

INTERIOR BOARD OF LAND APPEALS

Thomas E. Smigel and Barbara W. Smigel

v.

Bureau of Land Management

155 IBLA 158 (July 17, 2001)

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Editor's Note: Reconsideration denied by order dated November 18, 2003

THOMAS E. SMIGEL
BARBARA W. SMIGEL

v.

BUREAU OF LAND MANAGEMENT

IBLA 99-85

Decided July 17, 2001

Appeal from a decision of Administrative Law Judge James H. Heffernan, affirming an Assistant District Manager, Bureau of Land Management, decision denying an application for a grazing permit. NV-050-97-01.

Affirmed as modified.

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

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

2. Grazing Permits and Licenses: Filing Requirements-- Documents: Date and Time of Filing

Any document required or permitted to be filed, which was received in the proper BLM office, either in the mail or by personal delivery when the office is not open to the public, will be deemed to have been filed as of the day and hour the office next opens to the public under regulations in effect on August 21, 1995. 43 CFR 1821.2-2(d) (1995).

3. Environmental Quality: Environmental Statements-- National Environmental Policy Act of 1969: Environmental Statements

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are insignificant.

4. Environmental Quality: Environmental Statements

A party challenging a decision record and finding of no significant impact, based on an underlying environmental assessment, must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's action if it is reasonable and supported by the record on appeal.

APPEARANCES: L. Eric Lundgren, Esq., Cheyenne, Wyoming, for Appellants; John R. Payne, Esq., Assistant Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Thomas E. Smigel and Barbara W. Smigel (Smigels or Appellants) have appealed from an October 6, 1998, decision (1998 Decision) issued by Administrative Law Judge James H. Heffernan upon cross motions for summary judgment, affirming a December 10, 1996, final decision (1996 Decision) of the Assistant District Manager, Renewable Resources, Las Vegas District Office, Bureau of Land Management (BLM or Respondent). In his 1996 Decision, the Las Vegas Assistant District Manager declined to offer or grant Appellants a grazing permit for the Newberry Mountain Allotment when the Smigels did not accept the terms and conditions of the proposed permit. Appellants' request for stay of the Assistant District Manager's decision was denied. See Order in IBLA 97-269, April 16, 1997.

As brief background, the Newberry Mountain Allotment has not been grazed since 1969, although a grazing permit has been issued. Because the allotment is classified as "ephemeral," an application must be submitted by the permittee every three months for continued use, with BLM then deciding whether adequate forage is available to permit such use. (BLM Response to Petition for Stay (Response) in IBLA 97-269 at 3.)

BLM indicates that over half of the Newberry Mountain Allotment is located on critical desert tortoise habitat. It states that Biological Opinions (BOs) issued by the Fish and Wildlife Service (FWS) in 1991 and 1994 prescribe terms and conditions for grazing in this habitat, and that the Nevada BLM has applied these terms to all grazing permits issued which involve the desert tortoise habitat. Id.

While the allotment has not been grazed since 1969, BLM's permittee of record, Mrs. Tom Roden, was issued another 10-year grazing permit in 1992, subject to the three-month review requirement, and incorporating the terms of the 1991 BO. Id. at 3-4. In 1995, Mrs. Roden sold the base property, which consisted of water rights for the permitted area, to Appellants. On April 28, 1995, the Smigels submitted a transfer application for the permit held by Mrs. Roden, but failed to secure her signature, as required, on the application. Id. at 4. As a result of this deficiency and the inaccurate listing of four watering areas in the permit area on land that had been transferred from BLM to the National Park Service, the permit forms were returned to Appellants for correction and resubmission. The forms (with accurate water data) were resubmitted in August 1995. Id. at 5.

