

decision is granted by the Office of Hearings and Appeals. Additional discussions related to those paragraphs appear in section 4160.4, below.

#### Section 4160.4 Appeals

The proposed rule would amend this section by adding language clarifying how the appeal of a BLM grazing decision, and a petition for a stay of the decision pending appeal, affect the effectiveness of the decision and the continuity of ongoing grazing operations, if any. The current provision merely states the procedural requirements for filing appeals, and defers to the Department of the Interior regulations at 43 CFR 4.470, which do not address the issues of whether and to what degree ongoing activities should continue in the face of an appeal or stay.

The APA provides a right of action against agencies and officers of the United States to persons adversely affected or aggrieved by agency action. However, such action may be sought in a federal court only when a decision is "final." 5 U.S.C. 704. An agency action is not considered final where the agency requires by rule that an administrative appeal to a superior agency authority be filed and provides that the agency action is inoperative while the appeal is pending. The Department's administrative appeals regulations recognize the requirement that a party must first exhaust administrative remedies before resorting to Federal Court: "No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective. \* \* \*" 43 CFR 4.21(c).

Under the Department's administrative appeals regulations, unless the authorized officer, the Director of OHA, or IBLA places a decision in immediate effect, a BLM grazing decision is ineffective until the 30-day appeal period expires. If a petition for stay is filed within the appeal period, the decision is not in effect for 45 days after the expiration of the appeal period or until OHA acts on the stay petition, whichever occurs first. If the stay is not granted, the party has exhausted his administrative remedies and may seek review in federal court. If a stay is granted, the decision, with exceptions discussed below, is inoperative while the appeal is pending, and thus under the APA a party must exhaust his administrative remedies before resorting to federal court.

There are instances, however, where grazing may continue even though an appeal has been filed and a stay of the decision has been granted. These situations do not, however, present a conflict with the "finality" requirement found in the APA. The first example occurs when a party appeals, but does not seek a stay of the decision. In such a case the decision will be in effect after the 30-day appeal period, but it is not considered "final" for purposes of the APA since the party did not exhaust his administrative remedies. Under the current regulations, grazing is allowed even after the decision is stayed when there was no valid permit or lease in effect at the time of the appealed decision. BLM regulations provide that in such a situation, grazing would be allowed consistent with the appealed decision even when the decision is stayed. In such a case, a party would have fully complied with OHA's regulations pertaining to exhaustion of administrative remedies, but grazing would be allowed. BLM believes it is necessary to allow grazing even if a stay is granted because the OHA regulations do not establish time frames for resolution of appeals. To do otherwise would potentially eliminate grazing and deny a user the ability to graze the lands for years awaiting an administrative decision. As a result, a party could seek judicial review of the decision since the decision would be effective during the appeal. In cases such as these, the BLM is attempting to find a balance between the exhaustion of administrative remedies under the APA and its responsibilities under FLPMA and TGA to:

- Manage lands for multiple use and sustained yield,
- Regulate the occupancy and use of the rangelands,
- Safeguard grazing privileges,
- Preserve the public rangelands from destruction or unnecessary injury, and
- Provide for the orderly use, improvement, and development of the range.

BLM proposes to set forth the kinds of grazing decisions that would be rendered inoperative by the granting of a stay of a BLM grazing decision:

- Those that modify terms and conditions of a permit or lease during its current term or during the renewal process; and
- Those that offer a permit or lease to a preference transferee with terms and conditions that are different from the previous permit or lease terms and conditions.

It is proposed that if a stay of either of these kinds of decisions is granted, the immediately preceding grazing

authorization would not expire and the affected permittee, lessee, or preference applicant would continue grazing under the immediately preceding grazing authorization, subject to any applicable provisions of the stay order and subject to the provisions of proposed section 4130.3(b).

As a result, the appealed decision is inoperative. Nonetheless, grazing under the prior grazing authorization would continue under the APA provision at 5 U.S.C. 558 requiring that "a license with reference to an activity of a continuing nature" does not expire until an agency makes a new determination. Thus, a permittee or lessee who has made timely and sufficient application for a renewal or a new license in accordance with part 4100 would not have his permit or lease expire until the application has been finally determined by the Department of the Interior (5 U.S.C. 558(c)). This approach reconciles the exhaustion provision of the APA and the expectation set forth in the APA that a permittee will continue to operate under the immediately preceding authorization in order to ensure security of tenure.

Where a party has no valid grazing authorization at the time that the decision is rendered, there is a reduction in area available for grazing use, or the applicant is seeking use of ephemeral or annual rangelands, BLM could not authorize use based on the previous year's authorization. Thus, under the proposed rule, grazing would continue pursuant to the decision even in the case of a stay when a decision:

- Modifies a permit or lease because of a decrease in public land acreage available for grazing;
- Affects an application for grazing use of BLM-designated ephemeral or annual rangeland;
- Affects an application for additional forage temporarily available;
- Affects an application for a grazing permit or lease that is not made in conjunction with a preference transfer application.

In these cases, BLM would authorize grazing consistent with the final decision that has been stayed, and affected parties could resort to the Federal Courts without exhausting administrative remedies.

BLM specifically invites comment on this section regarding how it might effectively incorporate both the exhaustion and "activity of a continuing nature" requirements of the APA, and ensure that the public land grazing is managed in such a way as to meet the direction of the TGA and FLPMA.