's 2009 review that roughly 220 cattle and 101 AUMs were gathered from and consumed in Pasture 5 after Sept. 30, 2005. Using the above-described formula to correct for BLM's erroneous assumption and error in identifying the percentage of public lands in that pasture would show Hanley cattle then consumed only 12 AUMs on those public lands (101 AUMs X 0.88 X 0.13 = 11.6 AUMs), which is less than half its authorized grazing use of Pasture 5 (28 AUMs).

constructed in the TSA during 2004, these trespasses were resolved and closed when Hanley paid for the unpermitted use of 7 AUMs, and Hanley avers another permittee constructed the noncompliant fence and is liable for that violation. See Hanley Affidavit at 21, 25.

The majority views the factual record quite differently: whereas I find the 2004 actual use report establishes compliance, the majority concludes the ALJ correctly found that report demonstrates noncompliance in 2004; whereas I infer Hanley cattle were grazed similarly every year as during 2004 (*i.e.*, they were grazed and gathered only from Pasture 5 and non-TSA pastures after the end of the Pasture 1-3 grazing seasons), it characterizes that inference as being based on “unsubstantiated assumptions”; whereas I believe the AUM limit for Pasture 5 applies only to its 13% of public lands and that BLM AUM calculations should be corrected to account for that fact, the majority views such a correction as addressing a “hypothetical BLM error.” 183 IBLA at 219. Notwithstanding the 2004 actual use report, the majority finds it “specious” for Hanley to claim its cattle were not in Pastures 1-3 after the end of their grazing seasons and presumes (or infers) that nearly all Hanley cattle remained in and were gathered from those pastures because it had expressed difficulty gathering its cattle in May 2004 and made similar statements in 2003 and 2006. 183 IBLA at 211. Without any record support or even a suggestion by BLM, the majority then states that even if Hanley was permitted to graze more than 4 cattle in Pasture 5, “we would find that practice incompatible with rangeland health standards,” which “would provide a rational basis for BLM’s decision to deny permit renewal to HRP.” *Id.*

ALJ Holt’s grant of summary judgment to BLM was based on his ruling that Hanley was not permitted to graze more than 4 cattle in Pasture 5, which rendered it immaterial where its cattle were gathered from so long as more than 4 cattle were in the TSA after the end of the Pasture 1-3 grazing seasons. Because I find that ruling in legal error on an issue of material significance to the 2009 Decision, I believe the ALJ Decision must be reversed. I also find from the factual record and reasonable inferences drawn from those facts that Hanley exceeded only the 2002 grazing season by 4 days, its authorized grazing use of Pasture 5 by 9 AUMs in 2006, and may have exceeded such use by 23 AUMs during 2005. *But see* 183 IBLA at 219 (“even if [Hanley] were allowed to vary livestock numbers in Pasture 5, the numbers shown on [its] Actual Use Reports showed use far in excess of the allowed maximum of 25 AUMs for Pasture 5”), 220 (“even if . . . its practice was to graze all of its allowed cattle at any given time on the single Pasture 5, . . . we fail to see how this raises a genuine issue of material fact, when use of any AUM over 25 would be a violation of the 2002 Permit”). Whether my inference or the majority’s presumption (inference) is better supported by the record serves to underscore, at least for me, why Hanley’s request for a hearing and remand to the Hearings Division should be granted (*e.g.*, for receipt of evidence showing whether Hanley grazing practices in 2002, 2003, 2005, 2006, and/or 2007 were the same (or substantially different) from those that occurred in 2004).

A determination of substantial compliance is to be made by BLM based on the publicly available record. BLM found during its 2009 performance review that Hanley was not permitted to graze more than 4 cattle in Pasture 5, disregarded the 2004 actual use report, assumed all cattle gathered after the Pasture 1-3 grazing seasons were from those pastures and Pasture 5 and that Pasture 5 contains 100% public lands so as to determine compliance with its AUM limit, and then determined: “[Hanley] has not been in substantial compliance with the terms and conditions [of the 2002 Decision].” 2009 Decision at 10; *see id.* at 4-9, 11. But if the 2002 Decision permitted Hanley to graze more than 4 cattle in Pasture 5 and it grazed similarly in all years as it clearly did in 2004, the essential foundation and predicate for the 2009 Decision is necessarily eliminated. Under such circumstances, I believe this matter must be remanded to BLM for it to consider the current record, but excluding its erroneous finding that Hanley was not permitted to graze more than 4 cattle in Pasture 5 and its factually unsupported assumptions, and then determine whether that record shows Hanley was (or was not) in “substantial compliance” with the 2002 Decision.

2. *Substantial Compliance with the 2008 Decision*

I also find ALJ Holt erred in ruling that Hanley waived its right to a hearing on whether BLM properly determined it was not in “substantial compliance” with the 2008 Decision due to the 2009 trespasses. He ruled such a waiver occurred because Hanley failed to present evidence showing those trespasses did not occur, adding that he was not bound by ALJ Sweitzer’s order to the contrary.¹⁹ ALJ Decision at 19-20. However, the rule at 43 C.F.R. § 4110.1(b) does not limit the scope of a “substantial compliance” determination on an application for grazing permit renewal to whether a trespass occurred and expressly allows the consideration of extenuating circumstances (*e.g.*, “circumstances beyond the control of the applicant”). 43 C.F.R. § 4110.1(b)(1)(ii); *see* 60 Fed. Reg. at 9926 (if “extenuating circumstances are to be considered, it will be the responsibility of the permittee to support them”).

Hanley swears the 2009 trespasses were due to the “unlawful” conduct of third parties who intentionally left gates open and tore down its fences. Hanley Affidavit at 34-37 (quoting Verified NOA at 40). Although these circumstances were communicated to BLM on December 10, 2009, when its Verified NOA was filed, I can

¹⁹ Hanley quoted language from that order as confirming its right to a hearing on these trespasses in appealing from a decision not to renew its grazing permit. Hanley Reply at 2-3; *see supra* note 14. ALJ Holt stated he was not bound by that language because ALJ Sweitzer “too broadly describes the Decision now under consideration.” ALJ Decision at 19. However, I am unable to locate that distinction in the 2009 Decision.

find no indication in this record that they were considered by BLM when it later determined Hanley was not in “substantial compliance” with the 2008 Decision. Before BLM could obtain a judgment as matter of law in this case, I believe it was required to show these circumstances were considered and that BLM then had a rational basis for determining they nonetheless showed that Hanley was not in substantial compliance with the 2008 Decision. As BLM showed neither, I conclude that ALJ Holt erred in granting its motion for summary judgment on the 2009 trespasses.

The majority discounts the Hanley Affidavit because it fails to “specify when the gates were open, cut, or damaged, whether this occurred reasonably close in time to the BLM observations, or the physical relationship between the open/cut/damaged gates and the locations of trespassing cattle” or to disclose what steps, if any, that Hanley took “to ensure that its gates remained closed, or that cattle straying onto public lands were promptly recovered,” adding that they would give more credence to that affidavit but for his statement that it had left gates open after there had been a fire on the allotment two years earlier. 183 IBLA at 214, 220.²⁰ They then ruled a hearing was unnecessary because, even if it were there shown that these trespasses were due to illegal conduct by third parties in “leaving gates open and tearing down [Hanley]’s fences,” such would not “rise to the level of extenuating circumstances.” 183 IBLA at 218. I disagree and find Hanley’s averments sufficient to warrant a hearing, where the circumstances surrounding these trespasses could be fully explored and the trier of fact would then have the opportunity to assess witness credibility in making findings of fact as to who knew and did what, when, and where.²¹

²⁰ I fail to see how that earlier response to a fire has any bearing on the veracity of the Hanley Affidavit, but even if it did, such would be for an ALJ to determine at a hearing, not for this Board to assume in deciding whether a hearing is warranted in this case.

²¹ Hanley also identifies extenuating circumstances surrounding the noncompliant fence that was constructed in 2003 (*i.e.*, it was actually constructed by another grazing permittee). *See* Hanley Affidavit at 21; *supra* note 4. While they were not earlier reported to BLM and there was no reason for it to consider them in the 2009 Decision, Hanley apparently intended to present them at the hearing that ALJ Holt ruled had been waived. The majority rules that further proceedings are not needed on this issue because Hanley was “responsible for the [fencing] violation.” 183 IBLA at 213. However, the issue here is not whether Hanley was legally responsible for constructing that fence (I assume it was), but whether these circumstances constitute extenuating circumstances to be considered when making a “substantial compliance” determination under 43 C.F.R. § 4110.1(b)(1)(ii). As I believe they are and should have been considered by BLM in
(continued...)

Accordingly, I respectfully dissent from this Board affirming ALJ Holt's decision to grant BLM's motion for summary for judgment.

_____/s/_____
James K. Jackson
Administrative Judge

²¹ (...continued)

making that determination, I would also remand this issue for a hearing before an ALJ.