



COMMISSION FOR THE  
PRESERVATION OF WILD HORSES

Stewart Facility  
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Carson City, Nevada 89710  
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COMMISSIONERS

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Reno, Nevada

Paula S. Askew  
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Steven Fulstone  
Smith Valley, Nevada

Dawn Lappin  
Reno, Nevada

December 17, 1991

Scott Billing, Area Manager  
Paradise-Denio Resource Area  
BLM-Winnemucca District Office  
705 East 4th Street  
Winnemucca, Nevada 89445

RE: Appeal - Paiute Meadows Multiple Use Final Decision  
Appeal - Paiute Meadows Final Allotment Evaluation Summary  
Appeal - Black Rock Range East Herd Management Area Wild  
Horse Gathering Plan

Dear Mr. Billing,

The Commission for the Preservation of Wild Horses, representing the State of Nevada, as an affected interest for wild horses and their habitat, is formally appealing your Notice of Full Force and Effect Final Multiple Use Decision of Paiute Meadows Allotment, Allotment Evaluation, and Black Rock East Gathering Plan for the following reasons:

1) The Commission was given no opportunity to review or comment on the Bureau of Land Managements Final Decision for this Allotment prior to its finalization. FLPMA, the 1971 Wild Free Roaming Horse and Burro Act, NEPA, and BLM grazing regulations grant the State of Nevada the right to participate in the making of decisions about the management of the public's rangelands including those denominated "multiple use decisions" by the Bureau.

a) The Final Decision was after the fact of a Livestock Agreement (11/19/91). BLM Instruction Memorandum NV-89-268 states: "If controversy still exists, then the BLM implements the desired changes via a "Proposed Grazing Decision." The comments you received on your draft allotment evaluation (July 3, 1991), clearly indicated that a controversy existed. If the BLM, under its instructions memorandum (IM NO NV 89-268 change 2), determined this decision to be "non-controversial" then this Full Force and Effect Decision is not necessary.

Telephone conversations with the District on December 10, 1991, confirmed that because the Resource Area intended to go Full Force and Effect, no draft decision was sent out for public comment. Yet, page 33 of the Final Allotment Evaluation, dated November 22, 1991, refers to (VII A) a November 1, 1991, meeting with permittee to discuss management alternatives and potential

Scott Billing, Area Manager  
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agreement; a November 11, 1991, meeting with the permittee to discuss carrying capacities and potential agreement; and a November 14, 1991, meeting with the permittee to discuss carrying capacity and proposed agreement. You also refer to a November 12, 1991, consultation meeting between the BLM and Western Range Service, a range consulting firm for the permittee, to discuss interpretation of monitoring data and carrying capacity.

Whether or not there was a "draft" available for the permittee; Western Range Service and the permittee did in fact have the only opportunity to comment and consult regarding carrying capacities, management alternatives, and resolution of any disagreement. Unlike the livestock operator, appellants were not shown the final until after the decision was issued.

The decision for the Paiute Meadows Allotment violated our rights to participate as "affected interests."

2) The Bureau did not implement its land use plan (MFP III) through proper activity plans. The Bureau has violated FLPMA (43 CFR 1610.5-3 (a)(c) and 1610.5-5), and its' own land use plan through failure to amend the original MFP III, which has significantly changed the short term objectives through the November 19, 1991, "Livestock Use Agreement." Changes in the allotment's short term objectives were negotiated through the permittee's "Livestock Use Agreement" and were not consulted, coordinated or cooperatively reviewed by the affected interests. Appellants never had an opportunity to review, let alone comment on the new short term objectives prior to your acceptance of them. It appears as though the Area Manager "cut a deal" for the benefit of the livestock and then issued a Full Force and Effect Decision against wild horses.

3) The Final Decision to remove 400 to 600 wild horses to retain current livestock use on the allotment represents a significant action. Under NEPA the Bureau is obligated to analyze the significant impacts to the wild horse population. An EIS or at the very least an EA is required as a minimum to meet NEPA compliance.

4) The monitoring data was collected to establish stocking levels under the land use plan. We do not argue that the riparian and vegetative communities have been severely impacted. We do argue how that data was analyzed and whether or not the monitoring data was utilized in the Livestock Use Agreement (i.e. the Final Multiple Use Decision).

a) Initially in the Draft Allotment Evaluation recommended a stocking level of both wild horses and livestock to be 4,597 AUM's. However, the use of this stocking level would have reduced the wild horses to 33 animals. With no explanation the final decision increases stocking level to 4,950 AUM's to accomodate an increase of 27 wild horses. According to the draft

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AE 4,597 is the carrying capacity for the allotment. By giving the permittee his 4,350 authorized active preference in addition to the minimum necessary AUM's for wild horses you are exceeding your previously stated carrying capacity for the allotment.

b) Heavy and severe grazing by wild horses south of Paiute Creek was instrumental in the Bureau's decision to reauthorize livestock grazing north of Paiute Creek. According to the Final AE, Use Pattern Mapping conducted for four years established that prior to introduction of livestock north of Paiute Creek, there was slight to light utilization of stream bank riparian vegetation. Severe grazing use covered less than 1% of the north area. After the 1990 introduction of livestock, heavy grazing use covered approximately 49% of the north area. Your own monitoring data indicates that the introduction of livestock has taken this allotment from a 1% rate to a 49% rate of heavy use in the north area.

c) According to BLM's documents you have analyzed livestock and wild horse use from 1987 through 1990. There is no mention in any of these documents as to whether that included your unauthorized livestock use (trespass), which copies of your documents indicate was severe between Black Rock Range East and West from 1985 through the present. A range tour was attended by members of this Commission, affected parties, and the permittee's legal council wherein trespass in the northern portion of the allotment as well as illegal salting near waters was occurring.

d) According to the Livestock Use Agreement, voluntary non-use will be applied for in the event that forage is temporarily available without notification to the affected interests. The agreement also states that should any horses migrate from the west portion of their HMA to the east portion the permittee will re-activate the non-use. The scheduled non-use for livestock must be suspended non-use, requiring a District Managers Decision to reinstate, as opposed to "not scheduled non-use" until such a time as monitoring shows availability of forage.

