

party who bears the burden of persuasion must lose.” (*Director, Office of Workers’ Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)). Often, the burden of proof had been confused with the “burden of production,” which refers to a party’s obligation to come forward with evidence to support its claim. The burden of proving a fact remains where it started, but once the party with this burden establishes a *prima facie* case, the burden to produce evidence shifts. The burden of persuasion, on the other hand, does not shift except in the case of affirmative defenses. Decisions of the Interior Board of Land Appeals (IBLA) hold that a party appealing a BLM decision has the burden of showing the error in the agency’s decision. If, for example, the agency denies a permit or lease to a new grazing applicant, that applicant would be expected to point out the error in BLM’s decision. Because each case must be analyzed on its own facts, BLM is not proposing to change our regulations to assign the burden of proof for all appeals.

- Changing the definition of monitoring and the process for conducting monitoring is not addressed in this proposed rule. Few comments directly addressed the definition of “monitoring” and those we did receive did not recommend any substantive changes in the definition. Therefore we are not proposing changes to the definition of monitoring. Many comments contained recommendations on how BLM should conduct monitoring. We received many comments from the livestock industry, and environmental and conservation groups, asking BLM to increase monitoring efforts on public lands. BLM considered including new regulatory language regarding monitoring that would have contained explicit direction on the development of allotment-specific resource management objectives and short and long term monitoring programs in consultation with the permittee or lessee. The current regulations, however, already allow BLM to develop resource management objectives and monitoring plans as part of its allotment management plans. As a result, we determined that establishing monitoring methodologies and working with permittees and lessees in collecting and interpreting data and developing monitoring reports are more appropriately handled through BLM’s own policy guidance in Manuals and Handbooks. Therefore, BLM has decided not to incorporate details on how to monitor in the proposed rule.

We have, however, added a requirement for monitoring in making determinations on rangeland health.

- Requiring permittees or lessees to submit an application for renewal of their permit or lease when their permits or leases expire is not explicitly addressed in the current regulations nor incorporated in the proposed regulations. We are especially interested in public comment on this issue.

- Adding another opportunity for administrative remedy by allowing a protesting party to appeal a BLM field office decision to the BLM State Director was recommended by several commenters during scoping. Such a provision would allow the BLM State Director to stay a decision pending further review. BLM determined it was not advisable to include this provision in the proposed rule. Such authority could cause the appeals process to become too cumbersome and result in more delays in the decision-making process.

- Providing for permittees and lessees to have control of water developments authorized under a range improvement permit was recommended by commenters during scoping. The current regulations do not allow for water developments to be authorized under a range improvement permit. Other commenters suggested that the rule should propose that BLM allow the permittee or lessee to enter into a Memorandum of Understanding with the BLM allowing the improvements to be used other than by livestock owned or controlled by the permit holder. BLM does not believe these regulatory changes are necessary and therefore will not address them in this proposed rule. We believe we can better address these issues in BLM policy and guidance.

- Establishing criteria for BLM’s use of full force and effect decision authority was recommended by some commenters during scoping. BLM believes that full force and effect decisions are fact-specific, so that it would be impossible to establish criteria to address each conceivable new decision. We disagree that developing criteria is necessarily helpful or relevant to the decision to issue a full force and effect decision to protect resources.

- Allowing for exchange of use agreements across allotments was recommended during scoping. Under the existing regulations, an exchange-of-use situation occurs where the permittee owns or controls unfenced private lands within the allotment where he grazes or wishes to graze. The permittee may request to graze additional livestock on the allotment to reflect the amount of forage on the private land. If BLM

authorizes the additional grazing, all the authorized livestock may graze anywhere within the allotment, and BLM will not charge grazing fees for the extra livestock. BLM received comments requesting that BLM expand this authority to accommodate a transaction called “trade of use” by removing the requirement that private lands in the exchange-of-use situation be located in the same allotment being permitted for grazing. This kind of case might arise in the situation where one permittee or lessee owns or controls unfenced intermingled private lands that are not within his allotment, but rather, within a second permittee’s allotment.

The first permittee cannot derive economic gain from the grazing use made on his private lands by the second permittee, unless either—

(1) The first permittee acts to control use of his own land, by means of fencing or through sale of the land or assignment of the land lease for a consideration to the second permittee; or

(2) BLM manages the second permittee’s grazing on the first permittee’s private land, which BLM currently does not have regulatory authority to do.

A commenter urged that BLM facilitate the “trade-of-use” between these permittees by collecting a grazing fee from the second permittee for grazing use of lands owned by the first permittee but located in the second permittee’s allotment, and crediting the fees collected from the second permittee for these lands to the first permittee’s grazing fee billing. BLM believes that this type of arrangement is best handled by private arrangement between the permittees, but we encourage additional comments as to whether BLM should set up a separate process for such “trade of use” arrangements, or act as a broker between grazers on such transactions affecting private lands, perhaps for a service charge.

- Allowing BLM to have unrestricted discretion to determine circumstances that would warrant non-monetary settlement of a non-willful grazing trespass was recommended by a commenter during scoping. The current regulations identify the following four conditions—all of which must be satisfied before BLM can approve a non-monetary settlement for non-willful unauthorized livestock use:

1. Evidence that unauthorized use occurred through no fault of the operator.

2. The forage used was insignificant.

3. Public lands have not been not been damaged.