

simply reflects this statutory and decisional authority. If the stay is granted and the BLM decision is inoperative, resort to the courts is not available until the parties have exhausted their administrative remedies.

One comment stated that § 4.479 needs to be amended so as not to require exhaustion of administrative remedies when 43 CFR 4160.3(d) or (e) allows grazing to take place even if a stay has been granted, citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824–28 (9th Cir. 2002). Section 4160.3(d)–(e) specifies what grazing use is authorized when OHA stays a BLM decision pending appeal. In general,

An applicant who was granted grazing use in the preceding year may continue at that level of authorized use during the time the decision is stayed. * * * Where an applicant had no authorized grazing use during the previous year * * *, the authorized grazing use shall be consistent with the final decision pending the [OHA] final determination on the appeal.

In *Hahn*, environmental plaintiffs challenged BLM grazing decisions on the grounds that they perpetuated a long-term problem of livestock overgrazing in the Owyhee Resource Area, allegedly in violation of federal statutes and regulations and BLM's own guidelines for rangeland management. BLM and the ranchers argued that the lawsuit should be dismissed because the plaintiffs had not filed an administrative appeal and sought a stay of the grazing decisions and had therefore failed to exhaust their administrative remedies. The court disagreed, holding that, because of § 4160.3(d)–(e), BLM's grazing decisions would not be rendered inoperative even if a stay were granted.

While finding that the plaintiffs were not required to exhaust their administrative remedies under the facts of that case, the court in *Hahn* left open the prospect that, under a different set of facts, a stay would render the final BLM decision inoperative for purposes of 5 U.S.C. 704, even if it resulted in authorized use at the previous year's level. In that situation, exhaustion of administrative remedies would still be required. For example, if a BLM grazing decision increased a rancher's authorized use from the previous year's level and an environmental group challenged that increase, a stay that resulted in authorized use at the previous year's level under § 4160.3(d)–(e) would render the BLM decision inoperative, and exhaustion of administrative remedies would be required. Similarly, if a BLM grazing decision reduced a rancher's authorized use from the previous year's level and

the rancher challenged that decrease, a stay that resulted in authorized use at the previous year's level would render the BLM decision inoperative, and exhaustion of administrative remedies would be required. We have revised § 4.479(d) to reflect the court's decision in *Hahn*.

One commenter opposed the proposed regulations on the grounds that, under the Taylor Grazing Act (TGA) and the APA, a BLM decision affecting a grazing permit is a sanction and an order within the meaning of the APA [and] cannot become effective until the permittee is afforded a hearing and allowed to present testimony and other evidence. 5 U.S.C. 556(d) & (e). * * * The proposed rule change would be facially invalid. * * * [T]he proposed changes force the holder of a TGA grazing permit to seek a stay when the TGA and the APA mandate that such a stay be automatic.

We disagree that the typical BLM grazing decision is either a “sanction” or an “order” within the meaning of the APA. In fact, in a number of cases, the grazing permittee has sought the BLM decision and wants it to take effect immediately, but another interested party files an appeal and a petition for a stay. In any event, this argument is currently under review in *Wallace v. Bureau of Land Management*, No. 02–1119 (CBS) (D. Colo.). If necessary based on the outcome of that litigation, we will consider further amendments to our regulations at a future time.

C. Section-by-Section Analysis

Section 4.421

We have added a definition for the term “person named in the decision,” and that term is then used in §§ 4.470–.472 to identify everyone who must be served with an appeal, petition for a stay, and a response. The term is defined as “an affected applicant, permittee, lessee, or agent or lienholder of record, or an interested public as defined in § 4100.0–5 of this title.” BLM is required to serve its proposed decision on these persons under § 4160.1, and will list their names and addresses at the conclusion of its final grazing decision. This will help to ensure that anyone whose interest may be adversely affected by the final BLM decision, or by an appeal of that decision, has an opportunity to participate in the appeal process and will be bound by the outcome.

Section 4.470

This section is based on the existing § 4.470(a)–(b). We have added the phrase, “or within 30 days after a proposed decision becomes final as provided in § 4160.3(a),” to be

consistent with § 4160.4. We have also added the phrase, “and serve a copy of the appeal on any other person named in the decision,” at the end of § 4.470(a). This language is based on the service requirements in 43 CFR 4.22(b), 4.413(a).

Throughout this preamble and rule, references to a “final BLM grazing decision” or “the decision” should be construed to include any relevant portion of such a decision. Thus an adversely affected party may appeal only a portion of a BLM decision, may petition for or be granted a stay of only a portion of a BLM decision, and so on. Adding a phrase like “or relevant portion thereof” wherever the term “final BLM grazing decision” appears would make the rule cumbersome and would merely state what most readers would take for granted anyway.

Paragraphs (b), (c), and (d) are based on similar language in the existing § 4.470. Paragraphs (b) and (c) are adopted as proposed, and paragraph (d) is modified to refer to the appeal period provided in paragraph (a). We have moved proposed paragraph (e) to redesignated § 4.474 because that section deals with the authority of an ALJ; as a result, proposed paragraph (f) has become paragraph (e).

Section 4.471

Section 4.471 is new; existing § 4.471 has been redesignated as § 4.473. As proposed, new § 4.471 would have referred to the standards and procedures in existing § 4.21 (proposed §§ 4.22–.24) regarding petitions for a stay and requests to make a BLM decision immediately effective. Since we have decided not to amend § 4.21 in this final rule, we have revised § 4.471 so that it fully incorporates the relevant standards and procedures from § 4.21.

In new § 4.471, paragraph (a) specifies where a petition for a stay must be filed, and paragraph (b) specifies where copies must be served.

Proposed paragraph (b), dealing with requests to make a BLM decision effective immediately—and related provisions in proposed §§ 4.474(c)(2) and 4.478(a)(2)—have been deleted. These provisions were intended to extend to the ALJ the authority given to the OHA Director and the Board in § 4.21(a)(1) to make a decision effective immediately when the public interest so requires, notwithstanding the automatic stay provisions of § 4.21(a)(1)–(3). Instead of the several deleted provisions, we have added § 4.479(c) to state the same authority more simply.

Proposed paragraph (c), redesignated as paragraph (b), has been revised to require service of copies of the appeal