SURVIVING FOREST SERVICE AND BLM TERM GRAZING PERMIT RENEWALS

BUDD-FALEN LAW OFFICES

A COMPREHENSIVE GUIDE FOR PERMITTEES

Freedom of Information Act (FOIA)

The FOIA is the act that gives the citizens the right to access information from the federal government including the Bureau of Land Management ("BLM") and Forest Service ("FS"). That includes all information in your grazing permit files, monitoring files and other files related to your use of the federal or public lands. It is critically important that all grazing permittees have a copy of their entire agency files and review those files on a periodic basis. It is the information in these agency files that will be used to make decisions about your continued use of your allotments, so if there is information in those files that is not correct or misleading, you have to take steps to correct that information, before it is used against you.

"…if there is information in those files that is not correct or misleading, you have to take steps to correct that information, before it is used against you."

Additionally, FOIA is regularly used by environmental groups and others who want to eliminate your use of your grazing allotments. These groups often produce reports, take pictures and collect "data" that they request be placed in your allotment files and reviewed during your permit renewal process. The federal agencies are not obligated to contact the permittee prior to putting this third-party information in your files, so it is up to each permittee to regularly check their allotment files to ensure that any third-party data placed in the file is accurate and relevant.

PURPOSE

The purpose of this paper is to provide a general overview of livestock grazing and permit renewal on Bureau of Land Management and Forest Service lands. There are many nuances in the law and this paper is not intended to cover those. This paper also does not predict the outcome of any individual case. While I am pleased to present this information, should you need additional information on a particular fact situation, please contact my office.

HISTORY OF NATIONAL ENVIRONMENTTAL POLICY ACT (NEPA) COMPLIANCE FOR TERM GRAZING PERMIT RENEWALS

Statutory Authority for Grazing on the Public/Federal Lands

1. Forest Service Lands

In the mid to late nineteenth century, many forests located on public land were subject to the unregulated commercial cutting of timber. In response to the problem, Congress passed the Creative Act of 1891. The Creative Act allowed the President to reserve forest lands, but did not provide for the regulation or use of such lands. Conservationists opposed the Creative Act's failure to protect forest lands through regulation, while Western settlers opposed the Act's failure to provide for any use of the reserves.

In response to this backlash, Congress passed the Organic Administration Act ("Organic Act") in 1897. The Organic Act allowed the President to protect and use forest land by reserving such land for two purposes, "securing favorable conditions of water flows," and furnishing "a continuous supply of timber." Legislative history for the Act shows that Congress was concerned with the management of the timber resource and the protection of the streams which a healthy forest produces. Livestock grazing was not addressed in the Organic Act, apparently because Congress did not realize that vast tracts of rangeland would also be reserved as national forests. In fact, despite the clear mandate to reserve "forest" land, the President subsequently reserved over 100 million acres of public rangeland as national forests. Upon reservation, Congress' open range policy on the forest reserves was eliminated.

Initially, the Secretary of the Interior was appointed to manage national forests. Since half of the land in the national forest system was actually rangeland, which at the time was being used the American people for grazing, the Secretary of the Interior immediately began to adopt policies to recognize and protect existing grazing use. In 1902, the Secretary of the Interior began regulating grazing pursuant to a system of "preference," with preference for grazing privileges and use being assigned first to ranchers residing within the national forest, then to ranchers with ranches within the national forest but who resided elsewhere, then to ranches outside of but near to the national forest, and lastly to persons not living near the reserve who had some sort of equitable interest in the national forest.

In 1905, Congress amended the Organic Act by switching management authority from the Secretary of the Interior to the Secretary of Agriculture. The amendment also stated that the Secretary of Agriculture "shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests" and "may make such rules and regulations and. . . to regulate their occupancy and use and to preserve the forests thereon from destruction." That same year, the Secretary met with western livestock industry leaders regarding the Secretary's development of rules for "occupancy and use" of livestock on Forest Service rangeland. The Secretary of Agriculture promised the ranchers to build on and improve the "preference" system began by the Secretary of the Interior, by protecting "priority of use" based on "the Law of Occupancy and the Prior Appropriations Doctrine," by making grazing reductions only after "fair notice," by giving "preference" to small ranchers with "intelligent forest management," and with rancher

input in the form of "advisory boards."

