United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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WILDEARTH GUARDIANS & SID CHILDRESS

v.

BUREAU OF LAND MANAGEMENT

IBLA 2016-203 Decided December 9, 2020

Appeal from a decision of Administrative Law Judge James H. Heffernan, dismissing an appeal from a decision of the Rio Puerco (New Mexico) Field Office, Bureau of Land Management, to issue a 10-year grazing permit for the El Banquito Allotment, and affirming another decision of the same office to issue a 10-year grazing permit for the Azabache Allotment. NM-010-2015-001 & NM-010-2015-002.

Vacated and remanded in part, reversed in part.

APPEARANCES: Sid Childress, Esq., Santa Fe, New Mexico, *pro se* and for WildEarth Guardians; Justin Tade, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ACTING ADMINISTRATIVE JUDGE LEVINE

WildEarth Guardians and Sid Childress (collectively, WildEarth) appeal from a May 24, 2016, decision of the Departmental Cases Hearings Division, which resolved two grazing appeals brought by WildEarth. In one appeal, the Hearings Division dismissed WildEarth's challenge to a 10-year grazing permit issued by the Rio Puerco (New Mexico) Field Office of the Bureau of Land Management (BLM) for the El Banquito Allotment. In the other appeal, the Hearings Division granted summary judgment to BLM on WildEarth's challenge to a 10-year grazing permit for the Azabache Allotment.

The Hearings Division erred in dismissing WildEarth's appeal of the El Banquito permit because BLM's decision to issue this permit was a final BLM grazing decision that was subject to appeal. We therefore vacate the Hearings Division's dismissal of that appeal and remand the appeal to the Hearings Division for further proceedings.

INDEX CODE:
40 C.F.R. § 1508.9
43 C.F.R. §§ 4.470, .480
43 C.F.R. § 46.120
43 C.F.R. §§ 1610.5-4, -5, -6
43 C.F.R. § 4100.0-8
43 C.F.R. § 4180.2

The Hearings Division also erred in granting summary judgment to BLM in WildEarth's appeal of the Azabache permit. We therefore reverse the Hearings Division's decision regarding that appeal and grant summary judgment to WildEarth.

BACKGROUND

Legal Background

The Taylor Grazing Act

The Taylor Grazing Act of 1934 (TGA) authorizes BLM, by delegation from the Secretary of the Interior, "to issue . . . permits to graze livestock on" the public lands.[1] The TGA also authorizes BLM to "make provision for the protection, administration, regulation, and improvement" of public lands that are subject to grazing permits.[2]

BLM has issued grazing regulations pursuant to the TGA.[3] These regulations require BLM to develop standards for rangeland health, which describe desirable conditions for range resources such as watersheds and native plant and animal habitat.[4] For example, BLM's standards for public lands in New Mexico include the following standard for riparian sites:

> Riparian areas are in a productive, properly functioning, and sustainable condition, within the capability of that site.
>
> Adequate vegetation of diverse age and composition is present that will withstand high stream flow, capture sediment, provide for groundwater

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[1] 43 U.S.C. § 315b (2018). All citations to statutes are to the current version of the official U.S. Code, published in 2018.

[2] *Id.* § 315a.

[3] *See generally* 43 C.F.R. Part 4100 (2005). All citations to BLM's grazing regulations, found in Part 4100, are to the 2005 version of the regulations. *See Hanley Ranch P'ship v. Bureau of Land Mgm't*, 183 IBLA 184, 199 n.20 (2013)[a]. Citations to all other regulations are to the current version of the official Code of Federal Regulations, published in 2019.

[4] *See generally* 43 C.F.R § 4180.2; *see also* BLM Handbook H-4180-1, Rangeland Health Standards at I-9 (Jan. 19, 2001) ("Standards of land health are expressions of levels of physical and biological condition or degree of function required for healthy lands and sustainable uses, and define minimum resource conditions that must be achieved and maintained."), https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h4180-1.pdf (last visited Oct. 20, 2020).

a) GFS(MISC) 2(2013)

recharge, provide habitat and assist in meeting State and Tribal water quality standards.[5]

If BLM "determin[es] that existing grazing management practices or levels of grazing use . . . are significant factors in failing to achieve the standards," the regulations require it to "take appropriate action," with the goal of obtaining "significant progress toward fulfillment of the standards."[6]

In order to satisfy its obligation to respond with "appropriate action" to a failure to meet the standards, BLM has to know whether the standards are being met. For this reason, when BLM begins the process of deciding whether to renew a grazing permit, it must assess whether the allotments covered by the permit are meeting the standards.[7]

The National Environmental Policy Act

BLM's grazing decisions are also subject to the National Environmental Policy Act (NEPA). NEPA requires BLM to prepare an environmental impact statement (EIS) before it undertakes a "major Federal action[] significantly affecting the quality of the human environment."[8] If it is unclear whether an action will significantly affect the quality of the environment, BLM may prepare a less-detailed environmental assessment (EA) to document the analysis leading it to conclude that an EIS is or is not required.[9]

When a proposed action is similar to an action that was previously analyzed in an EA or EIS, the Department's regulations allow BLM to rely on the existing EA or EIS if it

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[5] Consolidated Administrative Record (CAR), *WildEarth Guardians v. Bureau of Land Mgm't*, DCHD-2015-0050, Appellants' First Motion for Summary Judgment (filed Jan. 8, 2016), Exhibit (Ex.) 14, U.S. Department of the Interior, Record of Decision, Standards for Public Land Health and Guidelines for Livestock Grazing Management at 4 (Jan. 12, 2001).

[6] 43 C.F.R. § 4180.2(c).

[7] *See W. Watersheds Project v. Bureau of Land Mgm't*, 195 IBLA 115, 117 (2020)[b], *appeal dismissed*, No. 1:19-CV-95-TS-JCB, 2020 U.S. Dist. LEXIS 166893 (D. Utah Sept. 11, 2020); *S. Nev. Water Auth.*, 191 IBLA 382, 387 (2017)[c]; *Petan Co. of Nev. v. Bureau of Land Mgm't*, 186 IBLA 81, 86 (2015).[d]

[8] 42 U.S.C. § 4332(2)(C).

[9] *See* 40 C.F.R. § 1508.9(a). On July 16, 2020, the Council on Environmental Quality published revisions to its NEPA regulations, which took effect on September 14, 2020, and "apply to any NEPA process begun after" that date. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,372 (July 16, 2020). Because the NEPA process at issue in this appeal began before that date, these revised regulations do not apply in this appeal.