#### APPEAL OF THE FULL FORCE AND EFFECT BLACK ROCK RANGE EAST HERD MANAGEMENT AREA WILD HORSE GATHERING PLAN

The Commission is hereby filing an appeal to the November 22, 1991, Wild Horse Gathering Plan based on the following:

1) The Bureau has ignored the entire land use planning process by issuing this document. The Bureau has not analyzed whether an Environmental Impact Statement is required due to the severity of the reduction, or at a minimum a Draft Environmental Assessment and Draft Capture Plan, thereby deleting the public participation process as required by the Land Use Planning Process.

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2) Your own capture plan states that your census data from July 1989, February 1990, and July 1991, shows significant swings in population numbers. By not considering the HMA as a whole rather than a portion of an allotment your actions are not accounting for the horses full utilization of their habitat, including seasonal movement. Prior to gathering wild horses from the Black Rock East HMA, the Bureau must determine the impacts to the populations in the Black Rock West HMA. By your own admission in your "Livestock Use Agreement" there is significant movement of wild horses identified by your promise to the permittee to assess the impacts of a fence separating the HMA "for control of migration of wild horses."

3) We are appealing Winnemucca Districts simplification of manipulation of age and sex ratios. On page 4 of the gather plan, you state the "The Wild Horse and Burro Advisory Board has recommended that the BLM continue to pursue fertility control, population modeling, and other options as a management tool to regulate or suppress reproductive rates in wild horses and burros. It is possible that sex ratios in the Black Rock Range-East HMA may be manipulated to favor a higher percentage of males over females." There is no Bureau policy that has enacted the Advisory Board recommendations. According to WO IM NO. 91-216, the Bureau is "returning captured wild horses 10 years of age of older to herd areas." There is no current policy to authorize the manipulation of sex ratios. Furthermore an EA needs to be done regarding the cumulative impacts of one or more of these strategies.

In Nevada, pilot fertility control programs have been discussed for implementation. It is a lengthy process of identifying areas for possible implementation, gathering necessary data, having decisions in place, having a HMAP, doing EA's, submitting draft and final documents for most of the above, then draft and final documents for a pilot fertility control program agreed upon by all of the multiple users of the public lands. This is not a process to be taken lightly especially when adjusting populations of animals. It appears as though you have not given adequate consideration to this process. It would be in the best interest of the Bureau, the wild horses, and the public to investigate further studies before implementation. Statewide criteria needs to be developed before methods other than capture are considered.

In conclusion we appeal this gather on the basis of the above mentioned concerns as well as the fact that the Bureau may not gather horses without the evidence that wild horses are the sole contributor to overgrazing. The data in the AE and the

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Gather Plan does not support that wild horses are the only  
damanging factor. In fact the data does support that there was  
no overgrazing north of Pauite Creek prior to the reauthorization  
of livestock.

Sincerely,

A handwritten signature in cursive script that reads "Catherine Barcomb". The signature is written in dark ink and is positioned above the typed name and title.

CATHERINE BARCOMB  
Executive Director



STATE OF NEVADA  
DEPARTMENT OF WILDLIFE

1100 Valley Road  
P.O. Box 10678  
Reno, Nevada 89520-0022  
(702) 688-1500  
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BOB MILLER  
Governor

WILLIAM A. MOLINI  
Director

Mr. Scott Billings  
Paradise-Denio Resource Area  
Bureau of Land Management  
705 East Fourth Street  
Winnemucca, Nevada 89445

RE: Appeal - Paiute Meadows Multiple Use Final Decision

Dear Scott:

As an affected interest by definition in 43 CFR 4100.0-5, the Nevada Department of Wildlife hereby appeals the Notice of Full Force and Effect Final Multiple Use Decision Paiute Meadows Allotment. Pursuant to 43 CFR Section 4.470(a), the following represents the required statement as to why this decision is in error:

1. The Final Decision is not consistent with the Paradise Denio Management Framework III (MFP III) Decisions.

The Bureau of Land Management did not implement its land use plan (MFP III) through proper activity plans. An allotment management plan or habitat management plan has not been prepared. Failure to provide specific multiple-use allotment objectives and detailed monitoring studies necessary to evaluate the effectiveness of management actions in achieving these objectives (43 CFR 4120.2) required the Bureau to issue this Final Decision. Implementation of the Paradise-Denio land use plan for the Paiute Meadows Allotment is dependent upon the Paiute Meadows Allotment Evaluation and this Final Decision.

Short term objectives for the allotment evaluation set (allowable use levels) utilization limits for key areas and key vegetation species of the allotment. These short term objectives are necessary to implement management actions to achieve the allotment evaluation's long term objectives. Fish and Wildlife Short and Long Term Objectives of the allotment evaluation are consistent with MFP III Decisions of the land use plan. These actions help the Bureau's obligations under the Federal Lands Policy and Management Act 1976.

Mr. Scott Billings

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**2. Livestock carrying capacity determinations are invalid.**

Livestock carrying capacity, as defined in 43 CFR 4100, is the maximum stocking rate possible without inducing damage to vegetation or related resources. The active preference of this allotment was established on the basis of historical use. The land use plan was to initiate intensive management and monitor the effects to determine the livestock carrying capacity. As previously stated, the Bureau of Land Management failed to implement proper activity plans and must utilize the allotment evaluation as the means to implement the land use plan and achieve its goals and objectives.

The allotment evaluation's key areas, use pattern mapping and short term objectives for wildlife habitat were not decisive factors in the determination of the livestock carrying capacity in the final decision. Without full consideration of key riparian areas and lack of wildlife habitat monitoring data, the Final Decision stocking rates, season of use and conditions of licenses have no direct relation to protection and enhancement wildlife habitat.