The circumstances surrounding the August 1995 resubmission of the permit application have led to a major part of this dispute. BLM states in a sworn affidavit that Appellants' and the BLM official's signatures on the Smigels' initial permit were back-dated and that the actual signing occurred between August 25 and August 29, 1995. See BLM Cross Motion, Exh. B, Stager Declaration at 3; Edward Seum Affidavit. Appellants claim that Thomas Smigel signed the application after working hours on Friday, August 18, 1995, and dated the application the next day, Saturday, August 19, 1995. The date is critical because BLM amended grazing regulations effective August 21, 1995. 1/

The date issue gives rise to the Smigels' contention that their transfer application and the ensuing grazing permit should have been covered by the earlier grazing regulations which were effective through midnight, August 20, 1995. The grazing permit signed by the Smigels appears to be dated August 19, 1995, and includes the signature of the Acting Area Manager, Edward Seum, with the date of his signature listed as August 20, 1995. As noted above, Mr. Smigel contends he signed the document at that time, while BLM contends that Appellant was not given

1/ On February 22, 1995, BLM amended 43 CFR Part 4130, regarding authorization of grazing (the Range Reform Regulations). 60 FR 9965 (Feb. 22, 1995). A provision was added to the regulations stating:

"The authorized officer shall consult, cooperate and coordinate with affected permittees or lessees, the State having lands or responsible for managing resources within the area, and the interested public prior to the issuance or renewal of grazing permits and leases."

43 CFR 4130.2(b). Also, as amended, 43 CFR 4130.2(d) reads:

"The term of grazing permits or leases authorizing livestock grazing on the public lands and other lands under the administration of the Bureau of Land Management shall be 10 years unless--

* * * * *

(4) The authorized officer determines that a permit or lease for less than 10 years is in the best interest of sound land management."

The Range Reform Regulations became effective on Aug. 21, 1995. 60 FR 9965 (Feb. 22, 1995).

the document until August 25, and that he signed it between August 25 and August 29, 1995. See 1998 Decision at 3. When it became aware of the backdating, which BLM claims was done by both Thomas Smigel and BLM's official, it determined that the consultation, cooperation and coordination (CCC) requirements of the new grazing regulations that became effective on August 21, 1995, should have been complied with. Id., see BLM Cross Motion, Exh. B, Stager Declaration at 5-6. BLM then notified the Smigels of the requirement to comply with the new regulations and the obligation to conduct CCC. Id. After BLM officials addressed this requirement with Appellants on September 6, 1995, the Smigels signed a relinquishment of their permit on September 7, 1995. See Att. E to Response.

Following the required coordination and consultation, BLM prepared an Environmental Assessment (EA) which determined the additional terms and conditions which would be necessary for the permit to address both resource and highway safety concerns. (Response at 5.) On August 7, 1996, BLM officials met with the Smigels to provide them with a copy of the new terms and conditions that would be added to the permit, and Appellants signed an acknowledgment that failure to accept these terms would result in rejection of their transfer application in accordance with 43 CFR 4110.2-3(a)(3) and 43 CFR 4130.2(f). Id. at 6; see Att. F to Response.

After Appellants' proposed modifications to the terms were not accepted by the Area Manager, BLM issued a proposed Record of Decision/ Finding of No Significant Impact (ROD/FONSI) on October 31, 1996, which supported the issuance of a 2-year permit with the terms and conditions provided to the Smigels on August 7, 1996. Id. at 6-7. A final offer was provided Appellants by BLM on November 9, 1996. Appellants did not accept the terms, and filed a protest to the proposed decision. See Att. H to Response. On December 10, 1996, BLM issued the 1996 Decision denying the protest and declining to offer or grant Appellants a grazing permit, and the appeal to the Hearings Division ensued.

In his 1998 Decision from which this appeal has been taken, Judge Heffernan determined, in pertinent part:

In this case, based upon the numerous public comments elicited through the CCC and EA processes, the BLM established reasonable grounds for requiring the terms and conditions, which were included in the proffered permit. When the Appellants elected not to accept those reasonable terms and conditions as part of the permit, they thereby surrendered the opportunity for grazing on the allotment, which BLM had offered to them.

(October 6, 1998, Decision at 10.)