As a result, in 1906, the Secretary codified into regulation "The Use Book." With regard to livestock grazing, the Use Book states:

Applicants for grazing permits will be given preference in the following order.

(a) Small near-by owners.

Persons living in or close to the reserve whose stock have regularly grazed upon the reserve range and who are dependent upon its use.

(b) All other regular occupants of the reserve range. After class (a) applicants have been provided for, the larger near-by owners will be considered, but limited to a number which will not exclude regular occupants whose stock belong or are wintered at a greater distance to the reserve.

(c) Owners of transient stock.

"The owners of stock which belong at a considerable distance from the reserve and have not regularly occupied the reserve range. Priority in the occupancy and the use of the range and the ownership of improved farming land in or near the reserves will be considered, and the preference will be given to those who have continuously used the range for the longest period."

Thus, those with land and homestead ties closest to the national forest held the greatest entitlement to graze therein. Based on the "preference" system created by The Use Book, ranchers could then obtain permits to graze livestock on national forest rangelands.

The Use Book's system of grazing preference became a remarkably stable property right. Nearly 50 years after The Use Book was codified, a United States tax court held that "preference is the dominant element of the [forest service] grazing privileges, and in the absence of contingencies, which may never happen, the grazing permit, as the facts show as true in this case, and renewals thereof follow the preference as a matter of course." The court continued:

"That the grazing of livestock on the national forests is to be regarded as a substantial, well-established, and indefinitely continuing part of the national forests program, is not, according to our reading of the grazing regulations and the Forest Service Manual, open to question. In fact, along with the declared purpose of perpetuating the organic resources on both the national forests and related lands, another of the "leading objects" of the said program is the "stabilization of that part of the livestock industry, which makes use of the national forests;" and along with and in promotion of such stabilization is the declared purpose of protecting the "established ranch owner and home builder against unfair competition in the use of the range." The word "'stabilization" is from the word "stabilize," which means to make stable, and stable, in turn, means firmly established, constant, durable, permanent. Studied in the light of these purposes and objectives, it seems to us abundantly clear that the statute and the regulations contemplate that once the right to a fair and just allotment of grazing lands has been acquired under the established procedures, that right, subject to some adjustment if it should become necessary for protection of the range or for a more equitable distribution among preference holders, is to be regarded as an indefinitely continuing right."

"A [forest service] preference, once acquired, is not exhausted through use and it is not limited as to time, but is of indefinite duration and continues until canceled or revoked." The court's assessment of the Forest Service preference right is remarkably insightful. By

apportioning grazing rights to sustainable ranching units with private base property, and then treating those rights as indefinitely continuing, the Forest Service was able to provide significant stability to individual ranches and the livestock industry as a whole.

While current Forest Service regulations no longer use the term "preference," in substance the preference right remains. Rangeland is divided up into "logical range management units," called "grazing allotments," which are typically comprised of a combination of national forest rangeland, adjacent or interspersed private land and water resources, and "range improvements" designed to improve forage production and promote sustainable grazing use. Permits to graze on allotments are issued, typically for a ten year period, "to persons who own livestock to be grazed and such base property as may be required." Thus, to qualify for a grazing permit, a rancher must be in the livestock business and own "base property." "Base property" is defined as private land, water and range improvements owned by the rancher and "specifically designated by him to qualify for a term grazing permit." Permit holders are given "first priority for receipt of a new permit at the end of the term period," and if the grazing allotment is retired, ranchers are given "reasonable compensation" for their interest in permanent livestock grazing improvements. Ranchers are also given significant rights to collaborate with the Forest Service with respect to the management of grazing allotments. Thus, while the terminology has changed, the principal remains the same. Preference to graze is given to those best able to use the grazing resource, ranchers who own adjacent or interspersed private land, water and improvements. While Congress has never expressly sanctioned the Forest Service preference system, neither has it ever sought to interfere, and it has, in fact, indirectly approved of it with portions of the Federal Land Policy and Management Act. The system of grazing preference has, in a sense, become the custom and usage of Western rangelands.

2. BLM Managed Lands

Since the nineteenth century settlement of the American west, livestock have been grazed on public lands. Initially, most grazing on the public land was conducted on "open range," meaning grazing was not restricted by fencing to particular areas. As the number of ranchers grazing livestock on the open range increased, competition for finite range resources led to fierce resource competition. In 1934, at the insistence of the ranchers themselves, Congress sought to restore order to public lands grazing on lands outside of National Forest reserves via passage of the Taylor Grazing Act ("TGA").

