

INTERIOR BOARD OF LAND APPEALS

Bertrand Paris & Sons
v.
Bureau of Land Management

150 IBLA 146 (August 27, 1999)

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BERTRAND PARIS & SONS

v.

BUREAU OF LAND MANAGEMENT

IBLA 96-246

Decided August 27, 1999

Appeal from a decision of Administrative Law Judge James H. Heffernan upholding Bureau of Land Management decisions implementing a third-year phased-in reduction in active grazing preference and denying requests for increases in active use on the Medicine Butte Allotment.

Affirmed.

1. Grazing and Grazing Lands—Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals

Where holders of grazing permits failed to timely appeal 1992 Final Multiple Use Decision, they were barred from challenging the validity of the adjustment prescribed therein to the extent that the adjustments were based on studies and monitoring data in existence at the time the 1992 Decision was issued.

2. Contracts: Construction and Operation—Grazing and Grazing Lands—Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Cancellation or Reduction

Reliance upon the oral information, advice or opinion of any Federal officer or employee will not bind the United States to vary the terms of a written grazing permit to conform to the representations allegedly made by such officer or employee, absent proof of extreme circumstances which would vitiate the permit.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for appellants; John R. Payne, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Bertrand Paris & Sons (appellants) hold grazing permits to graze both sheep and cattle on public lands located in the Medicine Butte Allotment within the Bureau of Land Management's (BLM's) Nevada Egan Resource Area. Appellants challenge two BLM decisions dated April 22, 1994, and April 25, 1995, denying their requests to substantially increase the number of livestock that they were previously permitted to graze. Additionally, appellants challenge BLM's February 3, 1992, Final Multiple Use Decision (1992 Decision), establishing the livestock carrying capacity for the Medicine Butte Allotment.

The 1992 Decision, issued in accordance with the Resource Management Plan/Environmental Impact Statement and Record of Decision for the Egan Resource Area, implemented several stocking-level reductions for the Medicine Butte Allotment. (Exhibit (Ex.) R-3.) The 1992 Decision changed appellants' previously permitted livestock active use from 15,174 animal unit months (AUM's) to 7,232 AUM's. (Tr. 29; Ex. R-3 at 3-4.) These AUM's were distributed by use area within the allotment. (Ex. R-3 at 3-4.) The rationale given for reducing livestock AUM's was that monitoring studies indicated that there was over-utilization in areas used by livestock and that a reduction was necessary to meet the Land Use Plan and Rangeland Program Summary objectives. (Ex. R-3 at 5.) More specifically, BLM concluded that analysis of monitoring data revealed that 6 of the 14 Land Use Plan objectives for the allotment were not being met due to existing grazing use by livestock and wild horses. *Id.* at 3. Monitoring studies, BLM stated, indicated "over-utilization on native range, winterflat bottoms, and crested wheatgrass seedings used by livestock and wild horses." *Id.* at 5. In accordance with the provisions of 43 C.F.R. § 4110.3-3, this reduction was implemented over a 5-year period, with one-third of the reduction taken in each of the first, third, and fifth years. (Ex. R-3 at 4; Tr. 29.) The 1992 Decision was not placed in full force and effect, thereby affording appellants a planning window within which to plan for, and implement the referenced changes.

The 1992 Decision also set the Appropriate Management Level (AML) for the allotment for wild and free roaming horses at 956 AUM's (80 horses). (Ex. R-3 at 7.) The 1992 Decision required the removal of "excess wild horses" (horse numbers above the AML) from the allotment. (Ex. R-3 at 8.) Appellants did not file a timely appeal of the 1992 Decision. (Tr. 29.)

The first year reduction in active preference under the 1992 Decision did not require appellants to reduce licensed use. (Tr. 335-36.) The 1992 Decision determined that the allowable livestock use in the third year, the 1994-95 grazing year, would be a total of 9,906 AUM's for both cattle and sheep (4,458 AUM's for cattle and 5,448 AUM's for sheep). (Ex. R-3 at 4.) This figure was above appellants' average licensed use between 1987 and 1990 of 8,453 AUM's. (Tr. 331-33.) Rather than accepting the third-year reduction in active preference, appellants on March 9, 1994, applied for 12,583 AUM's of active preference of combined cattle and sheep use. (Ex. E.)