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b) GFS(MISC) 2(2020)
c) GFS(MISC) 29(2017)
d) GFS(MISC) 8(2015)

"determines, with appropriate supporting documentation, that [the existing document] adequately assesses the environmental effects of the proposed action and reasonable alternatives."[10] BLM refers to this determination as a determination of NEPA adequacy (DNA). When BLM prepares a DNA, its supporting record must "include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects."[11]

The Federal Land Policy and Management Act of 1976

BLM's grazing program is also governed by sections 202 and 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), which require BLM to "develop . . . land use plans which provide by tracts or areas for the use of the public lands," and to "manage the public lands . . . in accordance with [these] land use plans."[12]

The Grazing Rider

In November 2003, Congress enacted, as part of an appropriations act, the following provision, which we refer to as the Grazing Rider:

> A grazing permit or lease issued by the Secretary of the Interior . . . that expires . . . during fiscal years 2004-2008 shall be renewed . . . . The terms and conditions contained in the expired . . . permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior . . . completes processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations.[13]

Congress subsequently extended the Grazing Rider several times, before making it permanent, in modified form, as part of section 402 of FLPMA.[14]

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[10] 43 C.F.R. § 46.120(c).
[11] *Id.*
[12] 43 U.S.C. §§ 1712(a), 1732(a); *see also* 43 C.F.R. § 4100.0-8 (specifying that BLM must "manage livestock grazing on public lands . . . in accordance with applicable land use plans," and that "[l]ivestock grazing activities and management actions approved by [BLM] shall be in conformance with the land use plan").
[13] 2004 Department of the Interior and Related Agencies Appropriations Act (2004 Appropriations Act), Pub. L. No. 108-108, § 325, 117 Stat. 1241, 1307-08 (2003).
[14] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3023, 128 Stat. 3292, 3762-63 (2014) (amending 43 U.S.C. § 1752(c)).

Factual Background

Developments Before 2011

The El Banquito and Azabache Allotments are located in Sandoval and McKinley Counties, in northwestern New Mexico.[15] The allotments include 27,262 acres of Federal lands managed by BLM, interspersed with private and State-owned land.[16]

In March 2001, BLM prepared an EA for a "proposal to revise the allotment management activities on the Azabache and El Banquito Allotments and to issue new ten-year grazing permits" (the 2001 EA).[17] The EA explained:

> There is currently no formal grazing system in use on the allotments despite past attempts. The allotments are currently difficult to manage due to the lack of permanent water. Management historically has been one of continuous grazing in areas of semi-permanent to permanent water sources. Other areas are only grazed seasonally when water is available in earthen tanks.[18]

BLM observed in the EA that "present livestock management has not resulted in improved resource condition within a desirable time-frame," and that this lack of improvement was the result of "[c]urrent management practices" and a lack of adequate range improvements.[19] BLM noted:

> It is clear from these assessments that livestock are negatively impacting rangeland health primarily due to poor livestock distribution. It is apparent that the majority of the key areas assessed receive a disproportionate amount of livestock use. Qualitative rangeland health assessments suggest that the majority of suitable rangelands depart moderately to extremely from their respective ecological site descriptions. This is primarily due to the presence of gullies, sheet and rill erosion, and

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[15] Azabache Administrative Record (AAR), Tab 7, BLM, Environmental Assessment for the Azabache (No. 42) and El Banquito (No. 49) Allotments Allotment Management Plan and Permit Renewal, EA NM-010-2000-025 at 1 (March 2001) (2001 EA).
[16] *Id.* at 15.
[17] *Id.* at 1.
[18] *Id.* at 17.
[19] *Id.* at 2; *see also id.* at 12 ("BLM is concerned about the livestock capacity and management for the Azabache and El Banquito Allotments.").

> extensive water flow patterns. There are also inadequate amounts of litter and a high percentage of bare ground.[20]

Based on these and other observations, BLM noted that "the New Mexico Standards for Public Land Health are not currently being met."[21]

The EA also discussed the riparian resources located in the two allotments. Two riparian areas, totaling about 31 acres, were described as being "contained within a . . . wildlife exclosure" and "excluded from livestock grazing," respectively, and were in "proper functioning condition."[22] A third riparian area, consisting of five segments totaling 380 acres, was subject to "special emphasis . . . for riparian management," under which "[l]ivestock grazing is restricted to the dormant season."[23] This area was described as "currently functional at risk."[24]

To address these conditions, the 2001 EA analyzed four alternatives, of which two are relevant to this appeal. Alternative B would continue current management of the allotments, and we therefore refer to it as the Current Management Alternative.[25] Alternative C, which BLM dubbed the "Proposed Action" Alternative, would require BLM to "formally combine[]" the two allotments, develop an allotment management plan, manage the livestock on the combined allotment as "a single herd" that would be "rotated through nine different pastures annually," and build various range improvements, including two pipeline systems that would constitute "the first step toward implementation of a one herd deferred grazing rotation system for the combined allotments."[26] Total grazing levels would not be reduced.[27] The EA also included, in an appendix, a number of terms and conditions that would apply to grazing permits issued under either of these alternatives, addressing issues such as the use of supplemental feed and mineral supplements.[28]

Turning to the environmental impacts, BLM anticipated that the Current Management Alternative would result in "static" or "downward" trends for vegetation and range resources, but that under the Proposed Action Alternative, these resources

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[20] *Id.* at 17.
[21] *Id.*
[22] *Id.* at 19.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 4.
[26] *Id.* at 7.
[27] *See id.* at 14.
[28] *Id.* App'x A at A-1 to A-2.

would improve, and would eventually meet the standards for rangeland health.[29] As for riparian resources, BLM stated that "[a]ll major riparian areas . . . have already been protected from livestock grazing," and that under either alternative, the limitation to dormant-season grazing in the larger riparian area "would increase vegetative production, litter, and plant composition and increase rates of riparian recovery by allowing the water table to rise and remain in the arroyo longer."[30] As a result, "[i]t would be expected that a functional rating would be reached in the long term."[31]

Based on the 2001 EA, BLM issued a "Finding of No Significant Impact and Decision Record" in October 2001 (the 2001 FONSI/DR), authorizing "the renewal of the 10-year grazing permits on the Azabache and El Banquito Allotments."[32] The 2001 FONSI/DR stated that "[l]ivestock grazing is authorized under the terms and conditions analyzed in the Proposed Action," and that these "terms [and] conditions . . . are . . . made a part of the permits."[33] It also stated that "[i]mplementing" the Proposed Action Alternative "will provide for" a number of actions and outcomes, including "[f]ormal combination of the Azabache and El Banquito Allotments into one," "[n]ew livestock grazing management practices," construction of range improvements, "[p]reparation of" an allotment management plan, and "[r]iparian areas that are continuing to improve and moving toward Properly Functioning Condition."[34] BLM concluded that "the potential impacts are not expected to be significant and an [EIS] is not required."[35]