The purpose of the TGA is "to stabilize, preserve, and protect the use of public lands for livestock grazing purposes . . . ." As the court in Public Lands Council v. Babbitt ("PLC 1"), 154 F.3d 1160 (10th Cir. 1998) explained, "Congress enacted the [TGA], establishing a threefold legislative goal to regulate the occupancy and use of the federal lands, to preserve the land and its resources from injury due to overgrazing, and 'to provide for the orderly use, improvement, and development of the range'." "One of the key issues the [TGA] was intended to address was the need to stabilize the livestock industry by preserving ranchers' access to the federal lands in a manner that would guard the land against destruction."

With passage of the TGA, Congress allowed for the reservation of public lands for the primary purpose of grazing. Specifically, the TGA authorized the Secretary of the Interior (delegated to the Grazing Service, predecessor to the (BLM) to create "grazing districts" on all unreserved public land. Grazing districts were created to "promote the highest use of the public land, pending its final disposal." For a district to be created, the land must be "chiefly valuable for grazing [livestock] and raising forage crops."

In addition to the President's support, Congressional intent to reserve land for livestock grazing and crops was also reflected in the debate regarding the TGA. As summarized in a 1994 report to Congress:

"During congressional debates on the TGA, members repeatedly referred to grazing district lands as being "reserved" for grazing purposes and analogized the grazing districts to forest reserves. Many provisions of the TGA deliberately parallel those of the Forest Organic Act of 1897. Grazing districts may be seen as being both "reserved" in the sense that they were removed from private appropriation and dedicated to a particular purpose, and as being "public lands" in the sense that private title to lands in grazing districts could be obtained if the lands were reclassified for such acquisition. District lands were recorded on contemporaneous Department of Interior records as "Reserved Public Domain (Subject to Taylor Act).""

As is the case with most reservations of public land, the TGA also expressly withdrew the reserved land from all forms of entry or settlement. Grazing districts "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry and settlement." Thus, the designation of an area of public land as a grazing district effectively stopped other conflicting land uses, reserving the land for livestock use.

In addition, the creation of a grazing district means that grazing must occur on the land. As summarized by the Tenth Circuit, "Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing." In other words, except upon the showing of good cause, the Secretary does not have discretion to bar grazing within a grazing district. See 43 C.F.R. § 4110.3 (stating that changes in grazing use "must be supported by monitoring, field observations, ecological site inventory or other data acceptable to the authorized officer.")

The Public Rangelands Improvement Act ("PRIA") also supports the fact that grazing must occur with a grazing district." Except where the land use planning process required pursuant to section 202 of the Federal Land Policy and Management Act (43 U.S.C. 1712) determines otherwise or the Secretary determines, and sets forth his reasons for the determination, that grazing uses should be discontinued (either temporarily or permanently) on certain lands, the goal of such management shall be to improve the range conditions of the public rangelands so that they become as productive as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the values and objectives listed in sections 1901(a) and (b)(2) of this title.
43 U.S.C. § 1903.

Preference rights determine who is entitled to graze livestock on the "reserved" public lands. The

framers of the TGA recognized that for a rancher to successfully graze livestock on the public land, two things were necessary: 1) the ownership of private property near the public land which can serve as the base for a livestock operation; and 2) access to sufficient water supplies which may serve the needs of the livestock. Congress also recognized that the livestock industry would be best served if the ranchers who were best able to practically utilize the public lands, and who were using the range at the time the TGA was passed, were allowed the right to graze on the public lands. The TGA states:

"The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in use of range. . . . Preference shall be given in the issuance of grazing permits to those within or near a [grazing] district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them . . . except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan.

43 U.S.C. § 315b.

In 1995, the BLM changed its regulations to state that grazing permits would show the "permitted use" of the range.

Preference rights also establish the amount or portion of grazing, described in terms of Animal Unit Months ("AUMs") of forage, to which each person in the grazing district is entitled. Prior to 1995, the BLM regulations defined grazing preference as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee," including "both active and suspended use." The preference is not an absolute guarantee of livestock numbers, but allows the rancher the right to utilize the maximum number of AUMs the range will support, up to the preference limit. If grazing use ["AUMs"] was reduced, the permittee retained his suspended use to be reactivated when forage conditions improved.