The Egan Resource Area Manager denied appellants' application on April 22, 1994 (Ex. B), because (1) the application requested higher stocking levels than those set out in the 1992 Decision (Tr. 488; Ex. B at 2), and (2) the 1994 Reevaluation supported the third-year reduction in active preference rather than an increase in active preference. (Ex. R-4; Tr. 482-88.)

Appellants submitted, and the Area Manager, again, on April 25, 1995, denied, for the same reasons, a similar application for the 1995 grazing season. See Ex. G.

A hearing on appellants' appeal of BLM's 1992, 1994, and 1995 decisions was held before Administrative Law Judge James H. Heffernan in Ely, Nevada, between November 11 and 14, 1995. On February 22, 1996, Judge Heffernan issued a decision affirming the BLM decisions. Therein, he concluded that: (1) because Paris did not appeal the 1992 Decision, that decision was not subject to review in this proceeding; (2) BLM did not enter into any verbal or other agreement with appellants concerning implementation of the 1992 Decision; and, in particular, there was no agreement that BLM would take certain action if appellants did not appeal the 1992 Decision (Tr. 33-35); (3) appellants in 1994 and 1995 applied for livestock grazing increases which exceeded the pertinent levels prescribed in the 1992 Decision (Exs. E and F); (4) BLM properly denied those increases because they requested higher grazing levels than those prescribed in the 1992 Decision and because monitoring data gathered subsequent to the 1992 Decision did not support the requested livestock increases (Ex. R-4); (5) wild horses were removed from the allotment in a timely gather in 1993 and 1994 (Tr. 453-55) and were removed as quickly as available funding, and legal and policy constraints would allow (Tr. 474). (Decision at 11-12.) From Judge Heffernan's February 22, 1996, decision, this appeal ensued.

Appellants argue on appeal that the regulation in effect at the time of the 1992, 1994, and 1995 decisions authorized appeal of decreases in active use at the time of the initial decision and at each decreasing step. In this case, appellants insist they are "authorized to appeal the third and fifth year reductions if monitoring indicates a scheduled reduction should be modified."

While appellants concede that this construction is "not clear from the plain language of the regulation," regulatory authority supporting this construction, they insist, was originally promulgated in 1981 in 43 C.F.R. § 4110.3-2(e):

Prior to implementation of each step of a phased suspension, the authorized officer shall review available information to determine whether the amount of suspension should be modified (either increased or decreased). If the authorized officer determines that monitoring data indicate that the amount of a scheduled suspension should be modified,

a new decision shall be issued under Subpart 4160 of this title. However, the new decision shall not extend a phase-in period established in a previous decision. 46 Fed. Reg. 5789 (1/19/81).

The 1981 appeal regulations similarly provided for appeal of third- and fifth-year reductions. See 43 C.F.R. § 4160.1-1 (1981) and 43 C.F.R. § 4160.3 (1981). Appellants note that in 1982 the Secretary amended 43 C.F.R. § 4110.3-2(e) by deleting the last line of that section which provided: "if the authorized officer determines that monitoring data indicates that the amount of a schedule suspension should be modified, a new decision shall be issued under 4160 of this title." They note that the Secretary "reaffirmed in the preamble to the amendment his intent to require an evaluation by monitoring to justify the additional adjustment" (see 47 Fed. Reg. 41704 (Aug. 21, 1982)) as was the case in Ruskin Lines Jr. v. BLM, 76 IBLA 170, 171-72 (1983).

Appellants, while acknowledging that the Secretary in 1984 amended 43 C.F.R. § 4110.3-2(e) by replacing that section with the current regulation found at 43 C.F.R. § 4110.3-3(b), emphasize that the "Secretary reaffirmed his previous intent to require evaluation of monitoring to justify the additional adjustments." Appellants urge us to focus on the comments to the amended regulation rather than the obvious deletion of paragraph (e). The former indicate that

section 4110.3-2 would be reworded to reaffirm that monitoring would be used to collect adequate, reliable data prior to the initiation of the five year adjustment period. This recognizes that a one-point-in-time survey of forage inventory without monitoring support is not considered adequate, reliable data to serve as a basis of forage allocation decisions.

