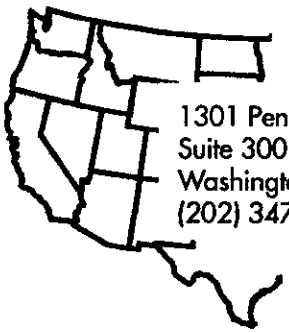

PUBLIC LANDS COUNCIL

1301 Pennsylvania Avenue, N.W.
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(202) 347-5355 Fax: (202) 737-4086

January 7, 2008

Mr. Jim Caswell
Director, Bureau of Land Management
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Caswell:

As you are aware, the Congressional language that provides direction on how the BLM will renew BLM grazing permits and leases when these permits/leases reach the end of their current term will expire on September 30, 2008. We'd like to express our appreciation of the working relationship we have with your Range staff to discuss this and other issues of importance to our industry.

It is our opinion that language in the Omnibus Appropriations Bill for FY 2004, (Pl 108-108), is consistent with other current laws and with existing regulations. It states, in pertinent part:

> " The terms and conditions contained in the expired, transferred, or waived permit or lease (waived in the case of the USFS but not of issue in this letter to you), shall continue in effect under the renewed permit or lease until such time as the Secretary of Interior .... completes processing of such permit or lease in compliance with all applicable laws and Regulations, at which time such permit or lease may be canceled, suspended, or modified, in whole or in part, to meet the requirements of such applicable laws and Regulations ."

We recognize that the BLM has a responsibility to evaluate under the National Environmental Policy Act the environmental and social and economic impacts, if any, of significant changes to the current terms and conditions of a BLM grazing permit or lease prior to a decision to make those changes. However, it is our view that renewal of a permit **under the same terms and conditions** does not constitute a "major federal action" as envisioned by NEPA and therefore does not, in and of itself, require environmental analysis. Environmental documentation would only be required for those allotments in which resource conditions have changed, indicated a need for a change in

the terms and conditions of the permit. BLM adoption of this approach will partially restore the policy that was in effect prior to 1999 that assured the automatic renewal of a permit under the same terms and conditions. A return to this policy may preclude having to ask Congress to renew the provisions of the 2004 Appropriations Bill.

If the current policies of the BLM are not revised to reflect this well-established approach to permit renewal before next September 30, 2008, and should the current appropriations language not have been renewed by that time, our permittees will lose their long-recognized ability to have their permits automatically renew.

We are requesting that you proceed with this necessary policy change. In the alternative, please clearly convey to us what will be the BLM approach with respect to renewal of a grazing permit or lease that expires after September 30, 2008.

Thank you for considering our position. Please contact us with any questions and we look forward to your response. We would be please to meet with you at your earliest convenience to further discuss this subject of great importance to the BLM and our industry.

Sincerely,

Dave Nelson

Dave Nelson
President
Public Lands Council

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

In Reply Refer To:
4100 (220)

September 10, 1999

EMS TRANSMISSION
Instruction Memorandum No. 99-194
Expires: 9/30/00

To: All Field Offices

From: Assistant Director, Renewable Resources and Planning

Subject: Permittee Requests For Information on Grazing Renewal

The Field Offices have asked for instructions on how to respond to letters from livestock permittees' concerns that the BLM will not complete work to renew particular grazing permits before those permits expire.

The BLM does not intend to order removal of livestock, upon expiration of a permit or lease, where a permittee has met the requirements of the Administrative Procedure Act (APA), 5 U.S.C. section 558(c). BLM recognizes a permittee may rely on the APA to continue to graze. However, this mechanism has not been used in the past in a situation such as this and there may be some legal risk.

The BLM can assist the process by asking the permittees or lessees to give the BLM a request for renewal before current permits or leases expire. Such a request for renewal may not be strictly necessary, but we think that it is a prudent method to proceed in this situation. You may contact the permit or lease holders in any manner you deem effective. Request for renewals may be brief, but should be in writing and should contain a short statement that the permit or lease holder remains qualified to graze on the public lands. All requests should be in writing and dated and signed. BLM should send a bill for the remainder of the grazing season where appropriate. The BLM should issue additional bills following the usual procedures if the extension extends into future years. The Grazing Authorization and Billing System (GABS) must be used to produce all grazing bills.