In 1995, the BLM changed its regulations to state that grazing permits would show the "permitted use" of the range. Under those regulations, "[p]ermitted use means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs." 43 C.F.R. § 4100.0-5 (1998). Whether described as a preference right or permitted use, the TGA refers to the combination of public range and private property as a "grazing unit."

Once the preference right (or permitted use) established who is entitled to receive grazing privileges and what share of the public grazing resource will be allocated to each, the Secretary is to determine under what terms and conditions grazing will be allowed. The Federal Land Policy and Management Act of 1976 ("FLPMA") mandates that the Secretary must manage public lands under the principal of "multiple use and sustained yield . . . ." Therefore, land within grazing districts should "be managed for many

purposes in addition to grazing . . . .” These “many purposes” are to be coordinated through resource management plans or “land use plans.” Typically land use plans (“LUPs”) are created for grazing districts or parts thereof. LUPs are major federal actions requiring NEPA documentation. 43 C.F.R. § 1601.0-6. LUPs are to be created with extensive public, state and local government and Indian tribe participation, input and comment.

Once a LUP is created, the Secretary must manage the lands according to the terms and conditions in the Plan. The terms and conditions of a grazing permit must be consistent with the direction in the applicable LUP.

Allotment management plans (“AMPs”) are also created according to the dictates of a LUP. An AMP describes how grazing will be conducted within a grazing district with respect to an individual livestock operation. The terms and conditions of an AMP are made part of the terms and conditions of the grazing permit. Thus, because the terms and conditions described in a LUP have been thoroughly reviewed pursuant to NEPA and other environmental statutes, grazing permits and AMPs consistent with the applicable land use plan should also be consistent with the procedures and process in NEPA. The development of an AMP is not mandatory. Grazing can occur simply based upon the issuance of a grazing permit.

Grazing permits “shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior.” Consistent with this provision, the FLPMA states:

> *“it will be in the best interest of sound land management to specify a shorter term…”*

“Grazing permits and leases may be issued by the BLM for a period of shorter than ten years only when the Secretary determines that: “it will be in the best interest of sound land management to specify a shorter term: Provided, That the absence from an allotment management plan of details the Secretary concerned would like to include but which are undeveloped shall not be the basis for establishing a term shorter than ten years: Provided further, That the absence of completed land use plans or court ordered environmental statements shall not be the sole basis for establishing the term shorter than ten years unless the Secretary determines on a case-by-case basis that the information to be contained in such land use plan or court ordered environmental impact statement is necessary to determine whether a shorter term should be established for any of the reasons set forth in items (1) through (3) of this subsection.”

The purpose of issuing a permit for a set period of time (typically ten years) is not to determine whether grazing should continue once the permit expires, but to provide for a periodic review of the terms and conditions thereof. “The mandatory renewal process contemplates that the substance of the grazing privilege, as opposed to the preference right of renewal, is to be periodically adjusted in accordance with the condition of the rangeland.” Therefore, provided that the permit holder is in compliance with the terms and conditions of the expiring permit and is willing to accept the terms and conditions of the new permit (subject to his appeal rights), the timely renewal of a grazing permit is not discretionary, it is mandatory.

NEPA Compliance for BLM and Forest Service Term Permit Renewal

Although at this point, the application of NEPA to individual term grazing permit renewals has been a BLM and FS policy for so long that it would be difficult to legally challenge; no court has ever specifically held that NEPA applies to a renewal of a term grazing permit. Rather, without the benefit of a federal court mandate or change in the statutes, in 1998 the BLM adopted a policy stating that (1) NEPA applies to permit renewals and transfers, (2) permittees will not be allowed to turn out their livestock on their allotments if the NEPA analysis has not been completed and (3) compliance with the Endangered Species Act and other federal laws will be included as part of the NEPA analysis. In fact, prior to 1998, the BLM held that the reissuance of a term permit, which allowed the continuation of a previously authorized activity under the previous terms and conditions, specifically did not require additional NEPA analysis. Rather, the BLM only conducted NEPA analysis when "on-the ground" changes were proposed. In fact, with regard to site-specific analysis on the individual grazing allotments managed by the BLM, the courts have held that NEPA analysis is not necessary on every individual grazing allotment. In NRDC v. Morton, the court held that a single national EIS prepared by the BLM for its grazing program violated NEPA because a program-wide EIS cannot provide "the detailed analysis of a local geographic condition necessary for the decision-maker to determine what course of action is appropriate under what circumstances." NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974), aff'd 527 F.2d 1386 (D.C. Cir. 1976), cert. denied, 427 U.S. 913. Significantly, the court emphasized that NEPA did not require preparation of an EIS on each grazing allotment. The court declared that "so long as the actual environmental effects of particular permits or groups of permits in specific areas are assessed, questions of format are to be left to [the BLM]." Id. at 841.