For an example, grazing during 1990 with cattle and wild horses resulted in severe (90%) grazing use of streambank riparian habitat along Paiute, Battle and Bartlett Creeks. The allotment evaluation's specific objective is not to exceed 30% utilization. The Bureau of Land Management claims the carrying capacity calculations were based upon methodology found in the Rangeland Monitoring Handbook, 1984. This document does not contain methodology referenced by the Bureau. Instead the Bureau used weighted average and potential stocking rate calculations found in its Technical Reference TR 4400-7. By use of averaging observed utilization rates and adjusting desired utilization rates, the Final Decision determined a livestock carrying capacity without full consideration of key streambank riparians. According to Technical Reference TR 4400-7, the use of weighted averages are indicators of proper use and assume uniform production of the allotment. In the case of Paiute Allotment, streambank riparians are key management areas and are to override the indicators of other key areas within the management unit. Land Use Plan Decisions, Bureau policy and findings of the allotment evaluation provide the justification and rationale to adjust livestock use to meet 30% utilization.

Streambank riparian areas constitute less than one percent of the allotment and the carrying capacity calculation masks the fact that severe grazing has occurred or will occur. In addition, the final decision provides no protective fences and prescribes a season of use during a portion of the hot season or growing period for key species. Furthermore, by modifying the specific multiple-use objectives found in the allotment evaluation, the District has established this methodology for future evaluations and decisions.

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Carrying capacity determinations did not utilize monitoring data for key upland wildlife habitats. The allotment evaluation listed key mountain browse species, identified special features and made specific short and long term objectives for wildlife. However monitoring studies were not conducted and future studies are dependent on future funding. The Final Decision makes no reference to future monitoring as described in the allotment evaluation. Winter livestock uses areas will cause direct competition for cover and forage crucial to big game.

**3. The Final Decision does not comply with applicable Bureau of Land Management Policies.**

The Bureau failed to consult. Changes in the allotment's short term objectives were negotiated in the permittee's livestock agreement and were not consulted, coordinated or cooperatively reviewed by the affected interests. Instruction Memorandum No. NV-89-268 requires the decision maker to seek full consultation on an allotment specific and on-the-ground basis.

The Final Decision was not done in a timely manner. Bureau of Land Management Instruction Memorandum No. 86-462 states: "the policy that a decision or agreement be made on all allotments in a planning area within 5 years of issuance of an RPS." The Paradise-Denio Range Program Summary was issued on October 14, 1984.

The Final Decision was after the fact of a Livestock Agreement. Bureau of Land Management Instruction Memorandum NV-89-268 states: "If controversy still exists, then the BLM implements the desired changes via a "Proposed Grazing Decision". Issues raised in this appeal were well address in the Department's letter of August 8, 1991. These issues were controversial.

The Final Decision does not conform to the Bureau of Land Management's Riparian Area Management Policy, January 22, 1987. The Policy Statement states: "Give special attention to monitoring and evaluating management activities in riparian areas and revise management practices where site-specific objectives are not being met." The allotment evaluation set these objectives and monitoring data showed they were not met. The Final Decision did not schedule any fences to preclude livestock access to riparians, adjust livestock levels to meet allowable use criteria or prescribe a season of use that will assure improvement of streambank and wetland riparians.



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**4. The Final Decision does not comply with the Endangered Species Act.**

The U.S. Fish and Wildlife Service issued a letter on July 2, 1991 to advise all parties that an attached list of Lahontan cutthroat trout waters requiring Section 7 Consultation. The list identified Bartlett, Battle and Paiute Creeks as "Undetermined Status in 1970". The allotment evaluation further mentions these waters as potential Lahontan cutthroat streams identified in a draft species management plan by the Department of Wildlife. The Department could find no reference to consultation with the Fish and Wildlife Service.

**5. The Final Decision does not comply with the National Environmental Protection Act.**

The Final Decision to remove 400 to 600 wild horses to retain current livestock use on the allotment represents a significant action. Development of new allotment specific multiple-use objectives by the livestock agreement was done without the consultation, cooperation or coordination of affected parties. These actions are not consistent with the land use plan and will require amendment to the Paradise-Denio Management Framework Plan III Decisions. This Final Decision will require an environmental assessment as a minimum to meet National Environmental Protection Act compliance.

Sincerely,

William A. Molini  
Director

12-11-91

To: STRICKLAND.R (SIE038)  
From: TCN903 Delivered: Wed 11-Dec-91 13:44  
EST Sys 141 (305)  
Subject: ROSE FROM JOHANNA -- THIRD TRY  
Mail Id: IPM-141-911211-123610685

DRAFT DRAFT DRAFT DRAFT DRAFT

December --, 1991

VIA FAX

Scott Billing, Area Manager  
Paradise-Denio Resource Area  
Bureau of Land Management  
Winnemucca District office  
705 East 4th Street  
Winnemucca, Nevada 89445

*wild horse  
removed - 2000 of  
benefit in horses  
& no ~~costs~~ costs  
in horses - repl  
too many horses  
ultimately*

Re: Appeal of Final Decision for Paiute Meadows Allotment

Dear Mr. Billing:

This letter is a formal appeal of your final decision for the above-captioned allotment which is located in the Paradise-Denio Resource Area. This appeal is filed on behalf of the Natural Resources Defense Council (NRDC) and the Sierra Club, Toiyabe Chapter, organizations which, as you know, have long been concerned about the management of livestock in the Paiute Meadows allotment (and other allotments) in the Paradise-Denio Resource Area. NRDC's copy of the decision was received on November 26, the Sierra Club's ----- . Therefore, this appeal is timely.

Both NRDC and the Sierra Club participated extensively in the scoping, draft and final stages of the land use planning and environmental impact statement (EIS) processes for this area. In addition, as you know, we have been participating in the allotment evaluation process that the Resource Area has been carrying out since our appeal of the [insert #] "livestock use agreements" that you negotiated in 1989 and the subsequent stipulation to withdraw that appeal. We were given an opportunity to review the draft allotment evaluation for the Paiute Meadows allotment and submitted comments on its contents. However, as discussed below, we were given no opportunity to comment on the BLM's ultimate decision for this allotment prior to the time it was finalized by you.

In general, we appeal the decision for the Paiute Meadows allotment on the grounds that it was issued in violation of our rights to participate as "affected interests" as well as that it is inconsistent with applicable provisions of the Paradise-Denio Management Framework Plan (MFP), the Bureau's riparian policy, the Endangered Species Act (ESA)

*substantively  
will not  
solve sound  
mgt. problem*

and the National Environmental Policy Act (NEPA).

According to the July 1991 allotment evaluation, monitoring data collected by the BLM since completion of the EIS reveal that the short-term objectives established by the BLM are not being met and there is little evidence of progress toward most long-term objectives. Serious overutilization is definitely occurring in riparian areas and stream survey data show major problems, in part because of wildhorses but also because of livestock use.

The final decision establishes new short-term objectives that are very different from the short term objectives presented in the draft and final allotment evaluations (as well as very different from the short-term objectives in all the evaluations issued since settlement of our appeal that we have seen). And, it establishes a stocking rate that was calculated by a process that is significantly different than the alternatives set out in the draft AE. The new objectives and the new stocking rate were established in an agreement that you negotiated with the livestock operator after release of the draft AE but prior to public release of the final AE and to issuance of the appealed from decision.

*different from  
manual formula*

*dates?*

1. Failure to permit meaningful public participation.

FLPMA and the BLM grazing regulations grant NRDC and the Sierra Club the right to participate in the making of decisions about the management of the public's rangelands, including those denominated "multiple use decisions" by the Bureau. See 43 U.S.C. 1712(f), 1739(e), 43 CFR 4100.0-5 (definitions of "affected interest" and "consultation, cooperation and coordination"). The Paradise-Denio Range Program Summary commits to affording affected interests the opportunity to actively participate as has the Nevada State Office of BLM. Indeed, Instruction Memorandum No. NV-89-268 provides that grazing decisions must be issued when management proposed is controversial.

That the appealed-from decision is controversial is evidenced by this appeal.

Appellants' right to participate as affected interests were totally compromised by the actions you took ~~in~~ prior to issuing this decision. Unlike the livestock operator, appellants were not shown the final AE until after the decision was issued. Appellants never had an opportunity to review, let alone comment on the new short-term objectives prior to your acceptance of them. Indeed, at no time prior to receiving the final decision were appellants even given any hint that these objectives would be changed. The stocking rate in the final decision was calculated by a method that is different from any the

*\**

alternative methods set out in the draft AE. In short, the real decisions were made by a process from which affected interests were totally excluded.

*violation of app  
we already own.*

Issuing a decision that reflects an agreement already reached without any public review or comment is a violation of the BLM's duty to consult, coordinate and cooperate with affected interests.

2. Non-conformance with MFP.

The land use plan for the Paradise-Denio Resource Area (the "MFP") directs that all grazing authorizations "will take measures" to protect important fish and wildlife habitat areas and "important wildlife waters." See, e.g., WLA 1.3, WL 1.11. It calls for development of "specific objectives pertaining to improving ... riparian and meadow habitat." WLA 1.5. And, the MFP specifically calls for improvement in aquatic habitat condition in Bartlett and Battle Creeks ["Pahute Crk" too. Is it the same as "paiute"??] as well as for habitat expansion in Battle [and Pahute]. Id. 1.1. The MFP directs that mountain browse be "consider[ed] ... as critical management species" in revising grazing systems. WL 1.4. Key species and appropriate utilization levels that will meet these objectives are found in Table 1-4 of the Paradise-Denio EIS.

*don't know*

The original short-term riparian and upland objectives analyzed in the draft and final AEs were developed by the Bureau to permit it to evaluate progress toward achieving the above-listed MFP objectives. They were consistent with these specific MFP objectives as were the key species identified. [BUT WHAT ABOUT THE FACT THAT THEY DON'T TAKE THE COWS OFF WHEN LIMITS ARE REACHED]. They were also consistent with Table 1-4. [How many decisions were issued with these "old" objectives??] This is not true, however, of the new objectives.

*last years?*

*we still disagree  
but the BLM policy  
removed them  
See 7 consultation  
H. Schumme took  
to Randy?*

The final decision sets out the new, significantly different short-term objectives that the operator and the Bureau negotiated. In lieu of the "old" specific limits on utilization, these new objectives direct that utilization "shall average" a specified percentage over a period of time. These new objectives will allow utilization of key species to exceed levels set in Table 1-4. Equally importantly, they will allow utilization to exceed the short term objectives in the draft and final AEs that the BLM established. They will allow heavy or even severe grazing of key species and crucial wildlife areas to continue in violation of the express terms of those objectives. WHY CAN'T WE SAY HERE THAT WE ESTABLISHED IN OUR PAST APPEALS THAT BLM CAN'T TAKE ACTIONS THAT IT KNOWS WILL NOT MEET THOSE OBJECTIVES? WHY

*old case  
should we ask  
it is a  
question?  
how?  
accuracy  
conflict  
reference  
it may  
individuals  
5 T. Dejo.*

*Al. D. 1  
does it  
Bartlett  
mountain  
public  
"diversity"  
etc.  
- riparian?*

IS IT DIFFERENT HERE????

3. Livestock carrying capacity determinations are invalid.

Livestock carrying capacity, as defined at 43 CFR ^U 4100, is the maximum stocking rate possible without inducing damage to vegetation or related resources. The stocking rate established for this allotment will permit key areas, and specifically riparian areas, to be sacrificed to grazing. More precisely, the BLM chose to calculate capacity using weighted utilization averages and a desired utilization level of 50% for streambank riparian vegetation. The use of the latter level is inconsistent with the objective utilized in the allotment evaluation process. The use of weighted averages insures that riparian areas -- the resource that is found in the least amount in this allotment and that is most sensitive -- will be overused in the future, because such small areas are totally discounted by that approach, despite their sensitivity and importance.

? definition  
in at least  
description

4. Violation of riparian policy.

The decision's new objectives, carrying capacity estimates and seasons of use are not consistent with the BLM's national riparian policy. That policy recognizes that riparian areas are special and requires management actions be taken "to maintain, restore or improve" them where "site-specific objectives are not being met." BLM, Riparian Area Management Policy (January 22, 1987).

As revealed clearly in the draft and final AEs, the objectives for riparian areas in this allotment are not being met. The new objectives will permit these areas to be abused and their key species to be overutilized as will the new approach to estimating capacity. The season of use established will permit grazing during a portion of hot season or growing period for key species, in contradistinction to a number of decisions previously issued by the Resource Area as well as in violation of the national policy. No fences have been scheduled to prevent livestock access to riparians and protect key species or stream habitat features.

sh?

which ones?

5. Failure to comply with NEPA.

As indicated above, grazing by both livestock and wild horses has adversely impacted the resources of the Paiute Meadows allotment, including in particular its riparian resources. In addition, as demonstrated above, the appealed-from decision is not consistent with the MFP or with national policy and is likely to result in harm to the allotment's sensitive riparian areas in the future.

Moreover, as discussed below, the decision may well have been issued in contravention of the requirements of the ESA. Finally, it calls for the reduction of a huge number of wild horses. Yet, no EIS or even an environmental assessment (EA) was prepared prior to issuance of the final decision. *What is benefit of horses if rocky in lots? Replace horse w/ ls ?!*

The claim that this decision was "covered" by the Paradise-Denio EIS is groundless. That EIS was not prepared for the purpose of allowing the BLM to make specific decisions about how to manage this allotment and it does not contain "the detailed analysis of local geographic conditions [that is] necessary for the decision-maker to" decide how to manage it. NRDC v. Morton, 388 F. Supp. 829, 838-39 (D.D.C. 1974). What is more, as demonstrated above, the new decision will permit use in excess of Table 1-4 in that EIS. Finally, the Bureau must have to do an EA, at least before removing horses. *army* Since they are not only removing horses, but effectively modifying the objectives of the land use plan. *??*

6. Failure to comply with the ESA.

By letter dated July 2, 1991, the U.S. Fish and Wildlife Service (FWS) identified the Lahontan outthroat trout waters that would require Section 7 consultation under the ESA. Bartlett, Battle and Paiute Creeks, all of which are in Paiute Allotment, are ~~all~~ on that list. The AE acknowledges that these creeks are potential Lahontan outthroat streams. Obviously, the Bureau's management of grazing in this allotment could adversely affect their potential. Yet, the final AE contains no reference to any consultation by BLM with the FWS. Actions taken by the BLM in violation of the ESA's procedural requirements are illegal, and must be set aside. See Statement of Reasons of Appellants Sierra Club - Toiyabe Chapter and the Natural Resources Defense Council, Inc., filed in IBLA # 89-318, at pp. 19 - 24 (incorporated by this reference). *date?*

*anyone checked to Remedy on this? New FWS employees? remaining AEs?*

CONCLUSION AND REQUEST FOR RELIEF

To remedy the serious violations of law, regulation and policy documented above, appellants, the Sierra Club and NRDC, respectfully request the following relief:

*ls on wild horses?*

1) Order the BLM to halt grazing on this allotment until it can be shown that such use will neither adversely affect the Lahontan outthroat trout and/or its habitat;

2) Order the BLM to estimate the grazing capacity of this allotment through use of monitoring and other available data and, with concurrence of the FWS, to authorize grazing at a level not to exceed capacity;

*according to manual directions*

3) Direct the BLM to amend the decision to provide that, if and when livestock are permitted to graze this allotment, they will be removed from areas of use when utilization levels have been reached in order to protect riparian and dependent values;

4) Direct the BLM to amend the decision to include monitoring specifications, including identification of key species, and a schedule of monitoring activities;

5) Direct the BLM to prepare an EIS or at a minimum an EA that analyzes the impacts of grazing at alternative levels and pursuant to alternative management practices on the specific resources of the Washburn allotment, including the Lahontan cutthroat trout and its habitat; and

6) Order the BLM to prepare a riparian recovery plan in conjunction with the Nevada DoW, the FWS and interested parties pursuant to which the only grazing that is permitted will affirmatively enhance recovery of the Lahontan cutthroat trout and its habitat and will improve to and/or maintain at least the following stream habitat conditions on Riser and Washburn Creeks: streambank cover 60% or above; streambank stability 60% or above; maximum summer water temperatures below 70 degrees F; and sedimentation below 10%.

Sincerely,

Johanna H. Wald  
NRDC

Rose Strickland  
Sierra Club, Toiyabe  
Chapter

Washburn



BLM DOES NOT HAVE <sup>LEGAL</sup> AUTHORITY FOR FFE  
ON WH'S ... not expected until March  
BLUFF

12-10-91

TRESPASS?

12-10-91

Scott Billing

Re: Appeal of Final Decision for ~~Parade~~ Paiute  
Meadows Allotment; and the accompanying  
Black Rock East wild Horse Gathering Plan.

This letter is a formal appeal of your final decision for the Notice of Gull Force and Effect Final Multiple Use Decision of Paiute Meadows Allotment and Black Rock East wild Horse Gathering Plan. This appeal is filed in behalf of WNOA, an organization which has long been active in land use planning, and concerned about the management of the resources in the Paradise-Venio Resource Area. WNOA's copy of the decision was received on Nov. 26, therefore the appeal is timely.

WNOA was given no opportunity to review or comment on the BLM's final decision for this allotment prior to its finalization.

Telephone conversations on 12/10/91 confirmed that because the RA was going FFE, no draft decision was sent to either the Commission or WNOA.

Yet pg 33 of the Final AE, dated Nov. 22, 1991



States (VII A.) 11/01/91 meeting with permittee  
to discuss management alternatives & potential  
agreement,  
11/12/91 meeting with permittee to  
discuss carrying capacities; potential  
agreement; 11/14/91 meeting with permittee  
to discuss carrying capacity and proposed  
agreement.

Whether or not there was a "draft" available for  
the permittee, they did in fact have the only  
opportunity to comment and consult regarding  
carrying capacities, management alternatives,  
and resolution of any disagreement. No such  
opportunities were afforded anyone else.

We appeal the decision for Paute Meadows  
on the grounds that selective participation  
violated our rights to participate as "affected  
interests. It is inconsistent with  
the Paradise Herd Management Framework  
Plan (MFP), the National Environmental  
Policy Act (NEPA), the Wild Free Roaming  
Horse Act (PL 92-195). It totally ignores  
IM-NO NV-85-345 ch 2 (9/30/87), IM NO NV 89-268  
( ), and IM NO WO 86-706 (4/24/89).

? no AE was issued

The Paint Meadows draft evaluation was issued July 1, 1991; the Final was issued Nov. 22, 1991; it is startling then to note the livestock agreement was signed by the permittee on Nov. 21, 1991, the day before the final decision was sent to the public. The agreement not only resolves the permittee's conflict with the management decisions, but DICTATES management of wild horse numbers. If the BLM under its Instructions (IM NO NV 89-268 Chg. 2) determined the decision to be "non-controversial" then why was the FFE provision applied.

Another communication with the District stated that the District had been instructed by N50 to disregard the Instruction Memorandum as it was being revised. A request under FOIA (dated Dec. 11) asked that date no replacement of the Instruction had been issued, therefore the aforementioned IM still applies.

- ① Failure to permit meaningful public participation  
FLPMA and BLM grazing regulations  
grant WFOA the right to participate in the  
decision making process. (See 13 U.S.C. 200

1712(f), 1739(e), 43 CFR ^U 4100.0-5)

② Failure to comply with NEPA

It calls for a 97% reduction of WH, yet no EIS or even an EA was prepared prior to issuance of final decision.

Due to the fact BEM has put a substantial # of AUMs into a "non legal / non-binding" non use, which can be brought to use without another decision, predicts that once WH are ~~are~~ removed, they will be replaced with livestock. Range tours as well as BEM's own data show little if any WH damage in the North Paiute in their HMA, so where did BEM authorize livestock use, North Paiute,

manipulation → Conclusion & request for relief to remedy the serious violations of law and policy discussed previously; WNOA respectfully requests the following:

① Order the BEM to est. graz cap of this allotment thru use of monitoring data

② determine thru use pattern mapping the critical wild horse use area

③ <sup>equitably</sup> reduce livestock and wild horses to the carrying capacity

③ direct BEM to amend decision

④ " " " prepare an EIS ~~on~~  
on the impacts of removal of 97% of  
the WH.



12-20-91  
~~Ch...~~  
Natural Resources  
Defense Council

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San Francisco, CA 94105  
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December 20, 1991

VIA FAX

Scott Billing, Area Manager  
Paradise-Denio Resource Area  
Bureau of Land Management  
Winnemucca District office  
705 East 4th Street  
Winnemucca, Nevada 89445

Re: Appeal of Final Decision for Paiute Meadows Allotment

Dear Mr. Billing:

This letter is a formal appeal of your final decision for the above-captioned allotment which is located in the Paradise-Denio Resource Area. This appeal is filed on behalf of the Natural Resources Defense Council (NRDC) and the Sierra Club, Toiyabe Chapter, organizations which, as you know, have long been concerned about the management of livestock in the Paiute Meadows allotment (and other allotments) in the Paradise-Denio Resource Area. NRDC's copy of the decision was received on November 26, the Sierra Club's was received subsequently. Therefore, this appeal is timely.

Both NRDC and the Sierra Club participated extensively in the scoping, draft and final stages of the land use planning and environmental impact statement (EIS) processes carried out by the Bureau of Land Management (BLM) for this area. In addition, as you know, we have been participating in the allotment evaluation process that the Resource Area has been carrying out since our appeal (IBLA #89-318) of the 14 "livestock use agreements" that you improperly negotiated in 1989 was settled. We were given an opportunity to review the draft allotment evaluation for the Paiute Meadows allotment and submitted comments on its contents. However, as discussed below, we were given no opportunity to comment on the BLM's ultimate decision for this allotment prior to the time it was finalized by you.

In general, we appeal the decision for the Paiute Meadows allotment on the ground that it will result in damage to publicly-owned resources, including, in particular, key riparian areas. Specifically, as demonstrated below, the

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Paradise-Denio Resource Area  
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decision was issued in violation of our rights to participate as "affected interests" and is inconsistent with applicable provisions of the Paradise-Denio Management Framework Plan (MFP), the Bureau's riparian policy, the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).

According to both the draft and final allotment evaluations (AEs), monitoring data collected by the BLM since completion of the EIS reveal that the short-term objectives established by the BLM in 1989 are not being met and there is little evidence of progress toward most long-term objectives established in the MFP. See, e.g., Paiute Meadows Final Allotment Evaluation Summary, p. 26 (November 22, 1991) (hereafter "Final AE"). Serious overutilization is definitely occurring in riparian areas and stream survey data show major problems, in part because of wild horses but also because of livestock use. See, e.g., *id.*, pp. 13, 14, 21, 22, 46. Indeed, the data reveal that riparian damage north of Paiute Creek increased dramatically with the increase in livestock numbers to 4000+ AUMs in 1990. *Id.*, pp. 13-14.

The final decision dated November 22, 1991 establishes new short-term objectives that are very different from the short-term objectives used for evaluation purposes in the draft and final AEs for the Paiute Meadows allotment (as well as all other AEs that we have seen since settlement of our 1989 appeal). And, it establishes a stocking rate that is significantly different than the stocking rates considered in the draft AE. The new objectives and the new stocking rate were dictated by a livestock use agreement dated November 19, 1991, which you signed on November 22, following the permittee who signed on November 21. This agreement was signed after release of the draft AE, which is dated July 1, 1991, but prior to issuance of your final decision and public release of the final AE, both of which are dated November 22, 1991.

1. Failure to permit meaningful public participation.

The Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (FLPMA), and the BLM grazing regulations grant NRDC and the Sierra Club the right to participate in the making of decisions about the management of the public's rangelands. See 43 U.S.C. §§ 1712(f), 1739(e),

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2. Non-conformance with MFP.

The MFP for the Paradise-Denio Resource Area directs that all grazing authorizations "will take measures" to protect important fish and wildlife habitat areas and "important wildlife waters." See, e.g., WLA 1.3, WL 1.11. It calls for development of "specific objectives pertaining to improving ... riparian and meadow habitat." WLA 1.5. And, the MFP specifically calls for improvement in aquatic habitat condition in Bartlett, Paiute and Battle Creeks as well as for habitat expansion in Battle and Paiute Creeks. Id. 1.1. The MFP directs that mountain browse be "consider[ed] ... as critical management species" in revising grazing systems. WL 1.4. Key species and appropriate utilization levels that will meet these objectives are found in Table 1-4 of the Paradise-Denio EIS.

Because the Resource Area failed to carry out the MFP through developing allotment management plans and allotment-specific objectives, short-term riparian and upland objectives were established for the purpose of evaluating progress toward achieving the above-listed MFP objectives. Thus, as the final AE notes at page 5 (#3), the "allotment specific objectives tie the Land Use Plan and RPS Objectives together into quantified objectives." And in response to the claim that "the permittee and the public" were not permitted to participate in their development, the final AE describes the public participation opportunities afforded the general public, affected interests and the permittee. Id., pp. 36-37.

The short-term objectives that were established and utilized in the draft and final AEs were consistent with the specific MFP objectives as were the key species identified. The short-term objectives were also consistent with Table 1-4. As the result of our most recent appeals of your decisions, Appeal Nos. N2-90-06 - 10, N2-90-14, N2-90-16, N2-90-20, we thought that we had established that the BLM was bound by these objectives. The livestock use agreement you signed, however, and the appealed-from decision do not conform to these objectives.

Both the livestock use agreement and the final decision set out identical new and significantly different short-

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43 CFR § 4100.0-5 (definitions of "affected interest" and "consultation, cooperation and coordination"). The Paradise-Denio Range Program Summary commits to affording affected interests the opportunity to actively participate as has the Nevada State Office of BLM. Indeed, Instruction Memorandum No. NV-89-268 provides that a grazing decision must be issued when the management proposed is controversial. The stipulation in IBLA #89-318 also contains public participation prescriptions. That the appealed-from decision is controversial is evidenced by this appeal (and the others that we understand have been or will be filed) while the failure to comply with these other requirements is demonstrated below.

Appellants' rights to participate as affected interests were totally compromised by the actions you took prior to issuing this decision. According to the agreement, the livestock operator was shown the final AE prior to its public release. Appellants were not afforded this privilege; instead we had to wait until after the agreement was signed and the decision issued. Appellants never had an opportunity to review, let alone comment on or negotiate, the new short-term objectives prior to your acceptance of them. Indeed, at no time prior to receiving the final decision were appellants even given any hint that these objectives could be changed. You apparently agreed to calculate the stocking rate by a method that is different from any of the alternative methods set out in the draft AE. You established a stocking rate in the agreement without allowing any public review or comment. In short, the real decisions were made by a process from which affected interests were totally excluded.

Issuing a decision that reflects an agreement already reached without any public review or comment is a violation of the BLM's duty to consult, coordinate and cooperate with affected interests. The effect of your action in this case is identical to the effect of the agreements that we challenged in IBLA #89-318, notwithstanding the Bureau's recognition, in the stipulation in that case, that, "[a]ll affected interests [must] be provided the same information and be afforded the same opportunities in arriving at the selected management action." Stipulation to Withdraw Appeal, p. 2, 3.



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term objectives. The "old" short-term objectives specified that utilization of key streambank riparian plants "shall not exceed 30%" on identified creeks and that utilization of key upland species "shall not exceed 50%." In their place, the new, secretly negotiated objectives direct that utilization "shall average" a specified percentage over a period of time. Notwithstanding your duty to provide a reasoned explanation of your action, see, e.g., Motor Vehicles Manufacturer's Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983), no rationale for adopting these new objectives has been provided. The section of the final AE that is identified as "[r]ationale," Final AE, p. 46, contains only a description of the new objectives, see id., p. 49, not a reasoned explanation for the jettisoning of the "old" and the adoption of the "new."

These new objectives will allow utilization to exceed the short-term objectives which were used to evaluate current management practices and progress toward management goals in both the draft and final AEs. The new objectives will also allow utilization of key species to exceed levels set in Table 1-4. They will allow heavy or even severe grazing of key species and crucial wildlife areas to continue in violation of the express terms of those objectives and the terms of the MFP. They are therefore illegal.

3. Livestock carrying capacity determinations are invalid.

Livestock carrying capacity, as defined at 43 CFR § 4100, is the maximum stocking rate possible without inducing damage to vegetation or related resources. The stocking rate established for this allotment will permit key areas, and specifically riparian areas, to be sacrificed to grazing. Rather than give full consideration to key riparian areas, the BLM chose to calculate capacity in a manner which effectively insures that those areas will be overused in the future, despite their sensitivity and importance. It also appears that the BLM chose not to utilize previously-developed range suitability criteria.

To establish stocking rates, the weighted average utilization formula was used, together with the new utilization objective. BLM Technical Reference TR 4400-7

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indicates that this formula should be used where production levels are uniform, which is not the case here. It also indicates that the formula may not account for distribution problems, which certainly are occurring here, particularly in the north part of the allotment as noted above. By ignoring key riparian areas and the previously-set objective for their use in calculating the stocking rate, the Bureau has come up with a capacity estimate that will result in harming these sensitive resources.

What is more, it appears that, in setting stocking rates, no adjustments were made for areas unsuitable for grazing. Appendix A, Section 3 of the Paradise-Denio EIS sets out unsuitability criteria developed by the BLM. Failure to utilize those criteria in setting stocking rates will result in otherwise avoidable resource damage.

#### 4. Violation of riparian policy.

The new objectives, carrying capacity estimates and seasons of use established in the agreement and challenged decision are not consistent with the BLM's national riparian policy. That policy recognizes that riparian areas are special places and requires management actions be taken "to maintain, restore or improve" them where "site-specific objectives are not being met." BLM, Riparian Area Management Policy (January 22, 1987).

As revealed clearly in the draft and final AEs, the "old" objectives for riparian areas in this allotment are not being met. Those objectives will clearly not be met under the management authorized by the livestock agreement and the challenged decision. The new objectives will permit these areas to be abused and their key species to be overutilized while the methodology used to estimate capacity will ensure it. No fences were scheduled in the decision to avoid this result and the new season of use that is prescribed will permit grazing during a portion of the hot season or growing period for key species. The decision does not even require the operator to remove his livestock when the new "average" utilization levels are reached.

In short, the challenged decision will permit the continued sacrifice of riparian areas and their values to

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the livestock operator's convenience. It is therefore inconsistent with the present day recognition of these areas' uniqueness and with the express terms of the riparian policy.

5. Failure to comply with NEPA.

As indicated above, grazing by both livestock and wild horses has adversely impacted the resources of the Paiute Meadows allotment, including in particular its riparian resources. In addition, as demonstrated above, the appealed-from decision is not consistent with the MFP or with national policy and is likely to result in harm to the allotment's sensitive riparian areas in the future. Moreover, as discussed below, the decision may well have been issued in contravention of the requirements of the ESA. Finally, it calls for the reduction of a huge number of wild horses. Yet, no EIS or even an environmental assessment (EA) was prepared prior to issuance of the final decision. What is the environmental benefit if the BLM makes no similar adjustment in livestock numbers? There is nothing in the agreement, the challenged decision or the final AE to prevent the BLM from increasing livestock numbers once wild horses have been removed -- as has been done in numerous other instances. See, e.g., U.S. General Accounting Office, Rangeland Management -- Improvements Needed in Federal Wild Horse Program, p.25 (GAO/RCED-90-110) (August 1990).

The claim that this decision was "covered" by the Paradise-Denio EIS is simply wrong. That EIS was not prepared for the purpose of allowing the BLM to make specific decisions about how to manage this or any allotment and it does not contain "the detailed analysis of local geographic conditions [that is] necessary for the decision-maker to" decide how to manage it. NRDC v. Morton, 388 F. Supp. 829, 838-39 (D.D.C. 1974). What is more, as demonstrated above, the new decision will permit use in excess of the levels set in Table 1-4 in that EIS. Finally, quite apart from the requirements of NEPA as applied to the Bureau's grazing program, it is indisputable that at least an EA must be prepared prior to removing wild horses from this allotment. See, e.g., Animal Protection Institute of America, IBLA #s 88-591, 88-638, 88-648, 88-679 (June 7, 1989), 109 IBLA 112, 126;

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American Horse Protection Ass'n v. Frizzell, 403 F. Supp. 1206, 1219 (1975).

The agreement you entered into and the subsequent decision you issued call for not only removal of hundreds of horses, but also effectively modify the objectives of the land use plan. Under these circumstances, we are shocked at your flaunting of the goals and requirements of NEPA.

6. Failure to comply with the ESA.

By letter dated July 2, 1991, the U.S. Fish and Wildlife Service (FWS) identified the Lahontan cutthroat trout waters that would require Section 7 consultation under the ESA. Bartlett, Battle and Paiute Creeks, all of which are in Paiute Allotment, are on that list. The draft and final AEs acknowledge that these creeks are potential Lahontan cutthroat streams. Obviously, the Bureau's management of grazing in this allotment could adversely affect their potential. Yet, the final AE contains no reference to any consultation by BLM with the FWS. Actions taken by the BLM in violation of the ESA's procedural requirements are illegal, and must be set aside. See Statement of Reasons of Appellants Sierra Club - Toiyabe Chapter and the Natural Resources Defense Council, Inc., filed in IBLA # 89-318, at pp. 19 - 24 (incorporated by this reference).

CONCLUSION AND REQUEST FOR RELIEF

To remedy the serious violations of law, regulation and policy documented above, appellants, the Sierra Club and NRDC, respectfully request the following relief:

- 1) Invalidate the livestock use agreement that the BLM entered into and the decision that was issued in conformance with its terms;
- 2) Order the BLM to utilize the objectives previously developed in making decisions about future management of this allotment, including decisions setting the stocking rate or livestock grazing capacity, and prohibit the agency from making decisions that will not conform to those objectives;

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3) Order the BLM to estimate the grazing capacity of this allotment through use of monitoring and other available data as well as the previously established range suitability criteria and to do so in a manner that will not allow riparian resources to be overgrazed, overutilized and/or otherwise harmed;

4) Direct the BLM to seek the comments of the FWS prior to issuing a new final decision for this allotment;

5) Direct the BLM to amend the decision to provide that, if and when livestock are permitted to graze this allotment, they will be removed from areas of use when utilization levels have been reached in order to protect riparian and dependent values;

6) Direct the BLM to prepare an EIS or at a minimum an EA that analyzes the impacts of livestock grazing at alternative levels and pursuant to alternative management practices on the specific resources of the Paiute Meadows allotment, including its potential as Lahontan cutthroat trout habitat and its present wild horse numbers and alternatives thereto;

7) Order the BLM to prepare a riparian recovery plan in conjunction with the Nevada Department of Wildlife, the FWS and interested parties pursuant to which the grazing that is permitted will affirmatively enhance Lahontan cutthroat trout habitat and will improve to and/or maintain stream habitat conditions on Paiute, Battle and Bartlett Creeks at an overall optimum of 60% or more; and

8) Award appellants their attorneys fees and costs in bringing this appeal.

Sincerely,

*Johanna H. Wald*

Johanna H. Wald  
NRDC

*Rose Strickland*

Rose Strickland JHM  
Sierra Club, Toiyabe

cc: Burton J. Stanley, Esq.

Original paper copy to follow via certified, first class mail