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September 23, 2003

Via Facsimile: (202) 208-5242
and First Class U.S. Mail
Kathleen Clarke
Director
Bureau of Land Management
1849 C Street N.W., Room 5655 MIB
Washington, DC 20240

Re: Livestock Industry Position Regarding Interior's "Sustaining Working Landscapes" Initiative and Suggestions to Improve Bureau of Land Management Regulations

Dear Ms. Clarke:

I. Sustaining Working Landscapes Initiative/Program

The purpose of this letter is to directly notify you regarding my understanding of the position of the livestock industry regarding the Washington Bureau of Land Management ("BLM")/Department of the Interior ("DOI") proposal called "Sustaining Working Landscapes." In short, a significant number of the state Resource Advisory Committees ("RACs") and the National Public Lands Council[1] have

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[1] The National Public Lands Council ("PLC") represents all ranchers with BLM grazing permits and leases in the West. Recently, the PLC met in Medora, North Dakota. Over 100 grazing permittees, representing all of the western states, attended that meeting. At that meeting, a resolution was passed, with NO opposing votes, rejecting the Sustaining Working Landscapes Initiative. After that vote, the PLC leadership then asked whether members of the PLC supported reviewing the program to determine if any portion of the initiative was acceptable to and would benefit the livestock industry. Not one attendee at that meeting believed that it would be fruitful to even review the Sustaining Working Landscapes program to try find any acceptable parts. Rather the grazing permittee representatives at that meeting soundly rejected the DOI program and its concept.

unanimously voted against supporting this program. Again, the western livestock industry overwhelmingly does not support this initiative. Consider the following concerns:

A. The creation of reserve common allotments, conservation partnerships, conservation easements, and voluntary allotment restructuring are all tools that can be **voluntarily** implemented now, without the need for rulemaking. While voluntary programs relating to resource management can be useful, there is also a significant opportunity for abuse of such programs by BLM field office employees who desire livestock grazing reductions.

B. Even in this Administration, the DOI and BLM fail to recognize the significant contributions that ranchers have and will continue to make toward good rangeland health "despite" their desire to continue grazing livestock; this concern is the most evident in the BLM's proposals for reserve common allotments, conservation partnerships and voluntary allotment restructuring. In the original scoping notice for these programs, the BLM suggests these proposals will be used to reduce current livestock grazing. The BLM's goal in any regulations or initiatives it proposes should be good rangeland health, not "automatically" reducing livestock grazing.

C. If this program is implemented, how will the BLM protect the permittee from BLM retribution when a permittee declines the invitation to place his livestock on a reserve common allotment, grant a conservation easement over his private land or declines to participate in allotment restructuring? Certainly in political Administrations less favorable to land use, the opportunity for BLM retribution is significant. Additionally, in a significant number of cases, range scientists can show that resource concerns are not the result of grazing too many total livestock numbers, but are based on livestock distribution or timing problems. Often, changing the pattern of livestock distribution by developing water sources in different acres of the allotment, constructing fences and other techniques can solve resource concerns, without reducing overall numbers. However, if the BLM regulations create and focus on ways in which the BLM can force permittees to reduce their numbers without considering other valid alternatives, livestock numbers will be reduced. Similarly, if the BLM has the authority to decide whether to invest money into range improvements or reduce cattle numbers, a significant member of ranchers will be "voluntarily" forced to reduce numbers. If these new programs are implemented, provisions in the regulations must mandate that decisions made regarding reserve common allotments or the other "voluntary" programs must also include "on-the-record" consideration of maintaining a viable ranch operation for the permittee.

D. I, personally, am also opposed to any program that would allow the BLM to gain control of easements over private land unless the BLM can guarantee that participation in the program is truly voluntary. Given my participation with the livestock industry over the past 15 years, I believe that a majority of the "on-the-ground" ranchers support my position.

E. In sum, I urge you to abandon the "Sustaining Working Landscapes" initiative. As stated in my opening paragraph, the PLC and the majority of western RACs also agree with that position.