In March 2003, BLM issued a 10-year grazing permit for the Azabache Allotment.[36] The permit authorized virtually the same number of animal unit months (AUMs) as the existing permit for this allotment, and contained only standard BLM terms and conditions (omitting the terms and conditions set forth in the appendix to the 2001 EA).[37] The permit was valid through February 28, 2013.[38]

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[29] *Id.* at 29-30, 32-33.
[30] *Id.* at 30; *see id.* at 33 (Proposed Action Alternative).
[31] *Id.* at 30.
[32] AAR, Tab 7, BLM, Finding of No Significant Impact and Decision Record for Grazing Permit Renewals on the Azabache (No. 42) and El Banquito (No. 49) Grazing Allotments at unpaginated (unp.) 1 (Oct. 2, 2001).
[33] *Id.*
[34] *Id.* at unp. 1-2.
[35] *Id.* at unp. 1.
[36] AAR, Tab 11, BLM, Grazing Permit (Mar. 28, 2003) (2003 Azabache Permit).
[37] *Compare id. with* 2001 EA, *supra* note 15, at 4, App'x A at A-1 to A-2. The permit authorized five fewer AUMs than the number shown in the EA (a difference of a quarter of 1%), but this difference appears to be an error, since the "Allotment Summary" at the bottom of the permit shows the same number of AUMs as the EA.
[38] 2003 Azabache Permit, *supra* note 36, at unp. 1.

The parties appear to agree that BLM also issued a 10-year grazing permit for the El Banquito Allotment in March 2002, effective through February 2012, although this permit is missing from the record on appeal.[39] In September 2010, BLM issued another permit for the El Banquito Allotment, effective retroactively from March 1, 2002, through February 28, 2012.[40] This September 2010 permit included the same number of AUMs as the pre-2001 permit for this allotment, and omitted the terms and conditions set forth in the appendix to the 2001 EA.[41]

The 2012 El Banquito Permit

In September 2011, BLM issued a new 10-year permit for the El Banquito Allotment, valid from March 1, 2012 through February 28, 2022.[42] This permit stated: "In accordance with Public Law 111-322, an extension of Public Law 111-242 Continuing Appropriations Act, 2011, this permit . . . is issued under the authority of section 416, Public Law 111-88 and contains the same mandatory terms and conditions as the expired . . . permit."[43] Unlike the September 2010 grazing permit, this permit included the terms and conditions set forth in the appendix to the 2001 EA.[44]

In August 2012, BLM issued another 10-year permit for the El Banquito Allotment, valid for the same dates and in all other respects identical to the permit issued in September 2011, except for the addition of a third named permittee.[45] We refer to this permit as the 2012 El Banquito Permit.

The 2014 Azabache Permit

In March 2012, BLM issued a one-year permit for the Azabache Allotment, effective from March 9, 2012, through February 28, 2013.[46] This permit overlapped with the final year of the 2003 permit, and incorporated a few changes from that permit, such

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[39] *See* CAR, *WildEarth*, DCHD-2015-0050, Opening Brief for Appellants at 16 (filed Dec. 23, 2015) (Opening Brief) (referring to a "permit for a 10-year term that began on 03/01/2002").
[40] *See* El Banquito Administrative Record (EBAR), Tab 8, BLM, Grazing Permit (Sept. 2, 2010) (2010 El Banquito Permit).
[41] *Compare id.* at unp. 1 with 2001 EA, *supra* note 15, at 4.
[42] EBAR, Tab 8, BLM, Grazing Permit (Sept. 12, 2011).
[43] *Id.* at unp. 1.
[44] *Id.*
[45] EBAR, Tab 8, BLM, Grazing Permit (Aug. 13, 2012) (2012 El Banquito Permit).
[46] AAR, Tab 11, BLM, Grazing Permit (Mar. 26, 2012).

as changing the named permittees and including the terms and conditions from the 2001 EA, which had been omitted from the 2003 permit.[47]

In October 2012, BLM issued another one-year permit for the Azabache Allotment, effective from March 1, 2013, through February 28, 2014.[48] The terms of this permit matched those of the permit issued in March 2012.

In April 2013, BLM prepared a "Standards Determination" to evaluate the Azabache Allotment's conformance with the New Mexico standards for rangeland health (the 2013 Standards Determination).[49] BLM applied the standards for upland sites and biotic communities, and concluded that both of these standards were being met.[50] The document included several observations that differed markedly from observations made 12 years earlier in the 2001 EA, including that "[t]here were no rills/gullies present at" any of the examined sites, that amounts of vegetative litter and bare ground were consistent with the applicable ecological site descriptions, and that the sites were "productive, stable and in a sustainable condition."[51] BLM did not evaluate the allotment under the standard for riparian areas, stating that this standard "Does Not Apply."[52]

On June 9, 2014, BLM prepared a DNA, concluding that the environmental effects of the proposed permit for the Azabache Allotment had been adequately analyzed in the 2001 EA.[53] That DNA is described in greater detail below.

The same day that it issued the DNA, BLM issued a notice of proposed decision, stating its intent to issue a new permit for the Azabache Allotment, which would "adhere to the terms and conditions listed in the EA."[54] As "[t]he proposed livestock management actions," BLM listed the issuance of a grazing permit, with the same number of AUMs described in the 2001 EA.[55]

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[47] *Id.* This permit also restored the five AUMs that had been omitted from the 2003 Azabache Permit. *See supra* note 37.
[48] AAR, Tab 11, BLM, Grazing Permit (Oct. 11, 2012).
[49] AAR, Tab 8, U.S. Forest Service, Standards Determination for the Rio Puerco Field Office BLM Azabache Allotment (Apr. 12, 2013) (2013 Standards Determination). The determination was prepared by the U.S. Forest Service, as a contractor for BLM. *See id.*
[50] *Id.* at 6-10.
[51] *Id.* at 7-9, 11.
[52] *Id.* at 10.
[53] AAR, Tab 9, BLM, Determination of NEPA Adequacy (June 9, 2014) (2014 DNA).
[54] AAR, Tab 5, BLM, Notice of Proposed Decision for Authorizing Grazing Preference to the Permittee of Azabache Allotment #00042, DOI-BLM-NM-A010-2014-52-DNA, at 1 (June 9, 2014) (Proposed Decision).
[55] *Compare id.* with 2001 EA, *supra* note 15, at 4.

Nine days later, BLM issued a 10-year grazing permit for the Azabache Allotment, effective June 11, 2014, through February 28, 2024.[56] This permit is generally similar to the previous permits, except for the addition of two new terms and conditions that are not at issue in this appeal.[57] We refer to this permit as the 2014 Azabache Permit.