In their Statement of Reasons (SOR) for appeal, Appellants return to their argument that their acceptance of the permit occurred on Saturday, August 19, 1995, vice the later date determined by BLM, and claim that the

1998 Decision incorrectly states that they concede that the application was backdated. (SOR at 4.) They assert that the subsequent relinquishment that Thomas Smigel signed on September 7, 1995, was obtained through fraud, with BLM officials falsely telling the Appellants that the new regulations, which required a CCC process, went into effect before their permit was granted. Id. at 5. Further, Appellants claim, under the guise of revised regulations that should not have applied to the Smigels, BLM reduced the permit duration from 10 to 2 years and added burdensome new fencing requirements. Id. at 8. According to Appellants, these changes in the permit made it economically unfeasible and worthless. Id.

Appellants urge that their relinquishment of the permit was invalid and should be set aside, because BLM failed to follow its own established procedures for modifying or revoking an existing permit. Id. at 9. Moreover, Appellants claim, by applying the new regulations effective August 21, 1995, to their permit application, BLM's action "violated the Administrative Procedures Act and was arbitrary and capricious." Id. at 19.

Even if the new regulations were properly applied, which they dispute, Appellants argue that "BLM's decision to conduct an EA before re-issuing the permit * * * was contrary to the BLM's established procedures and was thus arbitrary and capricious." Id. at 28. When BLM did complete the EA, the Smigels claim that BLM "failed to analyze social and economic impacts of various alternatives in the EA as required by NEPA and the CEQ regulations." Id. Appellants claim BLM also failed to obtain input for the EA from important sources of information, most significantly the Smigels themselves, especially in responding to the scoping letter. Id. at 28-29. Likewise, the Smigels state that BLM relied upon improper considerations, including the possible negative impact on the agency's credibility, in preparing the EA, with the effect that the new terms and conditions added by the EA were arbitrary and capricious. Id. at 29.

In response to Appellants' principal contention that Thomas Smigel did not back-date the document and that it was filed either on Saturday, August 19, 1995 (see SOR at 4, 11), or on Friday, August 18, 1995 (SOR at 13), BLM claims that Edward Seum's sworn affidavit establishes that neither party signed the document as dated, but rather they signed between August 25-29, 1995, "apparently because they were concerned that the permit should show an issuance date which would predate the new regulations." (Answer at 6.) Respondent states that, when confronted with the sworn statement of Edward Seum, "the Smigels set forth their theory concerning how Mr. Seum nevertheless actually signed the permit on August 20, 1995." Id. at 7. BLM asserts that this "theory completely ignores Mr. Seum's sworn statement to the contrary, and much of it lacks any basis in the record whatsoever." Id. Similarly, with respect to Appellants' claim that BLM employees falsely told the Smigels that the permit had been issued after the new grazing regulations went into effect, BLM posits that since Thomas Smigel first received the permit on August 25, 1995, he could not seriously have believed, when he met with BLM officials on September 6, 1995, that the

permit had not been issued until after the new regulations had gone into effect. (Answer at 8.) 2/

BLM next responds to the Smigels' general allegations that the EA suffered from a lack of information and that an improper analysis was conducted. BLM urges that Appellants have failed to provide information which BLM could have considered, and have failed to show how a different analysis would have changed the result. (Answer at 10.) For this reason, BLM argues their NEPA challenge should be rejected. Id.

Equally important, BLM asserts, it has carefully addressed each of Appellants' other environmental claims in its earlier filings, adopted by reference in its Answer, and Judge Heffernan addressed these claims as well in his 1998 Decision. Id. Specifically, BLM states that the information provided in these earlier pleadings established that: (1) BLM had the discretion to prepare an EA (citing BLM Cross Motion at 19-20; Decision at 6); (2) BLM did analyze socioeconomic impacts (citing BLM Cross Motion at 20-21; BLM Reply at 5); (3) BLM did involve the Smigels in the consultation process (citing BLM Cross Motion at 21; Decision at 6); (4) BLM did not misrepresent the consulting reports in the EA (citing BLM Cross Motion at 21-22; Decision at 6-7); (5) the EA provided sufficient information concerning water sources (citing BLM Cross Motion at 22-23; Decision at 7); (6) the EA properly analyzed the impacts of grazing on the "sensitive" plant species *Phainopepla* (citing BLM Cross Motion at 24; BLM Reply at 3); and (7) the EA contains sufficient biological data (citing BLM Cross Motion at 24; BLM Reply at 6). Id.

[1] The Secretary of the Interior, pursuant to section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1994), is authorized to "make such rules and regulations" and to "do any and all things necessary to * * * insure 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." Id. The Federal commitment to protecting and improving Federal rangelands is reiterated in Title IV of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1751-1753 (1994), which amends the Taylor Grazing Act. See also 43 U.S.C. § 1739 (1994) (public participation in land management) and Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1994).

2/ While for the reasons set forth below the permit could not have issued under the "old regulations" as demanded by Appellants, we note that Edward Seum either lied in his statement on a Federal document subject to 18 U.S.C. § 1001 (1994), or he lied under oath in his subsequent affidavit concerning when the permit application was filed. As decision-makers for the Secretary of the Interior, we hold BLM employees to the same rigorous standards that we apply to private citizens. Appellants have consistently adhered to their claim that the document was filed Friday night after working hours and dated Saturday, the 19th. We cannot endorse Judge Heffernan's finding that Appellants admitted otherwise, and his decision is modified to that extent.

While compliance with the provisions of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior, implementation is delegated to his duly authorized representatives in BLM. Kelly v. BLM, 131 IBLA 146, 151 (1994); Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein. The Bureau enjoys broad discretion in determining how to manage and adjudicate grazing preferences. Yardley v. BLM, 123 IBLA at 90. Under 43 CFR 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 CFR Part 4100. In this manner, 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. Yardley v. BLM, 123 IBLA at 90. This scope of review recognizes the highly discretionary nature of the Secretary's responsibility for Federal range lands. Kelly v. BLM, supra; Claridge v. BLM, 71 IBLA 46, 50 (1983).

The standard of proof to be applied in considering an appeal of a grazing decision issued by BLM is the preponderance of the evidence test. Kelly v. BLM, supra; Eason v. BLM, 127 IBLA 259, 262-63 (1993). If a decision determining grazing privileges has been reached in the exercise of administrative discretion, "the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper." Kelly v. BLM, supra.

[2] We first examine Appellants' claim that the regulations effective until midnight, August 20, 1995, should have been applied to their permit application. In their SOR, Appellants claim Thomas Smigel signed the permit application after working hours on Friday, August 18, 1995, and dated the document Saturday, August 19, 1995. Appellants further claim that BLM's authorized representative, Edward Seum, signed the document on Sunday, August 20, 1995. Considering the evidence in a manner most favorable to Appellants, we nevertheless find that the grazing regulations which became effective August 21, 1995, and which required CCC, must be applied to the Appellants' permit application.

Under Board precedent and Departmental regulation applicable on the date at issue, presentation of a document after the hours during which the office was open to business did not constitute submission of the document on that day. The regulations provided:

Office hours; place for filing.

* * * * *

(b) Applications and other documents cannot be received for filing by the authorized officer out of office hours, nor elsewhere than at his office; nor can affidavits or proofs be taken by him except in the regular and public discharge of his ordinary duties.

43 CFR 1821.2-1 (1995).

Any document required or permitted to be filed under the regulations of this chapter, which is received in the proper office, either in the mail or by personal delivery when the office is not open to the public, shall be deemed to be filed as of the day and hour the office next opens to the public.

43 CFR 1821.2-2(d) (1995) (emphasis added). ^{3/} The Department has considered situations comparable to the Smigels' involving after-hour filings several times. See Bob Burch, 32 IBLA 93 (1977); M.J. Harvey, 19 IBLA 230 (1975). In Burch, *supra* at 96, we noted that in Floyd Childress, 62 I.D. 73 (1955), the Acting Solicitor discussed in detail the policy justifying the requirement that documents be filed in the proper BLM office during business hours. Further in Burch, *supra*, we explained:

A few months later [after Childress] the Deputy Solicitor discussed the same problem again and again concluded that a document not filed during business hours on the last day permitted for filing is to be deemed to have been filed the next business day and cited several court decisions so holding: Mattie B. Kinsey, 62 I.D. 334 (1955).

Id. at 97.

Thus, we find that the regulations that became effective August 21, 1995, did apply to Appellants' acceptance of the permit, as it was deemed filed on August 21, 1995. For this reason, Appellants' assertion that BLM officials committed fraud in gaining their relinquishment of the August 1995 permit during the September 6, 1995, meeting, by advising them that the new regulations applied, is without merit.

[3] We next examine Appellants' environmental claims. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), requires Federal agencies to determine whether a Federal action will have a significant environmental impact. In doing so, an agency first prepares an EA. 40 CFR 1501.3, 1501.4(c).

This Board has stated clearly that a determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review, or "hard look," at environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant effects will occur is reasonable in light of the environmental analysis. Southwest Center for Biological Diversity, 154 IBLA 231, 236-37 (2001); Southern Utah Wilderness Alliance, 140 IBLA 341, 348 (1997); The Ecology Center, Inc., 140 IBLA 269, 271

^{3/} The regulations were amended in 1999, 64 FR 53215 (Oct. 1, 1999), to purportedly reflect plain English.

(1997); Blue Mountains Biodiversity Project, 139 IBLA 258, 265-66 (1997); see Sierra Club Legal Defense Fund, 124 IBLA 130, 140 (1992); see also Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Maryland-National Capital Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992); Powder River Basin Resource Council, 120 IBLA 47, 56 (1991); Owen Severance, 118 IBLA 381, 392 (1991), and cases cited therein.

[4] A party challenging a ROD/FONSI, based on an underlying EA, must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Cabinet Mountains Wilderness v. Peterson, 685 F.2d at 681-82; Maryland-National Capital Park & Planning Commission v. U.S. Postal Service, 487 F.2d at 1029; Powder River Basin Resource Council, 120 IBLA at 56; Owen Severance, 118 IBLA at 381. The ultimate burden of proof in rebutting BLM's analysis is on the challenging party. G. Jon and Katherine M. Roush, 112 IBLA 293, 298 (1990); In Re Blackeye Timber Sale, 98 IBLA 108, 110 (1987). Mere differences of opinion provide no basis for reversal of BLM's action if it is reasonable and supported by the record on appeal. Committee for Idaho's High Desert, 139 IBLA 251, 257 (1997); Oregon Natural Resources Council, 139 IBLA 16, 22 (1997); Sierra Club, Toiyabe Chapter, 131 IBLA 342 (1994).

In its EA NV-054-96-018, BLM considered the proposed action and Alternatives A-E. The proposed action consisted of the Smigel's application for an ephemeral grazing permit on the Newberry Mountain Allotment. The administrative action required would be to approve or deny their application for a transfer of the 10-year permit for grazing between June 15 and February 28, annually. None of the terms and conditions related to fencing or protection of species were considered in the proposed action. Id.

Alternative A, which conforms to the Clark County Management Framework Plan (see EA at 4), was the original selected alternative. 4/ The issuance of a grazing permit under this alternative would have authorized the same use of the public lands for livestock grazing. Id. at 5. Under this alternative, the following terms and conditions, paraphrased to eliminate unnecessary verbiage, would be incorporated into the grazing permit:

- 1) No livestock grazing will occur on lands administered by the National Park Service within the Lake Mead National Recreation Area.

4/ Alternative A was modified in light of comments and concerns received by BLM during the scoping process to include extensive fencing requirements along State Highway 163 and the Needles Cutoff, as well as other requirements described *infra*.

- 2) A fence surrounding the Hiko Wash Restoration Project will be repaired by the permittee if livestock damage the fence, and livestock entering the Restoration Project area will be removed within one day of notice.
- 3) Livestock grazing would be authorized on lands within the Piute/Eldorado Desert Management Area (DMA).
- 4) Grazing use on an ephemeral allotment is authorized following application from a qualified applicant only after the periodic determination of adequate forage by BLM.
- 5) Supplemental feeding is limited to salt, mineral and/or protein supplements in block, granular or liquid form, with placement of supplements at least a minimum of 1/4 mile from all water sources.
- 6) An appropriate cultural resource inventory, established in consultation with the Nevada State Historic Preservation Office, will be conducted in the area of potential effect, with any sites found that are eligible for nomination to the National Register of Historic Places subject to inventory and evaluation in compliance with section 106 of the National Historic Preservation Act.

Id.

Alternative B is the denial of a term permit. Under this alternative, the permit would be disapproved and livestock use would not be authorized on public lands within the Newberry Mountain Allotment. Id. at 6. Alternative C, similarly, is the denial of a term permit to the Smigels, but with the added step of amending the Management Framework Plan to identify that the allotment has been permanently closed to grazing. Id.

A no-action Alternative D was also considered but rejected because BLM chose to exercise its responsibility under statutory and regulatory requirements to respond to the application for a grazing permit. Id.

Alternative E required all the conditions of Alternative A as well as the installation of more extensive fencing and range improvements. This alternative was not fully analyzed in detail in the EA because of potentially prohibitive range improvements that would be necessary. Id.

As an outcome of comments received on the EA, the Assistant District Manager advised in a letter to all commenters dated October 31, 1996, that these comments and concerns "resulted in the development of additional terms and conditions to mitigate resource impacts." (October 31, 1996, Letter at 1.) The following terms and conditions thus were incorporated in the attached ROD/FONSI, in addition to those already listed in Alternative A, and had to be satisfied prior to the approval of an ephemeral quarterly grazing authorization:

- a. Fencing along the Laughlin's and Needles Highway shall be completed prior to approval of an application to graze. Fencing shall be completed in order to address and mitigate highway right-of-way safety concerns. The fence will be installed according to the design specifications deemed necessary by the authorized officer (43 CFR 4120.3-4).
- b. Livestock control and management measures (i.e., alternate water sources, fencing), will be identified and implemented in order to manage and protect the Hiko Springs riparian resources.
- c. Section 106 consultation will be conducted with the Nevada State Historic Preservation Office (SHPO) [concerning Hiko Springs and Spirit Mountain Traditional Cultural Property] prior to the issuance of an authorization to graze livestock.

(ROD/FONSI, Terms and Conditions No. 1 at 2.) In addition to these new conditions precedent to grazing authorization, additional terms and conditions, beyond those required by Alternative A, were added that would apply upon the approval of an ephemeral grazing authorization. These included, inter alia: (1) use of hay or grains as a feeding supplement was prohibited in order to avoid the introduction of non-native plant species; (2) grazing was permitted in areas of critical habitat (48% of permit area) only in accordance with grazing Prescription 1 use levels, as identified in the 1991 and 1994 BOs related to Desert Tortoise Critical Habitat, thus requiring movement of cattle when the use level was met; (3) key grass species were to be identified for monitoring purposes; (4) all vehicle use in desert tortoise habitat within the allotment must be restricted to existing roads and trails; and (5) all trash and garbage must be removed from each camp site that is associated with livestock grazing and disposed of off-site in a designated facility. Id. at 2.

Appellants dispute Judge Hefferman's conclusion that the Assistant Area Manager's decision was rational and consistent with law. However, nowhere in their SOR do Appellants explain how changes in the EA to correct these claimed deficiencies might assist in providing the relief they seek. The gravamen of Appellants' appeal to this Board is their request that the September 7, 1995, relinquishment be rescinded and that the original 10-year grazing permit be reinstated, or in the alternative that the EA be set aside and a new permit be issued in accordance with the pre-August 21, 1995, regulations. As we have already determined that the August 21, 1995, regulations apply, were we to reject the EA with respect to the Smigels' application, the only recourse would be a new EA, under the requirements of the August 21, 1995, rules. The important point to be made is that issuance of any permit will be under the new regulations requiring consultation and consideration of concerns of interested parties, with the ultimate

result that those concerns must be considered, including the need for fencing for the reasons set forth below. Thus, even if Appellants were to prevail on one or more of their other environmental challenges, such as their assertion that the water resources were understated and improperly described and the requirement to consult on NHPA issues, Appellants would still not get the end result they want from their challenges to the EA; i.e., a permit under the old regulations.

Moreover, in their SOR, Appellants fail to show how any of their objections to the EA, with the possible exception of the cost of fencing, would have changed the result if addressed differently in the EA. With respect to fencing, Appellants have determined that the permit would not provide a cost-effective grazing opportunity because of the fencing requirements developed as a result of consultation under the new regulations. As stated in Appellants' SOR, the obligation to construct fencing along Highway 163 and the adjacent Needles Cutoff to protect range resources directly impacts permit acceptability and Appellants subordinate all other concerns to this objectionable requirement. According to the Smigels, BLM's rejection of Appellants' argument that fencing should be provided by NDOT, which justified BLM's conclusion that the offer of a grazing permit be withheld when terms and conditions were not accepted by Appellants, is proof that BLM's determination is implausible and irrational.

We find no merit in Appellants' argument as the only fencing that NDOT was required to provide related to tortoise control, not to cattle grazing. The ROD/FONSI prepared by BLM establishes the need to fence portions of the allotment abutting Highway 163 and the Needles Cutoff to protect these areas from livestock entry, and we find this is a reasonable requirement of granting the grazing permit. There is no evidence in the record nor has any been presented by appellants that fencing appropriate for tortoise control would similarly be appropriate for livestock control.

Moreover, the terms and conditions applied by BLM, as set forth above, are all rationally related to specific requirements of the ecological community considered in the EA, and during the scoping process, and are all reasonably designed to protect specific species or meet safety concerns. In identifying the issues of environmental concern in the EA, BLM first described these issues and then developed a term or condition to mitigate the problem identified. For example, the need to ensure the safety of motorists using State Highway 163 and the Needles Cutoff was addressed through a fencing requirement; the need to preclude unauthorized grazing on Lake Mead National Recreation Area was addressed through a requirement that cattle not be grazed in that area; the need to protect Hiko Springs as the only reliable water source within the part of the allotment to be grazed was determined to require repair of the protective enclosure whenever necessary; and the possibility of insufficient forage to sustain a viable livestock operation is directly related to the requirement to apply every three months for continued grazing and the decision to limit the permit to 2 years. Moreover, BLM's treatment of the water issue in

the terms and conditions did not raise specific objections by Appellants, and there is no objection raised to the number of Animal Unit Months offered in the permit, a matter directly related to available water resources.

We find that each of these grazing and/or range management considerations is both reasonable and consistent with the responsibilities imposed upon BLM in exercising its grazing management authority. The terms and conditions which directly meet these considerations are neither unreasonable nor unrelated to a specific identified management requirement. BLM thus carefully defined in the terms and conditions the action it had determined to take regarding the Newberry Mountain Allotment in order to meet the concerns set forth in the 1991 and 1994 BOs and the responses to the CCC.

There can be no question that Appellants did not desire to receive the allotment under these conditions, especially the requirement to fence the portion of the allotment abutting Highway 163 and the Needles Cutoff. However, considering the regulatory constraints under which the Area Manager was operating when he reviewed input received from consultation and coordination with affected agencies and landowners--as required by the new regulations which became effective August 21, 1995, it would not be proper to review Judge Heffernan's decision without recognizing the Area Manager's obligation set forth in 43 CFR 4130.2(f). That requirement states:

(f) The authorized officer will not offer, grant or renew grazing permits or leases when the applicants, including permittees or lessees seeking renewal, refuse to accept the proposed terms and conditions of a permit or lease.

It is only when the permittee "accepts the terms and conditions to be included * * * in the new permit * * * [that] the holder of the expiring permit * * * shall be given first priority for receipt of the new permit." 43 U.S.C. § 1752(c)(3)(1994); see also 43 CFR 4130.2(e)(3) (1995).

BLM provided Appellants with effective notice outlining the action it proposed to take regarding the Newberry Mountain Allotment, both in the August 7, 1996, meeting with appellant Thomas Smigel and in the terms and conditions attached to the October 31, 1996, Proposed Decision. BLM also discussed the terms and conditions in a meeting with Appellants on November 9, 1996. The conditions delineated as required for acceptance of this permit were all within BLM's scope of authority. It has the authority to allow and to require the construction of fences. See 43 U.S.C. §§ 315a and 315c (1994); Pete Stamatakis v. BLM, 115 IBLA 69, 74 (1990). Equally important, it was the Smigels' burden to establish and define the costs of fencing and thus show the requirement to be unreasonable, and they have failed to meet that burden. Moreover, even if the Smigels did establish some financial hardship, they would not have shown error in BLM's determination. Even severe economic injury to a grazer does not invalidate BLM's decision, but is only one consideration bearing on the reasonableness

of that determination. Yardley v. BLM, 123 IBLA 80, 93 (1992), and cases cited.

After August 20, 1995, BLM also had the authority to limit permit length to other than 10 years when in the best interest of sound land management. See 43 CFR 4130.2(d)(4) (1995). The determination to issue a 2-year permit was also reasonable in light of the comments of the State Supervisor, Nevada State Office, Fish and Wildlife Service (FWS), on the EA that "the issuance of a permit for the term specified [10 years] may reflect an irreversible and irretrievable commitment of resources by the Bureau, should changes be necessary prior to permit expiration." See State Supervisor, FWS, letter to Assistant District Manager of May 22, 1996, at 1-2. The fact that the allotment had not been grazed in nearly 30 years and the uncertainty of the impact of that grazing on the resources within the Newberry Mountain Allotment made this condition reasonable as well. In this case, therefore, in order to prevail before Judge Heffernan, the Smigels were required to show by a preponderance of the evidence that the 1996 decision with its additional terms and conditions offered, in a 2-year permit, was unreasonable. They have not done so.

After careful examination, we determine there is ample basis in the record of the 1998 Decision under review to support denial of the Smigels' application on the basis of their failure to agree to the proposed terms and conditions for grazing. Withholding issuance of an application for grazing privileges on the basis of a failure to accept reasonable terms and conditions is clearly authorized by 43 CFR 4130.2(f). Appellants have failed to meet their burden of showing BLM's analysis to be wrong.

An adjudication of the denial of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). When BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis. The burden is on the objecting party to demonstrate that a decision is improper. Kelly v. BLM, 131 IBLA at 151; Glanville Farms, Inc. v. BLM, 122 IBLA 77, 87 (1992); Fasselin v. BLM, 102 IBLA 9, 14 (1988). Judge Heffernan utilized these principles in affirming the decision appealed from. The Smigels have failed to show error, other than that Judge Heffernan misstated that Appellants agreed in their pleadings that they had backdated their permit application. The 1998 Decision is modified accordingly. As we find that the Appellants' application was legally filed on August 21, 1995; however, Appellants have presented no reason to disturb the substance of the 1998 Decision.

We have carefully considered each of the Appellants' other claims, and to the extent not specifically addressed in this decision, their arguments have been considered and rejected.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Heffernan's October 6, 1998, Decision is affirmed as modified.

James P. Terry
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge