

**ATTACHMENT 3**  
**Solicitors Memorandum M-37022, January 16, 2009**



## United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

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### Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Protest and Administrative Appeal of Biological Assessments – Livestock Grazing

### Introduction

In *F. Duane Blake (On Reconsideration)*, 156 IBLA 280 (2002), the Interior Board of Land Appeals (Board) reconsidered and affirmed its prior decision in *F. Duane Blake*, 145 IBLA 154 (1998), concluding that a biological assessment (BA) prepared by the Bureau of Land Management (BLM) under section 7 of the Endangered Species Act (ESA) should be treated as a grazing decision subject to the protest and appeal procedures required by the Taylor Grazing Act (TGA) and the BLM's grazing regulations.<sup>1</sup> The BLM has asked me whether that conclusion is a correct statement of the law.

As discussed in greater detail below, I conclude that BAs do not constitute grazing decisions that are subject to the procedural requirements of the TGA or the BLM's grazing regulations.

### Analysis

The TGA authorizes the Secretary of the Interior to allow grazing on the public lands and other lands administered by the BLM by issuing grazing permits or leases to qualified applicants. 43 U.S.C. §§ 315, 315a. The TGA also requires that the BLM "provide . . . for local hearings on appeals from decisions of the authorized officer." *Id.* § 315h.

The BLM's regulations implementing the TGA are codified at 43 C.F.R. Part 4100 and establish the following three-step process for modifying a grazing permit or lease:

The BLM must undertake "consultation, cooperation, and coordination" with affected permittees or lessees, States, and the interested public and provide these groups, to the extent practical, an

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<sup>1</sup> Throughout *Blake*, the Board uses the phrase "biological evaluation" instead of the phrase "biological assessment," which is used in the ESA regulations. See 50 C.F.R. §§ 402.02, 402.12. For purposes of clarity, this Opinion uses the term "biological assessment" (or BA) throughout.

opportunity to review, comment, and give input during the preparation of reports that evaluate data used as a basis for making permit modification decisions. 43 C.F.R. § 4130.3-3.

The BLM must then notify the interested public of proposed grazing decisions and serve proposed grazing decisions on any affected applicant, permittee or lessee. *Id.* § 4160.1(a). Such proposed decisions are subject to the protest and appeal procedures set forth in the grazing regulations. Under these procedures, any individual receiving a proposed grazing decision may protest the decision within fifteen days. *Id.* § 4160.2. If the BLM does not receive any protests during this time, the proposed decision automatically becomes the final decision of the BLM. *Id.* § 4160.3(a). Upon the timely filing of a protest, however, the BLM reconsiders its proposed decision in light of the protestant's statement of reasons and any other information pertinent to the case. *Id.* § 4160.3(b).<sup>2</sup>

The final step is for the BLM to issue its final grazing decision and serve it on the protestant and the interested public. *Id.* The final grazing decision is then subject to appeal, including a hearing, to an administrative law judge, *id.* § 4160.4, whose decision is then subject to appeal to the Board. *See* 43 C.F.R. Part 4.

Like all other federal agencies, the BLM must, as appropriate, also comply with the requirements of Section 7 of the ESA. For example, when the BLM proposes to take an action such as the modification of a grazing permit or lease, it must insure that the proposed action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" critical to endangered or threatened species. 16 U.S.C. § 1536(a)(2). To carry out this mandate, the ESA's implementing regulations require that, as a first step, an agency determine whether a proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). To facilitate this determination, the agency may prepare a BA. The purpose of a BA is to "evaluate the potential effects" of the action an agency is proposing to take on species or habitat protected by the ESA and "to determine whether any such species or habitat are likely to be adversely affected by the action and . . . whether formal consultation or a conference is needed" with the Fish and Wildlife Service or National Marine Fisheries Service (Service). *Id.* § 402.12(a). A "biological assessment" is defined by the ESA regulations as "the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat." *Id.* § 402.02.

Typically, the BLM prepares a BA and completes its section 7 obligations under the ESA before issuing a proposed grazing decision.<sup>3</sup> In instances where the BLM receives a biological opinion from the Service(s) at the end of the ESA consultation process, the BLM must decide whether to adopt the biological opinion (including, for example, any reasonable and prudent alternatives or

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<sup>2</sup> The BLM's grazing regulations provide an exception to this process. When the BLM determines that resources require immediate protection or when it is necessary to abate unauthorized grazing use, the BLM may close grazing allotments or modify grazing use immediately, without first issuing a proposed decision. *See* 43 C.F.R. §§ 4160.4, 4110.3-3(b), 4150.2(d).

<sup>3</sup> BLM also complies with other relevant laws, including the National Environmental Policy Act (NEPA) as part of its process leading up to a proposed grazing decision.

mandatory terms and conditions<sup>4</sup>), before issuing its proposed and final grazing decisions that will then be subject to the procedural provisions of the TGA and the grazing regulations. This process allows the BLM to fulfill its obligations under both the TGA and the ESA as part of one logical and sequential process.

In the Board's decision in *Blake*, there is no indication that the BLM issued any proposed grazing decisions at the end of the consultation and before issuing its final decisions. The Board thus may have been concerned that the parties affected by the decisions were being denied their procedural rights under the TGA and the grazing regulations. The Board directed the BLM to treat BAs as grazing decisions subject to all of the procedures prescribed by the TGA and the grazing regulations. *Id.* at 166 n.8. In its decision on reconsideration, the Board explained that this process:

allows BLM to fulfill its statutory mandate to allow notice and opportunity for hearing and review under the Taylor Grazing Act. At the same time, it also fulfills the mandates of the ESA that the proposing agency is to compile and submit the best available scientific data describing the effects of the action the proposing agency intends to take. It allows affected parties the opportunity to be heard, submit relevant evidence and file objections to a proposed BLM grazing action prior to formal consultation with FWS.

156 IBLA at 285–86.

The Board's conclusion, however, is incorrect.

A BA is not a proposed or final grazing decision. Instead, as noted above, it is an analysis of the potential effects of what may at some point become a proposed or final grazing decision and is prepared by an agency as part of its ESA section 7 compliance process. The purpose of a BA is to assist the BLM in deciding whether consultation under the ESA is required and, where it is, to inform the Service(s) during the consultation process. Further, the consultation process may and often does result in modifications or refinements to the agency action described and evaluated in a BA. In the case of a BLM grazing decision, this means that when the BLM actually gets to the point of issuing a proposed grazing decision, that decision may differ significantly from the original proposed action analyzed in the BA.

The Board's misapplication of the grazing regulations is confirmed by the fact that a BA, even if it contained a description of the proposed modifications to a grazing lease or permit, could not become a "final decision" should a protest not be filed. *See* 43 C.F.R. § 4160.3(a) (if no protest occurs, a proposed grazing decision becomes "the final decision of the authorizing officer without further notice"). Where consultation is required, a final grazing decision would have to take into account the results of the consultation to insure that implementation of the decision would not cause jeopardy. Because a BA is prepared in the middle of the BLM's process of developing a proposed grazing decision and is, by definition, an evaluation of the potential

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<sup>4</sup> *See id.* § 402.14(h) (components of a biological opinion) and 402.14(i) (components of an incidental take statement).

effects of what may become a proposed grazing decision and not the decision itself, the Board erred in requiring the BLM to treat BAs as protestable and appealable grazing decisions.<sup>5</sup>

**Conclusion**

BAs are intermediate analytical documents that describe, for ESA purposes, how proposed actions may affect listed species or critical habitat. They are not grazing decisions that may be protested or appealed under the TGA or the grazing regulations.

A handwritten signature in black ink, appearing to read "David Longly Bernhardt", with a stylized flourish extending to the right.

David Longly Bernhardt

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<sup>5</sup> In addition, under the Department's Office of Hearings and Appeals regulations, only individuals "adversely affected by a final BLM grazing decision" may appeal the decision. 43 C.F.R. § 4.470. And without a subsequent action to implement its findings, the analysis in a BA cannot "affect" anyone.