We are all aware that you have prioritized work and committed scarce resources to complete the high priority task of grazing permit and lease renewals. We recognize your hard work at NEPA compliance and in providing for the long term health of the land. This has been a most challenging and difficult task and we recognize and appreciate your efforts.

Questions concerning this memorandum should be addressed to George Ramey, WO Rangeland Management Specialist at 202-452-7747.

Henri R. Bisson
Assistant Director, Renewable Resources & Planning

Post-it™ Fax Note 7671	Date 9-10	# of pages ▶ 1
To Frank	From Dave
Co./Dept.	Co.
Phone # Vera	Phone # Cougar
Fax # +	Fax #

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Memorandum

To: **John Falen**

Via: **Telefax**
775/272-3396

From: **Karen Budd-Falen**
Budd-Falen Law Offices, LLC

Date: **January 24, 2008**

Re: **Follow up to Bureau of Land Management Memorandum Regarding National Environmental Policy Act Applied to Term Permit Renewal or Transfer**

The purpose of this memorandum is to make you aware of two recent additional cases regarding the application of National Environmental Policy Act ("NEPA") to Bureau of Land Management ("BLM") permit renewals and transfers. This memorandum does not change the opinion that NEPA should not apply to the renewal or transfer of a term grazing permit when there are no on-the-ground changes in grazing. Those new cases are as follows:

With regard to grazing permit transfers, there is an additional Ninth Circuit case that supports the contention that NEPA should not apply to the transfer of a term grazing permit from one qualified entity to another. In National Wildlife Federation v. Espy, the court held that if the transfer of title does not change the status quo, it is not subject to NEPA (i.e. cattle grazed on the land both before and after the title transfer). 45 F.3d, 1377, 1343-44 (9th Cir. 1995) quoting Upper Snake River v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990).

Second, with regard to permit renewals, Great Old Broads for Wilderness v. Kempthorne, refers to the various appropriations riders providing for the renewal of all expiring permits pending the completion of requisite review procedures. Great Old Broads for Wilderness v. Kempthorne, 452 F.Supp.2d 71, 76 (D. D.C. 2006). Specifically this case recognizes that with the Consolidated Appropriations Act of 2000, the

Secretary of the Interior was required to renew any grazing permit that expired or was transferred during fiscal year 2000 with "[t]he terms and conditions contained in the expiring permit . . . continu[ing] in effect under the new permit . . . until such time as the Secretary of the Interior completes processing such permit . . . in compliance with all applicable laws and regulations, at which time such permit . . . may be canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations." Id. quoting, Publ.L. 106-113 § 123 (1999). Additionally, it notes that provisions identical in all relevant aspects were subsequently enacted for those permits that expired or were transferred during 2001, 2002, and 2003. Id. citing Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 106-291 § 116 (2000); Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 107-63 §114 (2001); Consolidated Appropriations Resolution, Pub.L. No. 108-7 § 328 (2003) (requiring renewal of any grazing permit "that expires, is transferred, or waived during fiscal year 2003"). In 2003, Congress extended the same renewal requirement to all permits that expired, were transferred, or were waived "during fiscal years 2004-2008." Id. quoting Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 108-108 § 325 (2003). This rider also provided that "the Secretary in [the Secretary's] sole discretion" is to "determine the priority and timing for completing required environmental analysis of grazing allotments based on the environmental significance of the allotments and funding available to the Secretaries for this purpose." Pub.L. No. 108-108 § 325. This case specifically recognized the Appropriation Riders and ruled that the BLM did not act arbitrarily and capriciously by relying on the Appropriations Riders to renew the livestock grazing permits in the Glen Canyon National Recreation Area.

Should you have any questions, please do not hesitate to contact me.

Budd-Falen Law Offices, L.L.C.

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October 30, 2007

Via E-Mail: jeisenberg@beef.org
and First Class U.S. Mail
Jeff Eisenberg
Public Lands Council
1301 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20004-0607

Re: Application of National Environmental Policy Act to Bureau of Land Management Term Permit Renewal

Dear Jeff:

This follows upon the documents that my office e-mailed to you last week regarding the application of the National Environmental Policy Act ("NEPA") to Bureau of Land Management ("BLM") term permit renewals. As I am sure you are aware, our concern regarding whether the BLM chooses to conduct NEPA review for permit renewals is not as severe as our concern that livestock may be removed when NEPA is not completed or is not completed properly. Under the Administrative Procedures Act ("APA"), permits of a continuing nature, such as term grazing permits, must be renewed at least until a final decision is reached regarding the renewal. Additionally, even if NEPA applies, changes in the terms and conditions in the permit should not become effective until after the NEPA process is complete. As explained below, grazing is the current use. Therefore it is grazing, not grazing removal, that is the status quo. Even Secretary Babbitt grudgingly accepted that principle.

Often, it seems that permit renewal is compared to a timber sale that cannot go forward without a final decision so stating. Thus, NEPA can be used to delay a timber harvest because that harvest is a change in the status quo. We all know that environmentalists have used the NEPA appeals process to greatly delay or eliminate timber sales. On the other hand, when the renewal authorization is for an existing use such as a hydro project, no one suggests that the dam should be removed until the renewal process is complete. This is true even if the renewal process is not completed until long after the existing authorization has expired. Therefore, environmental activists have less reason to challenge those renewals because the use will continue while the appeal is pending. For ongoing uses, the NEPA process can be a pain, but it is usually a manageable pain because the use continues even if the NEPA process is delayed.

That is why it is critical to understand that grazing is more like a hydro project or a gas well than a timber sale because grazing is an existing on going use. If we lose that battle, and each renewal or transfer is treated as a new authorization, then our detractors will be able stop permittees from turning out by appealing each renewal decision. Thus, it is important that the industry insist that grazing renewals be treated as the renewal of an existing use, and not as the authorization of a new use.

In addition to the above "APA argument," the grazing industry has rights under the grazing statutes that other users of federal lands do not have. For example, when the Taylor Grazing Act ("TGA") was passed, most of the land now managed by the BLM was reserved from homestead entry and designated as livestock grazing reserves. This land was then included in grazing districts which still exist even though we seldom hear the term. When the Federal Land Policy and Management Act ("FLPMA") was passed in 1976, it changed a great deal regarding how BLM lands are managed. However, the FLPMA specifically grandfathered in all land classifications, including those lands classified as grazing lands. Although the grazing classification can be changed pursuant to the land planning process, livestock grazing must occur on those lands until that classification is affirmatively changed.

In Public Lands Council v. Babbitt, the Court ruled that because the land in question was reserved for livestock grazing purposes, the BLM was required to use the land for livestock grazing and that a permit not to graze was illegal. Thus, the Court found that the so-called "conservation use permit" was illegal because it was a permit not to graze upon land where grazing is a required use. It logically follows then that if the BLM cannot affirmatively choose to completely remove livestock grazing without first complying with the land planning process to remove the grazing classification (an action that would require NEPA review) then it cannot accomplish the same thing by failing to complete NEPA when renewing a term permit on land reserved for livestock grazing.

The provisions of the APA mandating permit renewal until such time as the NEPA decision–making process is complete apply independently of the TGA. The APA argument is easier to make because you do not have to explain the history of the grazing lands being reserved for livestock grazing and the legal ramifications of that designation. However, relying solely on the APA has two downfalls. First, the APA, which applies to all types of renewable federal permits and licenses, requires the applicant make a timely request for renewal. Grazing permit holders seldom request renewal because the BLM has always affirmatively offered the permit to the preference holder. However, under the TGA, the process starts with the assumption that the land must be used for grazing. Then the permit is offered to the holder of the preference right.

