

action under section 4170.1 against a grazing permittee or lessee that violates any of the prohibited acts identified in this section. For this category of prohibited acts, unlike the first two categories, the primary responsibility for enforcement generally rests with a Federal or state agency other than BLM. Three sets of prohibited acts are identified in this section. The first set consists of Federal or State laws or regulations pertaining to 6 different activities. Examples include: placement of poisonous bait or hazardous devices designed for the destruction of wildlife; pollution of water resources; and illegal removal or destruction of archeological or cultural resources. The second set of prohibited acts in this section identifies as prohibited acts the violation of specific laws and regulations including the Bald Eagle Protection Act, Endangered Species Act, and any provision of the regulations concerning wild horses and burros. The third set of prohibited acts in this section identifies as prohibited acts the violation of State livestock laws or regulations relating to branding and other livestock related issues. BLM proposes to retain the provisions in the third category of prohibited acts which allow us to withhold, suspend, or cancel all or part of a grazing permit if the lessee or permittee is convicted of violating any of the prohibited acts. The proposed rule would, however, clarify and limit BLM's enforcement authority by limiting its application to prohibited acts performed by a permittee or lessee on his allotment where he is authorized to graze under a BLM permit or lease. This change is intended to further ensure that the performance of the prohibited act is related to the permit or lease under which the violator is operating.

In the ANPR, BLM announced that it was considering which "non-permit related" violations BLM may take into account in penalizing a permittee. BLM received numerous comments opposing and supporting changes to this section. Many affiliates of the livestock industry characterized the current rule's provisions as a form of "double jeopardy." BLM does not believe that violation of the Federal or state laws listed in section 4140.1 violates the Double Jeopardy Clause of the Fifth Amendment of the Constitution when a civil sanction, such as suspending or canceling a permit after conviction for violating environmental laws on an allotment where an individual has a permit or lease to graze, furthers the legitimate objective of encouraging responsible stewardship of public

rangelands. Therefore, section 4140.0 is not a punitive measure that can be viewed as causing multiple punishments for the same offense. Furthermore, both the Endangered Species Act (ESA) and the Bald Eagle Protection Act (BEPA) provide for grazing sanctions. The ESA provides that if a Federal grazing permittee or lessee is convicted for a criminal violation of the Act, the agency may suspend, modify, or revoke the permit or lease. The BEPA provides that the head of a Federal agency that issues a grazing permit or lease may immediately cancel such permit or lease when a person who holds it is convicted of violating the Act. Commenters who opposed any changes in the prohibited acts section of the regulations urged BLM to retain current authority to cancel, suspend, or deny permits when the violation is related to environmental protection.

Subpart 4150—Unauthorized Grazing Use

Section 4150.3 Settlement

Existing paragraph (e) of this section has been modified to correct the reference to subpart 4160. We also propose adding a new paragraph (f) to this section to specify that if a permittee or lessee obtains a stay of a decision that demands payment or cancels or suspends a grazing authorization, BLM will allow him to graze under his existing authorization pending resolution of the appeal. This proposed change clarifies existing procedures and will ensure consistent implementation of the regulations.

Subpart 4160—Administrative Remedies

Section 4160.1 Proposed Decisions

BLM proposes to amend this section to specify that a biological evaluation or biological assessment that BLM prepares for purposes of the Endangered Species Act (16 U.S.C. 1531–1544) (ESA) is not a proposed decision for purposes of a protest to BLM, or a final decision for purposes of an appeal to the Office of Hearings and Appeals under the Taylor Grazing Act. This provision would prospectively supersede the decision of the Interior Board of Land Appeals (IBLA) in *Blake v. BLM*, 145 IBLA 154, 166 (1998) *aff'd*, 156 IBLA 280 (2000), holding that the protest and appeal provisions of 43 CFR subpart 4160 apply to a biological evaluation or biological assessment.

A Federal agency prepares a biological assessment or biological evaluation when it considers action that may affect species or habitats that are

protected under the ESA and are located on land managed by the Federal agency. A biological assessment or biological evaluation necessarily identifies what action an agency is considering, so that the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) can prepare a biological opinion pursuant to section 7 of the ESA (16 U.S.C. 1536). In addition, a description of the contemplated action would be necessary under proposed section 4130.3–3(b), which would provide for consultation with the interested public and others during the preparation of biological assessments or biological evaluations, to the extent practical. However, biological assessments and biological evaluations are tools that the FWS and the NMFS use to decide whether to initiate formal consultation under section 7 of the ESA. Therefore, they are not proposed grazing decisions that may be protested to BLM, or final grazing decisions appealable to OHA. If formal consultation is not required upon completion of the biological assessment, BLM will issue a proposed decision, such as the issuance of a permit or lease, that may be protested and appealed. If formal consultation is required, upon completion of the Section 7 consultation process BLM will issue a decision that may be the subject of protest and appeal.

Section 4160.3 Final Decisions

In order to reconcile statutory directives found in the Administrative Procedure Act, 5 U.S.C. 701–706 (APA), TGA and FLPMA, BLM proposes to amend this section by—

- Cross-referencing the Department's administrative appeals regulations,
- Clarifying the requirement that one must exhaust administrative remedies, and
- Defining what grazing is authorized while an administrative appeal is pending.

Current paragraph (c) states the 30-day deadline for filing an appeal of a final grazing decision or of a proposed decision that has become final "by default" because no party protested it. The proposed rule would move this text to section 4160.4 on Appeals, where it more properly belongs. BLM believes that the proposed revision would avoid duplication and more clearly cross-reference procedures applicable to grazing decision appeals in the regulations at 43 CFR 4.470. Paragraph (f) of this section would be redesignated paragraph (c) and edited for clarity.

Current paragraphs (d) and (e) describe what grazing is authorized if a petition for stay of a final grazing