Proceedings Before the Hearings Division

WildEarth timely appealed BLM's decisions to issue the 2012 El Banquito Permit and the 2014 Azabache Permit, and the Hearings Division consolidated the appeals.[58]

On May 24, 2016, the Hearings Division issued a decision dismissing WildEarth's appeal of the 2012 El Banquito Permit for lack of jurisdiction.[59] The Hearings Division also denied WildEarth's motion for summary judgment as to the 2014 Azabache Permit, and granted summary judgment to BLM instead.[60] The Hearings Division subsequently denied WildEarth's motion for reconsideration.[61]

WildEarth timely appealed the Hearings Division's decision,[62] and we have jurisdiction under 43 C.F.R. §§ 4.1(b)(2) and 4.410(a).

DISCUSSION

Standard of Review

BLM "enjoys broad discretion in determining how to manage and adjudicate grazing preferences."[63] Under the Department's regulations, "[n]o adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that

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[56] AAR, Tab 11, BLM, Grazing Permit (June 18, 2014).
[57] *Id.* at unp. 1.
[58] *See WildEarth*, DCHD-2015-0050, Scheduling Order at 1 (Aug. 18, 2015); *WildEarth*, DCHD-2015-0050, Consolidation Order (Sept. 24, 2015).
[59] *WildEarth*, DCHD-2015-0050, Summary Decision at 7 (May 24, 2016) (DCHD Decision).
[60] *Id.* at 17.
[61] *WildEarth*, DCHD-2015-0050, Motion To Reconsider Denied (June 13, 2016).
[62] CAR, Memorandum from Administrative Law Judge James H. Heffernan, Departmental Cases Hearings Division, to Interior Board of Land Appeals (June 21, 2016).
[63] *Smigel v. Bureau of Land Mgm't*, 155 IBLA 158, 164 (2001)[e]; *accord Bureau of Land Mgm't v. W. Watersheds Project*, 191 IBLA 144, 179 (2017).[f]

e) GFS(MISC) 21(2001)
f) GFS(MISC) 23(2017)

it represents a substantial compliance with" BLM's grazing regulations.[64] This standard of review "considerably narrow[s] the scope of review of BLM grazing decisions by [the Hearings Division] and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis."[65] The burden of demonstrating such an error lies with the party challenging BLM's decision.[66]

The Hearings Division may only grant summary judgment in a grazing appeal if it determines that "there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, with all reasonable inferences drawn in favor of the nonmoving party."[67] On appeal of an order granting summary judgment, we apply the same standard applied by the Hearings Division, except that the burden of persuasion now lies with the party appealing to this Board, which must "prov[e], by a preponderance of the evidence, the existence of genuine issues of material fact or an error of law by the [Hearings Division]."[68] We decide questions of law de novo.[69]

The 2012 El Banquito Permit

The Hearings Division dismissed WildEarth's appeal of the 2012 El Banquito Permit for lack of jurisdiction, holding that because BLM issued the permit under the Grazing Rider, the issuance of the permit was not a "final BLM grazing decision" that can be appealed to the Hearings Division.[70] We vacate this decision, holding that BLM's decision to issue the permit was a final BLM grazing decision and that the Hearings Division had jurisdiction to consider WildEarth's appeal.

We note at the outset that the 2012 El Banquito Permit states on its face that it was issued "[i]n accordance with Public Law 111-322, an extension of Public Law 111-242 Continuing Appropriations Act, 2011, . . . under the authority of section 416, Public Law 111-88."[71] The laws cited in the permit were a series of continuing resolutions that extended prior appropriations acts, including the Grazing Rider, for parts of Federal

[64] 43 C.F.R. § 4.480(b).
[65] *Smigel*, 155 IBLA at 164; *accord Dannelle Hensley*, 195 IBLA 345, 356 (2020).[g]
[66] *W. Watersheds Project*, 191 IBLA at 152.
[67] *Hensley*, 195 IBLA at 346; *see also id.* at 359-65 (elaborating on this standard).
[68] *Id.* at 346; *see also 06 Livestock Co.*, 192 IBLA 323, 334-35 (2018)[h] (comparing the standards before the Hearings Division and the Board), *reconsideration denied*, IBLA 2014-287-1 (Nov. 30, 2020); *Yousuf v. Cohlmia*, 741 F.3d 31, 37 (10th Cir. 2014) ("We review a grant of summary judgment de novo . . . .").
[69] *See Roche v. Bureau of Land Mgm't*, 195 IBLA 266, 270 (2020)[i]; *United States v. Scavarda*, 189 IBLA 9, 13 (2016).[j]
[70] *See* DCHD Decision, *supra* note 59, at 5.
[71] 2012 El Banquito Permit, *supra* note 45, at unp. 1.

g) GFS(MISC) 8(2020)
h) GFS(MISC) 7(2018)
i) GFS(MISC) 6(2020)
j) GFS(MIN) 25(2016)

fiscal years 2010 and 2011.[72] At the time that BLM issued the 2012 El Banquito Permit, these laws were no longer in effect; instead, the Grazing Rider continued in effect under section 415 of Public Law No. 112-74.[73] Despite this discrepancy in the permit's purported legal justification, however, we agree with the Hearings Division that BLM relied on the Grazing Rider when it issued the permit.[74]

Because BLM relied on the rider, the Hearings Division found that BLM had "performed a purely ministerial act."[75] Therefore, the Hearings Division concluded that the "permit renewal . . . does not constitute a final BLM grazing decision," and that it "d[id] not enjoy subject-matter jurisdiction to adjudicate the El Banquito appeal."[76]

The Department's regulations allow "[a]ny . . . person whose interest is adversely affected by a final BLM grazing decision [to] appeal the decision to an administrative law judge."[77] "To determine whether a letter from BLM constitutes a 'decision,' . . . we ask whether the letter takes or prohibits some action that affects the legal rights of some person."[78]

The 2012 El Banquito Permit "affect[ed] the legal rights of some person" because it authorized BLM's permittees to continue to graze livestock on the El Banquito Allotment for 10 years longer than they could otherwise have done.[79] On appeal, BLM

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[72] *See* 2011 Continuing Appropriations and Surface Transportation Extensions Act, Pub. L. No. 111-322, § 1, 124 Stat. 3518, 3518 (2010); 2011 Continuing Appropriations Act, Pub. L. No. 111-242, § 101(5), 124 Stat. 2607, 2607 (2010); 2010 Department of the Interior, Environment, and Related Agencies Appropriations Act, Pub. L. No. 111-88, Div. A, § 416, 123 Stat. 2904, 2959 (2009).