Second, the application of the APA with respect to transfers between qualified permit applicants is not clear. However, under the TGA, the permit will transfer to a qualified applicant because it must be offered to the new holder of the preference right.

While the concepts mentioned above are not new to you, I hope that these materials are useful to you and other industry leaders. If our industry loses this issue, and renewals can be delayed in the same manner as a timber sale, the results will be devastating. A categorical exclusion is not the answer because the list of exceptions is so broad that the anti-grazing groups will always be able to state a reason why the categorical exclusion should not apply for any given renewal.

As stated above, the application of NEPA, including utilization of a categorical exclusion is not harmful, so long as it is clear that the failure to complete the process on time does not require the removal of livestock.

Thank you for your efforts on this issue.

Sincerely,

/s/ Franklin J. Falen

Franklin J. Falen
BUDD-FALEN LAW OFFICES, LLC

FJF:nec

Enclosures

Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995 [P.L. 104-19]

Known as the "Rescissions Act of 1995"

Sec. 504. (a) Schedule for NEPA Compliance.--Each National Forest System unit shall establish and adhere to a schedule for the completion of National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) analysis and decisions on all allotments within the National Forest System unit for which NEPA analysis is needed. The schedule shall provide that not more than 20 percent of the allotments shall undergo NEPA analysis and decisions through fiscal year 1996.

(b) Reissuance Pending NEPA Compliance.--Notwithstanding any other law, term grazing permits which expire or are waived before the NEPA analysis and decision pursuant to the schedule developed by individual Forest Service System units, shall be issued on the same terms and conditions and for the full term of the expired or waived permit. Upon completion of the scheduled NEPA analysis and decision for the allotment, the terms and conditions of existing grazing permits may be modified or re-issued, if necessary to conform to such NEPA analysis.

(c) Expired Permits.--This section shall only apply if a new term grazing permit has not been issued to replace an expired or waived term grazing permit solely because the analysis required by NEPA and other applicable laws has not been completed and also shall include permits that expired or were waived in 1994 and 1995 before the date of enactment of this Act.

FY 2004 Interior and Other Related Agencies Appropriations Public Law 108-108

Sec. 325. A grazing permit or lease issued by the Secretary of the Interior or a grazing permit issued by the Secretary of Agriculture where National Forest System lands are involved that expires, is transferred, or waived during fiscal years 2004-2008 shall be renewed under section 402 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1752), section 19 of the Granger-Thye Act, as amended (16 U.S.C. 5801), title III of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1010 et seq.), or, if applicable, section 510 of the California Desert Protection Act (16 U.S.C. 410aaa-50). The terms and conditions contained in the expired, transferred, or waived permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior or Secretary of Agriculture as appropriate completes processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations. Nothing in this section shall be deemed to alter the statutory authority of the Secretary of the Interior or the Secretary of Agriculture: Provided, That where National Forest System lands are involved and the Secretary of Agriculture has renewed an expired or waived grazing permit prior to fiscal year 2004, the terms and conditions of the renewed grazing permit shall remain in effect until such time as the Secretary of Agriculture completes processing of the renewed permit in compliance with all applicable laws and regulations or until the expiration of the renewed permit, whichever comes first. Upon completion of the processing, the permit may be canceled, suspended or modified, in whole or in part, to meet the requirements of applicable laws and regulations: Provided further, That beginning in November 2004, and every year thereafter, the Secretaries of the Interior and Agriculture shall report to Congress the extent to which they are completing analysis required under applicable laws prior to the expiration of grazing permits, and beginning in May 2004, and every two years thereafter, the Secretaries shall provide Congress recommendations for legislative provisions necessary to ensure all permit renewals are completed in a timely manner. The legislative recommendations provided shall be consistent with the funding levels requested in the Secretaries' budget proposals: **Provided further, That notwithstanding section 504 of the Rescissions Act (109 Stat. 212), the Secretaries in their sole discretion determine the priority and timing for completing required environmental analysis of grazing allotments based on the environmental significance of the allotments and funding available to the Secretaries for this purpose:** Provided further, That any Federal lands included within the boundary of Lake Roosevelt National Recreation Area, as designated by the Secretary of the Interior on April 5, 1990 (Lake Roosevelt Cooperative Management Agreement), that were utilized as of March 31, 1997, for grazing purposes pursuant to a permit issued by the National Park Service, the person or persons so utilizing such lands as of March 31, 1997, shall be entitled to renew said permit under such terms and conditions as the Secretary may prescribe, for the lifetime of the permittee or 20 years, whichever is less.

Consolidated Appropriations Act, 2005
Public Law 108-447

TITLE III--GENERAL PROVISIONS

Sec. 339. **For fiscal years 2005 through 2007,** a decision made by the Secretary of Agriculture to authorize grazing on an allotment shall be categorically excluded from documentation in an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if: (1) the decision continues current grazing management of the allotment; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances. The total number of allotments that may be categorically excluded under this section may not exceed 900.

Budd-Falen Law Offices, L.L.C.

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MEMORANDUM
******

TO: **John Falen**

FROM: **Karen Budd-Falen**

DATE: **July 30, 2007**

RE: **Permit Renewals and Transfers**

The Department of the Interior ("DOI" or "Secretary") has issued a policy that compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq. is required prior to the renewal or transfer of livestock grazing preferences. Specifically, the DOI requires that the Bureau of Land Management ("BLM") complete an environmental assessment ("EA") or environmental impact statement ("EIS") (collectively "analysis") prior to term grazing permit reissuance or transfer. This new policy was the result of an internal change, not the result of rulemaking or any other public process. The new BLM permit renewal and transfer policy represents a significant change to past practice and statutory authority. Prior to 1998, the BLM held that the reissuance of a term permit, which allowed the continuation of a previously authorized activity under the permit's previous terms and conditions, did not require

additional NEPA analysis. Rather, the BLM only conducted NEPA analysis when "on-the-ground" changes were proposed.

As will be explained below, the DOI's new policy directly conflicts with existing statutes that protect grazing permittees. The Secretary cannot legally eliminate grazing due to BLM's failure to complete NEPA analysis. The BLM should reinstitute its 1998 policy.

I. EXISTING STATUTES PROHIBIT THE NEW POLICY

The new DOI policy violates existing statutes. As will be detailed below, there are existing statutes which require the BLM to follow certain procedures before adverse decisions become effective.

A. Taylor Grazing Act ("TGA")

The TGA, the statute codifying the BLM permit system, contains significant procedural protection for permittees using the BLM lands. For example, the TGA states that:

> The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department.

43 U.S.C. § 315h. This provision guarantees the right to a hearing when the BLM proposes an action that is adverse to a grazing permit. The new BLM policy frustrates this section by forcing permittees off their allotments before the agency makes a decision. Because many permittees do not have any other place to go with their livestock, they will be forced out of business before their hearing on the merits can begin.

The Taylor Grazing Act also states:

> 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 this case, the new BLM policy does not make an exception for grazing permits used to secure any bona fide loan. Thus, the new BLM policy violates this mandate.

B. Federal Land Policy and Management Act ("FLPMA").

According to FLPMA, 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 of shorter than ten years: *Provided further*, That the absence of completed the 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.

43 U.S.C. § 1752(b). (Emphasis added.) In violation of this statute, the BLM has issued a nation wide blanket policy stating that the sole basis for effectively canceling a permit is the absence of a completed "environmental statement." In contrast, the above quoted statute dictates the opposite result; the mere failure of the agency to timely complete a land use plan or court ordered environmental statement "shall not be the sole basis for establishing the [grazing permit] term shorter that ten years" without consideration of the Secretary on a case by case basis.

FLPMA further states:

> The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, ... *Provided further,* That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: *Provided further,* That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

43 U.S.C. § 1732(c). This provision clearly mandates against the BLM policy for several reasons. First, this section of FLPMA statute contemplates suspension of a permit for a violation of a statute. In this case, the permittees have violated no statutes justifying the suspension of their permits. Second, if there is a temporary suspension, such decision must be made on a case by case basis to "protect the health or safety or the environment." As stated above, the BLM policy does not contemplate a decision suspending grazing permits on a case by case basis for protection of health, safety or the environment.