Because the provisions for implementing both increases and decreases in available forage over a 5-year period are identical, those provisions presently pertaining to implementation of increases or decreases in available forage found in (Sections) 4110.3-1 and 4110.3-2 have been consolidated and incorporated into a new section, 4110.3-3. 48 Fed. Reg. 21820 (May 13, 1983).

Appellants, while acknowledging that Judge Heffernan recognized that the regulations contemplated appeals of the third- and fifth-year adjustments prior to February 1984, submit that he "erroneously concluded, at page 5," that this rule was "specifically deleted in the 1984 amendments to the grazing regulations," and that the rule in effect after February 1984

does not require that the third and fifth year portions of reduction be supported by any additional monitoring data, nor does it provide for subsequent appeals of the third and fifth year portions of such a grazing reduction in the absence of a timely appeal of the original decision.

(Decision at 5.) Judge Heffernan's conclusion, appellants insist, was erroneous as a matter of law because the language of the original regulation, which required additional monitoring and provided for appeals in February 1984, was not "deleted," as concluded, but was "reword[ed]" (48 Fed. Reg. 21820 (May 13, 1983)) and "amended" (49 Fed. Reg. 6451 (Feb. 21, 1984)). "The fact that the rule did not 'delete' the right of appeal is," they contend, "a compelling legal reason for the Board to re-examine the third- and fifth-year reductions required by the 1992 decision." See also *Ruskin Lines Jr. v. BLM*, supra at 171-72. (Statement of Reasons (SOR) at 69.)

BLM insists that "to the extent [appellants] interpret the regulations as requiring additional monitoring before the third and fifth-year portions of a five-year phased reduction may be implemented [appellants] misread[] past and present regulations." BLM denies that the regulations at any time (relevant here) required that third-year and fifth-year reductions be justified by additional monitoring. (Answer at 10.)

While conceding that the regulations at one time allowed for appeals of the third- and fifth-year adjustment, BLM emphasizes that that language was dropped and the current regulations do not provide for such appeals, as Judge Heffernan properly found. BLM reasons that, because a decision which sets forth a 5-year phased decision is still being implemented in the third and fifth years, allowing review of the third- and fifth-year portions is contrary to 43 C.F.R. § 4.470(b), and the doctrine of administrative finality.

Appellants, relying on *Irvin L. Crowder*, 20 IBLA 305, 307 (1975), argue that 43 C.F.R. § 4.470(b) is inapplicable to rejection of applications for increase in grazing preference. (Reply at 1.) Because the presence or absence of excess forage is a fact that will vary from growing season to growing season, the Board held in *Crowder* that "excess forage determinations, capable of considerable change from growing season to growing season, are not subject to the prohibition of 43 C.F.R. [§] 4.470(b)." Id.

[1] We affirm Judge Heffernan's conclusion that appellants, having failed to timely appeal the 1992 Decision, are barred from challenging the validity of the adjustments prescribed therein to the extent that the adjustments were based on studies and monitoring data in existence at the time that decision was issued. See 43 C.F.R. § 4.470(b); *Wayne D. Klump v. BLM*, 124 IBLA 176, 183 (1992). Nor did any of the regulations in force and effect in 1992, 1994, 1995, or currently, afford appellants the right to appeal phased-in adjustments. The regulatory provision authorizing appeal of each phased-in adjustment in both 43 C.F.R. § 4110.3-2(e) and 43 C.F.R. § 4160.3(e), was deleted from the post-1983 regulations. Compare: 43 C.F.R. § 4110.3-2(e) (1993) (47 Fed. Reg. 41710 (Sept. 21, 1982), and 43 C.F.R. § 4110.3-3 (1994 and the current version) (49 Fed. Reg. 6451 (Feb. 21, 1984), as amended at 53 Fed. Reg. 10234 (Mar. 29, 1988)); compare: 43 C.F.R. § 4160.3(d) (1983) (47 Fed. Reg. 46702 (Oct. 20, 1982) and 43 C.F.R. § 4160.3, 1994 and the current version (49 Fed. Reg. 12705 (Mar. 30, 1984)).