[73] *See* 2012 Consolidated Appropriations Act, Pub. L. No. 112-74, § 415, 125 Stat. 786, 1043 (2011). At the time that BLM issued its initial 10-year permit renewal for the El Banquito Allotment, in September 2011, the legislation that imposed the Grazing Rider on BLM was Division B of Public Law No. 112-10. *See* 2011 Department of Defense and Full-Year Continuing Appropriations Act, Pub L. No. 112-10, Div. B, §§ 1101(a)(4), 1104, 125 Stat. 38, 102-03 (2011).

[74] DCHD Decision, *supra* note 59, at 3-4.

[75] *Id.* at 5.

[76] *Id.*

[77] 43 C.F.R. § 4.470(a).

[78] *Roche*, 195 IBLA at 271 (quotation marks and alterations omitted).

[79] *See id.* at 272 ("Nor is this a case in which the April 26 Letter preserved a legal situation that would have changed in its absence (as would happen, for example, if it had renewed a right or privilege that would otherwise have expired)."); *see also Or. Nat. Res. Council v. Bureau of Land Mgm't*, 129 IBLA 269, 275-77 (1994)[k] (holding that "there

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k) GFS(MISC) 31(1994)

appears to concede this point, describing the issuance of the permit as a "final grazing decision."[80]

The Hearings Division nonetheless held that the issuance of the permit was not "a final BLM grazing decision" because under the Grazing Rider, the issuance of the permit by BLM was "a purely ministerial act."[81] By so holding, the Hearings Division conflated the question of whether issuing the permit was an appealable decision with the question of whether it was subject to NEPA.

Federal courts have long held that an agency need not comply with NEPA if "the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial."[82] The reasoning behind this rule is that if the agency cannot rely on environmental considerations in taking action, then "the information that NEPA provides can have no [e]ffect on the agency's actions."[83]

The fact that an agency action is "ministerial" for purposes of NEPA, however, does not mean that a Federal court, or the Hearings Division, lacks jurisdiction to hear *any* challenge to that action. Although the Grazing Rider imposed on BLM a non-discretionary duty to renew an expired permit until BLM "completes processing of such permit . . . in compliance with all applicable laws and regulations," the rider itself placed conditions on this renewal – most notably, the condition that "[t]he terms and conditions contained in the expired . . . permit . . . shall continue in effect under the renewed permit."[84] The Hearings Division has jurisdiction to consider, for example, a claim that a

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can be no doubt" that an action extending a grazing permit by two and a half years was a "proposed action" triggering the procedural rights of third parties). *Cf. Defenders of Wildlife*, 144 IBLA 250, 255 (1998)[l] (holding that a "grazing bill assessing a fee" was not an appealable decision because the bill "does not establish, authorize, or in any way adjudicate grazing privileges").

[80] BLM Answer at 2 (filed Oct. 6, 2016).

[81] DCHD Decision, *supra* note 59, at 5.

[82] *See Citizens Against Rails-to-Trails v. Surface Transp. Bd. (CART)*, 267 F.3d 1144, 1151 (D.C. Cir. 2001); *see also Sierra Club, Or. Chapter*, 87 IBLA 1, 9 (1985)[m] (stating that "if BLM had only a ministerial function," then this Board could not "review the issuance of a lease for BLM's exercise of independent judgment").

[83] *CART*, 267 F.3d at 1151; *see Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992) ("[W]hen an agency has no discretion to consider environmental values . . . , its actions are ministerial and not subject to NEPA.").

[84] *See* 2004 Appropriations Act, § 325, 117 Stat. at 1307-08.

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l) GFS(MISC) 64(1998)
m) GFS(MIN) 56(1985)

renewed permit deviates from the terms and conditions of the expired permit, which arises not under NEPA or the TGA but under the Grazing Rider itself.[85]

WildEarth raised at least one such claim in this appeal, arguing both before the Hearings Division and before this Board that BLM's October 2001 FONSI/DR combined the two allotments into one allotment, so that the permit issued in 2012 for the El Banquito Allotment alone deviated from the terms and conditions of the previous permit.[86] BLM, by contrast, asserts that "the one allotment, one herd system" described in the 2001 EA "has not . . . been implemented."[87] Because this dispute concerns the validity of "a final BLM grazing decision,"[88] the Hearings Division had jurisdiction to resolve it.

We therefore vacate the Hearings Division's decision dismissing WildEarth's appeal of the 2012 El Banquito Permit, and remand that appeal for the Hearings Division to consider WildEarth's claim that the 2012 El Banquito Permit violated the Grazing Rider because its terms and conditions deviate from the terms and conditions of the expired permit.[89] In so doing, we express no views on the merits of that claim.

The Azabache Allotment

The Hearings Division also granted summary judgment to BLM in WildEarth's appeal of the 2014 Azabache Permit. We reverse this decision, and grant summary judgment to WildEarth on its NEPA claim. Because we do so, we need not address WildEarth's remaining claims to the extent that these claims rely on factual circumstances that may change in a future permitting decision. Nonetheless, we address

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[85] *See, e.g., Ctr. for Biological Diversity v. Wagner*, No. 08-302-CL, 2009 U.S. Dist. LEXIS 70231, *18-30, 2009 WL 2176049 (D. Or. June 29, 2009) (considering whether the U.S. Forest Service violated the Grazing Rider by issuing a permit that authorized more grazing than the expired permit, and concluding based on extra-record evidence that the expired permit had been modified during its lifetime, such that the terms of the renewed permit matched the terms of the expired permit, as modified); *see also Jost v. Surface Transp. Bd.*, 194 F.3d 79, 90 (D.C. Cir. 1999) (considering whether the agency violated a non-environmental condition under the same statutory scheme at issue in *CART*).

[86] WildEarth Statement of Reasons (SOR) at 9, 28 (filed Aug. 1, 2016); Opening Brief, *supra* note 39, at 17.

[87] Opening Brief, *supra* note 39, Ex. 12, Respondent's Responses to Appellant's First Set of Discovery Requests at 16 (Nov. 11, 2015) (Discovery Responses).

[88] 43 C.F.R. § 4.470(a).

[89] *See Nat'l Wildlife Fed'n v. Bureau of Land Mgm't*, 145 IBLA 379, 383 (1998) (reversing the Hearings Division's dismissal of an appeal and remanding to the Hearings Division for further proceedings).

n) GFS(MISC) 84(1998)

two arguments made by WildEarth on appeal that involve legal errors made by the Hearings Division, reversing the Hearings Division's grant of summary judgment to BLM on WildEarth's FLPMA claim and on its claim related to the rangeland health standard for riparian areas.

WildEarth's NEPA Claim

WildEarth asserts that BLM's decision to issue the 2014 Azabache Permit violated NEPA.[90] Because BLM did not comply with the regulations governing the use of a DNA, we reverse the Hearings Division, and grant summary judgment to WildEarth.

A DNA is not an environmental analysis in its own right, "and may not be used to supplement an existing environmental analysis or to address site-specific environmental effects not previously considered."[91] Rather, a DNA documents BLM's determination that an existing EA or EIS "adequately assesses the environmental effects of the proposed action and reasonable alternatives."[92] When BLM prepares a DNA, its "supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects."[93] Where potentially significant new information exists, BLM's administrative record "must reflect that BLM has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information."[94]

BLM issued the 2014 Azabache Permit based on the 2014 DNA, which in turn identified the 2001 EA as the applicable environmental analysis.[95] The 2014 DNA stated that "[t]he proposed action is the same as the proposed action analyzed in" the 2001 EA, and that "[t]he geographic and resource conditions are the same as those analyzed in the last EA."[96] In response to a question on BLM's DNA form asking whether "the existing analysis [is] valid in light of any new information or circumstances (such as, [a] rangeland health standard assessment . . .)," BLM responded: "The existing analysis is still valid based on a recent Rangeland Health Standard Assessment (April 12, 2013) that determined the Upland Site and Biotic Community was meeting the Standard . . . ."[97]

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[90] SOR at 6, 18-19, 21, 25-26.
[91] *WildLands Defense*, 188 IBLA 68, 70 (2016).[o]
[92] 43 C.F.R. § 46.120(c).
[93] *Id.*
[94] *Mont. Trout Unl'td*, 178 IBLA 159, 169 (2009).[p]
[95] *See* Proposed Decision, *supra* note 54, at 1; 2014 DNA, *supra* note 53, at unp. 1.
[96] 2014 DNA, *supra* note 53, at unp. 2; *see also id.* (stating that "[t]he effects [of the new permit] will be the same because the proposed action is the same . . . as [that] analyzed in the NEPA Document").
[97] *Id.*

o) GFS(MISC) 19(2016)
p) GFS(O&G) 17(2009)

On appeal, WildEarth argues that BLM was required to supplement the 2001 EA because the agency "ma[de] substantial changes to the proposed action."[98] WildEarth also notes that the findings of the 2013 Standards Determination differed from the findings of the 2001 EA.[99] We therefore understand WildEarth to be arguing that BLM's 2014 DNA was improper both because BLM failed to "determine whether [the 2001 EA] adequately analyzed the effects of" the proposed 2014 Azabache Permit, and because BLM failed "to determine whether there exists new information relevant to environmental concerns that is significant and was not previously analyzed."[100]

As an initial matter, we reject WildEarth's argument that BLM was required to supplement the 2001 EA because the agency "ma[de] substantial changes to the proposed action."[101] WildEarth is correct that the current grazing regime, as authorized by the 2014 Azabache Permit, omits significant elements of the 2001 EA's Proposed Action Alternative, such as rotating the livestock annually "through nine different pastures" on the two allotments.[102] Indeed, BLM conceded through discovery that the Proposed Action Alternative has not been implemented.[103] This fact does not by itself obligate BLM to supplement the EA, however. An EA can support a subsequent decision if that decision is sufficiently similar to *any* alternative in the EA to ensure that the EA, as a whole, "adequately assesses the environmental effects of the proposed action."[104] WildEarth itself asserts that "[m]anagement of Azabache . . . continues under the [Current Management] Alternative . . . described in the EA."[105] Because this alternative was analyzed in the 2001 EA, BLM was not obligated to supplement that EA merely because it continued to implement that alternative.

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[98] SOR at 21; *see also id.* at 18 ("Even on individual allotments, BLM grazing permits must comply with [NEPA] through site-specific analysis of the impacts of proposed grazing, evaluation of alternatives, and other NEPA requirements." (citing *Nat'l Wildlife Fed'n v. Bureau of Land Mgm't*, 140 IBLA 85 (1997))).[q]

[99] SOR at 19, 25.

[100] *See Mont. Trout Unl'td*, 178 IBLA at 169.

[101] SOR at 21.

[102] *See* 2001 EA, *supra* note 15, at 7.

[103] *See* Discovery Responses, *supra* note 87, at 16 ("[T]he one allotment, one herd system has not yet been implemented.").

[104] *See* 43 C.F.R. § 46.120(c); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (holding that "supplementation is not required when . . . the new alternative is a minor variation of one of the alternatives discussed in the draft EIS, and . . . the new alternative is qualitatively within the spectrum of alternatives that were discussed in the draft EIS" (quotation marks and alterations omitted)); *accord Wyo. Wildlife Fed'n*, 184 IBLA 352, 362 (2014).[r]

[105] SOR at 6; *accord id.* at 8.

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q) GFS(MISC) 54(1997)
r) GFS(O&G) 1(2014)

Nonetheless, we reverse the Hearings Division's decision and grant summary judgment to WildEarth because BLM failed to include in its record "an evaluation of whether new circumstances [or] new information . . . not previously analyzed may result in significantly different environmental effects."[106] The 2001 EA found that "livestock are negatively impacting rangeland health"; "the key areas assessed receive a disproportionate amount of livestock use"; and "the majority of suitable rangelands depart moderately to extremely from their respective ecological site descriptions," due to circumstances including "the presence of gullies" and "inadequate amounts of litter and a high percentage of bare ground."[107] It concluded that "the New Mexico Standards for Public Land Health are not currently being met."[108] And it predicted that under the Current Management Alternative, "the general trend in rangeland health would remain static or downward."[109]

The 2013 Standards Determination, by contrast, found that the allotment was "productive, stable and in a sustainable condition"; that "[t]here were no rills/gullies present"; and that amounts of vegetative litter and bare ground were appropriate.[110] It concluded that the only two applicable standards, for upland sites and biotic communities, were being met.[111]

Before the Hearings Division, BLM acknowledged that the 2013 Standards Determination painted a different picture than the 2001 EA, but argued that BLM was justified in relying on the "best and most recent evidence of the overall range conditions on the Azabache [A]llotment," and was "not required to rely upon data or findings that are over thirteen years old."[112] BLM characterized WildEarth's "focus on" the 2001 EA as "desperate and misleading."[113] The Hearings Division agreed with BLM, finding that "[t]he monitoring performed by" BLM in preparing the 2013 Standards Determination "was adequate in content and scope to allow BLM . . . to take the required NEPA 'hard look' at relevant, environmental compliance issues."[114]

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[106] § 46.120(c); *see also Mont. Trout Unl'td*, 178 IBLA at 169 (requiring BLM "to determine whether there exists new information relevant to environmental concerns that is significant and was not previously analyzed").
[107] 2001 EA, *supra* note 15, at 17.
[108] *Id.*
[109] *Id.* at 30.
[110] 2013 Standards Determination, *supra* note 49, at 7-11.
[111] *Id.* 6-10.
[112] CAR, *WildEarth*, DCHD-2015-0050, BLM's Response to WildEarth's First and Second Motion for Summary Judgment at 10-11 (filed Feb. 22, 2016) (MSJ Response).
[113] *Id.* at 10.
[114] DCHD Decision, *supra* note 59, at 16.