Third, the last line of the statute states that specific language in other statutes shall govern the issue. An example of such specific language is contained in 43 U.S.C. § 1752(g) which states:

> Except in cases of emergency, no permit or lease shall be canceled under this subsection without two years' prior notification.

Contrary to this language, the BLM policy would "cancel" grazing permits with no notice simply for the failure of the BLM to complete its duties. As has been stated above, the BLM's policy violates the law.

C. Administrative Review Pursuant to the Administrative Procedure Act ("APA")

The APA provides several procedural requirements that must be followed prior to issuing a decision which adversely impacts a grazing permit. Title 5 U.S.C. § 554 states that adjudications are to be made on the record, after opportunity for a hearing before an impartial hearing officer. Additionally, the agency must allow interested parties an opportunity for the submission and consideration of fact, legal arguments and offers of settlement. The BLM policy fails to include these protections before eliminating grazing.

Title 5 U.S.C. § 556 establishes the burden of proof, and authorizes the agency to issue subpoenas and to receive evidence. These procedural requirements must be followed after the agency proposes an initial decision and before the agency can issue a final decision. Specifically, the statute states:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received .... A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.... A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts ....
>
> (e) The transcript of testimony and exhibits, together with all the papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. § 556(d)(e). (Emphasis added.)

Finally, the APA clearly states that federal agencies may not eliminate a license or permit, simply because of agency failure to renew the permit within the appropriate period of time. According to the APA:

> When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance was sections 556 and 557 of this title or other proceedings required by law and shall make its decision. . . .
>
> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558(c). (Emphases added). This statute makes it clear that the BLM cannot simply refuse to allow the permittees to continue to use their permits, without making an affirmative and appealable decision that the permit is canceled. The BLM policy violates this statute.

D. Judicial Review Pursuant to the APA

Judicial review of agency actions is governed by 5 U.S.C. §§ 702 et seq. According to that statute:

> The reviewing court shall --
>
> (1) compel agency actions unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. . . .
> (B) in excess of statutory jurisdiction, abuse of discretion, or short of statutory right;
> (C) without observance of procedure required by law;
> (D) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . .

(Emphasis added.) The new BLM policy does not honor the substantive and procedural protections that are required by the above referenced statute. Rather, the new BLM policy will summarily eliminate grazing without consideration of the harm to the permittees and without giving the permittees an opportunity to protect their interest. Therefore, if the Secretary's new policy is challenged in federal court pursuant to 5 U.S.C. § 706, the policy must be stricken because it is not in accordance with law and does not observe procedure required by law.

II. THE NEW POLICY IS NOT REQUIRED BY EXISTING LAW

NEPA applies to any "major federal action significantly impacting the quality of the human environment." 42 U.S.C. § 4332(C). The DOI has not explained why a simple "paper transaction" which will not result in any change to the "human environment" requires NEPA compliance. To subject a grazing permit which has already been analyzed for "impacts on the human environment" under a BLM land use plan to NEPA analysis, simply because the permit is up for renewal, is not only inconsistent with prevailing law, but wastes the agency's time and taxpayer's money. Consider the following points:

First, there is no court decision or other legal requirement that the BLM eliminate livestock grazing if NEPA studies have not been completed.[1] The "Comb Wash" Interior

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[1] The case is even more compelling with regard to the Forest Service NEPA permit reissuance policy. In fact, the only two court cases alleging that the Forest Service must complete NEPA analysis prior to permit reissuance ended in negotiated "case settlements" with the environmental groups. Thus, the agency has precluded the courts from ruling on the merits of the Forest Service's original policy that NEPA does not apply to reissuance of grazing permits.

Board of Land Appeals ("IBLA") decision, which will be discussed below, does not change this statement.

