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

NEVADA DIVISION OF WILDLIFE (NDOW), Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-14 and IBLA 93-460
SIERRA CLUB AND THE NATURAL RESOURCES DEFENSE COUNCIL (NRDC), Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-15
WILD HORSE ORGANIZED ASSISTANCE (WHOA), Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-16 and IBLA 93-522
COMMISSION FOR THE PRESERVATION OF WILD HORSES (CPWH), Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-17 and IBLA 93-523

RESPONSE OF APPELLANTS NEVADA DIVISION OF WILDLIFE AND NEVADA COMMISSION FOR THE PRESERVATION OF WILD HORSES TO BRIEF OF BLM

Appellants Nevada Division of Wildlife (NDOW) and the Nevada Commission for the Preservation of Wild Horses (COMMISSION) make this response to BLM's Post-Hearing Brief.

The position of appellants is simple: BLM does not have the kind of unrestrained discretion it claims in its brief to have used in determining carrying capacity and appropriate use on the Buffalo Hills Allotment. BLM's discretion is constrained both by law and by the applicable land use plan. Its use of discretion in issuing the multiple use decision ("decision") for the Buffalo Hills Allotment (allotment) breached both law and the land use plan, and was therefore an abuse of discretion.

1. SCOPE OF REVIEW.

BLM in its brief correctly identifies the scope of review as far as it goes. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. But the decision here under appeal does not purport to be *just* a grazing adjudication, it is a multiple use decision that involves more than livestock grazing. The relevant statutes and rules addressing management of the other resources implicated in the decision are equally applicable. And in any event appellants charge the decision is not consistent with regulatory requirements under 43 C.F.R. Part 4100. Appellants specifically claim the BLM is inconsistent with the land use plan, in violation of 43 C.F.R. § 4100.0-8, and that it violates the requirement that authorized grazing not exceed carrying capacity, in violation of 43 C.F.R. § 4130.6-1.

2. BLM'S DECISION TO NOT USE RIPARIAN OBJECTIVES IN DETERMINING CARRYING CAPACITY IS AN ABUSE OF DISCRETION.

After more than ten years of intensive planning on the allotment, BLM cannot now ignore that body of effort and revert to the kind of pre-FLPMA discretion it may once have enjoyed. Yet this is what BLM has done.

BLM's brief is an apologia for BLM's failure at every turn to follow procedure and honor commitments made over a course of many years. The brief is laden with references to BLM's discretion, used in each reference as an excuse to avoid some requirement of procedure. *See* Brief at 9, lines 7-9 ("BLM decided not to use 30% utilization, which was the desired utilization in the riparian areas, as the desired utilization for the whole allotment"); page 15, lines 10-11 ("the Area Manager chose to use a method known as weighted average utilization"); page 16, lines 5-9 ("the Area Manager determined that because the utilization between the end of October and February 28 was in the dormant season for plants, the BLM could allow up to 60% utilization"); page 18, lines 23-26 ("after reviewing the KMAs in existence on the Buffalo Hills allotment, the BLM felt that there needed to be additional KMAs in order to better represent the habitat types within the allotment"); page 20, lines 24-27 ("the Area Manager decided not to use the utilization objectives for streambank riparian areas to determine the carrying capacity for an entire pasture, because the riparian areas represented a very small percentage of the total area); page 23, lines 16-18 ("the Area Manager decided it would be appropriate to use the same ratios of horses and livestock that were in the LUP [Land Use Plan] and apply those to the calculated carrying capacity").

The purpose of land use planning is to "maximize resource values for the public through a *rational, consistently applied set of regulations and procedures which . . . ensure participation by the public, state and local governments.*" 43 C.F.R. § 1601.0-2 (emphasis added). BLM in its brief asks to be excused from this commitment to rationality, procedure, and public involvement in the name of agency discretion. It cannot be so excused.

Land use planning was performed on the allotment in consultation with the public and state agencies over a course of years. Witnesses for both BLM and the appellants testified regarding the extensive planning on the allotment. NDOW's witness testified that his agency contributed to BLM's planning process as early as the 1970's. Tr. at 30. NDOW cooperatively developed and signed an interagency agreement covering habitat on the allotment, the Fox Mountain Habitat Management Plan, Exhibit A-4.

Yet the BLM employs discretion to avoid the strictures of planning. The misuse of discretion appears at several separate points in BLM's brief, each of which deserves a short response.

The first and most egregious abuse is the manager's decision to not use riparian objectives when calculating carrying capacity. A key in determining carrying capacity is defining what level of utilization is appropriate for vegetation on an allotment. Brief at 15, lines 23-24. That number, expressed as a percentage, is then used in the calculation of carrying capacity. Tr. at 84, lines 20-25, and at 85, lines 1-3.

BLM over the years, through its land use planning process, and in close consultation with NDOW and others, has consistently identified such desired use. BLM ignored these numbers, however, when it identified the carrying capacity in the appealed-from decision. Tr. at 85, lines 10-16. In calculating carrying capacity, it did not use 5 percent as desired utilization, which some species require, according to the Monitoring Plan appended to the Allotment Monitoring Plan, Exhibit A-2 at 10, Table II; the Livestock Agreement, Exhibit A-3 at 3; and the Habitat Management Plan, Exhibit A-1 at 32. It did not use 30 percent, which is the utilization required for streambank riparian vegetation, according to the Livestock Agreement, Exhibit A-3 at 1; the Fox Mountain Habitat Management Plan, Exhibit A-4 at 8; and the Allotment Re-evaluation, Exhibit A-6 at 26. It did not use 50 percent, which is the maximum level of utilization identified for wetland riparian vegetation, according to the Livestock Agreement, Exhibit A-3 at 1, the Fox Mountain Habitat Management Plan, Exhibit A-4 at 10, and the Allotment Re-evaluation, Exhibit A-6 at 27. Instead, it went *outside the planning documents* developed over the years to justify 60 percent utilization. BLM Brief at 16, lines 4-9. It did so even though 60 percent had never been discussed in previous planning efforts.[1] It did so even though the 60 percent figure is a general one and

[1]BLM attempts to justify the change to 60 percent on the basis that the 50 percent figure previously relied on was for the "end of the livestock use period, which was the end of October." BLM Brief at 15 - 16. This is a false statement. Nowhere in any of the documents is the 50 percent figure identified to a portion of the year, or to the "grazing season," or to any other delimiting period of time. Utilization limits were determined based on the needs of the plants, not the needs of grazing animals.

admittedly is not applicable to riparian species. Tr. at 287-288. Further, there is no foundation to identify why this generic reference should be relied upon in lieu of the species-specific objectives developed for this particular allotment in conjunction with affected interests.

Several excuses are tendered by BLM in its brief for this miscalculation. The first is that the manager determined riparian resources were not significant enough to justify limiting grazing on the allotment to meet their requirements. Specifically BLM rests on the fact that riparian areas represent less than one percent of the allotment. BLM's Brief at 9, lines 9-12, and at 20, lines 24-27.

There is no legal authority cited in BLM's brief for this exercise of discretion. The land use plan objectives require improvement to riparian resources. Period. There is no "out" for objectives the manager deems insignificant or inconvenient. The manager simply cannot refuse to make carrying capacity determinations without reference to riparian objectives.

The facts also contravene the manager's decision. NDOW's witness testified that "approximately 90 percent of the terrestrial wildlife species depend on that one percent sometime . . . in the cycle of their lives, so therefore it's critical habitat." Tr. at 27, lines 11-14. His testimony on this point is not contradicted.

A second excuse tendered by BLM for eschewing riparian objectives is that it was unnecessary to use carrying capacity as a means to achieve riparian objectives, because other methods are available. BLM Brief at 9, lines 9-12; at 20, lines 27-28; and at 21, lines 1-4. But BLM has had more than ten years to try other methods, has in fact made such attempts, *see* Appellants' Brief at 12, and has failed. BLM cannot simply continue to rely on failed methods of livestock control to the detriment of riparian resources.

BLM admits it had an intensive management system in place on the allotment as early as 1987. Tr. at 195, lines 16-21. BLM also admits the damage to riparian systems continued in 1993, six years after implementation of the intensive system. Tr. at 210. *A fortiori*, the intensive management system does not work. Yet the BLM's 1993 decision relies upon the

same system to bring improvement to the riparian resource. This is illogical, arbitrary and capricious.

The other methods for controlling riparian damage are herding of livestock and fencing of riparian areas. Neither has proven successful, although BLM again offers up excuses for the failures. Herding was not mandatory before, BLM says, and now it is. BLM Brief at 14, lines 2-5 ("[T]he Area Manager did impose rigorous new requirements on the livestock operator which were designed to improve distribution"). This is simply wrong, the requirements were not new. *See* Appellants' Brief at 12.

Fencing has proven unsuccessful, BLM says, because adequate funding has not been available. BLM Brief at 24, lines 20-27; and at 25, lines 1-2. There are essentially two courses of action which might be selected if funding for projects is not available. One is that grazing will be allowed to continue, and harm to resources will be allowed to persist, until funding is available. This is an illegal course of conduct. The law does not allow the continued degradation of resources because funding is not available for exclosures. 43 C.F.R. § 4130.6-1. The only other course of action is to reduce the amount of grazing on the allotment. This is the only legal alternative, and the one BLM has chosen to abjure.

A third excuse proffered for ignoring riparian objectives is that BLM has not established adequate riparian key management areas. BLM Brief at 18, lines 23-28. But BLM admits it had two key riparian areas, Tr. at 340, and did not use them. There is no explanation given why this allotment still needs key areas identified more than 10 years after the land use plan was implemented. There is also no acceptable explanation given why BLM did not at least use the two riparian key areas it did have established.

A final excuse identified by BLM for higher utilization objectives is the provision that appears in several documents, *see* BLM Brief at 20, lines 6-9, that riparian objectives can be raised if done through an approved activity plan. But this is not a *carte blanche* for exercise of unreasonable discretion. BLM must have a rational basis, it cannot use an activity plan as an excuse for administrative fiat. No activity plan explains, *i.e.* provides a rational basis, why BLM can make such adjustment consistently with the unchanged land use plan objective

for improving riparian condition. The only reason offered for deviating from established guidelines is the provision for fencing and herding of livestock, and as explained above, reliance on these means is unwarranted.

The welter of excuses tendered by BLM signifies BLM's steadfast commitment to forsake riparian objectives for the unspoken purpose of preserving high levels of grazing. If there were any doubt, the ultimate proof of this is the authorization of grazing at status quo levels. Serendipity does not suffice to explain this coincidence. At every point in the process of setting carrying capacity at which BLM discretion could be exercised, the resolution of the question was made in favor of more animals grazing and against protection for riparian vegetation. This is unacceptable in light of the land use plan objectives, and was an abuse of discretion.

3. BLM ABUSED ITS DISCRETION BY WEIGHT AVERAGING RIPARIAN WITH NON-RIPARIAN ACTUAL USE UTILIZATION.

BLM claims it properly determined carrying capacity by averaging utilization on riparian areas with utilization on non-riparian vegetation. In fact, weighted averaging was inappropriate and another instance of abuse of discretion.

Since riparian vegetation makes up only 1 percent of the allotment in terms of area, overutilization of these areas, no matter how severe, is inevitably attenuated by averaging it with non-riparian utilization. Tr. at 82, lines 5-8. Even if every piece of riparian acreage were utilized 100 percent, overutilization on that 1 percent of the total acreage would be inconsequential if averaged with the remainder--or even a fraction of the remainder--of the allotment. Averaging in this manner is particularly inappropriate because riparian vegetation's significance is so out of proportion to its areal extent.

BLM claims it relied on its assumption it would have more uniform utilization on the allotment under the decision. BLM Brief at 6, lines 27-28, and at 13, lines 25-27. This was a faulty assumption, and does not provide a reasonable basis for BLM's use of discretion in

this regard. BLM's own witness testified that herding had not brought improvement to riparian vegetation. Tr. at 150, lines 1-13.[2]

BLM also relied on example D on page 57 of the BLM Manual describing calculation of stocking rate. BLM Brief at 18. BLM claims the example includes the equation for Potential Stocking Level, which makes use of averaging. But the use of averaging in that example was explained by NDOW's witness to be merely for illustrative and comparative purposes. Tr. at 120, lines 10-15. Perfect distribution does not exist on the allotment, and could not be reasonably anticipated given the failure of the intensive grazing system since 1987.

In fact the BLM's manual indicates that riparian areas should be key management areas whose utilization controls the remainder of the allotment. Exhibit A-9 at 54. No exception is provided on account of the areal diminutiveness of riparian vegetation.

4. BLM ABUSED ITS DISCRETION IN DETERMINING THE APPORTIONMENT OF AVAILABLE AUMs TO LIVESTOCK AND WILD HORSES.

The allocation of available forage to horses and livestock should have some basis in resource conditions and use data. Here, however, BLM has merely selected an arbitrary ratio for apportionment. The ratio bears no relevance to the relative actual harm caused by the two classes of animals. It was selected on the basis of administrative convenience and therefore must be set aside and remanded.

BLM declaims the lack of guidance it has for apportioning AUMs between horses and livestock. BLM's brief at 9. But the BLM ignores the decisions of the IBLA and federal courts which say that Appropriate Management Levels for horses should be based upon monitoring and resource needs. *E.g. Animal Protection Institute of America*, 128 IBLA 150

[2]The subsequent attempt by BLM's witness to renounce this testimony is not credible. Though he testified that the livestock agreement, Exhibit A-3, does not contain reference to herding, Tr. at 185, he did not deny the references to herding in the Allotment Management Plan, Exhibit A-2 at 16 and 17, which plan was signed by the permittees in 1987. The Allotment Management Plan was specifically incorporated into the Livestock Agreement, *see* Exhibit A-3 at 2. The testimony that herding is not specifically mentioned in the Livestock Agreement is therefore misleading.

(1994). Furthermore BLM ignores the requirement that wild horse actions must be minimally intrusive. 43 C.F.R. § 4710.4.

BLM acknowledged that one way to apportion adjustments in AUMs would be on the basis of the comparative harm caused by horses and livestock. And BLM admitted it could have determined the relative proportion of harm caused to vegetative resources. *See* Appellants' Brief at 20-21. Yet it refused to make adjustments on this basis. Inexplicably, it instead relied on the ratio created by the proportion of horses and livestock on the allotment at the time of the land use plan, adjusted to account for a reduction in livestock numbers in the years intervening between the land use plan and the 1988 agreement. While facially this adjustment may favor wild horses, it fails to provide any kind of rational basis for the decision. It arbitrarily selects two unrelated numbers--horses populations in 1983, livestock numbers in 1988--and perpetuates management on this basis. This absolutely fails to satisfy the requirements of law.

The fact, referenced in BLM's brief, that there are more horses than cows on the allotment is not relevant for determining whether the BLM action is arbitrary. *See* BLM Brief at 3, lines 22-26. It does not matter that there are more horses than cows on the allotment. The relevant comparison is not total numbers, but the difference in the damage caused by the different animals. If 20,000 horse AUMs caused no damage, and 4,000 livestock AUMs caused all the riparian damage, then the 20,000 horse AUMs should be left unaffected; there would be no reason to reduce this number, and the livestock AUMs would be the appropriate focus of any adjustment.

Equally irrelevant is the fact that the number of livestock on the allotment has been reduced from historical levels. *See* BLM Brief at 4, lines 1-9. The damage to the allotment documented by the BLM in its allotment evaluation was a result of grazing as it now exists, not as it existed fifteen or more years ago. There is no relevance--no logical nexus--between the historical use on the allotment and present management needs.

. . .

5. BLM's FAILURE TO DISCLOSE THE RATIONALE FOR ITS DECISION VIOLATES THE REQUIREMENT FOR PUBLIC PARTICIPATION AND STATE INVOLVEMENT.

BLM makes much of the fact that it "maintained contact with affected interests, including all of the appellants, throughout the Re-Evaluation process." Brief at 5, lines 16-18. But BLM did not provide a reasonable opportunity for the appellants, as affected interests, to *participate* in development of the decision here under appeal. The "contact" was all in one direction: BLM asked the affected interests to "submit any data they had." *Id.* Nothing was provided in the other direction. Not until the hearing itself did appellants learn BLM's rationale for determining carrying capacity.

The law requires opportunity for participation by the public and the state in BLM's actions on public lands. The failure of BLM to disclose its reasons, until the hearing on appeal, is a fundamental omission which not only deprives the record of any support for BLM's decision, but also violates the requirements for cooperation and consultation. *E.g.* 43 U.S.C. § 315h, 43 U.S.C. §§ 1701(2) and 1701(5), 43 U.S.C. §§ 1712(c) and 1712(f), 43 U.S.C. § 1739(e), 43 C.F.R. § 1601.0-2. The role of the state in sharing the responsibility for wildlife habitat management is particularly regarded in the law. *See* 43 C.F.R. § 24, Department of Interior Fish and Wildlife Policy: State-Federal Relationships. There is no meaningful opportunity for public or state involvement if BLM conceals its reasoning in arriving at a decision such as this.

CONCLUSION

Throughout its case and its post-hearing brief, BLM repeats on the one hand it used proper procedure to determine carrying capacity at 18,819 AUMs, using weighted averaging and 60 percent desired utilization; on the other hand it knew it was exceeding utilization limits on riparian vegetation, thus in its discretion BLM adjusted the carrying capacity downward. These are fundamentally inconsistent assertions. That it had to adjust the carrying capacity downward is evidence that the manner of initially determining carrying capacity, using the potential stocking level calculation, was in error. Range management may not be an exact science, but it is a science nonetheless. The procedures used to determine

carrying capacity are among those referred to at 43 C.F.R. § 1601.0-2, intended to give consistency and predictability to BLM's actions.

BLM cannot rely on its intentional misapplication of these procedures to justify reversion to unfettered agency discretion. Yet this is exactly what BLM has done. Through its improper use of carrying capacity calculations, BLM in essence sets up a straw man which is then easily rejected in favor of the manager's use of "discretion." The number derived by the calculation--18,819 AUMs--is so clearly too high that it may be rejected out of hand. The manager's use of discretion is then substituted, although in reality that "discretion" is an arbitrary decision to preserve existing levels of livestock grazing while reducing wild horse numbers.

Discretion cannot supplant procedure. The decision of the BLM should be remanded to the Resource Area for determination in accordance with proper procedure.

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Respectfully submitted,

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