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Wild Horses & Nevada Division of Wildlife, Appellants  
6

7 UNITED STATES DEPARTMENT OF THE INTERIOR  
8 OFFICE OF HEARINGS AND APPEALS  
HEARINGS DIVISION

9 NEVADA DIVISION OF : N2-93-14 and IBLA 93-460  
10 WILDLIFE (NDOW), :

11 Appellant :

12 v. :

13 BUREAU OF LAND MANAGEMENT, :

14 Respondent :

15 .....  
16 SIERRA CLUB AND THE NATURAL : N2-93-15  
17 RESOURCES DEFENSE COUNCIL :  
(NRDC), :

18 Appellant :

19 v. :

20 BUREAU OF LAND MANAGEMENT, :

21 Respondent :

22 .....  
23 WILD HORSE ORGANIZED : N2-93-16 and IBLA 93-522  
ASSISTANCE (WHOA), :

24 Appellant :

25 v. :

26 BUREAU OF LAND MANAGEMENT, :

27 Respondent :  
28 .....

1 COMMISSION FOR THE : N2-93-17 and IBLA 93-523  
 2 PRESERVATION OF WILD HORSES :  
 (CPWH), :  
 3 :  
 Appellant :  
 4 :  
 v. :  
 5 :  
 BUREAU OF LAND MANAGEMENT, :  
 6 :  
 Respondent :  
 7 :

8 .....  
 9 I. STATEMENT OF THE CASE

10 These appeals charge the BLM has improperly determined carrying capacity for the  
 11 Buffalo Hills Allotment (the "allotment"), and has authorized grazing use at levels which will  
 12 cause continuing degradation of riparian resources, contrary to law and to land use planning.

13 The BLM has acknowledged for over ten years the degraded condition of riparian  
 14 vegetation on the allotment, and further acknowledges that the damage is caused by a  
 15 combination of livestock and wild horse use.

16 In order to remedy the damaged riparian resources, BLM developed utilization limits  
 17 for riparian vegetation. In order to achieve these limits, or objectives, BLM chose to  
 18 "manage" livestock, *i.e.* herd livestock away from the riparian areas, or fence livestock out.  
 19 Unfortunately, livestock management proved unsuccessful in attaining the desired riparian  
 20 improvement.  
 21

22 Thus in 1993, when the allotment was reevaluated, the riparian resource was still in a  
 23 degraded condition. However, rather than adjust the number of livestock on the allotment by  
 24 properly calculating the livestock carrying capacity, BLM recommitted to livestock  
 25 management in its 1993 multiple use decision, here under appeal. BLM also relied on large-  
 26 scale removal of wild horses as a means to achieve the riparian objectives.  
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1           Upon these facts, appellants rest the following points on appeal:

2           (A)    The BLM's determination of carrying capacity was arbitrary. The arbitrary  
3 nature of the decision is shown in several ways. First, none of the documents presented with  
4 the decision provide a basis for the number in the decision. Second, the BLM failed to account  
5 for riparian utilization objectives in its determination of carrying capacity. Third, the BLM  
6 weight averaged riparian utilization to mask its influence on the carrying capacity  
7 determination. Fourth, the number determined to be the carrying capacity appears to be  
8 merely a justification for continuing grazing at levels similar to the past several years'  
9 authorizations. Such a basis is arbitrary and not consistent with law.

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11           (B)    The decision sets the authorized level of livestock grazing at numbers which are  
12 certain to cause continued damage to riparian vegetation.

13  
14           BLM openly admits its livestock authorizations will exceed carrying capacity until wild  
15 horses are brought down to Appropriate Management Levels.

16           Further, BLM argues that instead of reducing numbers of livestock to ease utilization  
17 on riparian vegetation, its decision will achieve that result by managing livestock. But the  
18 same provisions for livestock management that appear in the decision were implemented in the  
19 1980's, and were ineffective. It is unrealistic to expect a different outcome with unchanged  
20 practices.

21  
22           BLM committed in the early 1980's to improve the riparian resource on the Allotment.  
23 It has had ten years to do so without affecting the permittees' livestock operation. However,  
24 it has been unable to successfully restore the riparian vegetation through these methods. The  
25 BLM should now be required to take the additional measure of reduction in numbers of  
26 livestock.

27  
28           (C)    The Nevada Commission for the Preservation of Wild Horses furthermore

1 appeals from the decision because it imposes the onus of habitat improvement on wild horses.  
2 The riparian damage is caused by both livestock and wild horses, but only reduction in horse  
3 numbers is ordered. The Commission asserts that the allocation of available forage is not in  
4 accordance with the land use plan, and is therefore contrary to law.

## 5 6 II. STATEMENT OF THE FACTS

7 On February 9, 1993, the Sonoma/Gerlach Resource Area of the U.S. Bureau of Land  
8 Management (BLM) in Nevada, issued a full force and effect multiple use decision (the  
9 "decision") for the Buffalo Hills Allotment. See Exhibit A-7. That decision is the subject of  
10 these appeals.

11 The Nevada Division of Wildlife (NDOW) appealed from the decision in appeal number  
12 N2-93-14. The Nevada Commission for the Preservation of Wild Horses (Commission)  
13 appealed in appeal number N2-93-17.

14 These appeals were heard on January 10 and 11, 1995, in Reno, Nevada.

15 The allotment is located in northwestern Nevada, and is nearly a half million acres in  
16 size. Exhibit A-6 at 1. In the early eighties, the BLM acknowledged the poor condition of  
17 vegetation--particularly riparian vegetation--on the allotment, and determined through land use  
18 planning to cause improvement to it. Tr. at 30, lines 11-25, Tr. at 31, lines 1-5. Through the  
19 remainder of the 1980's, BLM issued a series of documents and decisions to effect  
20 improvement through changes in livestock management and planned range projects designed  
21 to control livestock movement. These began with the land use plan decisions, Tr. at 33, issued  
22 in 1982. Tr. at 194. Among these decisions was a strong commitment to improve riparian  
23 habitat. Tr. at 33, lines 14-19. See Exhibit A-1 at WL 1.10.

24 Next the Allotment Management Plan (AMP) was issued, Tr. at 38, in 1987. Tr. at  
25 36, line 25. The AMP was coupled with a Monitoring Plan, whose purpose was to "assure  
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1 that resources aren't damaged and to provide guidance on how the decisions will be determined  
2 on the allotment in the future." Tr. at 43, lines 19-22. Use limits from between 5 and 50  
3 percent were recognized for various plant species. Tr. at 41, lines 4-5.

4 In 1988 the BLM entered into a livestock agreement with the operators which further  
5 refined the original land use plan objectives, including a 30 percent streambank riparian  
6 objective. Tr. at 45, lines 14-25, tr. at 46, lines 1-7.

7 In 1989 the BLM issued the Fox Mountain Habitat Management Plan, an activity plan  
8 that continued the BLM's consistent commitment to improve riparian conditions. Tr. at 48,  
9 lines 3-24. It too contained a 30 percent utilization limit on streambank riparian vegetation.  
10 Tr. at 50, lines 12-15.

11 In spite of this intense effort through the 1980's to address riparian conditions, the  
12 riparian vegetation on the allotment did not adequately respond. Tr. at 210.

13 In 1993 the multiple use decision here under appeal was issued in response to the  
14 continued poor habitat condition. The decision purported to establish the carrying capacity for  
15 the allotment, *see* Exhibit A-7 at 7, and on that basis determined the two permittees' authorized  
16 grazing levels and seasons of use. *Id.* at 8-10.

17 The decision continued a system of grazing which divides the allotment into four  
18 pastures, and provides for a rotating schedule of use. Tr. at 245, lines 3-15. Only two  
19 pastures are used by livestock at any given time, while the other two are rested. Every two  
20 years, the two pastures used are alternated with the two rested pastures. This schedule of use  
21 was originally developed and implemented in the 1988 livestock agreement, and merely carried  
22 forward into the decision. *Id.* *See* Exhibit A-3 at 2-3.

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III. DISCUSSION

ISSUE A

Whether BLM determined the carrying capacity for the allotment in a manner which was arbitrary and not in accordance with law and land use planning objectives.

1. STATEMENT OF THE LAW.

"Carrying capacity" is defined at 43 C.F.R. § 4100.0-5 as "the maximum stocking rate possible without inducing damage to vegetation or related resources". BLM must not permit livestock use that exceeds the carrying capacity: "[a]uthorized livestock grazing use shall not exceed the livestock carrying capacity." 43 C.F.R. § 4130.6-1(a).

Livestock grazing must be consistent with the applicable land use plan:

The authorized officer shall manage livestock grazing on public lands . . . in accordance with applicable land use plans. . . . Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan.

43 C.F.R. § 4100.0-8. Grazing authorizations necessarily include conditions which will cause achievement of the land use plan objectives: "[l]ivestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public lands." 43 C.F.R. § 4130.6.

The burden of proof in a grazing appeal is a preponderance. *API v. BLM*, 128 IBLA 153 (1993). The appellant must demonstrate by a preponderance of the evidence that the BLM expert erred. *See also Jerry Kelly v. BLM*, 131 IBLA 146 (appellant must show by preponderance that decision was unreasonable or improper).

The reasonableness of agency action is determined by reference to the record before the agency at the time the decision was made. *Nevada Land Ass'n v. U.S. Forest Service*, 8 F.3d 713 (9th Cir. 1993).



1           If an agency reaches a proper decision on improper grounds, its decision must be  
2 vacated. *Bunyard v. Hodel*, 702 F.Supp. 820 (D.Nev. 1988).

3           "No adjudication of grazing preference will be set aside on appeal, if it appears that it  
4 is reasonable and that it represents a substantial compliance with the provisions of Part 4100  
5 of this title." 43 C.F.R. § 4.478.

6  
7           **2. APPLICATION OF LAW TO FACTS.**

8           The arbitrariness of the BLM's determination of carrying capacity is demonstrated by  
9 the facts in several ways.

10           a.       There is no support in the record for the BLM's determination of carrying  
11 capacity. Instead, gross inconsistencies plague the record. The decision set the carrying  
12 capacity at 12,682 AUMs. Exhibit A-7 at 7. However, the BLM's own documents contradict  
13 and fail to support this figure. The 1993 Allotment Reevaluation, which was the predicate  
14 study upon which the decision was based, listed the carrying capacity at 18,481, and 16,880.  
15 Exhibit A-6 at 39. The number 12,682 does not appear anywhere in the document. The  
16 carrying capacity document prepared in preparation for hearing also listed the carrying capacity  
17 at 18,819 AUMs. See Exhibit A-8, and testimony of Roy Leach, Tr. at 74. It also does not  
18 contain the figure of 12,682. None of the documents describe the process used by the BLM  
19 to draw a carrying capacity of 12,682 from any of the other figures presented in the  
20 documentation. The BLM's witnesses admitted BLM had never set forth the rationale for the  
21 determination. Tr. at 269, 289, and 341.

22           The BLM's witnesses' testimony also contradicts the figure of 12,682 found in the  
23 decision, and demonstrates the BLM's prevarication on the issue of carrying capacity. Mr.  
24 Cribley was evasive and unable to define the term "carrying capacity" as it appeared in the  
25 decision. Tr. at 277-282. Mr. Rich Adams was similarly unresponsive when asked what the  
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1 12,682 figure represented:

2 A. There were 8000 AUM's associated with the rest pastures  
3 that were not part of the grazing preference.

4 Q. Is that a number that's included in the 12,000 figure for  
5 the carrying capacity in the decision.

6 A. No.

7 Q. *So there are AUM's available in excess of the carrying  
8 capacity identified in the decision?*

9 A. Yes.

10 Q. Well, I thought carrying capacity was the maximum  
11 amount of grazing available without doing damage to the  
12 resource.

13 A. Yes, that's true.

14 \* \* \* \*

15 Q. What I'm curious in finding out is if your testimony is  
16 that indeed this is the correct carrying capacity for the allotment.

17 A. Yes, it is.

18 \* \* \* \*

19 Q. Could you read the definition there [Exhibit R-10, p. 6-  
20 91] of carrying capacity?

21 A. "A maximum stocking rate policy [sic] without inducing  
22 resource damage to vegetation or related resources."

23 Q. Is that your understanding of what carrying capacity is?

24 A. Yes.

25 Q. So 12,682 AUM's is the maximum stocking rate possible  
26 without inducing damage to vegetation and related resources,  
27 would that be a correct statement?

28 A. Yes.

Q. *In that event, do you still maintain there are additional  
available AUM's on this allotment.*

Q. *There are not available AUM's additional to these.*

Tr. at 153-155 (emphasis added). The succeeding day of hearing, Bud Cribley testified on  
cross-examination that 18,481 AUMs is the carrying capacity of the Allotment. Tr. at 340-  
341. The BLM cannot therefore agree even among its own personnel regarding the correct  
carrying capacity for the allotment.

Mr. Cribley also testified he set the carrying capacity at 12,682 by initially determining



1 it to be 18,481, of which 8,568 was for horses, the remainder for livestock. Tr. at 13-25. He  
2 then halved the livestock portion of that amount to allow use of a four pasture rest-rotation  
3 system, with two pastures used by livestock for two consecutive years, while the same two  
4 years two pastures are rested, and then alternating the use and rest pastures the next two  
5 consecutive years; then further reducing the livestock carrying capacity to equal the existing  
6 level of livestock use on the Allotment. Tr. at 244-248.  
7

8 This testimony is not credible. There is nothing in the record anywhere indicating this  
9 is the procedure he used to arrive at the 12,682 figure. There was thus no opportunity at any  
10 time for any interested party to comment on the method. Mr. Cribley's explanation in fact is  
11 a *post hoc* rationalization of BLM's decision to continue livestock grazing at its present level.  
12

13 Furthermore, Mr. Cribley's testimony came the day following testimony by Rich  
14 Adams. Mr. Adams conceded: "[the carrying capacity of 12,682 AUMs] was a management  
15 decision to say that the existing active preference would be allocated." Tr. at 168, lines 23-24.  
16

17 BLM, more likely than not, determined livestock carrying capacity for the allotment by  
18 simply referring to existing levels of livestock use on the Allotment, and determining to  
19 preserve this use, rather than by mathematical calculation and reliance on monitoring data as  
20 required by law. This is best shown by the fact that livestock authorization in the decision is  
21 identical to that in the 1988 livestock agreement. See Exhibit A-7 at 8 ("[t]he livestock  
22 allocation will remain the same as established in the 1988 evaluation and agreement").  
23

24 The evasiveness of the witnesses, the inconsistency of the documents and testimony, and  
25 the unchanged livestock allocations indicate the lack of reasonable basis for the carrying  
26 capacity determination. Because the reasonableness of the decision is not demonstrated by  
27 reference to the record before the BLM at the time the decision was made, it cannot stand.  
28 *Nevada Land Ass'n v. U.S. Forest Service*, 8 F.3d 713 (9th Cir. 1993). Even were it a correct

1 decision arrived at on improper grounds, the absence of a proper basis for its derivation  
2 requires its vacation. *Bunyard v. Hodel*, 702 F.Supp. 820 (D.Nev. 1988).

3 b. The foregoing discussion amply demonstrates that the BLM's own calculations  
4 did not serve as a basis for setting the carrying capacity at 12,682 AUMs. But the BLM's  
5 calculations are arbitrary even if examined in isolation and apart from their failure to rationally  
6 correlate with the 12,682 figure, because they were performed contrary to BLM's own  
7 instructions for making the calculations.  
8

9 The calculation to determine carrying capacity is a simple one.

$$10 \quad \frac{\text{ACTUAL USE}}{\text{KMA UTILIZATION}} = \frac{\text{DESIRED ACTUAL USE}}{\text{DESIRED KMA UTILIZATION}}$$

11 Exhibit A-9 at 54. On the left side of the equation is the existing or actual grazing use in  
12 Animal Unit Months as a numerator, with the utilization of vegetation, expressed as a  
13 percentage, as the denominator. These are known values, derived from monitoring.  
14

15 The right side of the equation depicts what level of grazing *should* be permitted. The  
16 denominator is the desired utilization objective. This value is prescribed through land use  
17 planning. This leaves only the numerator on the right side as an unknown value, and by  
18 reference to the three known values, this amount can be calculated. This number is the  
19 "carrying capacity."  
20

21 The mathematical determination of carrying capacity set forth in the BLM's documents  
22 is improper because BLM failed to use streambank riparian utilization objectives as the  
23 "Desired Utilization" figure.  
24

25 It is undisputed that riparian vegetation on the allotment has been in unsatisfactory  
26 condition since the land use plan was issued in 1982. *See* . Even though significant  
27 livestock reductions occurred at or around 1982, Tr. at 261-262, and even though a four  
28



1 pasture rest-rotation system was implemented through the 1987 Allotment Management Plan  
2 and the 1988 Grazing Agreement, Tr. at 200, damage has continued to occur to riparian  
3 vegetation, as late as the time of the Allotment Reevaluation, Exhibit A-6, issued in 1993. Tr.  
4 at 210, lines 5-15.

5 Use of carrying capacity adjustments and subsequent reductions in livestock numbers  
6 is an appropriate method of addressing deteriorated range condition. *Natural Resources*  
7 *Defense Council, Inc. v. Hodel*, 624 F.Supp. 1045, 1057 (D. Nev. 1985). And, riparian area  
8 utilization limits properly control the overall determination of carrying capacity. BLM's own  
9 manual instructs that:

11 key management areas could be riparian, wetland,  
12 or meadow areas surrounded by uplands.  
13 Maintaining proper use on the meadow could  
14 cause low utilization on the uplands. A key  
15 management area is the key area that overrides the  
16 indicators of the other key areas within the  
17 management unit. Management actions are based  
18 on the key management area.

19 Exhibit A-9 at 54.

20 Yet the carrying capacity calculations performed for the allotment were made without  
21 reference to the significant needs of streambank riparian vegetation. Sixty percent was the only  
22 "Desired Utilization" figure employed in the calculations. See Exhibit A-8. A much lower  
23 figure should have been used. The objective for streambank riparian vegetation has been  
24 consistently identified at 30 percent throughout the planning process for the allotment. See Tr.  
25 at 45, lines 14-25, tr. at 46, lines 1-7, Tr. at 50, lines 12-15. Furthermore, certain riparian  
26 species require a far lower level of utilization than even 30 percent. See Tr. at 41, 46, 52, and  
27 285. Thus even 30 percent was a compromise figure.

28 When questioned why the more conservative streambank riparian objectives were not

1 used, Rich Adams, the BLM's witness, could only respond "I cannot answer that question."  
2 Tr. at 142.

3 The next day of hearing, Bud Cribley offered some additional response. He said that  
4 BLM chose to use livestock management instead of reduction in numbers to achieve the desired  
5 objectives. Tr. at 240, lines 1-17.

6  
7 Mr. Cribley's response is inadequate. Reliance on livestock management had already  
8 been attempted on the allotment and was proven ineffective. Tr. at 117, 118, lines 1-4, 150,  
9 lines 1-13. Mr. Cribley's attempt to deny this is not credible. He stated that herding as an  
10 instrument for livestock management was not provided for in the 1988 Livestock Agreement  
11 with the operator, but the Agreement itself and Mr. Adams contradict this testimony. The  
12 1987 AMP states that "Livestock will be distributed and controlled by horseback . . . to  
13 achieve even distribution and proper utilization levels." See Exhibit A-2 at 17, and Tr. at  
14 150. Mr. Cribley himself conceded that herding was part of the grazing management practices  
15 of the 1980's. Tr. at 267, line 25, and 268 at line 1. His only hesitation was in characterizing  
16 the herding as mandatory under the previous actions. He attempted to portray conditions for  
17 herding and utilization contained in the AMP and Livestock Agreement as nonbinding, see Tr.  
18 at 271, lines 11-25, although regulations provide that such objectives and conditions are  
19 binding. 43 C.F.R. § 4130.6.

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21  
22 Mr. Cribley also attempted to justify use of 60 percent by reference to Exhibit R-21,  
23 which identifies that figure as generally appropriate. Tr. at 234, lines 2-7. However, on  
24 cross-examination, Mr. Cribley acknowledged this was a general figure which is not applicable  
25 to all plant species, Tr. at 287, lines 19-22, and in particular did not account for riparian  
26 species. Tr. at 288, lines 1-15.

27  
28 Mr. Cribley ultimately revealed the true reason why the lower utilization limits were

1 not employed: it is because the riparian areas are only a small percentage of the allotment, and  
2 BLM does not wish to allow their management to limit the use of the remainder of the  
3 allotment. Tr. at 240, lines 5-17. Instead, the BLM chose to rely on herding, *id.*, even  
4 though herding has already proved ineffective for meeting riparian objectives. Essentially,  
5 BLM has chosen to manage riparian sites that receive heavy utilization as "sacrifice areas".  
6 However there is no law which authorizes the concept of sacrifice areas.  
7

8 In view of the failure of livestock management to succeed in achieving the riparian  
9 objectives on the allotment, it was arbitrary for BLM to omit the streambank riparian  
10 objectives in the calculations for carrying capacity. Carrying capacity adjustments are the only  
11 viable means for alleviating the impacts of livestock grazing, given the limits of funding for  
12 projects and the inadequacies of herding.  
13

14 c. BLM's mathematical calculation of carrying capacity is additionally flawed  
15 because it improperly averaged riparian utilization with upland data, thereby down playing the  
16 serious overuse of riparian vegetation.  
17

18 Again the calculation to determine stocking rate is as follows.

$$19 \quad \frac{\text{ACTUAL USE}}{\text{KMA UTILIZATION}} = \frac{\text{DESIRED ACTUAL USE}}{\text{DESIRED KMA UTILIZATION}}$$

20 Exhibit A-9 at 54.

21 But the methodology used in the carrying capacity document prepared for the Buffalo  
22 Hills Allotment, Exhibit A-8, is improper because the BLM used another equation. The  
23 calculation actually employed by the BLM is as follows:  
24

$$25 \quad \frac{\text{ACTUAL USE}}{\text{AVERAGE/WEIGHTED}} = \frac{\text{POTENTIAL ACTUAL USE}}{\text{DESIRED AVERAGE}} \\ 26 \quad \text{AVERAGE UTILIZATION} \quad \text{UTILIZATION}$$

27 Exhibit A-9 at 55. This is the equation entitled "Potential Stocking Level". *Id.* This  
28

1 calculation is inappropriate for setting stocking rates because it assumes a perfect world. "A  
2 Potential Stocking Level is the level of use that *could* be achieved on a management unit, at  
3 the desired utilization figure, assuming utilization patterns could be completely uniform."  
4 Exhibit 9 at 55. The Allotment Reevaluation contains numerous references to uneven  
5 utilization, with concentration on riparian areas. *See e.g.* Exhibit A-6 at 15. The BLM's own  
6 witnesses attested to uneven utilization on the allotment. Tr. at 150 at 11-13. Thus, since  
7 utilization is not even, use of this equation on this allotment was plainly improper.  
8

9 The utility of the Potential Stocking Rate equation is in its comparative use with the  
10 Desired Stocking Rate. It demonstrates theoretical potential increases in carrying capacity *if*  
11 perfectly uniform utilization could be achieved. Tr. at 120, lines 10-15. The use of Potential  
12 Stocking Rate is therefore illustrative of an ideal, and should not play in the actual  
13 determination of carrying capacity, especially where distribution problems are known to exist.  
14

15 The mathematical problem with using the Potential Stocking Level calculation is that  
16 it uses weighted averaging, averaging heavy riparian utilization with lesser upland habitat  
17 utilization. The result is the muting or elimination of the heavy riparian utilization. Tr. at 82,  
18 lines 7-8.  
19

20 The comparative effects of the two calculations was demonstrated by Appellant's  
21 witness. Tr. at 87-92. Mr. Leach performed the calculation for the Calico Pasture with the  
22 Desired Stocking Rate calculation. For the actual use figure--the left-hand numerator in the  
23 equation--he accepted the BLM's own figures for both livestock and horses. Tr. at 87, lines  
24 10-17. For the denominator on the left side, instead of the weighted average utilization  
25 depicted by the BLM at .7 or 70 percent for 1989, *see* Exhibit A-8 at 2, and .5 or 50 percent  
26 for 1990, *see* Exhibit A-8 at 3, he employed .8 or 80 percent as actual utilization (this figure  
27 corresponds with the BLM's own data indicating heavy use of riparian vegetation in those  
28

1 years, *see* Exhibit A-6 at 15, 26-30). And instead of the 60 percent desired utilization used  
2 by BLM, *see* Exhibit A-8, he inserted a 30 percent streambank riparian objective as the right  
3 hand denominator, because Donnelly Creek passes through the pasture, justifying use of the  
4 streambank riparian utilization limit. Tr. at 88, lines 4-5.

5  
6 The product of this calculation was a much lower number than the BLM's figure. The  
7 witness's figure was 2,740 AUMs, while the BLM's was 4,002 AUMs. Tr. at 88. The  
8 disparity demonstrates the effect of weight averaging utilization. The result is significant  
9 overestimation of carrying capacity, and continued overutilization of riparian vegetation.

### 10 3. CONCLUSION TO ISSUE A.

11 BLM as an administrative agency charged with carrying out the law has a certain  
12 amount of discretion in the decisions it makes for public lands. But that discretion is not  
13 unlimited, and it is constrained in direct correlation with the level of detail developed in the  
14 land use plan. As land use plan objectives are refined through activity plans, the level of  
15 discretion decreases. The manager cannot ignore the land use plan, he must abide by it and  
16 see that it is given more than lip service in agency actions.

17  
18 BLM's determination of carrying capacity in this case finds no basis in the written  
19 record. The sole BLM effort to explain the figure is the testimony of Bud Cribley at the  
20 hearing on the appeals. Besides the implausibility of his explanation, it is unavailing for  
21 preserving the decision, because the reasonableness of agency action is determined by reference  
22 to the record before the agency at the time the decision was made. *Nevada Land Ass'n v. U.S.*  
23 *Forest Service*, 8 F.3d 713 (9th Cir. 1993). Mr. Cribley's post hoc explanation cannot serve  
24 as a reasoned basis for the decision. *Bunyard v. Hodel*, 702 F.Supp. 820 (D.Nev. 1988).

25  
26  
27 Furthermore, the BLM omitted important riparian objectives of 30 percent when  
28 calculating carrying capacity, and weight averaged heavy riparian utilization with lesser

1 utilization on non-riparian vegetation. This discounted the effect of grazing on riparian  
2 vegetation, contrary to BLM's own policies, and contrary to the land use plan's consistent  
3 emphasis on improving deteriorated riparian vegetation.

4 BLM's entire case relies on agency discretion in place of science and objectivity. Tr.  
5 at 240, lines 5-17. Although determination of carrying capacity may not be an exact science,  
6 Tr. at 242, it is subject to objective determination *if* the manager appropriately applies the  
7 BLM's own policy for making the mathematical calculation. In this case, he did not, and his  
8 decision should on that basis be vacated.  
9

#### 10 **ISSUE B**

11 BLM's decision will result in grazing which exceeds carrying capacity, and therefore  
12 is contrary to law.

#### 13 **1. STATEMENT OF THE LAW.**

14 "Carrying capacity" is defined at 43 C.F.R. § 4100.0-5 as "the maximum stocking rate  
15 possible without inducing damage to vegetation or related resources". BLM must not permit  
16 livestock use that exceeds the carrying capacity: "[a]uthorized livestock grazing use shall not  
17 exceed the livestock carrying capacity." 43 C.F.R. § 4130.6-1(a).  
18

19 Livestock grazing must be consistent with the applicable land use plan:

20 The authorized officer shall manage livestock grazing on public  
21 lands . . . in accordance with applicable land use plans. . . .  
22 Livestock grazing activities and management actions approved by  
23 the authorized officer shall be in conformance with the land use  
24 plan.

25 43 C.F.R. § 4100.0-8. Grazing authorizations necessarily include conditions which will cause  
26 achievement of the land use plan objectives: "[l]ivestock grazing permits and leases shall  
27 contain terms and conditions necessary to achieve the management objectives for the public  
28 lands." 43 C.F.R. § 4130.6.



1           **2.       APPLICATION OF LAW TO FACTS.**

2           Carrying capacity is "the maximum stocking rate possible without inducing damage to  
3           vegetation or related resources". 43 C.F.R. § 4100.0-5. BLM identified this number on the  
4           allotment as 12,682. Exhibit A-7 at 7. BLM admitted the use authorized by the decision  
5           would exceed the carrying capacity for at least four years until horse numbers reach AML.  
6           Tr. at 283, lines 11-12. This is an admitted violation of law. "Authorized livestock grazing  
7           use shall not exceed the livestock carrying capacity." 43 C.F.R. § 4130.6-1(a).  
8

9           Carrying capacity is exceeded in the decision for the additional reason that the true  
10          carrying capacity is lower than represented in BLM's documents. As explained in detail in the  
11          foregoing discussion of the first issue, BLM minimized the consistent overuse of riparian  
12          vegetation when it determined carrying capacity by employing techniques of weight averaging  
13          and conscious disregard for streambank riparian objectives, contrary to procedure. The result  
14          was an inflated carrying capacity figure. The excuse for doing so was BLM's reliance on  
15          techniques which have already been tried and failed. Herding has failed, and fencing to protect  
16          riparian areas has not been funded. Tr. at 258, lines 16-20.  
17

18          Inadequacy of herding and absence of funding do not justify violation of regulations  
19          which prohibit exceeding carrying capacity. BLM's claims of inability to render absolute  
20          performance due to funding restrictions cannot be ignored, but such claims must be carefully  
21          scrutinized, since officials may seize on a remedy made available for "extreme illness" and  
22          promote it into the "daily bread of convenience". *NRDC Inc. v. Train*, 510 F.2d 692, 713  
23          (D.C. Cir. 1975).  
24

25          This clearly is what has happened on this allotment. Alternatives for achieving riparian  
26          objectives include adjustments in livestock numbers. If livestock use cannot be managed to  
27          meet objectives, then the only legal alternative is to not authorize use, or to limit numbers to  
28

1 a degree that will achieve the objectives. Livestock grazing must be consistent with the land  
2 use plan, 43 C.F.R. § 4100.0-8, and the land use plan requires improvement in riparian  
3 conditions.

### 4 3. CONCLUSION

5 More than ten years after the land use plan for the allotment was adopted, BLM cannot  
6 reasonably defer the need to adjust livestock numbers to protect riparian resources. BLM  
7 admits that, for the next four years, its authorization of livestock grazing will exceed carrying  
8 capacity. Beyond that, the true carrying capacity will still be exceeded even when horses are  
9 brought to AML, because the calculation performed by BLM to determine carrying capacity  
10 improperly omitted consideration of riparian resources.  
11

12 Because the authorized levels of grazing will not result in attainment of land use plan  
13 objectives, *i.e.* restoration of riparian habitat, it is contrary to law.  
14

### 15 ISSUE C

16 BLM's apportionment of available forage between wild horses and livestock was  
17 arbitrary, and contrary to law and land use planning for the allotment.  
18

### 19 1. STATEMENT OF THE LAW.

20 The public lands must be managed "in accordance with the land use plans developed  
21 . . . under section 202 of this Act [43 U.S.C.S. § 1712]". 43 U.S.C. § 1732(a).

22 "Management activities affecting wild horses and burros . . . shall be in accordance  
23 with approved land use plans prepared pursuant to part 1600 of this title [43 C.F.R.]." 43  
24 C.F.R. § 4710.1.

25 "Management shall be at the minimum level necessary to attain the objectives identified  
26 in approved land use plans." 43 C.F.R. § 4710.4.  
27

28 . . .

1 Livestock grazing must be consistent with the applicable land use plan:

2 The authorized officer shall manage livestock grazing on public  
3 lands . . . in accordance with applicable land use plans. . . .  
4 Livestock grazing activities and management actions approved by  
5 the authorized officer shall be in conformance with the land use  
6 plan.

7 43 C.F.R. § 4100.0-8. Grazing authorizations necessarily include conditions which will cause  
8 achievement of the land use plan objectives: "[l]ivestock grazing permits and leases shall  
9 contain terms and conditions necessary to achieve the management objectives for the public  
10 lands." 43 C.F.R. § 4130.6.

11 A decision to make proportionate reductions in livestock and wild horse use must be  
12 based on monitoring. *Animal Protection Institute of America*, 128 IBLA 150 (1994). "The  
13 removal of wild horses is unauthorized if the AML 'has been established for administrative  
14 reasons, rather than in terms of the optimum number which results in a thriving natural  
15 ecological balance and avoids a deterioration of the range.'" *Id.* at 155 (1994) (citation  
16 omitted).

## 17 2. APPLICATION OF LAW TO FACTS

18 The land use plan for the Sonoma-Gerlach Resource Area says that "[a]fter the fifth  
19 year adjustments, continue monitoring and if adjustments in addition to the fifth year  
20 adjustments are required, adjust livestock, wild horses, and wildlife *proportionately* based on  
21 forage availability." Exhibit R-20 at 1 (emphasis added).

22 Proportionality of adjustments is also provided for in the 1988 Livestock Agreement.  
23 Exhibit A-3 at 3, *See Tr.* at 93, lines 9-14.

24 BLM's apportionment of adjustments in the decision was not proportional. There are  
25 no reductions in livestock AUMs; there are significant wild horse reductions. On its face the  
26 decision is in violation of the land use plan.  
27  
28

1           The damage to riparian vegetation is caused by a combination of livestock and wild  
2 horse damage. Exhibit A-6 at 15. BLM characterizes the livestock-caused damage as a  
3 problem with livestock distribution, but identifies the wild horse damage as a function of  
4 numbers of horses present. The characterization of livestock-caused damage as merely a  
5 distribution problem is arbitrary because the solution to such problem--livestock management--  
6 has already proven ineffective. The characterization is an improper attempt to justify horse  
7 removal, but to leave livestock numbers unaffected.  
8

9           Further, BLM had information sufficient to allow it to identify the respective damage  
10 caused by wild horses and livestock based upon the respective utilization made by each, and  
11 could have removed both horses and livestock in proportion to that damage. This  
12 determination could have been easily made because BLM monitored the rested pastures when  
13 only horses were present, and could then compare utilization on the same pasture when both  
14 horses and livestock were present.  
15

16           Q:    So the rested pasture then, there were no cows in  
17                the rested pastures, but there were horses there,  
18                right?

19           A:    Yes.

20           Q:    Let's see if I can understand. Then when you monitored,  
21                did not those rested pastures give you a percentage of  
22                horse use that were using the rested pastures?

23           A:    We monitored the utilization that occurred with just  
24                strictly horse use.  
25

26 Tr. at 178, lines 3-12. When further pressed, BLM's witness did not deny the information was  
27 available to make reductions based on which animals were causing damage, he simply stated  
28 BLM chose not to use the data, and instead relied on data from pastures where the horse and  
livestock use was commingled and could not be differentiated. *Id.* at 23-25.

          A:    [A]t the time we did not differentiate between what --  
              well, we could differentiate between what was horse  
              utilization and what was livestock utilization.

- 1 Q: But I thought you said you monitored for horse use only?  
2 A: Right, in the rest pastures, but stocking calculations is  
3 based on the pasture where both were used or grazing  
[sic].

4 Tr. at 179, lines 1-9. Thus BLM could have identified the proportions of use made by horses  
5 and livestock, and on that basis could have made proportionate reductions in respective  
6 carrying capacities. The failure of BLM to do so violated the land use plan requirement for  
7 proportional reductions. This in turn is a violation of law, for statute and regulation both  
8 require actions be consistent with the land use plan. 43 U.S.C. § 1732(a), 43 C.F.R. §  
9 4710.1.  
10

11 Furthermore, placing the onus of the reductions on wild horses violates the requirement  
12 that "[wild horse] management shall be at the minimum level necessary to attain the objectives  
13 identified in approved land use plans." 43 C.F.R. § 4710.4.

### 14 3. CONCLUSION

15 BLM correctly identified damage caused by both livestock and wild horses. BLM  
16 correctly identified a need to reduce overall use on the allotment. However, contrary to the  
17 land use plan, and contrary to law, BLM failed to apportion the adjustment in carrying capacity  
18 equitably between horses and livestock.  
19

### 20 PROPOSED FINDINGS OF FACT

- 21 1. The Buffalo Hills Allotment is located in the Sonoma-Gerlach Resource Area in  
22 northwest Nevada. Exhibit A-6 at 1.  
23  
24 2. Riparian vegetation on the Allotment has been in unsatisfactory condition since the  
25 development of the land use plan, *i.e.* the Sonoma-Gerlach Management Framework  
26 Plan, in 1982. Tr. at 30, lines 11-25, Tr. at 31, lines 1-5.  
27  
28 3. The unsatisfactory condition of riparian vegetation is due to a combination of livestock

1 and wild horse utilization. Exhibit A-6 at 15.

- 2 4. Through the 1980's, BLM developed a series of plans and management actions which  
3 attempted to address the unsatisfactory condition of the riparian resource. Tr. at 33-50,  
4 194-200.
- 5 5. The plans and actions of the 1980's relied upon an intensive grazing system,  
6 characterized by a four pasture rest-rotation schedule. The system furthermore included  
7 herding of livestock and utilization objectives of 30 and 50 percent for riparian  
8 vegetation. Tr. at 200.
- 9 6. The plans and actions of the 1980's failed to remedy the condition of riparian resources,  
10 and utilization on riparian vegetation continued to exceed objectives as late as 1993.  
11 Exhibit A-6 at 15, 26-30.
- 12 7. In 1993, BLM issued its final full force and effect multiple use decision for the  
13 Allotment. Exhibit A-7.
- 14 8. The 1993 Decision relies upon the same grazing system implemented in the 1980's, Tr.  
15 at 245, lines 3-15. and increases utilization limits to 60 percent. Tr. at 239, lines 17-  
16 22.
- 17 9. The 1993 full force and effect multiple use decision for the Allotment set the carrying  
18 capacity for the Allotment at 12,682 AUMs.
- 19 10. The carrying capacity for the Allotment is identified at 16,880 and 18,481 in the  
20 Allotment Reevaluation, Exhibit A-6 at 39; and at 18,819 in the separate document  
21 offered to support the carrying capacity figure in these appeals. Tr. at 74, Exhibit A-8.
- 22 11. Bud Cribley, Area Manager for the Sonoma-Gerlach Resource Area, testified he set the  
23 carrying capacity at 12,682 by initially determining it to be over 18,000, of which a  
24 certain amount was for wild horses, the remainder for livestock use; then halving the  
25  
26  
27  
28

1 livestock portion of that amount to allow use of a four pasture rest-rotation system, with  
2 two pastures used by livestock for two consecutive years, while the same two years two  
3 pastures are rested, and then alternating the use and rest pastures the next two  
4 consecutive years; then further reducing the livestock carrying capacity to equal the  
5 existing level of livestock use on the Allotment. Tr. at 244-248.  
6

7 The testimony of Bud Cribley regarding the method by which he determined the  
8 carrying capacity for the Allotment is not credible. His testimony was a *post hoc*  
9 rationalization of BLM's decision to continue livestock grazing at its present level.  
10 There is nothing in the documents offered at hearing which tends to substantiate his  
11 explanation of the method used to set carrying capacity. Furthermore, his testimony  
12 came the day following testimony by Rich Adams. Mr. Adams conceded: "[the  
13 carrying capacity of 12,682 AUMs] was a management decision to say that the existing  
14 active preference would be allocated." Tr. at 168, lines 23-24.  
15

16 BLM, more likely than not, determined livestock carrying capacity for the  
17 Allotment by only referring to existing levels of livestock use on the Allotment, and  
18 determining to preserve this use, rather than by mathematical calculation and reliance  
19 on monitoring data as required by law.  
20

- 21 12. BLM did not disclose the methodology and rationale it used to determine the carrying  
22 capacity for the Allotment, as set forth in the 1993 decision, at any time during the  
23 consultation and coordination process. Tr. at 65, 269, and 289.  
24 13. BLM omitted streambank riparian objectives in its calculation of carrying capacity for  
25 the Allotment. Tr. at 239, lines 17-25, Tr. at 240, lines 1-17.  
26 14. BLM calculated carrying capacity by use of weighted averaging of utilization, Tr. at  
27 252, lines 7-18, even though BLM knew utilization on the allotment was not uniform.  
28

1 Exhibit A-6 at 15.

- 2 15. BLM determined carrying capacity by reference to, and in order to sustain, the existing  
3 levels of livestock use on the Allotment. Tr. at 168, lines 23-24.
- 4 16. Riparian area utilization limits properly control the overall determination of carrying  
5 capacity on an allotment. Exhibit A-9 at 54.
- 6 17. Reliance on livestock management had already been attempted on the allotment and was  
7 proven ineffective. Exhibit A-6 at 15.
- 8 18. The reason why streambank riparian utilization limits were not employed is because the  
9 riparian areas are only a small percentage of the allotment, and BLM does not wish to  
10 allow their management to limit the use of the remainder of the allotment. Tr. at 240,  
11 lines 1-17.
- 12 19. Carrying capacity adjustments are the only viable means for alleviating the impacts of  
13 livestock grazing, given the limits of funding for projects and the inadequacies of  
14 herding.
- 15 20. Utilization on the allotment is not uniform, and will not be uniform under the  
16 continuation of the grazing system originally established in the 1987 AMP and 1988  
17 livestock agreement. BLM therefore improperly averaged riparian utilization with  
18 upland data, depreciating the serious overuse of riparian vegetation.
- 19 21. BLM has admitted that livestock use on the allotment, as authorized by the decision,  
20 would exceed the carrying capacity for at least four years until horse numbers reach  
21 AML. Tr. at 283, lines 11-12.
- 22 22. The correct carrying capacity is lower than represented in BLM's documents. BLM  
23 minimized the consistent overuse of riparian vegetation when it determined carrying  
24 capacity by employing techniques of weight averaging and conscious disregard for  
25  
26  
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1 streambank riparian objectives, contrary to procedure. The result was an inflated  
2 carrying capacity figure.

3 23. The land use plan for the Sonoma-Gerlach Resource Area requires that adjustments in  
4 use will be proportional among livestock, wild horses, and wildlife. Exhibit R-20 at  
5 1 (emphasis added).

6  
7 24. BLM's apportionment of adjustments in the decision was not proportional: there were  
8 no reductions in livestock AUMs, and significant reductions in numbers. Exhibit A-7.

9 25. BLM had information sufficient to allow it to identify the respective damage caused by  
10 wild horses and livestock, and could have removed both horses and livestock in  
11 proportion to that damage. Tr. at 178, lines 3-12 and 23-25, Tr. at 179, lines 1-9.

12  
13 PROPOSED CONCLUSIONS OF LAW

14 1. BLM is required to manage the allotment to improve and not cause damage to riparian  
15 resources.

16 2. BLM must determine carrying capacity in the manner prescribed in its manual, TR  
17 4400-7, or by some other equally rational and objective method which depends upon  
18 monitoring data and objectives set for the Allotment.

19 3. BLM's failure to include streambank riparian objectives in the calculation to determine  
20 carrying capacity is contrary to law because it fails to address overutilization of riparian  
21 resources and is therefore inconsistent with the land use plan requirement for improved  
22 riparian condition.

23  
24 4. BLM's use of weighted averaging to determine the Allotment's carrying capacity is  
25 contrary to law because it fails to address overutilization of riparian resources and is  
26 therefore inconsistent with the land use plan requirement for improved riparian  
27 condition.  
28

- 1 5. BLM's authorization of livestock use for the next four years will exceed the carrying  
2 capacity of the allotment, and is therefore contrary to law.
- 3 6. When BLM issued its multiple use decision for the Buffalo Hills Allotment, it lacked  
4 a rational basis for its determination of carrying capacity for the Allotment at 12,682  
5 AUMs.
- 6 7. Contrary to the applicable land use plan, BLM improperly apportioned available forage  
7 on the allotment between livestock and wild horses. While the land use plan requires  
8 proportional reductions in livestock and wild horse AUMs to meet carrying capacity,  
9 the decision preserves existing livestock AUMs, but reduces wild horse AUMs.
- 10 8. Use of carrying capacity adjustments and subsequent reductions in livestock numbers  
11 is an appropriate method of addressing deteriorated range condition.
- 12 9. Inadequacy of herding and absence of funding do not justify abandonment of land use  
13 plan objectives for riparian vegetation, and do not justify violation of regulations which  
14 prohibit exceeding carrying capacity.
- 15 10. If livestock use cannot be managed--*i.e.* herded, and excluded by fencing--to meet  
16 objectives, then the only legal alternative is to not authorize use, or to limit numbers  
17 to a degree that will achieve the objectives.
- 18 11. The failure of BLM to apportion reductions in AUMs between wild horses and livestock  
19 in proportion to the damage caused by each violated the land use plan. This in turn is  
20 a violation of law. 43 U.S.C. § 1732(a), 43 C.F.R. § 4710.1.
- 21 12. Imposing the burden of reduction disproportionately on wild horses is a violation of law  
22 which requires that "[wild horse] management shall be at the minimum level necessary  
23 to attain the objectives identified in approved land use plans." 43 C.F.R. § 4710.4.
- 24  
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PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that the final full force and effect multiple use decision for the Buffalo Hills Allotment be vacated and remanded to the Sonoma-Gerlach Resource Area for recalculation of the carrying capacity in accordance with the foregoing; and it is FURTHER ORDERED that the decision be remanded so that the Resource Area may apportion any necessary reductions in AUMs between wild horses and livestock, in proportion to the amount of overutilization each contributes to the allotment.

DATED this 10th day of March, 1995.

Respectfully submitted,

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