II Suggestions for Regulatory Reform

Although I strongly oppose the Sustaining Working Landscapes Initiative, there are numerous regulatory changes that should be considered and implemented by this Administration. Given that this law firm has spent over ten years litigating on behalf of the livestock industry before the Office of Hearings and Appeals ("OHA"), I can assure you that there are regulation changes which would greatly benefit the industry, regardless of the political Administration in control of the bureaucracy. My proposals for regulatory changes are as follows:

A. BLM State and Local Standard and Guideline Decisions Should be Appealable Decisions. Under the Babbitt Rangeland Reform regulations, the BLM's decisions regarding a permittee's compliance with state or local BLM "standards and guidelines" ("S&Gs") are not considered a "final decision" for the purposes of appeal. This is in error. Because the BLM clearly bases future action on its S&G determinations, these are final decisions and the right to legally challenge these decisions before an independent hearing officer and before a local BLM office takes an adverse action against a grazing permit or lease must be granted.

B. Right to Appeal Terms and Conditions in Grazing Permits or Leases. Although the Taylor Grazing Act and the BLM regulations clearly give the permittee the right to administrative appeal all adverse decisions, in some cases, the local BLM offices are attempting to avoid that right. Specifically, the regulations at 43 C.F.R. § 4130.2(f) state that "the authorized officer will not offer, grant or renew grazing permits or leases when the applicants, including permittees or lessees seeking renewal, refuse to accept the proposed terms and conditions of a permit or lease." Based upon this regulation, the BLM is requiring permittees to accept ALL permit or lease terms and conditions, whether or not those terms are adverse to the permittee or are unnecessary to protect the resource, as a pre-condition of permit renewal. In other words, it is the BLM's position that unless the permittee accepts all permit or lease terms and conditions,

without appeal, the BLM can simply refuse to offer, grant or renew a term grazing lease or permit. This clearly violates the TGA's mandated hearing process. The regulation should be clarified to allow the permittee to sign the renewed or granted permit or lease, then appeal those terms and conditions that are adverse to his interests.

C. Meaning of a Stay of Decision Implementation. The regulations regarding a stay of decision should be clarified that the granting of a stay by the Interior Board of Land Appeals ("IBLA") authorizes the grazing use that is shown on the prior term permit or lease, not the immediately prior annual operating plan or grazing application that was authorized the immediately previous year.[2] This section should also apply to grazing permit transfers such that when a permit is transferred from one permittee to a qualified applicant, the grazing use authorized to the new permittee is the use authorized by the prior valid term permit.

D. Uniform Application of Administrative Procedures Act ("APA") to the Grazing Administrative Appeal Process. Although I generally support the current grazing appeal process, particularly the opportunity for an evidentiary hearing before an administrative law judge, there are several improvements that can be made. These include:

1. Transmission of Notice of Appeal. Under the current regulations, Notices of Appeal are sent to the BLM "authorized officer" who is to "**promptly**" transmit the appeal to the State Director. See 43 C.F.R. § 4.470 (d). (Emphasis added). There are numerous cases, however, in which the appeal is not "promptly" transmitted by the authorized officer, making it nearly impossible to file subsequent pleadings because the Office of Hearings and Appeals ("OHA") does not have the case file, the BLM has not assigned a docketing number to the appeal and the OHA does not know why it is receiving subsequent pleadings. There have also cases in which Notices of Appeal were never transmitted to the OHA at all, and were not returned to the permittee. This regulation should be changed to allow the permittee to present his appeal directly to the OHA for docketing, assignment of case numbers and other ministerial functions. If the BLM believes that the Notice of Appeal should be

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[2] This was the decision reached by the BLM in Western Watersheds Project, IBLA 2003-315, IBLA 2003-316, Jay Mathews, *et al.*, IBLA 2003-325 (August 28, 2003). See Exhibit 1. However, the IBLA does not publish "stay" decisions so the grazing permittees will have to fight this issue over and over unless there is a change in the regulations.

dismissed because it is not procedurally proper, the BLM can file a Motion to Dismiss with the Appellant and the OHA. There are simply too many instances under which the BLM "authorized officer" can delay or ignore the transmission of a Notice of Appeal. If you would like specific examples of these occurrences, I would be happy to provide them.

2. OHA Authority of Review and Burden of Proof. The Interior Board of Land Appeals ("IBLA") has stated that administrative hearings before the OHA are governed by the Administrative Procedures Act ("APA"). See Eason v. BLM, 127 IBLA 259, 260 (1993). I agree with that determination. However, there are two areas in which the IBLA and OHA have ignored the APA requirements. These areas deal with the OHA's authority on review of a BLM decision and the "burden of proof." Consider the following:

   a. Section 7(c) of the APA provides that "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d) (1988). The United States Supreme Court has held that § 7(c) requires the proponent of the rule or order to meet its burden by a preponderance of the evidence. Steadman v. Securities & Exchange Commission, 450 U.S. 91, 102 (1981). The IBLA has determined that for grazing adjudications which fall under section 9 of the Taylor Grazing Act and, therefore, under 5 U.S.C. § 554(a), the BLM is the "proponent of the rule or order" and must prove its decision by a preponderance of the evidence. See E. L. Cord, 64 Interior Dec. 232, 241-2 (1957)(holding that APA section 7(c) allocating the burden of proof to the proponent of the rule applies to the BLM with respect to adjudications under section 9 of the Taylor Grazing Act, and to the appellant with respect to adjudications under section 3 of the Taylor Grazing Act); Frank Halls, 62 Interior Dec. 344, 350 (1955)(pursuant to APA section 7(c), the BLM has the burden of proof when the BLM cancels an outstanding grazing permit).

      The problem for the OHA occurs, however, in interpreting the BLM regulations regarding the OHA's authority to make its decision. Specifically, 43 C.F.R. § 4.1 provides "The Office of Hearings and Appeals, . . . is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the department involving hearings, and appeals and other review functions of the

Secretary." The BLM counters this APA requirements by citing 43 C.F.R. § 4.478(b). That regulation states that the adjudication of a grazing preference will not be set aside if it is "reasonable and that it represents substantial compliance" with the agency regulations. Rather than limiting the "reasonable and substantial compliance" language to cases only concerning the adjudication of a grazing preference, the BLM has expanded this requirement to apply to all grazing decisions. Under this application, the exception to the APA required review is completely subsumed by the exception at 43 C.F.R. § 4.478(b). The new regulations should strongly clarify that the "reasonableness and substantial compliance" exception in 43 C.F.R. § 4.478(b) only applies to cases involving an adjudication of a grazing preference between two equally qualified applicants, and not to other cases involving BLM decisions.

b. Requirement for Automatic Stay. The APA also governs all adjudications "required by statute to be determined on the record after opportunity for agency hearing." 5 U.S.C. § 554(a). Since the TGA, as interpreted by the courts, mandates a formal evidentiary hearing on the record, adjudications under the TGA must comply with those mandates. See, Ralph and Beverly Eason, 127 IBLA 259, 261 (1993). Under the APA, a sanction cannot be imposed, or an order issued, by an agency until a hearing is held, and the whole record created. 5 U.S.C. § 556(d). A "sanction" is defined by the APA to include the whole or part of an agency requirement, revocation, or suspension of a license, or the taking of other compulsory or restrictive action. 5 U.S.C. §§ 551(10)(F)&(G). A "sanction" is also defined as the imposition of a penalty or fine, the assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees. 5 U.S.C. §§ 551(10)(D)&(E). An "order" is defined to mean the "whole or part of a final disposition of an agency matter, other than rulemaking, but including licensing." 5 U.S.C. § 551(6). The whole record includes "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceedings . . . ." 5 U.S.C. § 556(e). Since BLM decisions terminating and/or otherwise modifying the terms and conditions of a grazing permit are a "sanction" and "order" within the meaning of the APA, the decision cannot be imposed until a record consisting of the transcript of testimony, exhibits, and all filings is created. 5 U.S.C. §§ 556(d)&(e). In the case of a grazing appeal, the

whole record is not created until after a hearing before an administrative law judge is held. See, 43 C.F.R. § 4.24(a). Accordingly, and as a matter of law, a decision affecting a grazing permit issued under the TGA must be suspended until after the permittee is afforded a hearing on the merits. See also 43 U.S.C. § 1732(c) (stating that any decision affecting the use of public lands, such as a decision modifying the terms of a grazing permit, must be based upon a final administrative finding, after notice and hearing).[3]

c. Motions for Summary Judgement or Briefing on a Stipulated Record. The administrative appeal regulations should include the opportunity to brief cases upon a stipulated record or motion for summary judgement, rather than forcing every case to an evidentiary hearing. Some OHA judges do allow this procedure although response and reply times are not uniformly set. Because this procedure may assist the OHA in reducing its back-loaded docket, adopting uniform summary judgment requirements, including specifying times for response and reply briefs should encourage case resolution. After reviewing the summary judgment motions, responses and replies, if the administrative law judge finds the need for factual evidence, an evidentiary hearing can be ordered.

E. Elimination of Taking of Private Property Through "Reasonable Access Provision. The regulations should not allow the BLM to force access across private lands. Under the current regulations, the BLM is authorized to require "reasonable administrative access across private and leased lands." 43 C.F.R. § 4130.3-2(h). Under this regulation, the BLM has taken the position that the agency determines what access is "reasonable." This regulation results in a "taking of private property" without compensation in violation of the U.S. Constitution. It has been clearly stated by the courts that "one of the most essential sticks in the bundle of rights characterized as property [is] the right to exclude

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[3] Recently, the Federal District Court for the District of Colorado agreed with this legal conclusion. See W. Wesley Wallace v. United Sates Bureau of Land Management, Civ. No. 02-M-424 (March 2, 2002). The Complaint alleged that the sanction implemented against the Plaintiff could not, as a matter of law, be implemented until after a hearing on the merits as required by the APA. The federal court agreed, and granted a temporary restraining order against the BLM. Based upon that ruling, the BLM settled the case and did not impose the sanction. The Court then granted the Plaintiff's requests for fees and costs because the BLM's position was not substantially justified. See Exhibit 2.

others." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Dolan v. Tigard, 129 L.Ed 2d 304, 316, 321 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); Loretto v. Teleprompeter, 458 U.S. 419, 433 (1982). "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Loretto, supra, 458 U.S. at 435. When an owner is forced to suffer an unwanted physical invasion "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." Id. The BLM's ability to determine when it can unilaterally eliminate the "right to exclude others" is a violation of these precedents.

F. The regulations defining "interested public" and allowing the "interested public" to be involved in grazing decision should be changed to reflect the language of the statutes. Under the current regulations, anyone can be named an "interested public" who presents a written request to the authorized officer. 43 C.F.R. § 4100.0-5. The regulation requires no showing of standing, in fact, there does not have to be any evidence that such "interested public" have ever seen the allotment. This regulation should be narrowed to require interested public have standing, particularly if there is a desire to appeal a decision regarding the allotment.

G. Additionally, the BLM regulations regarding "interested party" involvement in allotment management plan ("AMP") development should be governed by statute. Section 8 of the Public Rangelands Improvement Act ("PRIA"), 43 U.S.C. §1752(d) sets forth the requirements for AMP development. This Act states, "If the Secretary concerned elects to develop an allotment management plan for a given area, he shall do so in careful and considered consultation, cooperation and coordination with the lessees, permittees and landowners involved, the district grazing advisory boards [citations omitted] and any State or States having lands within the area to be covered by such allotment management plan." Emphasis added. In contrast, the BLM regulations add additional involvement in the AMP development process by the "interested public." 43 C.F.R. § 4120.2(a). Clearly PRIA contemplated that those who are impacted (or have standing) should be involved in the development of AMPs. The BLM regulations should be changed to reflect that statutory commitment.

I appreciate the opportunity to provide this information to you and your staff. While I believe this administration is very supportive of sustaining the western public lands livestock industry and the communities on which they depend, I am very concerned that little "on-the-ground" changes to the Babbitt Rangeland Reform regulations have been offered to the industry for comment. Rather, in my opinion, it appears that the administration is pushing initiatives such as the Sustaining Working

Landscapes which may "sound" laudable east of the Potomac River, but have little "on-the-ground" benefit to the rancher simply trying to make a living and support his rural community in the west. As someone who spends significant time working with the "on-the-ground" rancher, I offer these suggestions to you to consider in making a true improvement for the western public lands rancher. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Karen Budd-Falen
BUDD-FALEN LAW OFFICES, P.C.

KBF:nec

Enclosures

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
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August 28, 2003

IBLA 2003-315 WESTERN WATERSHEDS PROJECT	:	Hearings Division Docket No. WY-01-2003-1
IBLA 2003-316 WESTERN WATERSHEDS PROJECT	:	Hearings Division Docket No. WY-01-2003-4
IBLA 2003-325 JAY MATHEWS, ET AL.	:	North Gooseberry Allotment Motion for Clarification Granted

ORDER

On May 15, 2003, the Worland (Wyoming) Field Office, Bureau of Land Management (BLM), issued an emergency closure decision affecting the North Gooseberry Allotment (#00508) under 43 CFR 4110.3-3(b). The decision immediately closed the entire allotment to grazing based on range conditions that were due to drought in previous years.

On June 13, 2003, following receipt of a report by a technical review team fielded by the State of Wyoming Department of Agriculture and a proposal for limited grazing on the allotment from the permittees, BLM rescinded its May 15 decision, stating: "Based on precipitation received during the past 30 days it has been determined that there is some forage available for grazing. The BLM will be contacting the affected operators during the next week to discuss utilization options."

On July 3, having conferred with the permittees, BLM issued an "Emergency Grazing Modification Decision," also under 43 CFR 4110.3-3(b). The July 3 decision allowed no grazing on the allotment for the March 1, 2003 - February 28, 2004 grazing year north of Fifteenmile Creek but authorized 495 AUM's grazing use by cattle south of Fifteenmile Creek between July 15-October 15. The July 3 decision noted that 495 AUM's "is a 94% reduction of cattle AUMs authorized under the grazing permits." Western Watersheds Project and Jay Mathews as well as the other grazing permittees on the allotment appealed.

We stayed BLM's July 3 decision in response to a petition from Jay Mathews and the other grazing permittees by order dated August 7, 2003.

EXHIBIT
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On August 14, 2003, the Bureau of Land Management (BLM) filed a motion asking for clarification of the effect of the August 7, 2003, order. BLM asked "exactly what level of grazing use the permittees may utilize pending the appeal" under 43 CFR 4160.3. Motion for Clarification at 1.

By order dated August 15, 2003, we took BLM's motion under advisement and offered appellants an opportunity to respond. In the meantime we have received:

1) from Western Watersheds Project in IBLA 2003-315 and 2003-316:

a) a Response to Bureau of Land Management's Motion for Clarification, and

b) a Supplemental Response to Bureau of Land Management's Motion for Clarification.

2) from Jay Mathews and the other grazing permittees in IBLA 2003-325:

a) a Motion for Emergency Relief Pending Consideration of BLM Motion for Clarification,

b) a Response to Bureau of Land Management Motion for Clarification, and

c) a Supplemental Response to Bureau of Land Management Motion for Clarification.

In addition, late in the day on August 27 we received a Supplement to BLM's Motion for Clarification from BLM. We received a Reply to BLM's Supplement from Western Watersheds Project on August 28.

The regulation involved, 43 CFR 4160.3, provides in part:

> (d) When the Office of Hearings and Appeals stays a final decision of the authorized officer regarding an application for grazing authorization, an applicant who was granted grazing use in the preceding year may continue at that level of authorized grazing use during the time the decision is stayed, except where grazing use in the preceding year was authorized on a temporary basis under § 4110.3-1(a). Where an applicant had no authorized grazing use during the previous year, or the application is for designated ephemeral or annual rangeland grazing use, the authorized grazing shall be consistent with the final decision pending the Office of Hearings and Appeals final determination on the appeal.

> (e) When the Office of Hearings and Appeals stays a final decision of the authorized officer to change the authorized grazing use, the grazing use authorized to the permittee or lessee during the time that the decision is stayed shall not exceed the permittee's or lessee's authorized use in the last year during which any use was authorized.

(Emphasis supplied).

When BLM proposed the current version of 43 CFR 4160.3 in 1994, it explained in the preamble:

> This section would be amended to clarify the process for filing an appeal and a petition for a stay of the decision. * * * The proposed rule also clarifies the amount of grazing use that would be allowable when a decision has been stayed by the Office of Hearings and Appeals or by order of a Federal Court. Where an appellant had no authorized grazing use the preceding year, the authorized grazing use would be required to be consistent with the decision pending a final determination on appeal. * * * Where a decision proposes to change the amount of authorized grazing use, the permitted grazing use would remain at no more than the appellant's previously determined permitted use during the time an appeal is pending. * * *

58 FR 14314, 14338 (March 25, 1994). The language of proposed §4160.3(e) read: when a BLM decision is stayed, " * * * the grazing use authorized * * * shall not exceed the permittee's or lessee's previously permitted use during the time that the decision is stayed." 59 FR 14314, 14352 (March 25, 1994) (emphasis supplied).

In the preamble to the final regulation BLM stated: "These provisions [§4160.3(d) and (e)] are being adopted as proposed, with minor changes to * * * clarify that the proposed term 'previously permitted use' means 'authorized use in the last year during which any use was authorized.'" 60 FR 9894, 9950 (Feb. 22, 1995).

In its original Motion for Clarification, BLM stated it was not clear whether subsection (d) or (e) of the regulation applied, but in either event the question was what is meant by the terms "authorized grazing use" and "authorized use" in §4160.3(e). BLM suggested three alternative levels of grazing: 1) the number of AUMs the permittees specified in their statement of reasons for appeal, i.e., 2284; 2) the number of AUMs of "permitted active use," i.e., 8506; and 3) the number of AUMs actually used during the 2002 grazing season, i.e. 806 AUMs. Motion for Clarification at 2, 4, and 5 and Attachment A.

In its Supplement to its Motion for Clarification, BLM distinguishes between total permitted use and "active use" and states it believes that the "permittee's or lessee's authorized use in the last year during which any use was authorized" language in §4160.3(e) "refers to the active use specified in the applicable permit." Supplement to BLM's Motion at 3. However, BLM states, referring to the immediately preceding "shall not exceed" language in § 4160.3(e), "although a stay could allow use up to the active permitted use, BLM has the ability, if it deems it necessary, to require a lower level of use." Id. at 3, 4-5.

> The importance of recognizing BLM's discretionary authority to require a level of use lower than the active use set out in a permit where the Board has issued a stay pursuant to 43 CFR 4.160.3(e) is illustrated by the facts of these cases, where even the permittees acknowledge that the range cannot at this time support the full level of active use specified in the applicable permits, given the effect of the drought on current range conditions.

Id. at 5.

Western Watersheds Project believes that "the only reasonable interpretation of this regulation [§ 4160.3(e)] requires BLM to cap grazing at the active use level authorized in grazing year 2002," i.e., 806 AUMs. WWP Response at 5. "Without question, however, BLM currently enjoys the explicit discretion to reduce interim levels to protect resources conditions on the public lands. See 43 C.F.R. § 4160.3(e) (grazing use shall not "exceed" authorized use in the last year)." Id. at 11. WWP disagrees with BLM's equating authorized use with active use specified in the applicable permit, however:

> BLM's interpretation of the regulations would include AUMs placed in temporary nonuse as "active use specified in the applicable permit" (and therefore "authorized use"), in express violation of the grazing regulations. See 43 C.F.R. § 4100.0-5 (defining "active use" as "the current authorized use, including grazing and conservation use . . . . Active use does not include temporary nonuse . . . within all or a portion of an allotment.")

WWP Reply at 2. "Under BLM's interpretation of 'authorized use,' AUMs placed in temporary nonuse – i.e., 7700 AUMs on North Gooseberry (permitted use AUMs (8506) minus 806 AUMs (active use) * * * would be counted toward establishing 'active use.' " Id. at 3.

The permittees believe they should be allowed "the authorized use from 2002, and should not be limited to the actual use, which was made under an entirely different set of resource conditions and included voluntary nonuse due to the fact that there was a lack of forage growth in 2002." Permittees' Response at 1. (BLM's July 3 decision acknowledges that the grazing permittees had voluntarily agreed to reductions in livestock numbers and season over the past three years.)

The language of the regulations does not support the positions advocated by BLM and WWP. Although the terms "authorized use" and "authorized grazing use" in § 4160.3 (which have no apparent difference in meaning) are not themselves defined in § 4100.0-5 or elsewhere, the definition of "grazing permit" in that regulation states that grazing permits "specify all authorized use including livestock grazing, suspended use, and conservation use. Permits specify the total number of AUMs apportioned, the area authorized for grazing use, or both." "Active use," on the other hand, is defined to mean "current authorized use" and "may constitute a portion, or all, of permitted use. Active use does not include temporary nonuse or suspended use of forage within all or a portion of an allotment." (Emphasis supplied).

It is clear that active use is more limited than authorized use. If BLM meant "authorized use" to be the same as "active use" it would either have defined "authorized use" as "active use" in § 4100.0-5 or employed the term "active use" in § 4160.3. Thus, the permittees' "authorized use in the last year during which any use was authorized" is the level of AUMs granted in their grazing permits for grazing year 2002.

Further, we cannot read the "not to exceed" language of § 4160.3(e) as giving BLM discretion to determine what level of grazing use is allowed pending a decision on appeal. That would render both the language of the regulation and the effectiveness of our authority to grant a stay based on the regulation a chimera.

Thus, the effect of staying BLM's July 3 decision is that the North Gooseberry Allotment permittees may use all of their permitted AUMs pending a decision on appeal. Whether it is in their long-term interest to do so, or whether it is even possible given the current condition of the range, is another question, as they evidently recognize.

Will A. Irwin
Administrative Judge

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Counsel for the Bureau of Land Management

cc. Administrative Law Judge Frederick Lambrecht

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Richard P. Matsch

Civil Action No. 02-M-424

W. WESLEY WALLACE,

Plaintiff,

v.

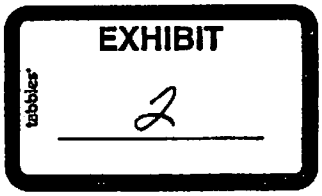
UNITED STATES BUREAU OF LAND MANAGEMENT, an Agency of the United States Department of the Interior,
GALE NORTON, Secretary of the United States Department of the Interior,
KATHLEEN CLARKE, Acting Director of the Bureau of Land Management, and
CALVIN N. JOYNER, in his official capacity as Field Manager of the San Juan Field Office of the United States Bureau of Land Management,

Defendant.

ORDER AWARDING ATTORNEYS' FEES AND COSTS

On April 19, 2002, the plaintiff filed an application for attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, with accompanying documents. The defendants filed a response on May 21, 2002, and the plaintiff filed a reply on July 12, 2002, with an *errata* filed July 18, 2002.

This civil action was initiated by a complaint filed on March 1, 2002. The relief sought by the plaintiff was for a mandamus and an injunction together with a declaratory judgment, all of which challenged the imposition of administrative sanctions without a pre-deprivation hearing using both the mandamus statute, 28 U.S.C. § 1361 and the Administrative Procedures Act. The plaintiff complained of the denial administratively by the Department of the Interior of an administrative application for a



stay of those sanctions and asked this court to determine that proceeding with those sanctions prior to an administrative hearing on the merits of the dispute giving rise to those sanctions was contrary to federal statute and was a violation of the due process protection of the plaintiff's property provided by the United States Constitution.

This court granted the plaintiff's motion for temporary restraining order against enforcement of the sanctions. Ultimately, the parties entered into a settlement agreement for a stay of a monetary civil penalty and temporary suspension of spring grazing required by the BLM final trespass decision of November 3, 2001, pending a final decision on the administrative appeal. The agreement further provided for the issuance of a permit for the spring of 2002 and refund of the penalty paid and the plaintiff agreed to dismiss this civil action. This civil action was, accordingly, dismissed.

The defendants' objections to the EAJA application challenged the standing of the plaintiff as a prevailing party both as to the financial status and the results of this litigation. The defendants also challenged the amounts requested.

Although Wesley Wallace has brought this action as an individual, the subject matter of this case is his business, a ranching operation utilizing federal lands for grazing cattle. That business is unincorporated and its net worth is less than $7 million. The plaintiff therefore qualifies under 28 U.S.C. § 2412(d)(2)(B). The plaintiff is a prevailing party in this litigation under the test announced in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), because the settlement materially altered the relationship between the parties as it was when this civil action was filed. Indeed, the settlement agreement was

in effect a consent decree and achieved all of the purposes of the plaintiff in bringing this action.

The plaintiff has conceded that he is not entitled to payment for the costs of legal services of his lawyers in administrative proceedings. The defendants' legal position was not substantially justified. This court has separately analyzed the time records submitted by counsel and has determined that the compensable time for this litigation is 61.5 hours and the statutory rate of $125 will be applied. The expenses billed by the attorneys are deemed to be administrative expenses that are subsumed within the hourly rate and are not separately compensable. The court will not award attorneys' fees for the preparation and submission of the application for fees. Upon the foregoing, it is

ORDERED that the plaintiff W. Wesley Wallace is awarded attorneys' fees in the amount of $7,687.50, and may recover the statutory costs of this action upon submission of a bill of costs within ten days.

DATED: December 4th, 2002.

BY THE COURT:

Richard P. Matsch, Judge

Case Number: 02-M-424

I certify that I mailed a copy of the attached to the following:

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Dated: December 5, 2007

By: Shannon Drake