Second, legislative history and court precedent clearly demonstrate that the agency is not mandated to complete NEPA documentation when issuing or renewing term grazing permits and authorizations. For example, during the congressional debates over the Public Rangelands Improvement Act ("PRIA") 43 U.S.C. § 1752(d) (the Act authorizing allotment management plan ("AMP") development), Congress specifically stated that the development of most AMPs would not be subject to NEPA requirements unless on-the-ground improvements were planned.

Third, the few federal court cases dealing with NEPA application to federal land grazing permits discuss NEPA compliance for land use plans, and allotment management. These cases start with the proposition that NEPA applies to development of land use plans and land and resource management plans ("RMPs"). For the last fifteen (15) years, the Forest Service and the BLM have been completing NEPA analyses as part of their land use planning processes. See Resources Limited v. Robinson, 789 F. Supp. 1529 (D. Mont. 1991).

With regard to site specific analysis on the individual BLM grazing allotments, 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.[2]

The BLM will cite to an IBLA decision, National Wildlife Federation et al. v. Bureau of Land Management, 140 IBLA 85 (1997) (hereinafter "Comb Wash decision") claiming that the decision requires completion of a NEPA analysis for the reissuance of a grazing permit. This reliance is misplaced. 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. In addition, IBLA is an administrative agency not a federal court.

III. RECOMMENDATION

Because the new policy was created administratively, it can be changed administratively. We recommend that the DOI simply rescind the current policy and return to the 1998 policy which does not require NEPA compliance to simply renew a term grazing permit under existing terms and conditions.

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[2] In complying with the court's decision, the BLM divided all the allotments in its individual resource areas into three general categories, "maintenance," "improvement" and "custodial." The agency then completed an EIS for each category. In one particular case, the court upheld the BLM's decision to divide fifty-five (55) grazing allotments into these three categories and complete an EIS for each category.

John & Sharon Falen

From: "Maggie Beal" <mbeal@beef.org>
To: "Jeff Eisenberg" <jeisenberg@beef.org>; <mbeal@beef.org>
Sent: Friday, August 10, 2007 12:45 PM
Attach: Secretary letter 8-07.pdf
Subject: PLC letter to Secretary Kempthorne

The following letter was sent to Secretary of the Interior Dirk Kempthorne today.

August 10, 2007

The Honorable Dirk Kempthorne
Secretary of the Interior
1849 C Street, NW, Room 6156
Washington, DC 20240

Dear Secretary Kempthorne:

The Public Lands Council wants to thank you for meeting with our leadership last Wednesday, 1 August. We strongly believe that cooperative conservation will ultimately prove to be successful if those who own or make a living from the land are engaged in the task. Because we share your mission of caring for the land while also striving to run economically viable ranching operations in the West, we were grateful to come speak with you about the critical issues facing the livestock industry on public lands: Bureau of Land Management (BLM) regulation litigation, issuance of Endangered Species Act (ESA) regulations, and grazing permit security. Our views on each of these issues are summarized below.

BLM Grazing Regulations Litigation

We ask the Department to appeal the adverse ruling on the grazing regulations issued by Judge Winmill, if possible. If an appeal proves not to be possible, we ask the Department to reopen the administrative record at the earliest possible date to perform the analyses necessary to strengthen the legal defensibility of those aspects of the rule that are most central to effective administration of the grazing program by BLM.

ESA Regulations

We ask the Department to publish proposed regulations to improve administration of the Endangered Species Act at the earliest possible date.

Grazing Permit Security

We ask the Department to take the necessary measures and focus the necessary resources to ensure that grazing permits are renewed and are not interrupted because of an effort to address environmental laws.

Again, we want to thank you for meeting with us and giving us the chance to exchange our views on these important issues with you.

Sincerely,

David Nelson
President

CC: Michael Bogert, *Counselor to the Secretary*
Gary Smith, *Director, External and Intergovernmental Affairs*
Jim Hughes, *Acting Director, Bureau of Land Management*
Jim Caswell, *Nominated Director, Bureau of Land Management*
<<Secretary letter 8-07.pdf>>