BLM's supporting record in this case does not demonstrate that the agency "evaluat[ed] . . . whether new circumstances [or] new information . . . not previously analyzed may result in significantly different environmental effects," as required by the regulations.[115] The conditions described in the 2013 Standards Determination differ dramatically both from the existing conditions described in the 2001 EA and from the EA's predictions regarding future conditions under the Current Management Alternative. Rather than evaluate the significance of these "new circumstances" and "new information," however, the 2014 DNA relies on the incorrect premise that "[t]he . . . resource conditions are the same as those analyzed in the last EA."[116]

On appeal, BLM argues that it was "not required to rely upon" the 2001 EA.[117] But relying upon the 2001 EA is precisely what BLM chose to do when it prepared the 2014 DNA, rather than preparing a new environmental analysis. Because the 2014 DNA does not evaluate whether the "new circumstances [or] new information" uncovered by the 2013 Standards Determination "may result in significantly different environmental effects" than those analyzed in the 2001 EA,[118] the DNA does not "represent[] a substantial compliance with" BLM's legal obligations.[119] We therefore reverse the Hearings Division's decision, and grant summary judgment to WildEarth in its appeal of the 2014 Azabache Permit.[120]

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[115] 43 C.F.R. § 46.120(c); *see also id.* (requiring BLM to "determine[], with appropriate supporting documentation, that [the existing EA] adequately assesses the environmental effects of the proposed action").

[116] 2014 DNA, *supra* note 53, at unp. 2; *see Mont. Trout Unl'td*, 178 IBLA at 170 ("[N]owhere in the DNA does BLM state whether the new information discussed matters of environmental significance and, if so, why it does not result in significantly different environmental effects from those previously analyzed in existing NEPA documents.").

[117] MSJ Response, *supra* note 112, at 11.

[118] *See* § 46.120(c).

[119] *See* 43 C.F.R. § 4.480(b).

[120] *See Mont. Trout Unl'td*, 178 IBLA at 171 ("Given the paucity of supporting documentation in this record, we are unable to determine whether BLM has taken the requisite hard look at new information and, accordingly, set aside BLM's decision and remand this case for action consistent with this holding."); *see also WildLands Defense*, 189 IBLA 19, 29 (2016)[s] (holding that where BLM's comparison of the prior EAs to the new proposed action is "conclusory and vague," the DNA "does not suffice as a determination that the environmental effects of the [proposed action] were adequately addressed by" the EAs, and the Board "must conclude that BLM's decision was not supported by an appropriate NEPA analysis"); *Ctr. for Native Ecosystems*, 170 IBLA 331, 347 (2006)[t] (holding that where "there has been no procedural NEPA compliance" due to

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s) GFS(MISC) 36(2016)
t) GFS(O&G) 17(2006)

WildEarth's FLPMA Claim

FLPMA requires BLM to "manage the public lands . . . in accordance with [its] land use plans."[121] BLM's grazing regulations further specify that BLM must "manage livestock grazing on public lands . . . in accordance with applicable land use plans," and that "[l]ivestock grazing activities and management actions approved by [BLM] shall be in conformance with the land use plan."[122]

The governing land use plan in this case is BLM's 1986 Rio Puerco Resource Management Plan (RMP), as subsequently amended.[123] WildEarth argues on appeal, as it did before the Hearings Division, that the 2014 Azabache Permit did not conform to this plan.[124] The Hearings Division rejected this argument without determining what the governing land use plan requires, or whether the permit conformed to those requirements:

> Appellants argue that BLM failed to comply with the 1986 Rio Puerco Resource Management Plan. However, BLM did not rely upon this antiquated RMP. Rather, BLM based its proposed decision and new permit upon the contemporary monitoring conducted . . . in 2013. This is an

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a deficient DNA, "this Board is not the proper entity to create NEPA documentation"); *S. Utah Wilderness All.*, 157 IBLA 150, 157 (2002)[q] (noting that while this Board "has authority . . . to review information submitted on appeal to demonstrate the sufficiency of BLM's NEPA analysis and to permit that information to 'cure,' if necessary, an otherwise perceived deficiency in that analysis," "such exercise of our de novo review authority is discretionary . . . and it should be used with caution and not to mask any substantial defect which may have occurred in the NEPA analysis").

[121] 43 U.S.C. § 1732(a).

[122] 43 C.F.R. § 4100.0-8; *accord 06 Livestock Co.*, 192 IBLA at 370 ("BLM's Grazing Decisions Must Be Consistent with the Governing Land Use Plan").

[123] *See* BLM, Rio Puerco Resource Management Plan and Record of Decision (Oct. 1992 Update), https://eplanning.blm.gov/public_projects/lup/99793/134929/165083/1992_RMP_UPDATE_508CB.pdf (last visited Oct. 20, 2020). This version of the RMP includes technical updates made in 1992, but does not include any substantive amendments made since 1986. *See* 43 C.F.R. § 1610.5-4 (allowing approved land use plans to "be maintained as necessary to reflect minor changes in data," so long as such maintenance does "not . . . change the terms, conditions, and decisions of the approved plan").

[124] *See* SOR at 5-6, 9-10, 15-17, 28; *see also Childress v. Bureau of Land Mgm't*, IBLA 2016-97 (filed Feb. 19, 2016) (raising similar claims in another appeal).

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q) GFS(O&G) 9(2002)

> appropriate application of BLM's broad discretion in administering the Taylor Grazing Act . . . .[125]

On appeal, BLM similarly does not address either the question of what the governing land use plan requires, or the question of whether the 2014 Azabache Permit conformed to those requirements. Instead, BLM argues that "[w]hen BLM makes grazing permit decisions, it is not legally required to ensure that grazing permits meet the standards found in general management plans whether they be recent, or, as in this case, nearly thirty years old."[126]

To the extent that the Hearings Division held that BLM was not required to conform to the governing land use plan, it erred. BLM must "manage livestock grazing . . . in accordance with applicable land use plans," and ensure that "grazing activities and management actions" are "in conformance with the land use plan."[127] The planning decisions made in a land use plan therefore bind BLM until BLM modifies those decisions by amending or revising that plan through the land use planning process.[128]

While we conclude that the Hearings Division erred to the extent that it held that BLM did not need to conform to the governing land use plan, we express no view on what that plan requires, or on whether BLM in fact conformed to that plan. Because we grant summary judgment to WildEarth on its NEPA claim, there is no need for this Board or the Hearings Division to decide these questions at this time. Rather, BLM must ensure that any new permitting decision conforms to the governing land use plan.

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[125] DCHD Decision, *supra* note 59, at 12.

[126] BLM Answer at 9; *see also id.* at 10 ("BLM is not required to comply with the thirty year-old Rio Puerco Resource Management Plan . . . .").

[127] 43 C.F.R. § 4100.0-8. *Cf. Public Lands Council v. Babbitt*, 529 U.S. 728, 744 (2000) ("The Secretary also points out that since development of land use plans began nearly 20 years ago, all BLM lands in the lower 48 states are covered by land use plans, and all grazing permits in those States have now been issued or renewed in accordance with such plans, or must now conform to them." (quotation marks omitted)).

[128] *See* 43 C.F.R. §§ 1610.5-5, 1610.5-6 (specifying procedures for revising and amending land use plans); *S. Nev. Water Auth.*, 191 IBLA at 405 ("[L]and use plans can be changed only through a land use planning process, which involves public notice and comment procedures."); *Sierra Club Legal Def. Fund, Inc.*, 124 IBLA 130, 140 (1992)[r] ("[W]e find appellants' assertion that BLM based its decision on an outdated [land use plan] unpersuasive. There is no dispute that the proposed sale partially implements the goals and objectives of the 1983 Clark County [plan]. That [plan] is the currently applicable land use plan for the area and will remain so until it is super[s]eded upon completion of the Stateline RMP/EIS.").

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r) GFS(MISC) 47(1992)

WildEarth's Riparian Areas Standard Claim

We next address WildEarth's claim that BLM erred by issuing the 2014 Azabache Permit without first determining whether the Azabache Allotment satisfied the rangeland health standard for riparian areas.[129] When reviewing BLM's decision not to apply a particular rangeland health standard, we ask whether that decision reflects "a reasonable exercise of the bureau's professional judgment."[130] In so doing, we bear in mind our general standard of review, under which BLM's application of the grazing regulations is deemed reasonable if it is "supportable on any rational basis."[131]

BLM acknowledges that there are riparian areas in the Azabache Allotment.[132] The 2001 EA described three such areas. Two areas, totaling about 31 acres, were described as being "contained within a . . . wildlife exclosure" and "excluded from livestock grazing," respectively, and were in "proper functioning condition."[133] A third area, totaling 380 acres, was subject to "special emphasis . . . for riparian management," under which "[l]ivestock grazing is restricted to the dormant season."[134] The EA stated that the limitation of grazing on the larger area to dormant-season use "would increase vegetative production, litter, and plant composition and increase rates of riparian recovery by allowing the water table to rise and remain in the arroyo longer."[135] Therefore, the EA concluded that "[a]ll major riparian areas . . . have already been protected from livestock grazing," and that "[i]t would be expected that a functional rating would be reached in the long term."[136]

The 2013 Standards Determination states that the riparian areas standard "Does Not Apply" to the Azabache Allotment, without further explanation.[137] The Hearings Division inferred that BLM's determination that the standard does not apply "was premised on" the statement in the 2001 EA that "all major riparian areas . . . have already been protected from livestock grazing."[138]

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[129] SOR at 7, 10, 17-20, 29.
[130] *See Manuel Manuz*, 192 IBLA 192, 203 (2018)[s].
[131] *See Smigel*, 155 IBLA at 164; *accord Hensley*, 195 IBLA at 356.
[132] BLM Answer at 10; *accord* DCHD Decision, *supra* note 59, at 12.
[133] 2001 EA, *supra* note 15, at 19.
[134] *Id.*; *see also id.* at 5 (showing these areas on a map).
[135] *Id.* at 30.
[136] *Id.*
[137] 2013 Standards Determination, *supra* note 49, at 10. *Cf. Manuz*, 192 IBLA at 204 (noting that BLM "documented its rationale for not evaluating" a particular standard).
[138] DCHD Decision, *supra* note 59, at 12; *accord* BLM Answer at 10.

s) GFS(MISC) 2(2018)

This explanation for BLM's determination does not satisfy the requirement of a "rational basis."[139] The purpose of assessing whether an allotment meets the rangeland health standards is to allow BLM to determine whether "existing grazing management practices or levels of grazing use . . . are significant factors in failing to achieve the standards."[140] The statement in the 2001 EA that "[a]ll major riparian areas . . . have already been protected from livestock grazing" describes the outcome that BLM *expected* to see as a result of the existing management practices, which were incorporated into each of the grazing alternatives.[141] This statement reflects BLM's prediction that "[i]t would be expected that a functional rating would be reached in the long term."[142] The fact that BLM predicted in 2001 that these management practices would result in a favorable outcome does not excuse BLM from assessing, twelve years later, whether that prediction had come true in those riparian areas where grazing has continued to occur.

We conclude that the Hearings Division erred by granting summary judgment to BLM on this claim, based on its mistaken holding that the statement found in the 2001 EA provided a rational basis for BLM's later decision not to assess whether the allotment was meeting the riparian areas standard. As with the FLPMA claim, there is no need to remand this claim to the Hearings Division, because BLM will have another opportunity either to determine whether the allotment meets the riparian areas standard, or to provide a rational basis for determining that this standard does not apply.

CONCLUSION

We hold that the Hearings Division had jurisdiction to consider WildEarth's appeal of the 2012 El Banquito Permit. We therefore vacate the Hearings Division's decision dismissing that appeal, and remand the appeal for the Hearings Division to consider WildEarth's claim that the permit violated the terms of the Grazing Rider.

We also hold that BLM failed to evaluate, before issuing the 2014 Azabache Permit, whether the "new circumstances" and "new information" identified in the 2013 Standards Determination "may result in significantly different environmental effects" than the effects analyzed in the 2001 EA.[143] Furthermore, we hold that BLM was required to conform to the governing land use plan when issuing that permit (but do not decide whether it did so), and that the predictive statements in the 2001 EA did not provide a rational basis for determining that the riparian areas standard does not apply. We

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[139] *Smigel*, 155 IBLA at 164.
[140] 43 C.F.R. § 4180.2(c); *see W. Watersheds Project*, 195 IBLA at 117; *S. Nev. Water Auth.*, 191 IBLA at 387.
[141] 2001 EA, *supra* note 15, at 30.
[142] *Id.*
[143] *See* 43 C.F.R. § 46.120(c).

therefore reverse the Hearings Division's decision regarding the 2014 Azabache Permit and grant summary judgment to WildEarth.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,[144] the decision appealed from is vacated in part and remanded, and reversed in part.

/s/
Haninah Levine
Acting Administrative Judge

I concur:

/s/
Silvia Riechel Idziorek
Administrative Judge

[144] *Id.* § 4.1.