> *The BLM manages livestock grazing on 155 million acres of those lands. The terms and conditions for grazing on BLM-managed lands (such as stipulations on forage use and season of use) are set forth in the permits and leases issued by the BLM to public land ranchers. –BLM website*

The BLM will cite to an Interior Board of Land Appeals ("IBLA") decision, National Wildlife Federation et al. v. Bureau of Land Management, 140 IBLA 85 (1997) (hereinafter "Comb Wash allotment") claiming that the decision requires completion of a NEPA analysis for the reissuance of a grazing permit. This reliance is misplaced. First, the IBLA decision is based upon the specific facts of that specific case. The IBLA did not say that NEPA compliance was needed for permit reissuance on all grazing allotments in the west, but on the Comb Wash allotment. The IBLA specifically rested its decision on the trial court's finding that livestock grazing was degrading the environment. The BLM did not challenge that finding to the IBLA, thus, based upon the BLM's admission that grazing in this case was degrading the environment, the IBLA found

NEPA compliance was necessary.

Second, the IBLA relied on the fact that the resource management plan in that case did not contain a site-specific discussion regarding grazing in this area. Thus, the court stated that additional analysis should be added to ensure site specific consideration of effects in that case. Again, while the IBLA states that the BLM had to complete NEPA analysis for the Comb Wash allotment, the IBLA has not applied this precedent to the entire BLM for every grazing allotment in the BLM.

Finally, the reissuance of a grazing permit is not a discretionary function within the agency. Because reissuance of a grazing permit is non-discretionary, I believe that a legal argument could be made that the NEPA processes do not apply. However, to date, the courts have not ruled on the validity of this argument and the agencies have been applying NEPA to permit renewal since the late 1990s. Unless a permittee is prepared to take this case to federal court, I believe that the best course of action is to work with the agency to get the NEPA completed in the most expeditious and cost-effective manner possible.

Permit Renewal Pending NEPA Compliance

Once the BLM and FS began requiring NEPA compliance for renewal of every term grazing permit, the agencies discovered the impossibility of timely keeping up the process. Initially the BLM argued that once the term grazing permit ended, grazing had to stop until a new permit was issued. In response, litigation in the Colorado Federal District Court was filed arguing that livestock grazing permits were a "permit of a continuing nature" under 5 U.S.C. § 558(c). As a permit of a continuing nature, the BLM and Forest Service would be required to extend each permit under substantially the same terms and conditions until the NEPA process was completed.

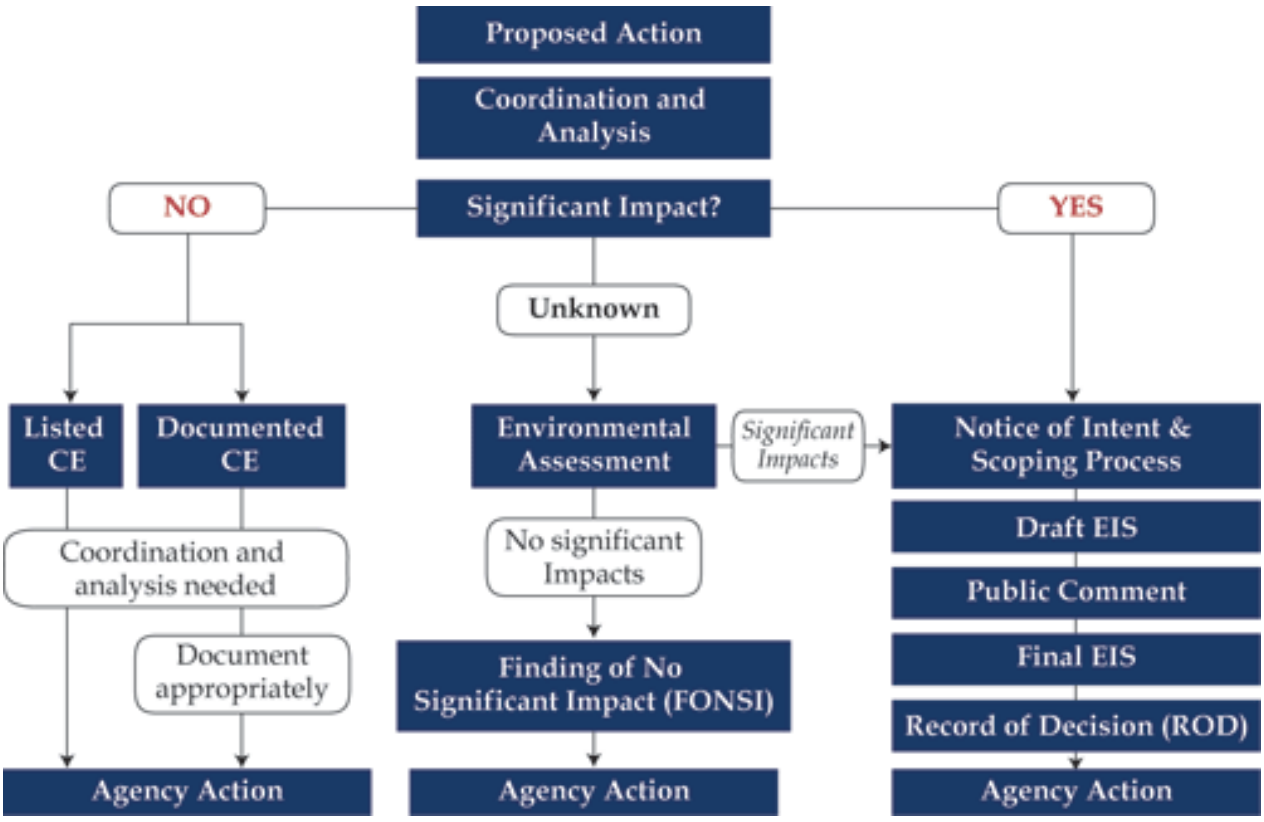
In addition, Congress sought to also ensure grazing continued by adopting a rider on the yearly Appropriations Bills that required a grazing permit to be extended under substantially the same terms and conditions as the expiring permit until the federal agencies completed processing the permit under NEPA and other environmental statutes. This language was permanently codified into statute in 2015.

NEPA

Purpose of NEPA

NEPA was adopted by Congress and signed by President Nixon in 1969 to **(1)** Ensure that the federal agencies consider the consequences of their actions and **(2)** to involve the public in federal agency decisions. NEPA requires that the environmental impacts of all federal agency actions be considered prior to issuing a decision. Further NEPA states that, if there are either beneficial or detrimental environmental impacts, that the "custom and culture of the local citizens and economic consequences of such agency actions are also considered. All courts have proclaimed that NEPA is a "procedural statute" only and that NEPA does not demand any particular outcome.

Of course that does not mean that NEPA is not often "misused" to try to achieve a particular outcome. A significant number of cases have held that once litigation is filed, the courts can temporarily enjoin (stop) an action until the merits of the case are decided. For resource users, if a project is enjoined, it can effectively kill the project because you are not allowed to implement the project until the court finally rules (which often can take a year or more). By that time, project funding is often lost, or, if cattle are removed from the allotment, they will be sold because there are no other options for the permittee. Even if no NEPA violation is found in the end by the Court or it is a ministerial violation that can be easily fixed, it can still be a loss for the project if the significant delay has eliminated the project altogether.



NEPA Form

1. The most common forms of NEPA are an environmental assessment ("EA") or an environmental impact statement ("EIS"). An EIS or EA generally requires environmental consideration of the proposed action, alternatives to the proposed action, mitigation for any adverse environmental consequences and public participation.

a. Direct and indirect effects, cumulative impacts and connected actions - Courts have held that the federal agencies have to consider direct and indirect effects, cumulative impacts and connected actions in the NEPA process. For example, in a recent case in Wyoming, the IBLA held that the BLM erred in completing an EA for grazing term permit renewal that did not consider the connected action of oil and gas development on the allotment in the context of the sage grouse. Although I would argue that not every action within a locality is a "cumulative effect" or a "connected action," certainly if there are other completed or proposed EAs or EISs within the same area as the allotment under consideration, those connected actions should be considered by the federal agencies as well.

b. Failure to adequately explain why the agency did not analyze an alternative(s) - Another area that seems to be litigated is whether the federal agency adequately explained why it did not analyze a particular alternative or particular action. The courts do not require the agencies to consider every possible scenario or alternative imaginable in the completion of a NEPA document, but if something is considered and rejected, the NEPA document must explain the rationale.

c. Failure to collect all possible data - It is often argued during the course of litigation over the sufficiency of the NEPA document that the agency failed to gather or analyze all possible data or other scientific or expert information. Like the decision not to analyze a particular alternative, as long as the federal agency identifies any data gaps and explains why it is not filling those gaps, the courts normally defer to the agency. It is when the agency identifies a data gap and fails to either fill the gap or explain why that is not necessary that the courts will reject the NEPA analysis.

d. "No action" alternative versus "no grazing" alternative - The courts often state that the alternatives analysis is the heart of the NEPA document. The purpose of the alternatives analysis it to compare various scenarios against the "no action" alternative to predict the environmental consequences. One area of major disagreement between the environmental community and the ranching community is the status quo or "no action" alternative. Because these are "grazing lands" as defined by the statutes, we believe that the "no action" alternative or "status quo" is continued grazing. Environmental groups, on the other hand, argue that because the grazing permit has expired, grazing should not be allowed, therefore the "no action" alternative is no grazing. The "no action" alternative is the status quo. The determination of the "no action" alternative is important because, again, it is against the "no action" alternative that the other alternatives are compared. Permittees should work to ensure the proper consideration of the grazing status quo.

2. A third form of NEPA important to grazing permittees is a categorical exclusion ("CX"). Both Forest Service and the BLM, based on a July 15, 2015 Instruction Memorandum (IM 2015-121), can document term grazing permit renewal with a CX.

a. The use of a CX for term permit renewal is discretionary. However, each permittee should strongly encourage their respective federal agency to use a CX for term permit renewal if your permit fits the criteria.

b. The criteria for a CX include a requirement that (1) the monitoring data and evaluation for rangeland heath determinations show that the allotment is meeting all standards, or that if the allotment is not meeting standards, livestock grazing is not the causal factor; (2) the allotment does not contain any "extraordinary circumstances" that would make it ineligible for a CX; (3) compliance with the Endangered Species Act (including section 7 consultation) is met; and (4) the term permit is bring renewed or transferred under substantially the same terms and conditions as the prior term permit.

ADMINISTRATIVE APPEALS

FS Administrative Appeals Process Applied to Term Grazing Permits

Appeal Process

Forest Service decisions are decided by the next higher line officer. Thus, if you receive a decision from the district ranger, your appeal is to the forest supervisor. If the decision you want to appeal was issued by the forest supervisor, the appeal is to the regional forester.

Appeal Contents

a. Grazing permittees who want to appeal a decision regarding their term permit are bound by the procedures at 36 C.F.R. Part 214. Under that process, a permittee has 45 days from the date of the decision to file a notice of appeal and statement of reasons. In addition to the general filing requirements in 36 C.F.R. § 214.8, the notice of appeal and statement of reasons have to contain all of the legal, technical, monitoring, practical and/or scientific reasons that the decision is in error. While this does not have to be a "legal brief," any evidence that you have of a legal or technical nature has to be included in the notice of appeal and statement of reasons, including any range monitoring or other data. Additionally, if you are interested in making an oral presentation to the deciding officer or qualify for the mediation program, you have to make those requests in the notice of appeal and statement of reasons.

b. Once your notice of appeal is filed, the deciding officer has a chance to file a responsive statement. That statement will contain all of his legal reasons and evidence supporting his decision. The permittee will then have a chance to file a reply.

c. There is no evidentiary hearing in the Forest Service appeals process, although if the permittee believes if it would be helpful, he can

request an "oral presentation." Oral presentations give the permittee a chance to more thoroughly explain your issues or answer any questions of the reviewing officer.

BLM Administrative Appeals Process

Appeal Process

a. The Department of the Interior allows for a permittee or environmental group to participate in an evidentiary proceeding before an administrative law judge ("ALJ") when challenging the renewal of a term grazing permit or any of the terms and conditions in a term grazing permit. These ALJ's are part of the Department of the Interior's ("DOI") Office of Hearings and Appeals ("OHA") which was created in the 1970s.

b. Related to a grazing permit renewal, the process is for the BLM to issue the decision as a "proposed decision." The appellant can either elect to file a protest within 15 days, which the BLM is required to consider prior to issuing a final decision. After consideration of the protest, the BLM will issue a final decision, which has to be appealed within 30 days. On the other hand, an appellant can allow the protest period to run, which allows the proposed decision to become a final decision automatically. The appellant then has 30 days from the date of the final decision to file an appeal.

c. Notices of appeal and statements of reason are filed with the BLM district or area officer who signed the proposed or final decision. That BLM officer then forwards the appeal to the OHA for assignment to an ALJ. The notice of appeal has to be accompanied with a statement of reasons (although you can also request an additional 30 days to file the statement or reasons if a timely notice of appeal is filed). Like FS statement of reasons, the BLM statement of reasons has to contain all of the points that the appellant wishes to challenge. If you do not raise a particular point in the statement of reasons, it is deemed waived.

Evidentiary hearing and further appeal

a. ALJs hold evidentiary-type hearings. That means that the appellant gets to put on witnesses and cross examine the opposing witnesses from the BLM or intervening party. Expert testimony can be offered as well as exhibits and other information. On the basis of that hearing, the ALJ will issue his decision.

b. If any party is not happy with the ALJ decision, they can appeal to the Interior Board of Land Appeals ("IBLA"). The IBLA acts as an appellate board like a circuit court would for a district court. The IBLA speaks for the Secretary of the Interior. If the BLM loses before the IBLA, it cannot challenge the decision to a federal district court; if the permittee or environmental group loses an appeal before the IBLA, they can proceed to federal district court if they so choose.

Challenging Agency Scientific or Expert Opinions

a. "Chevron Deference" - In 1984, the U.S. Supreme Court issued an opinion in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) which fundamentally changed the way that the courts view federal agency administrative decisions. According to that case, courts should generally defer to agency interpretations of statute, as well as the scientific expertise of the administrative agency. As a practical matter, for the permittee it means that if your appeal or litigation turns on an interpretation of administrative law or on a scientific or factual determination, the courts will defer to the administrative agency's decision.

b. Although you will normally "lose" if the case turns on a "battle of the experts" and you are trying to pit your expert against the expert in an agency, there are ways to eliminate that deference and equalize the playing field. Specifically courts (including the IBLA) have held that if (1) the agency is not completing the right kind of study to get the information it seeks, (2) the study is incorrectly completed on the ground or (3) the data does not support the agency's conclusion, deference is no longer afforded to an agency's expert determination. Once that deference is eliminated, the opinion of your expert will be given equal weight to that of the agency's.

General Requirements Before Proceeding to Federal Court

a. Administrative Record - Whether the permittee is dealing with Forest Service or BLM, the administrative appeals process in the ONLY place where a permittee can ensure that all information that the federal court should consider can be added to the record. Federal courts ONLY review the information that was presented in the administrative appeals process, so it is important that you fully participate in the administrative appeal. No additional data, scientific information or analysis or other information can be added once a federal court case has been filed.

b. Exhaustion - Federal courts also require that administrative appeals be exhausted prior to proceeding to federal court. That means that neither the permittee nor the environmental group challenging a term grazing permit decision can go straight to court without going through the administrative appeals process first.

c. Exception to Exhaustion Requirement - One exception to the requirement that a permittee or appellant has to exhaust administrative remedies by administratively appealing a decision is a challenge to the Annual Operating Plan ("AOP") or Annual Operating Instructions ("AOI") to a permittee. Although both the BLM and FS state that AOIs and AOPs are not "appealable," that only applies to the agency administrative processes. Both the Ninth Circuit Court and the Tenth Circuit Court have held that AOIs and AOPs can be challenged in federal court by both environmental groups and the permittees themselves.

d. Issue Preclusion - Finally, all issues that may be raised, have to be raised in the administrative appeals process. In other words, a new issue cannot be introduced to the federal court that was not considered in the administrative appeals process.

Budd-Falen Law Offices is located in Cheyenne Wyoming. We are a law firm dedicated to giving a voice to the Western States on property issues. Please visit us on Facebook at Budd-Falen Law Offices L.L.C and follow us on Twitter @Buddfalenlaw

Frank Falen
300 East 18th St. Cheyenne, WY 82001
(307) 632-5105