Judge Heffernan properly distinguished Wayne D. Klump v. BLM, 124 IBLA 176 (1992), as not involving a challenge to a phased-in adjustment. In Klump, BLM in an April 1981 proposed decision adjusted Klump's authorized active grazing use on the Simmons Peak Allotment No. 51280 from 85 cattle year long (CYL's) to 44 CYL's "with the reduction to be phased in over a 5-year period." Klump did not appeal the April 1981 decision and Klump's grazing preference was reduced to 44 CYL's in the fifth year. Klump, some 5 years after the fifth year of the phased-in reduction in 1991, sought to increase his grazing preference from 44 CYL's to 65 CYL's. It was in that context that we held: "Although Klump's failure to appeal from the 1981 decision reducing his authorized active grazing use on the Simmons Peak Allotment No. 51280 prevents him from now disputing the validity of that adjustment, see 43 CFR 4.470(b), he has timely appealed BLM's denial of his requested increase in CYL's." Klump v. BLM, supra at 183.

Klump therefore does not stand for the proposition that a permittee can challenge a third- or fifth-year phased-in reduction through an application to increase his grazing preference above the level of active use prescribed in the decision adjusting authorized active grazing use on the allotment. To hold otherwise would be to allow a permittee to challenge each stage of a phased-in reduction through an application to increase his grazing preference: the very right eliminated by the post-1983 regulations. The post-1983 regulations require that acceptable data exist supporting the full amount of reduction at the time the initial reduction is taken. 43 C.F.R. § 4110.3-3(b). If data acceptable to the authorized officer is available to support the entire reduction, "an initial reduction shall be taken on the effective date of the agreement or decision and the balance taken in the third and fifth years following that effective date." Likewise the regulation provides: "If data acceptable to the authorized officer to support an initial reduction are not available, additional data will be collected through monitoring. Adjustments based on the additional data shall be implemented by agreement or decision that will initiate the 5-year implementation period." Id.

Because data exists to support the entire reduction at the time of the initial reduction, the regulations do not require BLM to independently justify each of the phased-in reductions. The phased-in reductions under the post-1983 regulations exist not because the full reduction is not supported by sufficient data at the time of the initial adjustment, but rather are an accommodation to the permittee.

Comments on the post-1993 regulations confirm that BLM was willing to await receipt of acceptable monitoring data before implementing initial reductions in grazing preference because it recognized the long-term effects of 5-year phased-in decisions. Thus, in response to criticism "that the monitoring provisions in the proposed regulations would delay necessary reductions in grazing use on the public lands and result in needless deterioration of the forage resource," the Department stated "the Department of the Interior has concluded that the proposed rule makes it consistent with the existing policy of accumulating an accurate data base upon which to make long term resource use decisions which may have

substantial impact on public land users." 49 Fed. Reg. 6444 (Feb. 21, 1984). Responding again to criticism that proposed 43 C.F.R. § 4110.3 "would not provide for reduction in use to be implemented in less than five years when needed to sustain resource productivity," BLM stated:

After careful review of proposed §§ 4110.3-2 and 4110.3-3, the Department has determined adequate authority is available for temporary resource protection under §§ 4110.3-2(a) and 4110.3-3(c). Permanent reductions to achieve multiple use objectives should be phased in over a five year period unless agreement can be reached by the parties involved (§ 4110.3-3(b)). Where resource conditions warrant an immediate significant reduction, the initial reductions made the first year may be large enough to significantly improve resource conditions and may be placed in full force and effect to stop resource deterioration (§ 4160.3).

Id. at 6443.

Once BLM has completed its 5-year phased-in reduction, it can entertain an application to increase a permittee's grazing preference and can grant that request if monitoring studies indicate that the allotment is capable of supporting the requested increase in active grazing use. See Klump v. BLM, *supra* at 183.

Appellants reliance on Ruskin Lines Jr. v. BLM, *supra*, and Irvin L. Crowder, *supra*, are misplaced. Ruskin Lines Jr. v. BLM, *supra*, involved the application of the pre-1994 regulations, which admittedly permitted challenges to phased-in reductions. The administrative law judge's order to reexamine conditions before implementing the next phase-in reduction in active use in Irvin L. Crowder was expressly authorized under paragraph (e) of the pre-1994 regulations applicable in that case.

Below, appellants contended that an oral agreement existed between BLM and appellants that the third- and fifth-year reductions in active grazing preference would be implemented only where warranted by monitoring data. On appeal to the Board, appellants couch their argument somewhat differently, contending that representations made to appellants led them to believe that they should not appeal the 1992 Decision, and constitute an equitable reason to re-examine and correct the 1992 Decision and the third- and fifth-year reductions in active use. (SOR at 60-65.) Rejecting appellants' contention that BLM entered into an oral agreement, Judge Heffernan stated:

As another potential exception to the doctrine of administrative finality with respect to the 1992 decision, appellants argue, in context, that the BLM made certain verbal agreements in exchange for the appellants' agreeing not to appeal [the 1992 Decision]. Appellants infer that if such an agreement exists, then they should be accorded the procedural opportunity to contest the third and fifth year grazing reductions set out in the 1992 decision.

It is notable that the 1992 decision was not placed in full force and effect, and any appeal thereof would have perforce procedurally delayed implementation of all parts of the decision, including the wild horse provisions. During the hearing, the principal BLM witness, Mr. Longinetti, explained that BLM hoped to gather wild horses as soon as possible after issuance of the final 1992 decision, but that a gather immediately thereafter was unlikely because of a lack of funding (Tr. 33-34). Mr. Longinetti acknowledged that he discussed with the appellants the procedural consequences of an appeal of the 1992 decision, namely, that all portions of the decision, including the wild horse gather portions would be delayed as a result of any such appeal (Tr. 33-35).

It is obvious that any party in interest could have submitted an appeal to the 1992 decision, not just the appellants in these dockets. It is plain from the record that the representations made by Mr. Longinetti with respect to the delaying consequences of an appeal from any party in interest, did not constitute an agreement by BLM to implement a timely wild horse gather if, and only if, appellants did not appeal the 1992 decision.

Appellants argued in their Statement of Reasons and at the public hearing that the BLM entered into an oral agreement with them to the effect that, should the appellants not appeal the 1992 decision, BLM in turn, would promptly gather excess wild horses, undertake an allotment evaluation prior to implementing the additional reductions in grazing after the first year reduction, and continue monitoring prior to the third and fifth year reductions (Statement of Reasons, p.3; Tr. 570-571). Mr. Longinetti strongly denied making a per-se agreement, and specifically pointed out in his testimony that he had no authority to make any such agreement (Tr. 33-35).

Mr. Longinetti also stated that he discussed the procedural consequences of an appeal with the appellants (Tr. 108-109). Mr. Longinetti made a written summary of a conversation with the Appellants which took place on November 18, 1991. (Ex. C). In context, that conversation record makes clear that Mr. Longinetti explained to Mr. Bert Paris that an appeal would have the procedural effect of delaying a wild horse gather. Although Mr. Paris may have formulated his own, personal impressions of the import of the referenced conversation, the representations made by Mr. Longinetti did not constitute a binding agreement on the part of BLM. This is true for two reasons. First, as Mr. Longinetti correctly pointed out in his testimony, he did not have the authority to bind BLM to any such agreement (Tr. 35). Second, and even more important and relevant, Mr. Longinetti's comments to the

appellants about the consequences of an appeal did not apply exclusively to the appellants in these appeals. Following the issuance of the final 1992 decision, any party in interest had the procedural opportunity to submit a timely appeal (Tr. 111-112). The procedural opportunity to file an appeal from that decision was not restricted exclusively to the appellants herein; and it is, therefore, unequivocally clear in the context of the entire administrative record that Mr. Longinetti's representations regarding the consequences of a potential appeal were generic in nature, were not restricted in scope exclusively to the appellants, and in no way constituted even an implicit or inferential agreement on behalf of BLM.

Relatedly, Mr. Longinetti testified that his use of the term "agreement" in Exhibit C had reference to the provisions of the 1992 decision (Tr. 118-119; 337-338). This is understandable and logical because the 1992 decision set a substantially reduced wild horse AML, which would require a gather by BLM; however, Mr. Longinetti testified that he discussed with appellants his concern that an appeal might delay such a gather (Tr. 111-112). The "agreement" to which Mr. Longinetti referred, therefore, was the BLM commitment to gather wild horses to the AML level specified in the 1992 decision. In addition to the threat of a delaying appeal, Mr. Longinetti testified that he also discussed with the appellants potential funding limitations, which could also have had the effect of delaying the wild horse gather (Tr. 120-121). Therefore, because of both potential funding constraints, and because of the potential for an appeal from any interested party, it is apparent that the appellants and Mr. Longinetti alike were concerned about BLM's ability to execute the wild horse gather in a timely fashion. This concern was expressed in different ways by both parties, but it did not rise to the level of a side-bar agreement between the BLM and appellants.

Appellants have argued that if there was such an agreement, it should be construed as having been incorporated by reference into the 1992 decision (Tr. 17-18). It is unnecessary to address the issue of what the force and effect of such an agreement may have been, because it is the determination of the undersigned that no such agreement was concluded between BLM and the appellants.

(Decision at 6-7.)

We agree with Judge Heffernan that appellants, because they did not appeal the 1992 Decision, cannot now challenge that decision or, more importantly, the data contained in that decision supporting the phased-in reductions. BLM is also correct in its assertion that under the post-1994 regulations, it possessed authority to phase in the third- and fifth-year reductions based on data collected in support of the

1992 Decision. We similarly find that BLM could rely on the 1992 Decision and data supporting that decision to deny appellants' 1994 and 1995 requests for grazing increases.

Appellants claim, however, that they agreed to forego an appeal of the 1992 reduction decision, and that this was in consideration of the use of post-1992 monitoring data to review third- and fifth-year reductions and in consideration that BLM would more expeditiously remove "excess" wild horses from the allotment. See Tr. 106, 107, 112-15, 563-65, 570-71, 106, 112, 620-25. Judge Heffernan, in concluding that an agreement did not exist, relied on BLM's claim that the language contained in Exhibit C, that Bert Paris "was afraid we wouldn't live up to our part of the agreement stated in the evaluation," referred to BLM's agreement to gather excess wild horses in the 1992 Decision. See Tr. 118-19, 336-38.

[2] Although it does not characterize its argument as such, appellants effectively seek to have the Board hold that BLM is estopped from denying an oral agreement, acting in reliance on their asserted claim that BLM promised third- and fifth-year reviews prior to implementing reductions if appellants foreswore an appeal of the 1992 permit decision. Claims of estoppel are considered by the courts on the basis of four elements, which are described in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970): (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe that it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Terra Resources, Inc., 107 IBLA 10, 13 (1989).

Estoppel is an extraordinary remedy, especially as it relates to public lands and cannot be used to defeat BLM's protection of the interests of the United States based on its failure to act or neglect of duty. 43 C.F.R. § 1810.3; James W. Bowling, 129 IBLA 52, 56 (1994); So. Way Co., 123 IBLA 122, 128 (1992).

Furthermore, estoppel against the Government in matters concerning the public lands must be based upon "affirmative misconduct" such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); D.F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982). We have expressly ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be "in the form of a crucial misstatement in an official decision." Henry E. Krizman, 104 IBLA 9, 11 (1988); United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975) (quoting Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974)). We find no affirmative misconduct by BLM, that is, misrepresentation or concealment of a material fact in a written decision. See Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981); United States v. Ruby Co., supra at 703-04; James W. Bowling, supra at 54-55. There is no evidence that a BLM official with authority to do so ever affirmatively

represented to appellants in a written decision that the third- and fifth-year reductions would not be placed in effect.

While we have no reason to dispute appellants' assertion that they understood from Longinetti that the 1994 allotment survey would take place, and that further reductions would be based on that analysis, we must conclude that Judge Heffeman's determination that no agreement existed was correct. We find, as Longinetti himself testified, that he is not a person who possesses the authority to rewrite the permit or amend it, and no such written determination to that effect was ever executed, in any event.

Moreover, even were we disposed to receive evidence of such claims by an unauthorized BLM officer or employee, we could not allow such statements to vary the terms of a written agreement between appellants and the Government. Absent proof of circumstances which would vitiate the agreement, reliance upon the oral information, advice or opinion of any Federal officer or employee will not bind the United States to vary the terms of a written agreement to conform to the representations allegedly made by such officer or employee. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Kenneth Lexa, 138 IBLA 224, 230 (1997); Bart Cannon, 138 IBLA 194, 197 (1997); Walter C. Eagar, 138 IBLA 45, 48 (1997).

Section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1994), authorizes the Secretary, with respect to grazing districts on public lands, to "make such rules and regulations" and to "do any and all things necessary to * * * ensure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." Title IV of the Federal Land Policy and Management Act of 1976, which amended the Taylor Grazing Act, reiterates the Federal commitment to protecting and improving Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1994); see also, Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1994); Filippini Ranching Co. and Paris Ranch v. BLM, 149 IBLA 54, 59 (1999).

Implementation of the Taylor Grazing Act of June 24, 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior. Nevada Division of Wildlife v. BLM, 145 IBLA 237, 250-51 (1998); Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein.

BLM enjoys broad discretion in determining how to manage and adjudicate grazing preferences. Nevada Division of Wildlife v. BLM, supra at 251; West Cow Creek Permittees v. BLM, 142 IBLA 224, 235 (1998); Riddle Ranches, Inc. v. BLM, 138 IBLA 82, 84 (1997); Yardley v. BLM, supra at 90. Under 43 C.F.R. § 4.478(b), BLM's adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. By adopting this standard, the Department has considerably narrowed the scope of review of BLM grazing decisions by an administrative law judge and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis.

West Cow Creek Permittees v. BLM, *supra* at 236; Riddle Ranches, Inc. v. BLM, *supra* at 84. An appellant seeking relief from a grazing decision reached in the exercise of BLM's administrative discretion bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper. West Cow Creek Permittees v. BLM, *supra*; Kelly v. BLM, 131 IBLA 146, 151 (1994). Accordingly, a BLM determination of the carrying capacity of an allotment will not be disturbed in the absence of a showing, by the preponderance of the evidence, that the determination is unreasonable or improper.

We have also recognized that, where the accuracy of a range survey is challenged, it is not enough for a range user to show that the grazing capacity could be in error, he must show by a preponderance of the evidence that the survey is erroneous. Glanville Farms, Inc. v. BLM, 122 IBLA 77, 87 (1992); Clyde L. Dorius, 83 IBLA 29 (1984); Briggs v. BLM, 75 IBLA 301, 302 (1983), Allen v. BLM, 65 IBLA 196, 200 (1982). In the present case, the 1992 Decision and the data supporting it were not timely challenged by appellants. That data constituted the basis for the grazing levels for a 5-year period. The 1994 and 1995 requests of appellants, denied by BLM, were properly considered, and rejected, on the basis of the 1992 Decision.

We find it unnecessary to consider appellants' challenge to Judge Heffeman's conclusion that BLM properly determined that utilization objectives and 6 of the 14 management plan objectives continued to be unmet in the 1994 Reevaluation. Because the 1992 Decision and the data on which it was based supported further reductions in the third and fifth years, at issue here, the 1994 Reevaluation would only be relevant to grazing levels beyond the fifth year, not in issue in this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of Administrative Law Judge Heffeman is affirmed.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge