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

10	NEVADA DEPARTMENT OF WILDLIFE,	)	IBLA 93-88
11	Appellant	)	Appeal from the Area Manager's
12	v.	)	Decisions dated June 30 and
13	BUREAU OF LAND MANAGEMENT,	)	September 18, 1992, Paiute
14	Respondent	)	Meadows Allotment, Winnemucca
15	NEVADA COMMISSION FOR THE PRESERVATION OF WILD HORSES,	)	District, Nevada
16	Appellant)	
17	v.	)	N2-92-12
18	BUREAU OF LAND MANAGEMENT,	)	Appeal from the Area Manager's
19	Respondent	)	Decisions dated September 18
20		)	and November 30, 1992, Paiute
21	WILD HORSE ORGANIZED ASSISTANCE,	)	Meadows Allotment, Winnemucca
22	Appellant	)	District, Nevada
23	v.)	
24	BUREAU OF LAND MANAGEMENT,	)	N2-92-13
25	Respondent	)	Appeal from the Area Manager's
		)	Decisions dated September 18
		)	and November 30, 1992, Paiute
		)	Meadows Allotment, Winnemucca
		)	District, Nevada

26 BLM'S RESPONSE BRIEF

27 Respondent Bureau of Land Management (BLM) makes the
28 following response to the Opening Brief filed by Appellants

1 Nevada Division of Wildlife and Commission for the Preservation
2 of Wildhorses (hereinafter "Opening Brief"). BLM did not receive
3 a brief from the Wild Horse Organized Assistance. Appellants
4 raise the sole issue of whether the annual authorizations they
5 appealed were in fact appealable decisions. The issue is before
6 the Hearings Division as a result of an IBLA Order dated April 3,
7 1996, which states in part: "The issues of whether BLM's
8 decisions were subject to appeal and if so, whether such
9 decisions were proper are issues within the jurisdiction of the
10 Administrative Law Judge, not the Board." Att A, p 3.

11 Appellants do not challenge the decisions themselves,
12 because BLM subsequently issued a Multiple Use Decision (MUD) for
13 the allotment on April 12, 1993. Thus, the annual authorizations
14 which are the subject of the appeals are no longer in effect.
15 These same appellants appealed the MUD, and those appeals were
16 the subject of a settlement agreement. See Att B.

17 Statement of Facts

18 In early 1990, Daniel Russell submitted applications for the
19 transfer of the grazing preference for the Paiute Meadows
20 allotment. On March 21, 1990, the Area Manager issued a Proposed
21 Decision denying the applications as submitted by Mr. Russell,
22 but approving the transfer as outlined in the decision. Att C.
23 The proposed decision authorized 4,350 AUMs of livestock use,
24 which represented a reduction of 3,477 AUMs from the prior
25 authorized use for livestock. Appellant NDOW received this
26 decision on March 22, 1990, but did not protest it. Subsequently,
27 Mr. Russell withdrew his earlier applications and submitted new
28 ones which conformed to the conditions outlined in the decision.

1 By letter dated April 25, 1990, the Area Manager acknowledged
2 that the earlier application had been withdrawn and vacated the
3 March 21 decision. Att D. The April 25 letter also offered a
4 grazing permit to Mr. Russell for signature, and this permit
5 conformed to the earlier decision. The permit was for a four
6 year period, and offered Mr. Russell 4,350 AUMs, or 700 cattle
7 between May 1 and November 5 of each year. It provided that
8 grazing use was to be made North of Paiute Creek.

9 The April 25 letter and permit were also sent to the
10 Appellants. They did not appeal the issuance of the four-year
11 permit. Annual authorizations were issued to Russell in 1990 and
12 1991, for 4,350 AUMs, but they were not appealed either. Att E.

13 In 1992, BLM completed an allotment evaluation and issued a
14 Multiple Use Decision which allocated 4,350 AUMs for livestock
15 and 600 AUMs for wild horses. Att F. The Appellants all filed
16 appeals to this decision, arguing among other things that the
17 livestock carrying capacities had not been properly calculated.
18 A settlement was reached with the Appellants regarding the
19 gathering of wild horses. Att G. After 495 wild horses were
20 removed from the allotment in early 1992, the MUD was remanded at
21 BLM's request and BLM issued a decision vacating the MUD. Att H.

22 Because the intervening MUD had been vacated, the four year
23 permit which had been issued in 1990 was still in effect. On May
24 12, 1992, the Area Manager issued another annual authorization
25 which for the most part conformed to the 1990 permit, authorizing
26 700 cattle from May 1 to November 5, for a total of 4,350 AUMs.¹

27

28 ¹ This authorization did deviate from the 1990 permit to the extent
that it authorized livestock use to the South of Paiute Creek,
whereas the 1990 permit only authorized livestock use to the North

1 (Opening Brief, Ex 1). This authorization was appealed by NDOW.
2 (Opening Brief, Ex 2). The Area Manager sent another letter
3 stating that the annual authorization was not appealable, and
4 citing to the 1990 permit, and NDOW appealed this letter as well.
5 (Opening Brief, Ex 3).

6 On July 31, 1992, the permittee applied for a change in use
7 on the allotment. On August 6, 1992, the Area Manager sent out a
8 letter authorizing a change in grazing use for the 1992 season.
9 (Opening Brief, Ex 4). Essentially, the decision reduced the
10 number of cows authorized on the allotment, but extended the time
11 from November 5 to February 28. It also authorized an additional
12 two weeks in the North area in the summer. Thus the total number
13 of AUMs was 224 less than the 4,350 AUMs authorized for the year.
14 The change was authorized because of drought conditions, but the
15 winter use was limited to areas which would not conflict with
16 wild horse or wildlife winter use. (Opening Brief, Ex 4, p 2).
17 This decision was appealed by CPWH and WHOA.

18 Argument

19 The appeals should be dismissed because the annual
20 authorizations appealed from are now moot. The Board has stated
21 the standard for determining mootness as follows:

22 An appeal is generally dismissed as moot, where, as a
23 result of events occurring after the appeal is filed,
24 there is no effective relief which the Board can afford
25 the appellant. . . .
26

27 of Pauite Creek. Appellants do not make an issue of this change in
28 their opening brief or rely on it to argue that the 1992 decision
was appealable. As with the August 6 decision discussed below, the
change was not material or substantive and therefore did not render
the 1992 authorization appealable.

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Nevertheless, . . . dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal would tend to preclude the issue from ever being reviewed.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366, 371 (1990) (citations omitted).

Here, there is clearly no relief which this Court may grant in terms of the 1992 annual authorizations which are the subject of these appeals (nor do the Appellants request any). Not only have the authorizations expired on their face, but the permit upon which they were based was itself replaced after the issuance of a Multiple Use Decision in 1993. The Appellants settled their appeals of this decision. The 1992 annual authorizations are simply no longer relevant in terms of the management of the allotment.

Nor would dismissal of these appeals preclude the general question of when an annual authorization is appealable from ever being reviewed. Permits are normally issued for ten years (43 C.F.R. § 4130.2), and it is not difficult to imagine successive authorizations which conform to the permit being appealed, and the appeals being decided, long before the ten-year permit itself expires. In this case, however, when a subsequent permit has been issued and the same appellants have resolved issues with regard to the subsequent permit, the question of the reviewability of annual authorizations issued under the prior permit is no longer capable of repetition.²

² The intervening permit distinguishes this case from Animal Protection Institute of America, 124 IBLA 231, 234 (1992). In that case, issues relating to wild horse roundups were found to be capable of evading review. Here, however, as set forth above, the question of reviewability of an annual authorization would be decided in the context of a ten-year permit.

1 If this court reaches the merits of the issue raised in the
2 opening brief, it has addressed a similar issue in an Order
3 issued on June 6, 1997, in Defenders of Wildlife, et al. v. BLM,
4 AZ-020-97-03080 (attached to Opening Brief as Exhibit 7). There,
5 the appellants appealed two grazing bills and annual
6 authorizations similar to the annual authorizations appealed
7 here. The Appellants in that case argued that the annual
8 authorizations were appealable decisions, but this Court
9 disagreed, stating:

10 In the opinion of the undersigned, for a routine
11 application and billing to constitute an appealable
12 decision, the authorized officer would have to approve
13 therein some material, substantive change, such as an
14 increase in AUM's, in order to trigger Appellate
15 jurisdiction in the Hearings Division under the purview
16 of 43 C.F.R. § 4160.3. In this case, the
17 administrative record makes clear that the application
18 and ensuing billing contained no material changes from
19 the previously authorized use throughout the years 1988
20 through 1996.

21 This case is similar. The annual authorization issued in
22 May of 1992 was very similar to the two prior annual
23 authorizations and the 1990 permit, none of which were appealed
24 by the Appellants. Therefore, given the rule set forth above,
25 the May 1992 annual authorization is not an appealable decision
26 because it did not constitute a "material, substantive" change
27 from prior practice.

28 Appellants rely on language in this court's recent decision
to the effect that an annual authorization might be rendered
appealable if Appellants could aver that the condition of the
range had declined. (Opening Brief, p 5:10-16). They argue that
the BLM's data shows such a decline, and that the 1992
authorization should therefore be considered an appealable

1 decision.

2 BLM's data, however, as interpreted in the Evaluation, did
3 not show that a reduction in livestock use was necessary.
4 Although BLM made an initial, conservative estimate of 3942 AUMs
5 as the carrying capacity for the allotment, BLM adjusted this
6 amount upward after discussions with the permittee's range
7 consulting service. Att J. BLM determined that a slightly
8 higher carrying capacity, of 4,950 AUMs, was appropriate in light
9 of below average rainfall for the area and other factors. The
10 number represented a 53.5 percent reduction in actual use, which
11 totaled at over 10,500 AUMs when the wild horse use was factored
12 in. Att J.

13 Furthermore, the context of the 1992 authorization should be
14 considered. First, pursuant to an agreement with the appellants,
15 a wild horse gather took place on the allotment in February,
16 1992. See Att G. A total of 495 wild horses were removed from
17 the allotment in that time. Therefore, to the extent BLM data
18 showed a reduction in AUMs was necessary on the allotment, a
19 large part of this reduction had taken place by the time the
20 annual authorization was issued for 1992.

21 Second, the AUMs authorized by the 1992 authorization
22 conformed with the 1990 livestock grazing permit which had a
23 four-year term. The appellants did not appeal the 1990 permit
24 when it was issued. In the absence of any appeal, the issuance
25 of the 1990 permit for four years was a final agency action,
26 which the agency was entitled to rely on. In order to argue that
27 an annual authorization issued pursuant to that permit was itself
28 an appealable decision, appellants should be required to show

1 some new set of circumstances which necessitated fewer livestock
2 AUMs. This they have failed to do.

3 Although both of the 1992 authorizations did make some
4 changes from past practice, they were not "material, substantive
5 changes." They did not increase the number of AUMs allowed on
6 the allotment, and in fact the August authorization decreased
7 that number by approximately 224 AUMs. They did allow different
8 use areas and a longer winter use period, but did not allow
9 winter use in areas which were identified as conflict areas for
10 wild horses and wildlife. Finally, they did not allow use during
11 the spring growing season, and did not conflict with the season
12 of use set forth in alternative "b" in the evaluation. Att J,
13 p 30.

14 Appellants merely argue in their brief that the August
15 authorization represented a "change." (Opening Brief, p 5:17-
16 23). They do not argue that it represented a "material,
17 substantive change." Nor do they argue that the May
18 authorization represented a "material, substantive change." In
19 the absence of any further showing by them of how the changes
20 were material or substantive, the changes in the 1992
21 authorizations should not be deemed to represent the kind of
22 changes which lead to an appealable grazing decision.

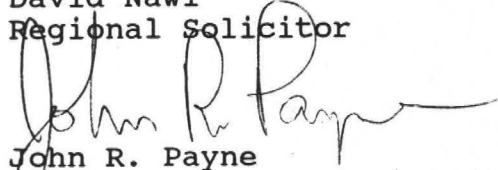
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1 Conclusion

2 For the above reasons the appeals should either be dismissed
3 as moot, or dismissed because they appealed annual authorizations
4 which were not themselves appealable decision.

5 Respectfully submitted,

6 David Nawi
Regional Solicitor

7  12/29/97
8 By: John R. Payne
9 Assistant Regional Solicitor

10 Attachments

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1 CERTIFICATE OF SERVICE

2 The original of the foregoing "BLM Response Brief" was sent
3 via Federal Express overnight delivery on December 29, 1997, to:

4 James H. Heffernan
5 Administrative Law Judge
6 Office of Hearings and Appeals
7 Hearings Division
8 139 East South Temple, Suite 600
9 Salt Lake City, Utah 84111

10 A copy of the foregoing "BLM Response Brief" was sent via
11 Federal Express overnight delivery on December 29, 1997, to:

12 C. Wayne Howle, Esq.
13 Deputy Attorney General
14 Office of the Attorney General
15 198 S. Carson St., No. 311
16 Capitol Complex
17 Carson City, NV 89710

18 A copy of the foregoing "BLM Response Brief" was sent via
19 "Certified Mail-Return Receipt Requested" on December 29, 1997,
20 to:

21 Dawn Y. Lappin
22 Wild Horse Organization
23 P.O. Box 555
24 Reno, NV 89504

25 Copies of the foregoing "BLM Response Brief" were sent via
26 regular mail on December 29, 1997, to:


27 State Director
28 Bureau of Land Management
P.O. Box 12000
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District Manager
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5100 East Winnemucca Blvd.
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I certify that the foregoing is true under penalty of perjury.

Executed this 29th day of December, 1997 at Sacramento, California.


Barbara L. Johnson



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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN ACTUALLY REFER TO:

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APR 13 1996

IBLA 93-88 : B2-92-10
: :
NEVADA DEPARTMENT OF WILDLIFE ET AL. : Grazing Permit
: :
: Appeals Referred to
: Hearing Division

ORDER

The State of Nevada, Department of Wildlife (NDOW), the State of Nevada, Commission for the Preservation of Wild Horses (NCPWH), and the Wild Horse Organized Assistance (WHA) have separately appealed decisions of the Paradise-Deno Resource Area Manager, Bureau of Land Management (BLM), holding that issuance of grazing hills for the Paiute Meadows Allotment to grazing permit holder Dan Russel were not subject to appeal.

Background

In 1990, Russell applied for transfer of the grazing preference associated with the Paiute Allotment and for the related grazing permit. See 43 CFR 4110.2-3(a)(4), (b). BLM reviewed the applications to determine whether to approve transfer of the grazing preference and to establish the terms and conditions of a new grazing permit. Upon approving the preference transfer, BLM authorized grazing use on an interim basis "for the 1990 grazing year or until [the allotment evaluation process] is complete" (Mar. 21, 1990, Notice). At that time, the Paiute Meadows evaluation was "scheduled to be drafted and issued for public comment and review by June 1990" (Mar. 21, 1990, Notice). A grazing bill, indicating that the grazing permit was approved, was issued by BLM on May 2, 1990.

On November 22, 1991, BLM issued "Notice of Full Force and Effect Final Multiple Use Decision Paiute Meadows Allotment and the Black Rock Range East Wild Horse Herd Management Area." That decision, based on the completed allotment evaluation, reduced the number of wild horses on the allotment and established a deferred grazing system for livestock, but affected no change to Russell's previously established preference and use. Appellants and others appealed that decision to the Board. On March 16, 1992, Administrative Law Judge John R. Rampton, granted BLM's request to set aside and remand its November 22, 1991, decision for further consideration. On remand, BLM issued a Notice of Proposed Decision for the Paiute Meadows Allotment, dated May 11, 1992. On April 12, 1993, BLM issued a Final Full Force and Effect Multiple Use Decision for the Paiute Meadows Allotment. The decision included a "Wildlife Management Decision," a "Full Force and Effect Livestock Decision" and a "Full Force and Effect

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages 4

To John Payne	From Dugue Wilson
Dept./Agency SW Regional Solicitor	Phone # 702-623-1579
Fax #	Fax #

NSN 7540-01-317-7368

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GENERAL SERVICES ADMINISTRATION



IBLA 93-88

Wild Horse Management Decision." Russell, NDOW, NCPWH, WFOA, and others appealed the wildlife management and wild horse management portions of the decision to this Board and the livestock management portion to an Administrative Law Judge pursuant to 43 CFR 4.470. By order dated August 12, 1993, this Board referred the appeals docketed here (IBLA 93-481, IBLA 93-482, IBLA 93-483, and IBLA 93-484) to the Administrative Law Judge assigned to the grazing appeal for a consolidated factual hearing.

The BLM actions at issue in the current appeals occurred subsequent to the remand of March 16, 1992, and prior to BLM's April 12, 1993, decisions. The procedural history of the various appeals filed and decisions issued during that period is set forth below.

Appeals of NDOW

On May 12, 1992, the Winnemucca District Office, BLM, sent a grazing bill to Russell for the period of May 1 to July 31, 1992. By letter dated May 22, a copy of the bill was sent to NDOW. Subsequently, on June 22, NDOW filed a "Formal Appeal of Paiute Meadows Grazing Permit" appealing the authorized use set forth in the grazing bill pursuant to 43 CFR 4.470. The Area Manager responded in a June 30, 1992, decision, stating that the authorization reflected in the grazing bill was "not an appealable action," and that he viewed NDOW's filing as a protest under 43 CFR 4.450-2. On July 31, NDOW filed its appeal of the June 30 decision, again arguing that BLM's actions were appealable under 43 CFR 4.470.

Thereafter, Russell applied for a change in use of the allotment for the remainder of the 1992 grazing season. The District Office approved the application on July 31, and sent a grazing bill to Russell depicting a reduced herd size in the allotment from 700 cows to 300, and limitations on areas of use. By cover letter dated August 6, BLM sent copies of the bill to all appellants. On September 15, NDOW filed "an appeal of [BLM's] re-authorization of grazing livestock on the Paiute Meadows Allotment of August 6, 1992," arguing that the authorization is a final agency action subject to appeal. On September 18, the Area Manager issued a decision essentially the same as his June 30, 1992, decision. NDOW filed its appeal of the September 18 decision on July 31, again arguing that BLM's actions were appealable pursuant to 43 CFR 4.470.

Appeals of NCPWH and WFOA

On July 24, 1992, NCPWH and WFOA filed identical appeals of "the issuance of the 1992 Grazing Permit for the Paiute Meadows Allotment." BLM's August 25 responses to the appeals were identical to BLM's June 30 decision. After BLM issued its August 6 notices regarding changes in grazing bill, NCPWH and WFOA filed separate notices of appeal on September 18, appealing the "grazing decision issued in August," and subsequently filed identical reasons in support of their appeals on October 20 and 21. The Area Manager responded by issuing two decisions

IBLA 93-88

dated October 28 which were identical to his September 18 decision. Later, on November 30, NCPWH and WROA filed identical appeals of BLM's October 28 decisions, arguing that when they filed their appeals, they believed that "it was to be IBLA that would decide if our appeal was valid."

Disposition of the Appeals

All of the appeals forwarded to the Board challenge BLM decisions to issue a grazing bill and subsequently issue a modification of that bill. Appeals of grazing decisions are governed by 43 CFR 4.470.1(a) which provides that "any applicant, permittee, lessee, or any other person whose interest is adversely affected by a final decision of the authorized officer may appeal to an Administrative Law Judge by filing his appeal in the office of the authorized officer within 30 days after receipt of the decision."

Instead of forwarding the appeal of NDOW to the Hearings Division for assignment of an Administrative Law Judge as required by 43 CFR 4.470(d) and specifically requested by the appellant, BLM erroneously forwarded the appeals to the Board. The issues of whether BLM's decisions were subject to appeal and if so, whether such decisions were proper are issues within the jurisdiction of the Administrative Law Judge, not the Board.

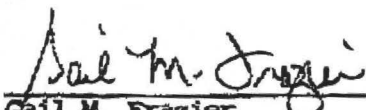
The appeals of WROA and NCPWH are apparently intended to be appeals to this Board. As indicated above, this Board has no jurisdiction over the subject matter of the appeals at this time. This Board would have jurisdiction only if appellants timely appealed a decision of the Administrative Law Judge to the Board pursuant to 43 CFR 4.476. Thus, the appeals of WROA and NCPWH are premature.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals filed by NDOW, WROA and NCPWH are referred to the Hearings Division for assignment of an Administrative Law Judge to consider and rule on the issues raised by the appeals.



John H. Kelly
Administrative Judge

I concur:



Gail M. Frazier
Administrative Judge

IBLA 93-88

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

NEVADA COMMISSION : N2-93-10 and IBLA 93-484
FOR THE PRESERVATION OF :
WILD HORSES (CPWH) :
Appellant :

v.

BUREAU OF LAND MANAGEMENT, :
Respondent :

..... :
NEVADA DIVISION : N2-93-09 and IBLA 93-482
OF WILDLIFE (NDOW) :
Appellant :

v.

BUREAU OF LAND MANAGEMENT, :
Respondent :

..... :
WILD HORSE ORGANIZED : N2-93-11 and IBLA 93-483
ASSISTANCE (WHOA) :
Appellant :

v.

BUREAU OF LAND MANAGEMENT, :
Respondent :



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ORDER

IT IS HEREBY ORDERED as follows:

Nevada Division of Wildlife (hereinafter "NDOW"), the Nevada Commission for the Preservation of Wild Horses (hereinafter "Commission"), and the Wild Horse Organized Assistance (WHOA) have agreed to withdraw the above-captioned appeals subject to the following stipulation:

STATEMENT OF FACTS

A. NDOW is an agency of the State of Nevada, whose duty it is to ensure the preservation, protection, management and restoration of wildlife within the State of Nevada. The COMMISSION is a commission of the State of Nevada, whose duty it is to ensure the preservation and management of wild horses within the State of Nevada. WHOA is a non-profit wild horse advocacy group.

B. On May 10, 1993, NDOW and on May 12, 1993, the COMMISSION and WHOA filed the above-captioned appeals from the Final Full Force and Effect Multiple Use Decision for the Paiute Meadows Allotment, dated April 12, 1993. The bases for these appeals were and are that (1) allotment specific objectives were not applied, thereby allowing for resource damage; (2) carrying capacities were determined improperly and contrary to the land use plan; (3) forage was not properly allocated; and (4) full force and effect was applied in a manner that would not protect natural resources.

ORDER

A. BINDING OBJECTIVES. The Paradise-Denio land use plan MFP III Decisions establishing the criteria for the Final Paiute Meadows Multiple Use Decision (1993) are commitments binding upon the BLM. Decisions setting appropriate management levels for wild horses and stocking rates for livestock

1 must be consistent with these short term objectives.

2 B. MONITORING. Monitoring is an essential part of BLM's obligation and
3 duty to determine the achievement of short term objectives set forth in
4 paragraph A above. The BLM therefore shall monitor the actual use of
5 livestock and wild horses and their impacts on the vegetative resources of the
6 Paiute Meadows Allotment in a manner which will ensure early detection of
7 effects which will result in nonattainment of wildlife habitat, riparian and range
8 objectives.
9

10 Specifically the BLM shall monitor fish and wildlife habitat within the
11 Paiute Meadows Allotment. The BLM will continue to collect utilization data
12 on stream bank and wetland meadow riparian habitats. Depending upon
13 available funding and other statewide priorities, BLM has a commitment to
14 collect wild horse census data will include accurate population estimates,
15 distribution, age composition, and annual rate of increase throughout the
16 allotment.
17

18 C. ADJUSTMENT IN USE. Part of BLM's effort to achieve the objectives set
19 forth in paragraph A above is the adjustment of active livestock grazing use and
20 appropriate management levels for wild horses when the evaluation of
21 monitoring data indicates an adjustment is necessary to achieve allotment
22 specific objectives within a reasonable time.
23

24 Desired Stocking Rate computations for the Paiute Meadows Multiple
25 Use Decision will be presented in the allotment evaluation or environmental
26 assessment to be completed no later than 1998. Summer pasture stocking rates
27 are to be determined by procedures found in Bureau of Land Management
28

1 Manual *Rangeland Monitoring Analysis, Interpretation, and Evaluation*,
2 Technical Reference 4400-7.

3 The following procedures will be applied:

- 4 1. All available rangeland monitoring and actual use data will be
5 applied.
- 6 2. Riparian habitats will be considered Key Management Areas.
- 7 3. Use pattern mapping data will not be weight averaged or yield
8 indexed in a manner which compromises or dilutes Key Management Area
9 observed utilization or objectives.
- 10 4. Allocation of forage must consider proportional adjustments based
11 upon actual use during the duration of the evaluation.

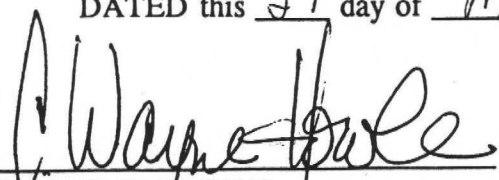
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13 The livestock season of use on summer pastures will be based upon
14 monitoring data and range science. A provision stating the following will be
15 included in the final decision transferring the grazing permit:

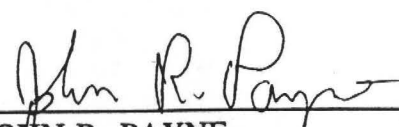
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17 For the 1995 grazing season, the off date for
18 livestock will be August 17th. Should utilization
19 objectives not be met after the 1995 grazing
20 season, the full implementation of the multiple-use
21 decision will occur in the 1996 grazing season
22 with the off date of July 17th. If objectives are
23 met after the 1995 grazing season, the 1996 off
24 date will remain August 17th. In any event the
25 full implementation of the multiple-use decision
26 will occur as scheduled in 1997 with an off date of
27 July 17th.

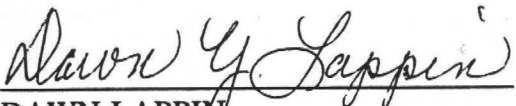
- 28
- D. **RANGE IMPROVEMENT PROJECTS.** Riparian enclosure projects will be
constructed in a timely manner as funding will allow. Interim adjustments in
carrying capacities and season of use will be taken to assure that resource
damage will be prevented.

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DATED this 27 day of March, 1995.


C. WAYNE HOWLE
Attorney for NDOW and Commission


JOHN R. PAYNE
Attorney for Respondents


DAWN LAPPIN
Representative for WHOA

ORDER

IT IS SO ORDERED THIS ___ day of _____, 1995.

ADMINISTRATIVE LAW JUDGE

4130
(NV-241)

March 21, 1990

CERTIFIED MAIL NO. P878372574
RETURN RECEIPT REQUESTED

Notice of Area Manager Proposed Decision

Dick Mecham
P.O. Box 342
Eureka, NV 89316

Dear Mr. Mecham:

On January 8, 1990 you submitted a transfer for grazing preference on the Paiute Meadows allotment. On February 21, 1990 you submitted an application for grazing use in the allotment as part of the transfer process. The applications were as follows:

January 8, 1990 application for transfer of grazing preference:

<u>Total Preference</u>	<u>Suspended Preference</u>	<u>Active Preference</u>
9,932 AUMs	2,105 AUMs	7,827 AUMs

February 21, 1990 Application:

<u>Livestock Number</u>	<u>Period</u>		<u>ZPL Use</u>	<u>Type Use</u>	<u>AUM's</u>
	<u>Begin</u>	<u>End</u>			
500 C	03/16/90	03/31/90	100	A	263
1,000 C	04/01/90	10/31/90	100	A	7,036
484 C	11/01/90	11/30/90	100	A	477
50 C	12/01/90	12/31/90	100	A	51
					<u>7,827</u>

After considering your applications, my proposed decision is to deny your applications as submitted and to approve your transfer and grazing applications as outlined below for the Paiute Meadows allotment as interim grazing management until the allotment evaluation is completed. The approval of the grazing preference transfer will be suspended pending any appeal of the final decision.

Approved transfer of grazing preference:

<u>Total Preference</u>	<u>Suspended Preference</u>	<u>Active Preference</u>	<u>Not Scheduled</u>	<u>Authorized Active Use</u>
9,932 AUMs	2,105 AUMs	7,827 AUMs	3,477 AUMs	4,350 AUMs



The grazing permit for the Paiute Meadows allotment will be as follows:

Livestock Number	Period		%PL Use	Type Use	AUM's
	Begin	End			
700 Cattle	05/01	11/05	100	A	4,350

Terms and Conditions:

Grazing use will be made north of Pahute Creek with herding practices designed to control drift of livestock south of Pahute Creek. Active grazing use will be held to 4,350 AUMs. 3,477 AUMs will be held in nonuse for conservation and protection purposes until evaluation of monitoring data indicates that active use may resume. No salt or mineral blocks shall be placed within one quarter mile of springs, meadows, streams, riparian habitats or aspen stands. You are required to perform normal maintenance on the range improvements to which you have been assigned maintenance responsibility.

Rationale:

An initial review of monitoring data indicates a possible overobligation of available forage within the southern portion of the allotment. This is due to the use of this area by wild horses. Monitoring data also indicates no apparent problems at this time with the northern portion of the allotment.

A review of the range survey used to adjudicate the grazing preference for this allotment shows that 4,341 AUMs were adjudicated for the northern portion of the allotment (north of Pahute Creek). For billing purposes an active grazing use of 4,350 AUMs will be authorized. A final determination of the carrying capacity of the Paiute Meadows allotment for livestock, wildlife and wild horses will be determined through the allotment evaluation process. I am approving interim grazing use for the 1990 grazing year or until this process can be completed. In addition to the grazing level of 4,350 AUMs, livestock use should be made north of Pahute Creek with herding practices designed to accomplish this, recognizing there is no restrictive barrier other than topography.

The livestock turn out date of May 1 is selected to provide for additional spring growth of forage prior to use by livestock. A final determination of the grazing season of use will be made when the allotment evaluation process is completed. This process will involve consultation with yourself and other affected interests prior to the selection of a management action for this allotment.

The Paiute Meadows evaluation is currently scheduled to be drafted and issued for public comment and review by June 1990. Additional monitoring data is also scheduled to be collected within the next 4 weeks and will provide additional information for the evaluation process.

Grazing use may be authorized at the approved levels, periods and areas of use. If the final decision is appealed, this decision shall be suspended pending final action on the appeal. The suspension of this decision would mean that the approval of the grazing preference transfer would also be suspended. Without completion of the preference transfer, active grazing use could not be authorized and as such the grazing permit would be cancelled.

The authority for this decision in pertinent part is contained in:

Title 43 CFR 4100.0-8:

"The authorized officer shall manage livestock grazing on public lands under the principle of multiple use and sustained yield, and in accordance with applicable land use plans. Land use plans shall establish allowable resource uses (either singly or in combination), related levels of production or use to be maintained, areas of use, and resource condition goals and objectives to be obtained. The plans also set forth program constraints and general management practices needed to achieve management objectives. Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan as defined at 43 CFR 1601.0-5(b)."

Title 43 CFR 4110.3:

"The authorized officer shall periodically review the grazing preference specified in a grazing permit and may make changes in the grazing preference status. These changes shall be supported by monitoring, as evidenced by rangeland studies conducted over time, unless the change is either specified in an applicable land use plan or necessary to manage, maintain or improve rangeland productivity."

Title 43 CFR 4110.2-3(a)(3):

"The transferee shall accept the terms and conditions of the terminating grazing permit or lease (see 4130.2) with such modifications as he may request which are approved by the authorized officer or with such modifications as may be required by the authorized officer."

Title 43 CFR 4110.3-2(b):

"When monitoring shows active use is causing an unacceptable level or pattern of utilization or exceeds the livestock carrying capacity as determined through monitoring, the authorized officer shall reduce active use if necessary to maintain or improve rangeland productivity, unless the authorized officer determines a change in management practices would achieve the management objectives."

Title 43 CFR 4110.3-2(c):

"Where active use is reduced it shall be held in suspension or in nonuse for conservation/protection purposes, until the authorized officer determines that active use may resume."

Title 43 CFR 4130.6-1(a):

"The authorized officer shall specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock carrying capacity as determined through monitoring and adjusted as necessary under 4110.3, 4110.3-1 and 4110.3-2."

Title 43 CFR 4160.3(c):

"...Decisions that are appealed shall be suspended pending final action except as otherwise provided in this section. Except where grazing use the preceding year was authorized on a temporary basis under 4110.3-1(a) of this title, an applicant who was granted grazing use in the preceding year may continue at that level of authorized active use pending final action on the appeal."

If you wish to protest this decision in accordance with 43 CFR 4160.2 you are allowed fifteen (15) days from receipt of this notice within which to file such protest with the Paradise-Denio Resource Area Manager, Bureau of Land Management, Winnemucca District, 705 E. 4th Street, Winnemucca, NV 89445. In the absence of a protest within the time allowed in accordance with 43 CFR 4160.3(a) the above proposed decision shall constitute my final decision.

Should this notice become the final decision and if you wish to appeal this decision for the purpose of a hearing before an Administrative Law Judge, in accordance with 43 CFR 4160.4 and 4.470, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the Paradise-Denio Resource Area Manager, Bureau of Land Management, at the above address.

Sincerely yours,

/s/ Scott R. Billing

Area Manager
Paradise-Denio Resource Area

cc: Certified copies to:

William C. Cummings P878372575
Tom Van Horne P878372576
Dan Russell P878372577
Nevada Department of Wildlife P878372578
Natural Resources Defense Council P878372579
Sierra Club-Toiyabe Chapter P878372580
Winnemucca Unit of the Nevada Cattlemen P878372581
Wild Horse Organized Assistance P878372582
Desert Bighorn Council P878372583
Nevada Land Action Association P878372584
Craig C. Downer P878372585
Commission for the Preservation of Wild Horses P878372586
Animal Protection Institute P878372587
Wilderness Society P878372588



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

WINNEMUCCA DISTRICT OFFICE

705 East 4th Street
Winnemucca, Nevada 89445



IN REPLY REFER TO:

4130/4160
(NV-241)

April 25, 1990

CERTIFIED MAIL NO: P 536 169 355
RETURN RECEIPT REQUESTED

Thomas Van Horne
708 10th Street
Suite 250
Sacramento, CA 95814

Dear Mr. Van Horne:

On April 23, 1990 I received a FAX copy of your letter withdrawing the February 21, 1990 grazing application submitted as part of the transfer of grazing preference for the Paiute Meadows allotment with a hard copy of the letter received on April 24. The February 21, 1990 application had resulted in my proposed decision of March 21, 1990 which denied this grazing application and approved the transfer of grazing preference with grazing use as stated in the decision.

In light of your withdrawal of the February 21, 1990 application the need for the decision is mute and as such my proposed decision of March 21, 1990 is hereby vacated.

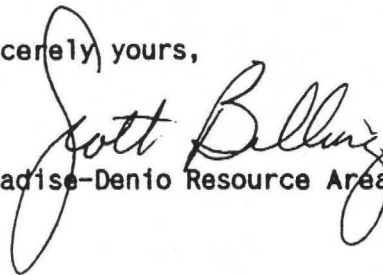
Your letter of April 23, 1990 also included an amended grazing application which is sufficient for completion of the transfer process.

As part of the grazing preference transfer process I am offering the grazing permit for the Paiute Meadows allotment to you for signature. Upon return of the permit the transfer process can be completed.



Your letter of April 23 also made the statement that you were withdrawing the application submitted on January 8, 1990. I believe this to be a misunderstanding on your part as the application of January 8 is the application for grazing preference (Form 4130-1a) that is an integral part of the transfer process, which cannot be completed without this application. I am proceeding as though the January 8, 1990 application is still valid unless I hear otherwise from you.

Sincerely yours,


Paradise-Denio Resource Area Manager

Enclosures: Grazing Permit

cc: Certified copies to:

William C. Cummings P 536169356

Dick Mecham P 536169357

Dan Russel P 536169358

Nevada Department of Wildlife P 536169359

Natural Resources Defense Council P 536169360

Sierra Club -Toiyable Chapter P 536169361

Winnemucca Unit of the Nevada Cattlemen P 536169362

Wild Horse Organized Assistance P 536169363

Desert Bighorn Council P 536169364

Nevada Land Action Association P 536169365

Craig C. Downer P 536169366

Commission for the Preservation of Wild Horses P 536169367

Animal Protection Institute P 536169368

Wilderness Society P 536169369

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

GRAZING PERMIT

STATE NV
G. ICE 024
OPERATOR NUMBER 272173
PREFERENCE CODE 03
DATE PRINTED 04/25/90
TERM 03/01/1990 TO 09/21/1994

PAIUTE MEADOWS RANCH

DAN RUSSEL
P.O. BOX 343
EUREKA, NV 89316

BUREAU OF LAND MANAGEMENT
PARADISE-DENIO R.A.
705 EAST 4TH STREET
WINNEMUCCA, NV 89445

THIS GRAZING PERMIT IS OFFERED TO YOU BASED ON YOUR RECOGNIZED GRAZING PREFERENCE ON THE PUBLIC LANDS AND/OR OTHER LANDS ADMINISTERED BY THE BLM. YOU ARE AUTHORIZED TO MAKE GRAZING USE TO THE EXTENT OF YOUR ACTIVE GRAZING PREFERENCE AS SHOWN BELOW UPON YOUR ACCEPTANCE OF THE TERMS AND CONDITIONS INCORPORATED HEREIN AND YOUR PAYMENT OF GRAZING FEES.

ALLOT ----- PASTURE -----	LIVESTOCK		GRAZING PERIOD		TYPE ----- %PL USE -----	AUM'S -----
	NUMBER	KIND	BEGIN	END		
00057 PAIUTE MEADOWS	700	CATTLE	05/01	11/05	100 ACTIVE	4350

TERMS AND CONDITIONS:

GRAZING USE WILL BE MADE NORTH OF PAHUTE CREEK WITH HERDING PRACTICES DESIGNED TO CONTROL DRIFT OF LIVESTOCK SOUTH OF PAHUTE CREEK. ACTIVE GRAZING USE WILL BE HELD TO 4350 AUMS. 3477 AUMS WILL BE HELD IN NONUSE FOR CONSERVATION AND PROTECTION PURPOSES UNTIL EVALUATION OF MONITORING DATA INDICATES THAT ACTIVE USE MAY RESUME.

NO SALT AND/OR MINERAL BLOCKS SHALL BE PLACED WITHIN ONE QUARTER (1/4) MILE OF SPRINGS, STREAMS, MEADOWS, RIPARIAN HABITATS OR ASPEN STANDS.

YOU ARE REQUIRED TO PERFORM NORMAL MAINTENANCE ON THE RANGE IMPROVEMENTS TO WHICH YOU HAVE BEEN ASSIGNED MAINTENANCE RESPONSIBILITY.

ALLOTMENT SUMMARY (AUM'S)

ALLOT -----	P R E F E R E N C E		
	ACTIVE	SUSP	TOTAL
00057 PAIUTE MEADOWS	7827	2105	9932

THIS PERMIT ; 1. CONVEYS NO RIGHT, TITLE OR INTEREST HELD BY THE UNITED STATES

IN ANY LANDS OR RESOURCES AND 2. IS SUBJECT TO (A) MODIFICATION, SUSPENSION OR CANCELLATION AS REQUIRED BY LAND PLANS AND APPLICABLE LAW; (B) ANNUAL REVIEW AND TO MODIFICATION OF TERMS AND CONDITIONS AS APPROPRIATE; AND (C) THE TAYLOR GRAZING ACT, AS AMENDED, THE FEDERAL LAND POLICY AND MANAGEMENT ACT, AS AMENDED, THE PUBLIC RANGELANDS IMPROVEMENT ACT, AND THE RULES AND REGULATIONS NOW OR HEREAFTER PROMULGATED THEREUNDER BY THE SECRETARY OF THE INTERIOR.

ACCEPTED:

SIGNATURE OF PERMITTEE: _____ DATE _____

AREA MANAGER: _____ DATE _____

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

DUE DATE MAY 1, 1990

TOTAL DUE \$7,873.50

STATE (1) NV
OFFICE (2) 024
OPERATOR NUMBER (3) 272173
REFERENCE CODE (4) 03
SCHEDULE NUMBER (5) 1
BILL NUMBER (6) 627217313
BILL DATE (7) 04/30/90
BILL CODE (8) 1
AMOUNT COLLECTED (9) \$7,873.50
FOR BLM USE ONLY

PAIUTE MEADOWS RANCH

DAN RUSSEL
P.O. BOX 343
EUREKA, NV 89316

BUREAU OF LAND MANAGEMENT
WINNEMUCCA D.O.
705 EAST 4TH STREET
WINNEMUCCA, NV 89445

MAKE REMITTANCE TO: US DEPT. OF THE INTERIOR-BLM. PLEASE RETURN THE TOP PORTION OF THIS NOTICE WITH YOUR PAYMENT, AND KEEP THE BOTTOM PORTION. THIS NOTICE SHOWS THE AMOUNT DUE IN GRAZING FEES FOR LIVESTOCK GRAZING USE OFFERED TO YOU. YOUR CANCELED CHECK IS YOUR RECEIPT. A SERVICE CHARGE OF \$10.00 WILL BE MADE FOR EACH APPLICATION REQUIRING A REPLACEMENT OR SUPPLEMENTAL BILL.

BILL NUMBER: 627217313 PAIUTE MEADOWS RANCH

ALLOT

PASTURE	LIVESTOCK NUMBER	BEGIN PERIOD	END PERIOD	T ZPL U	AUM'S	AUM COST	FEE AMOUNT
00057 PAIUTE MEADOWS	700 C	05/01/90	11/05/90	100 A,	4350	\$1.81	\$7,873.50
						SUBTOTAL	\$7,873.50
						SERVICE CHARGE	\$10.00
						TOTAL DUE	\$7,873.50

TERMS AND CONDITIONS:

GRAZING USE WILL BE MADE NORTH OF PAHUTE CREEK WITH HERDING PRACTICES DESIGNED TO CONTROL DRIFT OF LIVESTOCK SOUTH OF PAHUTE CREEK. ACTIVE GRAZING USE WILL BE HELD TO 4350 AUMS. 3477 AUMS WILL BE HELD IN NON USE FOR CONSERVATION AND PROTECTION PURPOSES UNTIL EVALUATION OF MONITORING DATA INDICATES THAT ACTIVE USE MAY RESUME. NO SALT AND/OR MINERAL BLOCKS SHALL BE PLACED WITHIN ONE QUARTER (1/4) MILE OF SPRING, STREAMS, MEADOWS, RIPARIAN HABITATS OR ASPEN STANDS. YOU ARE REQUIRED TO PERFORM NORMAL MAINTENANCE ON THE RANGE IMPROVEMENTS TO WHICH YOU HAVE BEEN ASSIGNED MAINTENANCE RESPONSIBILITY. YOU ARE REQUIRED TO SUBMIT A CERTIFIED ACTUAL USE REPORT WITHIN 15 DAYS AFTER THE END OF THE AUTHORIZED GRAZING USE PERIOD.

YEAR TO DATE AUTHORIZED

PAID

\$ 7,873.50

Date 5-16-90

DEPARTMENT OF THE INTERIOR
Bureau of Land Management CASE FOLDER

By Danielle Smith



BILL NUMBER: G27217313

ALLOT	PREF	NOT	AUTHORIZED				
ACTIVE	SCHED	ACTIVE	NONUSE	FR USE	SDU	TRAIL	TEMP
00057	7827	3477	4380				

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

STATE (1) NV
OFFICE (2) 024
OPERATOR NUMBER (3) 272173
PREFERENCE CODE (4) 03
SCHEDULE NUMBER (5) 1
BILL NUMBER (6) 02721731
BILL DATE (7) 04/01/91
BILL CODE (8) 1
AMOUNT COLLECTED (9) _____
FOR BLM USE ONLY

DUE DATE MAY 1, 1991
TOTAL DUE \$8,569.50

Bureau of Land Management
RECEIVED
APR 30 1991
DISTRICT OFFICE
WINNEMUCCA, NEVADA

PAIUTE MEADOWS RANCH

DAN RUSSEL
P.O. BOX 343
EUREKA, NV 89316

BUREAU OF LAND MANAGEMENT
WINNEMUCCA D.O.
705 EAST 4TH STREET
WINNEMUCCA, NV 89440

Post

MAKE REMITTANCE TO: US DEPT. OF THE INTERIOR-BLM. PLEASE RETURN THE TOP PORTION OF THIS NOTICE WITH YOUR PAYMENT, AND KEEP THE BOTTOM PORTION. THIS NOTICE SHOWS THE AMOUNT DUE IN GRAZING FEES FOR LIVESTOCK GRAZING USE OFFERED TO YOU. YOUR CANCELLED CHECK IS YOUR RECEIPT. A SERVICE CHARGE OF \$10.00 WILL BE MADE FOR EACH APPLICATION REQUIRING A REPLACEMENT OR SUPPLEMENTAL BILL.

BILL NUMBER: 027217314 PAIUTE MEADOWS RANCH ALLOT

PASTURE	LIVESTOCK NUMBER	BEGIN PERIOD	END PERIOD	T	% OF ADM'S	AUN COST	FEE AMOUNT
00007 PAIUTE MEADOWS	700 C	05/01/91	11/05/91	100 A	4350	\$1.97	\$8,569.
						SUBTOTAL	\$8,569.
						SERVICE CHARGE	\$.
						TOTAL DUE	\$8,569.

TERMS AND CONDITIONS:

GRAZING USE WILL BE MADE NORTH OF PAIUTE CREEK WITH HERDING PRACTICES DESIGNED TO CONTROL DRIFT OF LIVESTOCK SOUTH OF PAIUTE CREEK. ACTIVE GRAZING USE WILL BE HELD TO 4350 AUMS. 3477 AUMS WILL BE HELD IN NORMAL USE FOR CONSERVATION AND PROTECTION PURPOSES UNTIL EVALUATION OF MONITORING DATA INDICATES THAT ACTIVE USE MAY RESUME. NO SALT AND/OR MINERAL BLOCKS SHALL BE PLACED WITHIN ONE QUARTER (1/4) MILE OF SPRING, STREAMS, MEADOWS, TROPICAL HABITATS OR ASPEN STANDS. YOU ARE REQUIRED TO MAINTAIN NORMAL MAINTENANCE ON THE RANGE IMPROVEMENTS TO WHICH YOU HAVE BEEN ASSIGNED MAINTENANCE RESPONSIBILITY. YOU ARE REQUIRED TO SUBMIT A CERTIFIED ACTUAL USE REPORT BY PASTURE WITHIN 15 DAYS OF THE END OF YOUR AUTHORIZED USE PERIOD.

***IF YOUR PAYMENT IS NOT RECEIVED WITHIN 15 DAYS OF THE DUE DATE YOU WILL BE CHARGED A LATE FEE ASSESSMENT OF \$25.00 OR 10% OF THE

TITLE NUMBER: 627217314

GRAZING BILL, WHICHEVER IS GREATER, NOT TO EXCEED \$250.00. FAILURE TO MAKE PAYMENT WITHIN 30 DAYS OF THE DUE DATE MAY RESULT IN TRESPASS ACTION.

YEAR TO DATE AUTHORIZED

ALLOT	PREF	NOT	AUTHORIZED				EQU	TRAIL	TEMP
			SCHED	ACTIVE	NONUSE	FR USE			
00057	7827	3477	4350						

N292 10

NOV 22 1991

4160
(NV-240)

CERTIFIED MAIL NO. 477558764
RETURN RECEIPT REQUESTED

NOTICE OF FULL FORCE AND EFFECT FINAL MULTIPLE USE DECISION
PAIUTE MEADOWS ALLOTMENT

Dan Russell
P.O. Box 339
Folsom, CA 95630

Dear Mr. Russell:

The Record of Decision for the Paradise-Denio Environmental Impact Statement and the Management Framework Plan (Land Use Plan) was issued on July 09, 1982. These documents established the multiple use goals and objectives which guide management of the public lands on the Paiute Meadows allotment.

Monitoring has been established on the Paiute Meadows allotment to determine if existing multiple uses for the allotment are consistent with attainment of the objectives established by the Land Use Plan (LUP). Monitoring data has been collected and has been analyzed, through the allotment evaluation process, to determine progress in meeting multiple use objectives for the Paiute Meadows allotment, and to determine if changes are needed in existing management in order to meet specific multiple use objectives for this allotment.

Through the allotment evaluation process the Bureau of Land Management determined that a change in existing management is required in order to meet multiple use objectives for this allotment. Analysis of the monitoring data indicates that the existing numbers of wild horses and livestock is significantly contributing to the failure in meeting the multiple-use objectives for the Paiute Meadows Allotment. Analysis of the wildlife monitoring data does not indicate a need for a change in the existing management of wildlife. Therefore, this decision changes livestock and wild horse grazing use only and establishes the carrying capacity for livestock and wild horses that will result in a thriving natural ecological balance.

Through consultation, coordination and cooperation (CCC), comments were received and considered. As a result of evaluation conclusions and after consideration of input received through CCC, and in order to meet multiple use objectives established by the LUP, it is my decision to implement the grazing management changes on the Paiute Meadows Allotment through an agreement between the Bureau of Land Management and Daniel H. Russell dated November 22, 1991. The terms of that agreement are as follows:



- g) Improve to or maintain 15 acres of serviceberry, 82 acres of bitterbrush, 55 acres of ephedra, and 112 acres of winterfat vegetation types in good condition. [1]
- h) Improve to and maintain the water quality of Paiute, Battle and Bartlett Creeks to the State criteria set for the following beneficial uses: livestock drinking water, cold water aquatic life, wading (water contact recreation), and wildlife propagation.
- i) Improve to or maintain the 1000 acre Paiute seeding in good condition. (5-10 acres per AUM)

Footnote:

[1] Ecological status will be used to redefine/quantify these objectives where applicable.

CARRYING CAPACITY

The combined carrying capacity for livestock and wild horses shall be 4950 AUMs for the term of this agreement.

AGREED UPON CHANGES IN LIVESTOCK USE

A. From (Description of existing use)

1. Grazing Preference (AUMs)

a. Total Preference	9, 932
b. Suspended Preference	2, 105
c. Active Preference	7, 827
d. Not Scheduled (non use)	3, 477
e. Scheduled Use	4, 350

The authorized grazing use for the Paiute Meadows Allotment during 1990 and 1991 was adjusted to 4350 AUMs in conjunction with the transfer of grazing preference to Daniel H. Russell dated 01/05/90.

2. Season of Use - 05/01 to 11/05

During the 1990 transfer, the season of use was also adjusted.

3. Kind and Class of Livestock - Cattle, Cow/Calf

4. Percent Federal Range - 97%

5. Grazing System

During 1990 in conjunction with the transfer of grazing

N292 10

ALLOTMENT OBJECTIVES

The following allotment specific objectives tie the Paradise-Denio Resource Area Management Framework Plan III (Land Use Plan-LUP) and Paradise-Denio Resource Area Rangeland Program Summary (RPS) objectives together into quantified objectives for this allotment. The achievement of these objectives will be evaluated through monitoring over time.

1. Short Term

- a) Utilization of key streambank riparian plant species on Paiute, Battle and Bartlett Creeks shall average 30% on woody species over a period of time as indicated by utilization data collected at the end of the grazing period and 50% on herbaceous species as indicated by utilization data collected at the end of the growing season.
- b) Utilization of key plant species in wetland riparian habitats shall average 50% over a period of time as indicated by utilization data collected at the end of the growing season.
- c) Utilization of key plant species in upland habitats shall average 50% over a period of time as indicated by utilization data collected at the end of the growing season.
- d) Utilization of crested wheatgrass shall average 50% following completion of the Paiute Seeding fence reconstruction until such time as the seeding meets the long term objective of good condition, at which time utilization shall average 60% over a period of time as indicated by utilization data collected at the end of the growing season.

2. Long Term

- a) Manage, maintain, or improve public rangeland conditions to provide forage on a sustained yield basis for livestock, with an initial stocking level of 7,827 AUMs.
- b) Improve range condition from poor to fair on 161,158 acres and from fair to good on 15,938 acres. [1]
- c) Improve to or maintain 86 acres of ceanothus habitat types in good condition. [1]
- d) Improve to or maintain 345 acres of mahogany habitat types in good condition. [1]
- e) Improve to or maintain 188 acres of aspen habitat types in good condition. [1]
- f) Improve to or maintain 529 acres of riparian and meadow habitat types in good condition. [1]

preference to Daniel H. Russell dated 01/05/90, grazing use was authorized north of Paiute Creek with herding practices designed to control drift of livestock south of Paiute Creek. For the years 1988-1989 cattle were also turned out north of Paiute Creek, controlling drift south of Paiute Creek. Grazing use was not at full active preference during the period 1983-1990. The active preference for the allotment has been 7,827 AUMs since at least 1983. The permittee has generally turned out in the spring and gathered in the fall. During the period 1983-1990 licensed livestock cattle use has varied as follows:

1983	No use
1984	6,283 AUMs
1985	4,896 AUMs
1986	No use
1987	No use
1988	1,143 AUMs
1989	2,312 AUMs
1990	4,350 AUMs

B. To: (Description of Agreed upon Changes)

A. Livestock Use:

During the term of this agreement livestock management on the Paiute Meadows allotment will be as follows:

1. Grazing Preference Status (AUMs)

a.	Total Preference	9,932
b.	Suspended Preference	2,105
c.	Active Preference	7,827
d.	Not Scheduled (Voluntary Non-Use)	3,477
e.	Scheduled Authorized Use	4,350

2. Season of Use - 04/15 to 02/28

3. Kind and Class of Livestock - Cattle, Cow/Calf

4. Percent Federal Range - 100%

5. Grazing System

This agreement implements a deferred rotation grazing system as follows:

Year 1 and 2

North Paiute

446 Cattle	04/15 to 07/15	1348 AUMs
243 Cattle	10/16 to 02/28	<u>1088 AUMs</u>
		2436 AUMs

South Paiute

446 Cattle	07/16 to 10/15	1348 AUMs
126 Cattle	10/16 to 02/28	<u>566 AUMs</u>
		1914 AUMs

Total AUMs 4350 AUMs

Use of the Paiute Seeding will be deferred until after seedripeness during Year 1 and 2. Grazing use by livestock will be authorized in the seeding from July 15 through October 15. The utilization objective for the Paiute Seeding will be 50% of the standing crop during the first two years following reconstruction of the seeding boundary fence.

Year 3South Paiute

446 Cattle	04/15 to 07/15	1348 AUMs
126 Cattle	10/16 to 02/28	<u>566 AUMs</u>
		1914 AUMs

North Paiute

446 Cattle	07/16 to 10/15	1348 AUMs
243 Cattle	10/16 to 02/28	<u>1088 AUMs</u>
		2436 AUMs

Total AUMs 4350 AUMs

Use of the Paiute Seeding will be authorized for 04/15 to 07/15, concurrently with the South Paiute Use Area, with a utilization objective of 60% of the standing crop if the long term objective for good condition has been met. In the event it has not, the utilization objective will remain 50%.

Designated Areas of Use:

The areas of use are unfenced, with some natural barriers preventing livestock drift. To the extent that livestock drift may occur, the Bureau retains the authority to initiate trespass action if all reasonable alternatives have not been utilized to prevent the drift.

1) Winter Use Area:

This area would include all the lower foothills and lower country along the entire eastern portion of the allotment and fall below 1750 meters in elevation.

2) South Paiute Use Area:

This use area would be the southern portion of the allotment specifically from Paiute Creek south including the higher country above 1750 meters in elevation.

3) North Paiute Use Area:

This use area would be the northern portion of the allotment specifically from Paiute Creek north including the higher country above 1750 meters in elevation.

The attached map titled Paiute Meadows Allotment Use Areas outlines the livestock use areas as described above.

This distribution of authorized livestock use implements a grazing system and is not intended to constitute an assignment of the Total Grazing Preference or any part thereof to a specific area of use within the allotment. As the system may change, the distribution may change.

Terms and Conditions:

Grazing use will be in accordance with this Livestock Use Agreement.

Flexibility in turnout, movement between use areas, and removal dates will be allowed if approved in advance by BLM and if consistent with management objectives.

Salt and/or mineral blocks shall not be placed within one quarter (1/4) mile of springs, streams, meadows, riparian habitats or aspen stands.

The permittee is required to perform normal maintenance on the range improvements to which he has been assigned maintenance responsibility.

The permittee will be required to do the necessary riding to keep livestock in the proper use area during the proper time periods.

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6. Voluntary Non-Use

Voluntary Non-Use will be applied for by Daniel H. Russell to the extent of any Animal Unit Months of forage harvested annually by wild and free roaming horses in excess of 600 AUMs, based upon the post-gather census, but in no event shall such voluntary non-use application be for more than 300 AUMs.

This agreement allows Daniel H. Russell to apply for activation of the voluntary non-use in the event that forage is temporarily available.

RANGE IMPROVEMENTS

1. In order to assist the Bureau in achieving allotment specific objectives, Daniel H. Russell agrees to provide the labor for the reconstruction of the Paiute Seeding Fence in the South Paiute Use Area to be completed prior to the end of grazing year 1992. The BLM will provide the materials for the reconstruction of this fence.

2. By this agreement, Daniel H. Russell is requesting the construction of an allotment boundary fence on the west side of the allotment. The BLM agrees to complete an Environmental Assessment analyzing the proposal to construct this boundary fence by September 30, 1993. The proposed fence would essentially follow the west boundary of the East Black Rock HMA, the resource area boundary, and the allotment boundary. This fence would assist in establishing the integrity of the HMA division between the West Black Rock HMA and the East Black Rock HMA. In addition this fence will provide for control of migration of wild horses, if any, from the West Black Rock HMA into the East Black Rock HMA.

If the EA determines that no significant impact would result from the construction of the proposed fence, Daniel H. Russell agrees to work cooperatively with the Bureau in the fence design and construction. This includes an agreement to provide an amount of labor that is equitable to the interested parties. This also includes an agreement to maintain an equitable portion of the boundary fence once it is completed. Maintenance responsibilities will be assigned to affected grazing permit holders in an equitable proportion. The BLM would provide the archeological inventory; all materials in construction of the fence and additional labor. The BLM will develop a Cooperative Agreement for construction and maintenance of the proposed project. The BLM will use every option available to secure funding for the construction of the proposed project.

FUTURE MONITORING AND GRAZING ADJUSTMENTS

The Paradise-Deno Resource Area will continue to monitor the Paiute

Meadows Allotment. Daniel H. Russell will work cooperatively with the BLM in the development of a monitoring plan for the Paiute Meadows Allotment. This monitoring data will continue to be collected in the future to provide the necessary information for subsequent evaluation. These evaluations are necessary to determine if the allotment specific objectives are being met under the new grazing management strategy. In addition, these subsequent evaluations will determine if adjustments are required to meet the established allotment specific objectives.

The Paiute Meadows allotment is scheduled to be re-evaluated in 1995.

TERM/EXPIRATION OF AGREEMENT

This agreement sets forth the grazing management to be implemented on the Paiute Meadows Allotment following the adjustment of the wild horse population to the Appropriate Management Level (AML) of 50 horses or a population of horses ten (10) years of age or over, whichever is greater, within the Black Rock East HMA. In the event that this removal of horses to the adjusted AML cannot be made prior to April 15, 1992, or in the event that this removal of horses leaves a population in excess of 75 horses as determined by the BLM's post-gather census, to be conducted within one month following the gather, this agreement shall be null and void upon the express written option of Daniel H. Russell (or assignee/transferee) delivered to the BLM office in Winnemucca, Nevada, and a new agreement or decision shall then be issued to implement interim management on the Paiute Meadows Allotment.

In the event that this agreement becomes null and void, for whatever reasons, no word, number and/or phrase shall be considered an admission and/or commitment by any party to this agreement unless otherwise expressly agreed by that party.

In no event will this agreement be effective after February 28, 1995. Following the expiration date of February 28, 1995, a new agreement or decision will be issued regarding the livestock grazing management on the Paiute Meadows Allotment.

AUTHORITY: The authority for this decision is contained in Title 43 of the Code of Federal Regulations, which states in pertinent parts:

4100.0-8 "The authorized officer shall manage livestock grazing on public lands under the principle of multiple use and sustained yield, and in accordance with applicable land use plans. Land use plans shall establish allowable resource uses (either singly or in combination), related levels of production or use to be maintained, areas of use and resource condition goals and objectives to be obtained. The plans also set forth program constraints and general management practices needed to achieve management objectives. Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan as defined at 43 CFR 1601.0-5(b)".

4110.3 "The authorized officer shall periodically review the grazing

preference specified in a grazing permit or grazing lease and may make changes in the grazing preference status. These changes shall be supported by monitoring, as evidenced by rangeland studies conducted over time, unless the change is either specified in an applicable land use plan or necessary to manage, maintain or improve rangeland productivity".

4110.3-2(b) "When monitoring shows active use is causing an unacceptable level or pattern of utilization or exceeds the livestock carrying capacity as determined through monitoring, the authorized officer shall reduce active use if necessary to maintain or improve rangeland productivity, unless the authorized officer determines a change in management practices would achieve the management objectives."

4110.3-2(c) "Where active use is reduced it shall be held in suspension or in nonuse for conservation/protection purposes, until the authorized officer determines that active use may resume."

4110.3-3(c) "When the authorized officer determines that the soil, vegetation, or other resources on the public lands require temporary protection because of conditions such as drought, fire, flood, or insect infestation, after consultation with affected permittees or lessees and other affected interests, action shall be taken to close allotments or portions of allotments to grazing by any kind of livestock or to modify authorized grazing use. Notices of closure and decisions requiring modification of authorized grazing use shall be issued as final decisions which are placed in full force and effect under 4160.3(c) of this title."

4120.3-1(a) "Range improvements shall be installed, used, maintained, and/or modified on the public lands, or removed from these lands, in a manner consistent with multiple-use management."

4120.3-2 "Any person may enter into a cooperative agreement with the Bureau of Land Management for the installation, use, maintenance, and/or modification of range improvements needed to achieve management objectives. The cooperative agreements shall specify the division of costs or labor, or both, between the United States and operator(s). Title to structural or removable improvements shall be shared by the United States and operator(s) in proportion to the actual amount of the respective contribution to the initial construction. Title to nonstructural or nonremoveable improvements shall be in the United States."

4120.3-7 "The authorized officer may accept contributions of labor, material, equipment, or money for administration, protection, and improvement of the public lands necessary to achieve the objectives of this part."

4130.6 "Livestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public lands and other lands under Bureau of Land Management administration."

4130.6-1(a) "The authorized officer shall specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock carrying capacity as determined through monitoring and adjusted as necessary under 4110.3, 4110.3-1 and 4110.3-2 ".

4130.6-2 "The authorized officer may specify in grazing permits and leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to: ...

(f) Provision for livestock grazing to be temporarily delayed, discontinued or modified to allow for the reproduction, establishment, or restoration of vigor of plants, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth;"

4130.6-3 "Following careful and considered consultation, cooperation and coordination with the lessees, permittees, and other affected interests, the authorized officer may modify terms and conditions of the permit or lease if monitoring data show that present grazing use is not meeting the land use plan or management objectives."

4160.3(c) "A period of 30 days after receipt of the final decision is provided for filing of an appeal. Decisions that are appealed shall be suspended pending final action except as otherwise provided in this section. Except where grazing use the preceding year was authorized on a temporary basis under 4110.3-1(a) of this title, an applicant who was granted grazing use in the preceding year may continue at that level of authorized active use pending final action on the appeal. The authorized officer may place the final decision in full force and effect in an emergency to stop resource deterioration. Full force and effect decisions shall take effect on the date specified, regardless of an appeal."

This final decision is issued in Full Force and Effect in accordance with Title 43 CFR 4160.3(c) and is effective on December 01, 1991. This decision has been placed in Full Force and Effect due to the combined current forage demand by livestock and wild horses of 10,642 AUMs which is in excess of the calculated carrying capacity of 4950 AUMs. This over-obligation is causing damage to the vegetative resource on the Paiute Meadows Allotment.

If you wish to appeal this decision for livestock management for the purpose of a hearing before an Administrative Law Judge, in accordance with 43 CFR 4.470 you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the Area Manager, Paradise-Demo Resource Area, Bureau of Land Management, Winnemucca District, 705 E. 4th Street, Winnemucca, NV 89445. The appeal shall state the reasons, clearly and concisely as to why you think the final decision is in error.

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WILD HORSE AND BURRO MANAGEMENT DECISION

The allotment specific objectives for Wild Horses and Burros on the Paiute Meadows Allotment are:

Maintain and improve the free-roaming behavior of wild horses by protecting and enhancing their home ranges.

Manage, maintain, or improve public rangeland conditions to provide an initial level of 600 AUMs of forage on a sustained yield basis for 50 (AML) adult wild horses and maintain a thriving natural ecological balance.

Maintain and improve wild horse habitat by assuring free access to water.

It has been determined through monitoring that a thriving natural ecological balance can be obtained through an AML of 50 adult wild horses for the Black Rock Range East Herd Management Area in the Paiute Meadows allotment. All animals in excess of the AML of 50 adult wild horses will be removed from the Black Rock Range East HMA and from those areas where wild horses have moved outside of the HMA boundaries in the Paiute Meadows allotment and in the Black Rock Desert between the eastern boundary of the Paiute Meadows allotment and the Quinn River. All adult wild horses in excess of ten (10) years of age that are removed in the gather process will be returned to the Black Rock Range East Herd Management Area in accordance with Washington Office Instruction Memorandum 91-216.

RATIONALE: The analysis and evaluation of available monitoring data indicates that management actions for wild horses must be modified to meet multiple use objectives for the Paiute Meadows allotment. Current and past grazing use by wild horses is not meeting allotment objectives. In the South Paiute use area the conflict has been solely with wild horses and in the North Paiute use area it has been a combination of livestock and wild horses. The current forage demand is in excess of the identified carrying capacity of 600 AUMs for adult wild horses in the Black Rock Range East HMA. The adjustment of wild horses to 50 head of adult wild horses or 600 AUMs of forage demand and the reduction of the Active Use for livestock to 4350 AUMs will result in the achievement of a thriving natural ecological balance of the resources in the Paiute Meadows allotment as indicated by the evaluation of monitoring data. The level of 50 adult animals will maintain a viable herd which will be self sustaining.

AUTHORITY: The authority for this decision is contained in Sec. 3(a) and (b) of the Wild-Free-Roaming Horse and Burro Act (P.L. 92-195) as amended and in Title 43 of the Code of Federal Regulations, which states in pertinent parts:

4700.0-6(a) "Wild horses and burros shall be managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat."

4710.4 "Management of wild horses and burros shall be undertaken with

the objective of limiting the animals' distribution to herd areas. Management shall be at the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans."

4720.1 "Upon examination of current information and a determination by the authorized officer that an excess of wild horses or burros exists, the authorized officer shall remove the excess animals immediately..."

This final decision is issued in Full Force and Effect in accordance with Title 43 CFR 4160.3(c) and is effective on December 01, 1991. This decision has been placed in Full Force and Effect due to the combined current forage demand by livestock and wild horses of 10,642 AUMs which is in excess of the calculated carrying capacity of 4950 AUMs. This over-obligation is causing damage to the vegetative resource on the Paiute Meadows Allotment.

Within thirty (30) days of receipt of this decision for wild horse management, you have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations at 42 CFR 4.400. If an appeal is taken, you must follow the procedures outlined in the enclosed Form 1842-1, Information on Taking Appeals to the Board of Land Appeals. Within thirty (30) days after you appeal, you are required to provide a Statement of Reasons to the Board of Land Appeals and a copy to the Regional Solicitor's office listed in Item 3 on the form. In addition, a copy of the Statement of Reason will be provided to the Area Manager, Paradise-Deno Resource Area, Bureau of Land Management, 705 E. 4th Street, Winnemucca, NV 89445. The appellant has the burden of showing that the decision appealed from is in error.

WILDLIFE MANAGEMENT DECISION

The allotment specific objectives for wildlife habitat on the Paiute Meadows Allotment are:

Manage, maintain, or improve public rangeland conditions to provide forage on a sustained yield basis for big game, with an initial forage demand of 1,838 AUMs for mule deer, 307 AUMs for pronghorn, and 180 AUMs for bighorn sheep.

Improve to or maintain 2,134 acres in Black Rock DY-13, 41,678 acres in Black Rock DW-10, and 45,856 acres in Black Rock DS-6 in good or excellent mule deer habitat condition.

Improve or maintain 45,965 acres in Black Rock PS-15 in good pronghorn habitat condition. Improve to or maintain 35,274 acres in Black Rock PY-14, 2,623 acres in Leonard Creek PW-17, and 31,466 acres in Paiute Creek PW-16 in fair or good pronghorn habitat condition.

Improve to or maintain 69,949 acres in Black Rock EY-15 in good to excellent bighorn sheep habitat condition.

Improve to and maintain stream habitat conditions from 43% on Paiute Creek, 58% on Battle Creek, and 50% on Bartlett Creek to an overall optimum of 60% or above.

Streambank cover 60% or above.
Streambank stability 60% or above.
Maximum summer water temperatures below 70° F.
Sedimentation below 10%.

Protect sage grouse strutting grounds and brooding areas.
Maintain the big sagebrush sites within two miles of active strutting grounds in mid to late seral stage with a minimum of 30% shrub composition by weight.

The analysis of monitoring data indicates that the multiple-use objectives for the Paiute Meadows Allotment are not being met. The analysis of utilization and use pattern mapping determined that the wild horses were the primary factor in the non-achievement of the multiple-use objectives in the South Paiute use area and that wild horses and livestock were the primary factors inhibiting achievement of the multiple-use objectives in the North Paiute use area. Analysis of the existing management of wildlife indicates that wildlife populations in the Paiute Meadows Allotment are not significantly contributing to the failure in meeting the multiple-use objectives. Therefore, a change in the existing wildlife populations or the existing wildlife management of the Paiute Meadows Allotment is not warranted. Reasonable numbers for wildlife will remain as follows:

<u>Mule Deer</u>	<u>Pronghorn Antelope</u>	<u>Bighorn Sheep</u>
1,838 AUMs	307 AUMs	180 AUMs
		(when introduced)

Within thirty (30) days of receipt of this decision for wildlife management, you have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations at 43 CFR 4.400. If an appeal is taken, you must follow the procedures outlined in the enclosed Form 1842-1, Information on Taking Appeals to the Board of Land Appeals. Within thirty (30) days after you appeal, you are required to provide a Statement of Reasons to the Board of Land Appeals and a copy to the Regional Solicitor's office listed in Item 3 on the form. In addition, a copy of the Statement of Reason will be provided to the Area Manager, Paradise-Deno Resource Area, Bureau of Land Management, 705 E. 4th Street, Winnemucca, NV 89445. The appellant has the burden of showing that the decision appealed from is in error.

Sincerely yours,
/s/ Scott R. Billing
Area Manager
Paradise-Deno Resource Area

Attachment

January 31, 1992

BY TELEFAX: (702) 785-6602

Billy R. Templeton
Nevada State Director
Bureau of Land Management
P.O. Box 12000
Reno, Nevada 89512

re: Paiute Meadows Allotment/Black Rock
Range East HMA
Appeals of American Horse Protection
Association and The Humane Society of
the United States; Wild Horse
Organized Assistance; Nevada
Commission for the Preservation of
Wild Horses

Dear Mr. Templeton:

Thank you again for the opportunity to discuss the Paiute Meadows situation with you and Mr. Bennett while you were here for the Advisory Board meeting.

Based on our conversation, and further discussion among AHPA, the HSUS, WHOA and the Nevada Commission, our organizations are prepared to withdraw our appeals regarding the wild horse gather plan based on the points outlined below:

1. BLM will not reduce the Black Rock East herd below 200 during the gathering planned to begin in February;
2. Following the gathering, the Paiute Meadows Allotment multiple-use decisions dated November 22, 1991, will be vacated;
3. Consultation among affected interests will be undertaken regarding the Paiute Meadows Allotment/Black Rock East HMA in anticipation of a new proposed multiple-use decision. We understand that a multiple-use decision process for the Soldier Meadows/Black Rock West HMA will also begin this spring, and



Billy R. Templeton
Nevada State Director
January 31, 1992
Page 2

N29209

that planning for the two Black Rock HMAs will be coordinated, in recognition of the migration of horses between the two herd areas and other relationships.

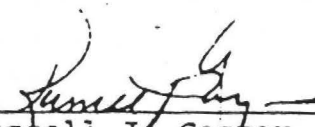
4. In the event further wild horse removals are proposed for the two herd areas, gather plans and Environmental Analyses will be prepared and issued along with the proposed multiple-use decisions.

5. Following the protest period on draft decisions, final decisions will be issued. These will be appealable administratively.

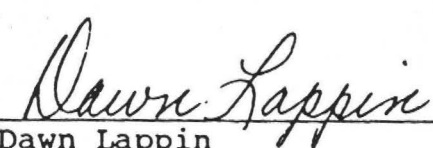
Our withdrawals relate to the pending appeal of the Wild Horse Gathering Plan, and are intended to allow a removal to go forward prior to the 1992 foaling season. We reserve our rights to appeal any other issue raised by the November 22, 1991, Multiple Use Decisions for the Paiute Meadows Allotment, or any subsequent decisions.

We hope that this letter accurately reflects the points discussed on January 30. If so, please indicate your agreement by signing below, and we will in turn forward separate letters formally withdrawing the appeals. If not, please call us.

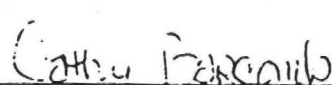
Very truly yours,



Russell J. Gaspar
Attorney for AHPA and The HSUS



Dawn Lappin
Wild Horse Organized Assistance



Cathy Barcomb
Nevada Commission for the
Preservation of Wild Horses

N29209

Billy R. Templeton
Nevada State Director
January 31, 1992
Page 3

AGREED:



Billy R. Templeton
Nevada State Director
Bureau of Land Management

Dated: 2/6/92

N292 10

4160
(NV-240)

MAY 11 1992

CERTIFIED MAIL NO. P477558725
RETURN RECEIPT REQUESTED

NOTICE OF PROPOSED DECISION
PAIUTE MEADOWS ALLOTMENT

Dan Russell
P.O. Box 339
Folsom, CA 95630

Dear Mr. Russell:

In November of 1991, the Paradise-Denio Resource Area completed a grazing evaluation of the Paiute Meadows allotment. After consultation with you and Western Range Service, you and I agreed to a Livestock Use Agreement for the Grazing Management on the Paiute Meadows allotment. The Livestock Use Agreement was implemented by a Multiple Use Grazing decision issued on November 22, 1991.

The Multiple Use decision was appealed by the Nevada Department of Wildlife, the Toiyabe Chapter of the Sierra Club, Natural Resources Defense Council, Wild Horse Organized Assistance, the Nevada Commission for the Preservation of Wild Horses, the American Horse Protection Association, Inc. and the Humane Society of the United States.

A series of meetings was held in January and February of 1992 with the appellants to discuss their points of appeal. As a result of these discussions, the American Horse Protection Association, the Humane Society of the United States, Wild Horse Organized Assistance and the Nevada Commission for the Preservation of Wild Horses agreed to withdraw their appeals regarding the wild horse gather plan based on the points outlined below:

1. BLM will not reduce the Black Rock East herd below 200 during the gathering planned to begin in February;
2. Following the gathering, the Paiute Meadows allotment multiple use decision dated November 22, 1991, will be vacated;
3. Consultation among affected interests will be undertaken regarding the Paiute Meadows allotment/Black Rock East HMA in anticipation of a new proposed multiple use decision. There is an understanding that a multiple use decision process for the Soldier Meadows/Black Rock West HMA will also begin this spring, and that planning for the two Black Rock HMAs will be coordinated in recognition of the migration of horses between the two herd areas and other relationships;

ENCLOSURE, N. I.
EXHIBIT

H

4. In the event further wild horse removals are proposed for the two herd areas, gather plans and Environmental Analysis will be prepared and issued along with the proposed multiple use decisions;
5. Following the protest period on draft decisions, final decisions will be issued. These will be appealable administratively.

The State Director, Bureau of Land Management, Nevada, agreed to these points for withdrawal. The American Horse Protection Association, the Humane Society of the United States, Wild Horse Organized Assistance, and the Nevada Commission for the Preservation of Wild Horses all withdrew their appeals for the gather of wild horses on Paiute Meadows allotment.

The Bureau of Land Management then requested to the Office of Hearings and Appeals and to the Interior Board of Land Appeals to remand the decision back to the Paradise-Denio Resource Area for further consideration.

The Paradise-Denio Resource Area received notice on March 27, 1992, from the Office of Hearings and Appeals that the appeals filed by the Nevada Department of Wildlife, Natural Resources Defense Council and the Sierra Club had been set aside and the decision remanded to the Resource Area for further consideration.

The Paradise-Denio Resource Area received notice on April 28, 1992, from the Interior Board of Land Appeals that the appeals filed by the American Horse Protection Association, the Humane Society of the United States, Wild Horse Organized Assistance, and the Nevada Commission for the Preservation of Wild Horses were dismissed in part and set aside in part and remanded along with the decision to the Resource Area for further consideration.

Therefore, it is my proposed decision to vacate the Multiple Use Decision for the Paiute Meadows allotment dated November 22, 1991. In vacating this decision, the Livestock Use Agreement signed between the permittee of the Paiute Meadows allotment and the Bureau of Land Management dated November 22, 1991, is termed null and void.

The Paradise-Denio Resource Area will keep interested parties informed of times and dates in which the other provisions of the agreement, signed by the State Director, will occur.

If you wish to protest this decision in accordance with 43 CFR 4160.2, you are allowed fifteen (15) days from receipt of this notice within which to file such protest with the Paradise-Denio Resource Area Manager, Bureau of Land Management, Winnemucca District, 705 E. 4th Street, Winnemucca, NV 89445.

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In the absence of a protest within the time allowed in accordance with 43 CFR 4160.3(a) the above proposed decision shall constitute my final decision. Should this notice become the final decision and if you wish to appeal this decision for the purpose of a hearing before an Administrative Law Judge, in accordance with 43 CFR 4160.4 and 4.470, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the Paradise-Denio Resource Area Manager, Bureau of Land Management, at the above address. An appeal should specify the reasons, clearly and concisely, as to why you think the decision is in error.

Sincerely yours,

/s/ Scott R. Billing

Area Manager
Paradise-Denio Resource Area

cc Certified copies to:

Sierra Club P477558727
Nevada Dept. of Wildlife-Fallon P477570435
Nevada Department of Wildlife-Winnemucca P477570436
Natural Resources Defense Council P477570437
Wilderness Society P477570438
U.S. Fish and Wildlife Service P477570439
Nevada Land Action Association P477570440
Craig C. Downer P477570441
Animal Protection Institute P477570442
John Marvel P477570443
Humboldt County Board of Commissioners P477570444
Nevada Commission for the Preservation of Wild Horses P477570445
Wild Horse Organized Assistance P477570446
American Horse Protection Association P477570447
Humane Society of the United States P477570448
C. Jean Richards P477570449
Thomas Van Horne P477570450
Western Range Service P477570451
Alan Schroeder, Atty at Law P477570452
Nevada Farm Bureau P477570453
William C. Cummings P477570454

B. Hopper

+130 (NV-241.4) N292 10

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Thomas S. Van Horne
708 10th Street
Suite 250
Sacramento, CA 95814

4a. Article Number
P477571439

4b. Service Type

Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
5-19-92

5. Signature (Addressee)

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, November 1990 *U.S. GPO: 1991-287-066 **DOMESTIC RETURN RECEIPT**

4100 (NV-240)

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

William C. Cummings
7700 College Town Drive
Suite 208
Sacramento, CA 95826

4a. Article Number
P477570454

4b. Service Type

Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
MAY 18 1992

5. Signature (Addressee)

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, November 1990 *U.S. GPO: 1991-287-066 **DOMESTIC RETURN RECEIPT**

4100 (NV-240)

SENDER:

- Complete items 1 and/or 2 for additional services.
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I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Mr. Doug Busse
Nevada Farm Bureau Federation
1300 Marietta Way
Sparks, NV 89431

4a. Article Number
P477570453

4b. Service Type

Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, November 1990 *U.S. GPO: 1991-287-066 **DOMESTIC RETURN RECEIPT**

4100 (NV-240)

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
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- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Mr. Alan Schroeder
P.O. Box 267
Boise, ID 83701

4a. Article Number
P477570452

4b. Service Type

Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

4100 (NV-240)

SENDER:

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- Complete items 3, and 4a & b.
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- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Mr. Al Steninger
Western Range Service
P.O. Box 1328
Elko, NV 89801

4a. Article Number
P477570451

4b. Service Type

Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
5-18

8. Addressee's Address (Only if requested and fee is paid)

SENDER.

- Complete items 1 and 2 for additional services.
- Complete items 3, a, 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
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- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

N 292 10
I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Thomas S. Van Horne
708 10th Street
Suite 250
Sacramento, CA 95814

4a. Article Number

P477570450

4b. Service Type

- Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

5-21-92

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form 3811, November 1990 U.S. GPO: 1991-287-066

DOMESTIC RETURN RECEIPT

4100 (NV-240)

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I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Ms. C. Jean Richards
1767 Fieldcrest Drive
Sparks, NV 89434

4a. Article Number

P477570449

4b. Service Type

- Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

5-19-92

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form 3811, November 1990 U.S. GPO: 1991-287-066

DOMESTIC RETURN RECEIPT

4100 (NV-240)

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I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

U.S. Humane Society
2100 "L" Street, NW
Washington, D.C. 20037

4a. Article Number

P477570448

4b. Service Type

- Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form 3811, November 1990 U.S. GPO: 1991-287-066

4100 (NV-240)

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
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- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

3. Article Addressed to:

Mrs. Dawn Lappin
Wild Horse Organ. Assist.
P.O. Box 555
Reno, NV 89505

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

4a. Article Number
P477570446

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
5-21-92

DOMESTIC RETURN RECEIPT

Form 3811, October 1990 U.S. GPO: 1990-273-861

Article Addressed to:

Ms. Cathy Barcomb
Commission for the Preservation
of Wild Horses and Burros
Steward Facility
Capitol Complex
Carson City, NV 89401

Signature (Addressee)
[Signature]

Signature (Agent)
[Signature]

4a. Article Number
P477570445

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
5-21-92

8. Addressee's Address (Only if requested and fee is paid)

If space does not permit, write "Return Receipt Requested" on the mailpiece next to article number.

Address on reverse of mailpiece only if requested

2. Restricted Delivery
Consult postmaster for fee.

4a. Article Number: **P477570441**

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: **5/11**

8. Addressee's Address (Only if requested and fee is paid)

3. Article Addressed to:
Mr. Craig C. Downer
P.O. BOX 456
Minden, NV 89423

5. Signature (Addressee): *Craig C. Downer*

6. Signature (Agent):

2. Restricted Delivery
Consult postmaster for fee.

4a. Article Number: **P477570440**

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: **MAY 18 1992**

8. Addressee's Address (Only if requested and fee is paid)

3. Article Addressed to:
Nevada Land Action Assoc.
419 Railroad Street
Elko, NV 89801

5. Signature (Addressee):

6. Signature (Agent): *Marilyn Tenney*

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

SENDER:
 • Complete items 1 and/or 2 for additional services.
 • Complete items 3, and 4a & b.
 • Print your name and address on the reverse of this form so that we can return this card to you.
 • Attach this form to the front of the mailpiece, or on the back if space does not permit.
 • Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):
 1. Addressee's Address
 2. Restricted Delivery
 Consult postmaster for fee.

3. Article Addressed to:
Humboldt County Commissioners
City-County Complex
1105 S. Bridge Street
Winnemucca, NV 89445

4a. Article Number: **P477570444**

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: **5/18/92**

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee): *[Signature]*

6. Signature (Agent): *[Signature]*

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

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 • Print your name and address on the reverse of this form so that we can return this card to you.
 • Attach this form to the front of the mailpiece, or on the back if space does not permit.
 • Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):
 1. Addressee's Address
 2. Restricted Delivery
 Consult postmaster for fee.

3. Article Addressed to:
Mr. John Marvel
State Assemblyman
P.O. Box 432
Battle Mountain, NV 89820

4a. Article Number: **P477570443**

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: **5/18/92**

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee): *[Signature]*

6. Signature (Agent): *[Signature]*

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

SENDER:
 • Complete items 1 and/or 2 for additional services.
 • Complete items 3, and 4a & b.
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 • Attach this form to the front of the mailpiece, or on the back if space does not permit.
 • Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):
 1. Addressee's Address
 2. Restricted Delivery
 Consult postmaster for fee.

3. Article Addressed to:
Animal Protection Inst. of America
P.O. Box 22505
Sacramento, CA 95822

4a. Article Number: **P477570442**

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: **5/18/92**

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee): *[Signature]*

6. Signature (Agent): *[Signature]*

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

292 70

EST. STA. PARK CA 95801

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

2. Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Ms. Rose Strickland
Sierra Club-Toiyabe Chapter
619 Robinson Ct.
Reno, NV 89503

4a. Article Number: P477558727

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: 5-20-92

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

DOMESTIC RETURN RECEIPT

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

2. Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Mr. Richard Heap
Department of Wildlife
State of Nevada
380 B Street
Fallon, NV 89406

4a. Article Number: P477570435

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: 5-19-92

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

DOMESTIC RETURN RECEIPT

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

2. Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Mr. Dave Harlow
U.S. Dept. of the Interior
Fish and Wildlife Service
4600 Kletzke Lane, Bldg. C
Reno, NV 89502

4a. Article Number: P477570439

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

2. Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Joan Reiss
The Wilderness Society
116 New Montgomery #526
San Francisco, CA 94105

4a. Article Number: P477570438

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery: 5-19-92

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

2. Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Ms. Nancy Whitaker
Animal Protection Institute of America
P.O. Box 22505
Sacramento, CA 95822

4a. Article Number: P477570434

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form 3811, October 1990 *U.S. GPO: 1990-273-861

DOMESTIC RETURN RECEIPT

1206
N8922100

I also wish to receive the following services (for an extra fee):

1. Addressee's Address

2. Restricted Delivery

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I also wish to receive the following services (for an extra fee):

1. Addressee's Address

2. Restricted Delivery

Consult postmaster for fee.

I also wish to receive the following services (for an extra fee):

1. Addressee's Address

2. Restricted Delivery

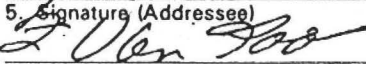
Consult postmaster for fee.

N292

- Complete items 3, and 4a & b
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
 - Restricted Delivery
- Consult postmaster for fee.

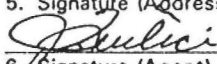
3. Article Addressed to: Dan Russell P.O. Box 339 Folsom, CA 95630	4a. Article Number P477558725
5. Signature (Addressee) 	4b. Service Type <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise
6. Signature (Agent)	7. Date of Delivery 5-18-92
	8. Addressee's Address (Only if requested and fee is paid)

4150 (NY-240)

- SENDER:**
- Complete items 1 and/or 2 for additional services.
 - Complete items 3, and 4a & b.
 - Print your name and address on the reverse of this form so that we can return this card to you.
 - Attach this form to the front of the mailpiece, or on the back if space does not permit.
 - Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
 - Restricted Delivery
- Consult postmaster for fee.

3. Article Addressed to: Nevada Department of Wildlife City/County Complex Winnemucca, NV 89445	4a. Article Number P477570436
5. Signature (Addressee) 	4b. Service Type <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise
6. Signature (Agent)	7. Date of Delivery 5-18-92
	8. Addressee's Address (Only if requested and fee is paid)

07/31/92 15:34

P02

GRAZING SCHEDULE

FOR BLM USE ONLY

Name (last, first, middle initial)

Russell, DAN

Address (include street, city, State, and zip code)

PAUTE MONTANA RANCH
c/o 2941 B GOLD CANAL DR
RANCHO CORDOVA, CA. 95670

State	
Office	
Operator No.	
Schedule No.	
Billing Code	
Special Bill Code	

I hereby apply for the following grazing use on the public lands and/or other lands administered by the Bureau of Land Management

(1) LINE NO.	(2) ALLOTMENT		(3) PAS- TURE NO.	(4) LIVESTOCK		(6) PERIOD		(7) % PL USE	(8) T U	(9) AUM'S	(10) TYPE LAND
	NAME	NO.		NUMBER	KIND	BEGIN	END				
	PAUTE MONTANA										
	North Paute use area high elevation area			1250	C	08/01/92	08/14/92	100	A	115	
	South Paute use area high elevation			300	C	08/01/92	10/31/92	100	A	907	
	North Paute use area low elevation										
	N/Elephant area of Paute use area west of beard creek head north land battle creek			250	C	11/01/92	02/28/92	100	A	986	
	low use			70	C	08/01/92	11/05/92	100	A	224	

Show your recorded brands, earmarks, and wangles *no use taken for this season only due to excessive number of wild horses and present conditions of particular magnitude.*

Show reason for nonuse, if requested: conservation and protection of the public lands; annual fluctuation of livestock operations; financial or other reasons beyond control of the operator; or livestock disease or quarantine.

Signature *DAN RUSSELL* Date *8-31-92*

Reason for nonuse: Approved Disapproved (Decision Required) Signature of Authorized Officer *Jott Bell* Date *8-31-92*

Title 18, U.S.C., Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States an false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

(See terms and conditions on the reverse hereof)

RECEIVED
JUL 31 1992

DISTRICT OFFICE
WINNEMUCCA, NEVADA

EXHIBIT
I

Palute Meadows

2. Change Season-of-Use

Alternative a. Grazing use within the Palute Meadows Allotment will be changed to eliminate use during the hot season. The season-of-use will be 11/01-06/01 each year. Livestock will be removed from the public lands for the period 08/02-10/30 each year. Grazing use will occur over the allotment with stocking levels not exceeding stocking rates for the north Palute and south Palute use areas. This season-of use will allow complete rest during the summer period and allow for a regrowth period for riparian vegetation.

Alternative b. Change the season-of-use to summer-fall-winter and implement a Deferred Rest Grazing System. The season-of-use will be 05/01-03/15 each year. Livestock will be removed from the public lands during the spring period (03/15-05/01). Stocking levels will not exceed stocking rates for the north Palute and south Palute use areas.

The objective of the deferred rest grazing system would be to reduce grazing pressure during the summer period. This grazing system will reduce grazing pressure for two consecutive years north of Palute Creek and one year south of Palute Creek. Under the Deferred Rest Grazing System, the Palute Meadows Allotment would be divided into three use areas. The use areas would be:

- 1) Winter Use Area: This area would include all the lower foothills and lower country along the entire eastern portion of the allotment.
- 2) South Palute Use Area: This use area would be the southern portion of the allotment specifically from Palute Creek south including the higher country and foothills not used for winter use.
- 3) North Palute Use Area: This use area would be the northern portion of the allotment specifically from Palute Creek north including the higher country and foothills not used for winter use.

The following grazing system would be implemented



Paiute Meadows

November 22, 1991

and Bartlett Creeks to the State criteria set for the following beneficial uses: livestock drinking water, cold water aquatic life, wading (water contact recreation), and wildlife propagation.

Improve to or maintain the 1000 acre Paiute seeding in good condition. (5-10 acres per AUM)

Footnotes:

- [1] The utilization levels will be used to evaluate and adjust management practices over a period of time.
- [2] Ecological status will be used to redefine/quantify these objectives where applicable.

IX. Rationale

Current and past grazing use by livestock and wild horses is not meeting allotment objectives. In the South Paiute use area the conflict has been solely with wild horses and in the North Paiute use area it has been a combination of livestock and wild horses. Monitoring data does not indicate a negative impact from current populations of wildlife.

Through the allotment evaluation process, the BLM, using available monitoring data, calculated an allotment carrying capacity of 3942 AUMs. During the review of the allotment evaluation, Western Range Service (WRS), a range consulting service for the permittee, submitted to the BLM their calculation for carrying capacity based on the interpretation of their monitoring data. Their calculation of carrying capacity ranged from 5000 to 7000 AUMs.

In a subsequent consultation meeting between the BLM and WRS (11/12/1991) discussion centered on the methods for calculating the carrying capacity.

WRS indicated that the BLM method of calculation was producing a conservative estimate of carrying capacity because the calculation had partially been based on the 1987 and 1988 data which only showed wild horse use in one use area of the allotment. WRS also indicated that the BLM method only addressed reducing the heavy and severe use areas to moderate use and did not account for forage that would be available in the areas of light and slight use that would be used with the implementation of the proposed grazing system.

In our analysis of the WRS methods for calculating the carrying capacity, we note that they have used a straight average of the utilization levels at specific locations throughout the North and South use areas of the allotment and have not taken into consideration the

actual proportion of acreage that each utilization zone represents. It also appears that they have not taken into consideration areas that may not be accessible to livestock.

Both methods used for calculating the carrying capacity have merit.

If the permittee's scheduled use is maintained at 4350 AUMs and the wild horse use is maintained at 600 AUMs, this reduces the actual demand for forage from 10,642 AUMs to 4950 AUMs which is a 53.5% reduction in actual use. The 4950 AUMs also approaches an average of our calculated carrying capacity and that of WRS.

In making a final determination of carrying capacity for this allotment, a review of the climatological data and personal interview with permittees adjacent to the Paiute Meadows allotment indicates that rainfall during the growing season of the past several years has been less than average. This has probably contributed to some of the heavy and severe use that has been detected during our monitoring studies.

Also of consideration in the determination of the carrying capacity is the implementation of the grazing system which requires the permittee to ride and move the livestock from one use area to another instead of turning the livestock out for season long use in the same area (North Paiute). The implementation of the grazing system to provide better distribution will reduce the heavy and severe use and improve distribution throughout the allotment and meet management objectives.

After reviewing the information, I conclude that the BLM calculations will produce a conservative estimate of the carrying capacity and that the WRS calculations would produce a maximum carrying capacity that may not be compatible with the meeting of our specific allotment objectives.

Therefore, I am selecting 4950 AUMs as the carrying capacity to achieve a thriving, natural ecological balance for the vegetative resource on the Paiute Meadows allotment. The use on the allotment will be monitored and another evaluation of monitoring will be completed after the 1994 grazing season.

The 600 AUMs of wild horse use is based on Alternative 1 of the technical recommendations which bases the level of livestock and wild horse use on the proportions established in the Land Use Plan. The LUP proportion of 92% livestock use and 8% wild horse use would equate to the following use:

$$\begin{aligned} 4950 \times .92 &= 4554 \text{ AUMs for livestock} \\ 4950 \times .08 &= 396 \text{ AUMs for wild horses} \end{aligned}$$

The 396 AUMs for horse use would allow for a year-round population of 33 wild horses. Reducing the herd size below 50 adult animals may jeopardize the genetic viability of the herd; therefore wild horse numbers will be adjusted to 50 adult animals using 600 AUMs of forage.

9:00A
TJA



United States Department of the Interior

OFFICE OF THE SOLICITOR
SUITE 6201, FEDERAL BUILDING
125 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84138

FAX TRANSMITTAL SHEET

Fax Number: Local: 524-4506
Long Distance: (801) 524-4506
Verification Number: (801) 524-5677

TO: C. Wayne Howle FAX NUMBER: _____
TO: Gene Stanley Miles FAX NUMBER: _____
TO: Daniel Rudnick FAX NUMBER: _____
Dawn Sapper
FROM: John Steiger

NUMBER OF PAGES INCLUDING COVER: 3le DATE: 1/6/98

MESSAGE: _____

RESPONDENT'S RESPONSE BRIEF IN SUPPORT
OF SUMMARY JUDGMENT

The Bureau of Land Management (BLM), through the undersigned counsel, hereby submits its response brief in support of summary judgment in the above-captioned matter. By orders dated October 7 and November 21, 1997,¹ this tribunal directed that this matter be resolved through summary judgment and established a briefing schedule. In accordance with the briefing schedule, the Commission for the Preservation of Wild Horses (Commission) and Wild Horse Organized Assistance (WHOA) (collectively, "Appellants"), and the Eureka County Board of County Commissioners (County) and Michel and Margaret Etcheverry (Etcheverrys) (collectively, "Intervenors") have submitted opening briefs. Herein is the BLM's response. For the following reasons, the BLM respectfully requests that its decision be affirmed.

I. Statement of the Case

A. The dockets and parties before this tribunal

As an initial matter, with the exception of the County's brief, the captions of the Appellants' and Intervenors' briefs indicate some confusion in the dockets and parties to the appeals properly before this tribunal. Originally, by letter dated September 5, 1997, this tribunal set a hearing date for all appeals from the Area Manager's Final Multiple Use Decision (FMUD) for the Roberts Mountain Allotment and the FMUD for the Three Bars Allotment. Based on a number of motions and pre-hearing teleconferences, this tribunal

¹ The November 21st order was issued under the caption, Eureka Livestock Co. v. BLM, N6-95-01, IBLA 95-179.

ordered all dockets dismissed except Nos. N6-95-5, N6-95-8, IBLA 95-168, and IBLA 95-169, all of which deal solely with the Roberts Mountain FMUD.² These latter four dockets are the only appeals now pending before this tribunal.³

The confusion with respect to the proper parties to these appeals stems from the caption of and introduction to the Etcheverrys' "Intervenor-Appellants Joinder," in which the Etcheverrys claim that they represent Eureka Livestock Company and are successors-in-interest to Eureka Livestock Company.⁴ This claim is contrary to the record. Eureka Livestock Company, through its principal Filbert Etcheverry, settled its appeal of the Roberts Mountain FMUD and it was dismissed. Eureka Livestock Co. v. BLM, N6-95-01, IBLA 95-179, Motion for Dismissal Granted (Oct. 2, 1997) (hereafter "Oct. 2, 1997, Order"). Indeed, this tribunal explicitly found that the Etcheverrys are "not parties to [the Company's] appeal," because, among other things, "nothing in the administrative record" indicates they

² See Eureka Livestock Co. v. BLM, N6-95-01, IBLA 95-179, Motion for Dismissal Granted (Oct. 2, 1997); Eureka County Board of County Commissioners v. BLM, N6-95-03, N6-95-11, IBLA 95-181, 95-234, etc., Public Hearing Canceled, Dismissal of Eureka County Appeals, etc. (Oct. 22, 1997); Eureka Livestock Co. v. BLM, N6-95-01, IBLA 95-179, Motion for Reconsideration of Order Granting Motion for Dismissal Denied, etc. (Nov. 21, 1997).

³ The record indicates other BLM-assigned docket numbers associated with the Roberts Mountain and Three Bars FMUD appeals that have been superseded by IBLA docket numbers and therefore do not represent separate appeals. These numbers are N6-95-6 (Commission-Roberts Mountain; IBLA 95-168 (pending)), N6-95-7 (WHOA-Roberts Mountain; IBLA 95-169 (pending)), N6-95-12 (County-Three Bars; IBLA 95-234 (dismissed)), and N6-95-04 (County-Roberts Mountain; IBLA 95-181 (dismissed)).

⁴ The discussion in the text should not be construed as the BLM's concession that the Etcheverrys have standing to participate in this appeal as a party. However, because the Etcheverrys have simply endorsed the County's arguments and raise none of their own, the BLM does not press the standing issue at this time.

are successors to Eureka Livestock Company. Eureka Livestock Co. v. BLM, N6-95-01, IBLA 95-179, Motion for Reconsideration of Order Granting Motion for Dismissal Denied, etc. (Nov. 21, 1997) (hereafter "Nov. 21, 1997, Order"). The Etcheverrys have made no attempt to challenge this finding. Therefore, the Eureka Livestock Company is not a party to this appeal and the Etcheverrys have not intervened in any capacity related to Eureka Livestock Company.

B. The issue and record before this tribunal

As set forth by this tribunal, the sole issue of these appeals is

whether the BLM's methodology to calculate carrying capacity to establish the appropriate management level for the Roberts Mountain Herd Management Area, as set forth in the Final Multiple Use Decision for the Roberts Mountain Allotment, is arbitrary and capricious or not in accordance with law.

Commission for the Preservation of Wild Horses v. BLM, N6-95-5, etc., Order at 2 (Oct. 7, 1997) (hereafter "Oct. 7, 1997, Order"). The Appellants have stipulated that there are no issues of material fact and the Intervenors are precluded from raising issues of material fact. Id. at 2; Eureka County Board of County Commissioners v. BLM, N6-95-03, N6-95-11, IBLA 95-181, 95-234, etc., Public Hearing Canceled, Dismissal of Eureka County Appeals, etc., at 7 (Oct. 22, 1997) (hereafter "Oct. 22, 1997, Order"); Nov. 21, 1997, Order at 2.

With respect to the record, the parties have stipulated that the administrative record prepared for the Interior Board of Land Appeals and remanded to this tribunal constitutes the record for review,⁵ as supplemented by any affidavits the parties submit to the extent they

⁵ This consists of the two records prepared for the Commission's and WHOA's appeals to the Board. These records are essentially identical, except for correspondence

are within the scope of the issue framed above and do not raise material issues of fact. Oct. 22, 1997, Order at 7; see Nov. 21, 1997, Order at 2-3. To date, of the other parties, only the County has submitted affidavits, one from John Balliette and another from J. Wayne Burkhardt. With this pleading, the BLM is submitting the affidavit of W. Craig MacKinnon, the current BLM Rangeland Management Specialist assigned the oversight of the Roberts Mountain Allotment.⁶

The Appellants and County (joined by the Etcheverrys) refer to a number of documents not in the stipulated record. In addition, both the Balliette and Burkhardt affidavits include "exhibits" of various documents. The BLM believes that some of these documents are relevant to the issue on appeal, and, during the course of the following discussion, will move to supplement the record with those documents.⁷ With respect to those documents that the BLM does not seek to admit, the BLM hereby moves to strike the parties' references to and inclusion of documents not in the stipulated record as irrelevant or immaterial to the narrow issue before this tribunal. See 43 C.F.R. § 4.475(c).

received from the Commission and WHOA and various references to the Commission or WHOA in BLM memoranda related to their protests and appeals. Where this pleading cites to the record, it will state the name of the document and indicate the BLM-affixed tab to the document in the record compiled for the Commission's appeal (e.g., "tab 1" refers to tab 1 of the Commission's appeal record).

⁶ Citations to affidavits will use only the affiant's last name (e.g., "MacKinnon at 1").

⁷ Those documents and their corresponding exhibit (Ex.) numbers are (1) "Rangeland Monitoring Analysis, Interpretation, and Evaluation," Technical Reference 4400-7 (Nov. 1985) (Ex. R-1) (see infra footnote 10); (2) Shoshone-Eureka Rangeland Program Summary (Dec. 1988) (Ex. R-2) (see infra footnote 11); (3) Nevada Rangeland Monitoring Handbook (Sept. 1984) (Ex. R-3) (see infra footnote 17); and (4) Rangeland Monitoring Utilization Studies, Technical Reference 4400-3 (Sept. 1984) (Ex. R-4) (see infra footnote 18).

C. Statement of facts

1. Methodology used to establish carrying capacity

The carrying capacity used to establish the appropriate management level (AML) for the Roberts Mountain Allotment portion of the Roberts Mountain Herd Management Area (HMA) was determined by calculating potential stocking level (PSL).⁸ MacKinnon, p.2, ¶5; see Roberts Mountain Allotment Final Evaluation, June 1994 (hereafter "AFE") (tab 7), pp.21-22.⁹ The methodology used by the BLM to determine PSL was taken from and is consistent with the BLM's technical reference, Rangeland Monitoring, Analysis, Interpretation, and Evaluation, Technical Reference 4400-7 (Nov. 1985) (hereafter "Technical Reference (or TR) 4400 7") (attached as exhibit R-1).¹⁰ MacKinnon, p.2, ¶5. Technical Reference 4400-7 is the primary guidance used by the BLM for rangeland monitoring, analysis, interpretation, and evaluation. Id.

⁸ The Roberts Mountain Allotment comprises 64.6% of the HMA. Roberts Mountain Allotment Final Evaluation, June 1994 (hereafter "AFE") (tab 7), p.5.

⁹ For a chronology of events leading up to issuance of the FMLUD, see Memorandum from District Manager, Battle Mountain, to State Director, re "Report of Appeal No. N6-95-5 [etc.]," pp.1-2 (Dec. 15, 1994) (tab 1). For a description of the setting and general environmental characteristics of the Roberts Mountain Allotment, see AFE (tab. 7), pp.3-7.

¹⁰ The BLM hereby moves for the admission of exhibit R-1. Both Appellants and Intervenor's cite this publication as authority. See Commission for the Preservation of Wild Horses' Motion for Summary Judgment (Comm. Opening Br.) at 3 n.1; Intervenor's Opening Brief (Co. Opening Br.), Balliette Aff., p.4, l.45, p.5, l.1-2, p.6, l.3-15; see also WHOA's Opening Brief (WHOA Opening Br.) at 1 (concurring in Commission's brief); Intervenor-Appellant's Joinder (Etcheverry's Joinder) (joining County's brief). Consequently, there should be no objection to the admission of exhibit R-1.

Potential stocking level was determined by calculating the "potential actual use" from the following formula:

$$\frac{\text{Actual use}}{\text{Weighted average utilization}} = \frac{\text{Potential Actual Use}}{\text{Desired average utilization}}$$

AFE (tab 7), pp.21-22; see TR 4400-7 (Ex. R-1), p.55. The methodology used to determine actual use, weighted average utilization, and desired average utilization was as follows:

Actual use. The BLM determined actual use by averaging the actual use by livestock, wild horses, and wildlife for the years 1987, 1989, and 1990. AFE (tab 7), pp.21-22.

Livestock use was determined based on actual use reports filed by the permittee.

MacKinnon, p.3, ¶6; see AFE (tab 7), pp.8-9. Wild horse use was estimated from aerial censuses conducted in 1978, 1982, 1985, 1987, 1989, and 1990. AFE (tab 7), pp.9-10 and App. C. The only wildlife of significance using key browse species are deer, so the BLM primarily used deer to establish wildlife use. MacKinnon, p.3, ¶6; see also AFE (tab 7), App. E. Since no current census data for deer were available, BLM biologists estimated deer population and season-of-use in consultation with the Nevada Division of Wildlife (NDOW), and this was used to determine the "actual use" of wildlife. MacKinnon, p.3, ¶6; see AFE (tab 7), p.9 and Map B.

Weighted average utilization. To determine weighted average utilization, the BLM used "use pattern mapping" to determine the areas of various utilization classes on the allotment, namely, light (0-40%), moderate (41-60%), and heavy (61-100%). AFE (tab 7), Maps G-J; see id., pp.13-14. Use pattern maps were compiled in 1987, 1989, and 1990, the same years that actual use data was compiled. AFE (tab 7), p.14. Once the BLM calculated acreages for each utilization class, it averaged the moderate and heavy classes to get a

weighted average utilization of 59%. Id., App. D. The BLM did not include the light utilization class in the calculations because the areas falling into the light utilization class have one or more of three physical attributes that discourage or make the area unsuitable for livestock grazing. MacKinnon, p.3, ¶7. These attributes are slopes greater than 50%, locations greater than two miles from water, and unsuitability of the vegetation for sustainable grazing. Id., pp.3-4, ¶7.

Desired average utilization. The BLM established desired average utilization based on the land-use objectives for the Roberts Mountain Allotment set forth in the Shoshone-Eureka Rangeland Program Summary (Dec. 1988) (RPS) (attached as exhibit R-2).¹¹ MacKinnon, p.4, ¶8. Those objectives are as follows: Utilization not to exceed 50% on key species by seed dissemination, and 60% by the end of the grazing year; utilization of riparian habitat not to exceed 30% on streambanks to be improved for aquatic habitat, or exceed 50% on other riparian habitat to be improved; and utilization of key browse species not to exceed 50% in terrestrial big game habitat areas. AFE (tab 7), pp.4-6. The BLM decided that a desired average utilization of 50% would best meet these objectives. MacKinnon, pp.4-5, ¶8. The BLM decided not to use 30%, which was the desired utilization on streambanks to be improved for aquatic habitat, as the desired utilization for the whole allotment because these areas represent less than one percent of the allotment, and

¹¹ The BLM hereby moves for admission of exhibit R-2. The Appellants allege that the BLM's methodology violates "land use plans" (Comm. Opening Br. at 9; see WHOA Opening Br. at 1 (concurring)), which include the RPS. Intervenors explicitly rely on the RPS as authority. Co. Opening Br., Balliette Aff., p.4, l.7, p.6, l.39, p.7, l.2-5, p.8, l.6-7, Burkhardt Aff., p.4, l.6-7; see Etcheverry's Joinder (joining County). Consequently, there should be no objection to the admission of exhibit R-2.

the BLM chose to limit the utilization on those areas through various livestock management strategies. Id., p.4, ¶8. The BLM decided not to use 60%, which was the maximum utilization at the end of the grazing year, because the use of 60% could allow grazing to exceed the objective of 50% utilization prior to seed dissemination. Id.

Using actual use, weighted average utilization, and desired average utilization for the years 1987, 1989, and 1990, the BLM then calculated the PSL for each of those years. AFE (tab 7), pp.21-22. The PSL for each year was subsequently averaged to establish the "average carrying capacity" of the allotment at 11,958 AUMs. Id., p.22.

2. Allocation of carrying capacity to establish AML

The BLM next allocated these AUMs to livestock, wild horses, and wildlife. The BLM first calculated the proportion of livestock, wild horse, and wildlife use based on the permittee's active preference for livestock and the average actual use by wild horses and wildlife for 1987, 1989, and 1990. Id. This proportion (80.4% livestock, 10.9% wild horses, 8.7% wildlife) was then applied to the PSL of 11,958 AUMs to calculate the adjustments to each category that would be necessary to match the PSL. Id. This calculation indicated that PSL could be achieved by the following reductions in AUMs from average actual use: 3261 for livestock, 442 for wild horses, and 353 for wildlife. Id. Because there is no data indicating that wildlife (i.e., deer) contribute to the overuse on key browse species, the BLM determined that the needed reduction in wildlife AUMs should come from livestock. Id., p.23. For wild horses, the BLM subtracted the needed reduction of 442 AUMs from the average actual use of 1,228 AUMs to establish the AML for the Roberts Mountain Allotment at 1,106 AUMs, or 92 horses. Id., p.22; FMUD (tab 2), p.14.

II. Argument

The BLM first addresses the issues raised by the Appellants. Since WHOA essentially repeats the Commission's arguments, both Appellant's arguments are addressed seriatim as presented in the Commission's opening brief. The BLM next address the issues raised by the Intervenors. The Intervenors' arguments are addressed seriatim as presented in the County's opening brief.

A. The Appellants' arguments are unpersuasive

1. The BLM reasonably used the heavy and moderate utilization classes to determine weighted average utilization

The Appellants first argue that the BLM should not have averaged the heavy and moderate utilization classes to determine weighted average utilization.¹² Commission for the Preservation of Wild Horses' Motion for Summary Judgment (Comm. Opening Br.) at 4; WHOA's Opening Brief (WHOA Opening Br.) at 2. They claim that this is an error because it "conceals the heavy use of streambank riparian habitat by dilution with upland utilization" and that the appropriate approach would use only the heavy utilization class to determine actual utilization. Comm. Opening Br. at 4. This argument overlooks the fact that livestock significantly graze the moderate utilization areas, as indicated by the use pattern maps (AFE (tab 7), Maps G-J). In short, the Appellants' theory would have the BLM pretend that no grazing occurs or will occur in the moderate utilization area.

¹² Although the Appellants assert that the BLM should have used 30% rather than 50% for desired average utilization, the Appellants have expressly stated that they do not challenge the use of 50% in this appeal. Comm. Opening Br. at 4. Consequently, the BLM does not address this issue.

Perhaps more importantly, the FMUD imposes a rigorous livestock management scheme intended to more evenly distribute livestock in the areas that are being used. This scheme includes herding requirements, the implementation of a rest-rotation grazing system, and the construction of water facilities and fences to force the desired livestock distribution. FMUD (tab 2), pp.10-12; see AFE (tab 7), pp.23-25. The Appellants' argument assumes that this livestock management scheme will be completely ineffectual. This is contrary to the BLM's experience (see MacKinnon, p.5, ¶9), but in any case is simply speculation. Consequently, the Appellants' argument boils down to a mere disagreement with the BLM's choice of strategies to reduce grazing in the heavy utilization areas, and as such must be rejected. The Office of Hearings and Appeals will not "overturn a BLM decision if the appellant merely presents some other course of action which may be theoretically as correct as that chosen by BLM." Animal Protection Institute of America, 118 IBLA 63, 76 (1991).

2. The BLM reasonably included wildlife in the calculation of actual use

The Appellants next argue that the BLM should not have included wildlife use in the calculation of actual use because "[u]se by wildlife is not measurable" and "wildlife use is not set, determined, or licensed by BLM." Comm. Opening Br. at 5; see WHOA Opening Br. at 2. The Appellants claim that this inflates the number of AUMs available on the allotment. Comm. Opening Br. at 5. This argument is without merit.

The Appellants cannot seriously dispute that there are deer on the allotment and that they do consume some of the forage, albeit not substantial, that would otherwise be available

to livestock and wild horses.¹³ Arguing otherwise would be inconsistent with the record. See AFE (tab 7), p.9, Map B, App. E. And although a wildlife (i.e., deer) census was not conducted, the BLM in consultation with NDOW biologists estimated population size and season-of-use. The Appellants provide no rationale or evidence undermining this approach. It is well-established that the Secretary, acting through the BLM, is "is entitled to rely upon his technical experts; absent a showing of error by a preponderance of the evidence, a mere difference of opinion will not overcome the reasoned opinions of the Secretary's technical staff." Susan J. Doyle et al., 138 IBLA 324, 327 (1997), citing Bill Armstrong, 131 IBLA 349, 351 (1994).

Finally, the Appellants' allegation that the BLM has no responsibility for wildlife is wrong. Wildlife expressly falls within the ambit of the BLM's mission in the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. §§ 1701 et seq.) to manage the public lands for multiple uses (id. §§ 1701(7), 1702(c) (definition of "multiple use," 1712(c)(1)). See also id. § 1701(8) (public lands are to be managed in a manner "that will provide food and habitat for fish and wildlife"). Indeed, the RPS specifies wildlife objectives that the BLM is obligated to work toward. RPS (Ex. R-2), p.2. Therefore, the Appellants' contention that wildlife AUMs were improperly included in the actual use calculation must be rejected.

¹³ It should be noted that the effect of including wildlife in calculating actual use did not result in any decrease of forage available for wild horses. The BLM determined that the reduction needed in wildlife AUMs to reach the carrying capacity of the allotment (i.e., PSL) should come from livestock. See AFE (tab 7), p.23.

3. The BLM reasonably allocated carrying capacity between livestock and wild horses

The Appellants' final argument is that the BLM erred in allocating the carrying capacity of the allotment, as determined by the PSL formula, because it used the permittee's active grazing preference rather than actual use in determining the proportionate reductions of livestock and wild horses needed to achieve carrying capacity. Comm. Opening Br. at 5-6; WHOA Opening Br. at 2. This argument overlooks the BLM's lack of authority to reduce a permittee's active preference (or, under the current grazing regulations, "permitted use"), unless monitoring data or a catastrophic event such as fire warrants otherwise. See 43 C.F.R. Subpart 4110.3. Without more, the mere fact that a permittee was not using his or her full active preference provides no basis for the BLM to reduce the permitted use to the number of livestock the permittee has chosen to run. If this were the case, permittees would be compelled to always use their full active preference to avoid losing it -- a situation that would not only be onerous for permittees but may also be detrimental to range resources, including wild horses.

In sum, the Appellants fail to carry their burden of proof to demonstrate that there is no rational basis to the BLM's determination of carrying capacity and the necessary reductions to reach it. See, e.g., Wayne D. Klump v. BLM, 124 IBLA 176, 182 (1992). Consequently, the BLM's decision should be affirmed.¹⁴

¹⁴ The Hearings Division has previously upheld the methodology at issue here from virtually the same challenges raised by the Appellants, among others, to the Buffalo Hills Allotment FMUD (see Nevada Division of Wildlife et al. v. BLM, N2-93-14, IBLA 93-460, etc., Decision at 9-10 (Nov. 22, 1995) (Ramon Child, ALJ). This decision is on appeal to the Board. Nevada Division of Wildlife (NDOW), and Nevada Commission for the Preservation of Wild Horses v. BLM, IBLA 96-___).

B. The Intervenor's arguments exceed the scope of the issue before this tribunal or are unpersuasive

As a general, threshold matter, the BLM objects to the majority of the County's arguments as outside the scope of the issue framed by this tribunal. This is especially troubling given the questionable standing of the County to participate in these appeals, which the BLM continues to maintain does not exist.¹⁵ Rather than discussing the appropriateness of the methodology used by the BLM to establish carrying capacity, the County's "Overview" demonstrates its attempt to raise factual issues about the data used (it is "[o]ld, inconsistent and inadequate" (Intervenor's Opening Brief (Co. Opening Br.) at 3)); legal issues about consistency with land use plans (the FMUD does not follow "objectives in the RMP/RPS" (*id.*)); and allegations of impropriety (the FMUD was "biased to support predetermined conclusions" (*id.*)). Rather than a focussed discussion of the merits of the BLM's methodology, the County alleges "numerous deficiencies of science and fact in the FMUD" (*id.*), primarily by relying on far-ranging and often insulting affidavits that have little to do with the narrow issue on appeal. The BLM will attempt to sort the wheat from the chaff, but to the extent it does not address one of the County's allegations, the BLM moves this tribunal to strike it as irrelevant and immaterial. See 43 C.F.R. § 4.475(c).

1. The assertion that the FMUD is invalid because of the lack of trend and condition data is irrelevant and, in any event, without merit

The County first argues that the lack of trend and condition data in the FMUD is a

¹⁵ See the BLM's Motion for Dismissal and Reply to Appellant's Opposition to Motion for Dismissal and Respondent's Opposition to Motion to Intervene filed in Eureka County Board of County Commissioners v. BLM, N6-95-03, N6-95-11, IBLA 95-181, IBLA 95-234.

major flaw and invalidates the AFE and FMUD. Co. Opening Br. at 4. Nowhere does the County explain how the lack of trend and condition data invalidates the carrying capacity (i.e., PSL) calculations that the BLM used in determining the AML. Consequently, this allegation appears irrelevant.

To be sure, trend and condition data are important in determining whether, over the long run, management actions are meeting management objectives.¹⁶ See TR 4400-7 (Ex. R-1), p.19. This, however, does not undermine the methodology the BLM used in determining carrying capacity. See MacKinnon, p.5, ¶10. Indeed, Technical Reference 4400-7 expressly recognizes that trend data is not necessary to establish stocking level in the short term. TR 4400-7 (Ex. R-1), p.33; see also id., p.6 (distinguishing data needed for short term vs. long term situations). One of the County's affiants, Mr. Balliette, argues that the lack of trend and condition data violate the RPS and the Nevada Rangeland Monitoring Handbook. Balliette, p.6, 1.29-40; see also Burkhardt, p.4, 1.3-8. This argument is meritless. Nowhere in the RPS (Ex. R-2) and Nevada Rangeland Monitoring Handbook (Sept. 1984) (Handbook) (attached as Ex. R-3)¹⁷ does it say that the BLM must use trend and condition data to establish carrying capacity.

Finally, the fact that weighted average utilization exceeds desired average utilization

¹⁶ Some trend (frequency) and condition (ecological status) data were collected in 1982 (AFE (tab 7), pp.14-15), and this data, at some point, will be used to determine whether management objectives are being met in the long term and whether management changes are necessary (MacKinnon, p.6, ¶11).

¹⁷ The BLM hereby moves for admission of exhibit R-3. WHOA, as well as the County, rely on the Nevada Rangeland Monitoring Handbook. See WHOA Opening Br. at 1; Co. Opening Br. at 6, Balliette Aff., p.4, 1.8-23, 30-33, p.6, 1.39, Burkhardt Aff., p.4, ¶5. Consequently, it is unlikely there will be an objection to its admission.

suggests that the trend is downward. See MacKinnon, p.5, ¶10. Put simply, if an allotment is being overutilized, it is more likely than not that its trend and condition is downward. See id. This relationship is generally recognized by one of the County's affiants, Mr. Balliette (p.6, 1.36-38), and not explicitly controverted by its other affiant, Mr. Burkhardt (see p.4, ¶ 6). Thus, the BLM's carrying capacity methodology impliedly includes trend, albeit not as an independent factor.

In sum, the County cannot point to anything that indicates that BLM erred in not using trend or condition data in its determination of carrying capacity. Although the County's affiants may think that, as a matter of course, trend and condition data should always be evaluated as part of the carrying capacity determination, this is simply their opinion and is insufficient to show error. See Doyle, 138 IBLA at 32. Without a showing that the BLM's methodology is "incapable of yielding accurate information, that there was a material departure from prescribed procedures, or that a demonstrably more accurate survey has disclosed a different range capacity," the County's argument must be rejected. Glanville Farms Inc. v. BLM, 122 IBLA 77, 87-88 (1992) (emphasis added).

2. The assertion that the BLM improperly used "ancient" data is irrelevant and, in any case, unsupported and contrary to the record

The County next argues that the BLM used "ancient" data in calculating utilization. Co. Opening Br. at 4-5. Again, the County does not show, or even attempt to show, how the use of purported "ancient" data would invalidate the BLM's methodology in determining carrying capacity. Consequently, this argument is not properly before this tribunal.

Even if it were, it is readily rejected. First, the ecological status data gathered in

1982 -- which anchors the County's "ancient" allegation -- was not used to determine carrying capacity. MacKinnon, p.6, ¶11. That data establishes a baseline from which trend will be determined in the future. Id. Second, the data relied on by the BLM to determine weighted average utilization, use pattern maps generated in 1987, 1989, and 1990, represent the most current data available. See id., pp.5-6, ¶11. The County does not point to any requirement that the BLM must conduct monitoring up to the very last moment to justify a grazing decision, nor does it provide any argument why the lapse of time invalidates the data relied on by the BLM. Finally, the record strongly suggests that the utilization data is not stale. The data for the 1987, 1989, and 1990 use pattern maps were consistently collected in September and October of each year (AFE (tab 7), p.13), and the maps show that use patterns did not vary significantly between years (id., Maps G-I). Although time elapsed between 1990 (the last mapping) and 1994 (when the FMUD was issued), there were no changes in livestock management documented during that period. MacKinnon, p.6, ¶11. Therefore, the use patterns would be expected to remain the same up until the time the FMUD was issued. Id. Thus, there is no basis to the County's allegation that the utilization data are somehow flawed.

3. The assertion that the BLM's utilization calculations improperly focused on riparian areas and ignored light use areas is without merit

The County's next argument is that the BLM improperly focused on riparian areas and ignored light use areas in calculating utilization. Co. Opening Br. at 5. Although the County's brief is somewhat confusing, based on its cites to the attached affidavits, the primary arguments appear to be that (1) the BLM should have used the average of the key

area utilization estimates (said to be 29%) rather than the weighted average utilization determined by the BLM (59%) (see Balliette, p.4, 1.5-20); and (2) the BLM should have included the light utilization class in its determination of weighted average utilization (see Burkhardt, p.5, ¶10). These arguments, at most, represent a mere difference in opinion, and, as such, must be rejected.

The argument that the BLM should have used an average of key area utilization estimates is misplaced for several reasons. First, the County appears to be advocating a methodology not endorsed by Technical Reference 4400-7. See TR 4400-7 (Ex. R-1), pp.54-60. Second, the County does not explain how its methodology would result in a more accurate carrying capacity determination than that made by the BLM through the use of the PSL formula. Finally, using an average of key area utilization estimates to determine utilization would be less accurate than the method used by the BLM because the key area utilization data is not as current as the use pattern mapping data used in the PSL formula and not all of the nine key areas are representative of the allotment. MacKinnon, pp.6-7, ¶12.

The argument that the BLM should have included the light utilization class in its determination of weighted average utilization is the flipside of the Appellants' argument that the BLM should have used only the heavy utilization class in determining actual utilization for the allotment. The Intervenor, apparently, would have the BLM average utilization on the entire allotment, including areas where livestock rarely or never go, whereas the Appellants would have the BLM use only the utilization found in the heavy use areas, where livestock tend to congregate. Like the Appellants, the Intervenor fails to demonstrate that the BLM erred.

The BLM excluded the light utilization class because those areas have historically not been grazed by livestock, primarily cattle, due to one or more of three restrictive physical attributes. MacKinnon, p.3, ¶7. These attributes are slopes of greater than 50%, locations greater than two miles from water, and unsuitability of vegetation for sustainable grazing. Id., pp.3-4, ¶7. The BLM has determined that cattle are unlikely to use areas with slopes greater than 50% or located greater than two miles from water, and that cattle should not use areas with unsuitable vegetation for long-term grazing. Id. Consequently, including the light utilization class in the weighted average utilization calculation would skew the calculation toward overestimating the suitable forage that cattle would actually use and therefore lead to overuse of those areas already moderately or heavily used. Id., p.4, ¶7. Thus, the BLM has a rational basis for its decision not to include the light utilization class. Because the County has not demonstrated that this rationale is invalid, its argument must be rejected. See Klump, 124 IBLA at 182 (the burden is on the appellant to show the lack of any rational basis).

One of the County's affiants, Mr. Burkhardt, claims that the BLM's exclusion of the light utilization class is not "acceptable professional procedure" and that it is contrary to two BLM technical papers, Rangeland Monitoring Utilization Studies, Technical Reference 4400-3 (1984) and Utilization Studies and Resource Measurements, Intra-agency Technical Reference (1996). Burkhardt, p.5, ¶10. Mr. Burkhardt's unsupported protestation that the BLM's methodology is unprofessional represents, at best, no more than a technical disagreement among experts. As previously discussed, it is well-settled that the Secretary is entitled to rely on the reasoned opinion of his experts. E.g., Doyle, 138 IBLA at 327. Mr.

Burkhardt's citation to the 1996 technical paper is misplaced because it was not in existence when the FMUD was issued, and his allegation that the BLM's methodology is inconsistent with the 1984 technical paper is erroneous. The Rangeland Monitoring Utilization Studies, Technical Reference 4400-3 (Sept. 1984) (attached as exhibit R-4)¹⁸ does not state that the BLM is required to include the light utilization class in the weighted average utilization calculation in every situation. In fact, Technical Reference 4400-3 states that, "[i]n the selection of a utilization study method, remember that no one method is suitable for all situations." TR 4400-3 (Ex. R-4), p.5. This is also reflected in the Nevada Rangeland Monitoring Handbook, which states that the procedures outlined there "are not designed to fit all situations nor are they meant to be followed in a cookbook fashion." Handbook (Ex. R-3), p.2.

In sum, the County has not carried its burden of proof in showing that the BLM inappropriately used weighted average utilization or that it erred in excluding the light utilization class in the weighted average utilization calculation.

4. The assertion that a reduction in AUMs is not a proper management strategy is irrelevant and, in any case, represents no more than a mere disagreement

The County contends that the BLM erred in reducing livestock AUMs to meet the carrying capacity of the allotment and instead should have considered fencing, water hauling, herding, and other actions to ameliorate any overutilization. Co. Opening Br. at 6. This

¹⁸ The BLM hereby moves for admission of exhibit R-4. WHOA, as well as the County, rely on Technical Reference 4400-3. See WHOA Opening Br. at 1; Burkhardt Aff., p.5, ¶10. Consequently, it is unlikely there will be an objection to its admission.

argument has nothing to do with the issue on appeal: whether the BLM's methodology in determining the carrying capacity used to set the wild horse AML for the Roberts Mountain Allotment portion of the HMA is unlawful. Consequently, it is irrelevant and should be summarily rejected.

In any event, the County's contention represents merely a disagreement in strategy. The BLM chose to address the overutilization problem on the allotment by a combination of reducing the allowable AUMs for livestock and wild horses and certain livestock management actions directed at moving livestock from the heavy utilization areas to the moderate utilization areas. The County, apparently, thinks that the overutilization problem can be solved solely by livestock management actions. This is simply insufficient to carry its burden of proof. See, e.g., Animal Protection Institute of America, 118 IBLA at 76.

5. The assertions related to "other utilization matters" are inapposite or meritless

The County tosses out a number of complaints related to "other utilization matters" (Co. Opening Br. at 6-7) that are either not responsive to the narrow issue before this tribunal or are meritless. The County's first two allegations improperly attempt to raise factual issues about the data used by the BLM in employing its methodology and, in any event, are baseless. Although both Three Bars and Roberts Allotment actual use data was presented in the Roberts Mountain AFE, the BLM used only Roberts Mountain actual use data in calculating carrying capacity. Compare AFE (tab 7), p. 8 with id., pp.21-22. Also, the County's argument that the key area utilization data is inconsistent with the use pattern maps is misplaced. The key area utilization data is not as current as the use pattern mapping

data used in the PSL formula and not all of the nine key areas are representative of the allotment. MacKinnon, pp.6-7, ¶12.

The County next alleges that the "base area suitable for livestock grazing" does not fluctuate and that precipitation does not match the areas found to be suitable for grazing. Both allegations fall short of demonstrating that the BLM erred in the methodology used to establish carrying capacity on the allotment. The County confuses utilization -- a measure of the plant biomass consumed -- with "areas suitable for grazing," presumably meaning production -- the amount of biomass available for grazing. Id., p.7, ¶13. The factors controlling utilization and production are obviously not the same. See id. Consequently, utilization is not necessarily consistent with production, much less with precipitation. Id.

6. The assertions regarding "wildlife and wild (feral) horses" are also inapposite or meritless

Finally, the County makes a number of assertions related to "wildlife and wild (feral) horses" (Co. Opening Br. at 7-8), all of which are either irrelevant to the issue on appeal or meritless. The County alleges that the BLM (1) failed to determine the optimum habitat for wildlife, (2) inadequately assessed the impact on sage grouse, (3) incorrectly attributed wildlife habitat problems to grazing, and (4) made wildlife recommendations that conflict with goals in the Shoshone-Eureka Resource Management Plan (RMP). These arguments have no imaginable bearing on the carrying capacity methodology used by the BLM or the protocol used to establish the AML, and therefore the BLM finds no need to respond.

The County's last contention is that the AUMs allocated to wild horses do not make sense in light of the number of horses estimated on the allotment, citing to Mr. Balliette's

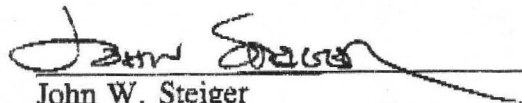
affidavit. It is unclear what horse estimates the County is referring to or how the alleged inconsistency invalidates the BLM's methodology. The AFE's use of the wild horse census data in determining carrying capacity is straight-forward and there are no apparent mathematical mistakes. See AFE (tab 7), pp.9-10, 21-22, App. C. At the pages of the affidavit cited by the County, Mr. Balliette argues that the AML does not comply with the "RMP goal of 984" AUMs. Balliette, p.7, l.12-24. Mr. Balliette misconstrues the 984 AUM "goal." That goal is set in the RPS, and it is intended to be a starting point, not a final objective. The RPS' objectives for wild horses are, among other things, to "initially manage to provide 984 AUMs of forage for 82 horses within the Roberts Mtn. Herd Management Area," but to "[m]aintain or improve wild horse habitat condition which enhances or preserves their wild and free-roaming behavior" RPS (Ex. R-2), p.31 (emphasis added). The FMUD's establishment of an AML of 92 horses for the Roberts Mountain Allotment portion of the HMA (FMUD (tab 2), p.14) is consistent with these objectives.

III. Conclusion

Neither the Appellants nor the Intervenors have carried their burden of proof to demonstrate that the BLM was arbitrary or capricious or not in accordance with law in selecting and using the methodology in the FMUD to calculate carrying capacity and establish the AML for wild horses in the Roberts Mountain Allotment. As demonstrated above, the BLM's methodology is underlain by a rational basis, and the parties' arguments, at most, represent nothing more than a disagreement. This is amply demonstrated by the

adverse positions taken by the Appellants and the Intervenors. The BLM's decision should be affirmed.

Respectfully submitted this 6th day of January, 1998.



John W. Steiger
Counsel for BLM

CERTIFICATE OF SERVICE


I certify that on the 6th day of January, 1998, the foregoing RESPONDENT'S RESPONSE BRIEF IN SUPPORT OF SUMMARY JUDGMENT was served by telefax (without exhibits) and overnight mail, return receipt requested (with exhibits), on the following as required by 43 C.F.R. § 4.401(c)(1):

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Secretary

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

COMMISSION FOR THE)
PRESERVATION OF WILD HORSES,)
WILD HORSE ORGANIZED,)
ASSISTANCE,)

N6-95-5, N6-95-8
IBLA 95-168, 95-169

Appellants,)

Appeal from Area Manager's Final
Multiple Use Decision, dated October 20,
1994, Roberts Mountain Allotment,
Shoshone-Eureka Resource Area,
Battle Mountain District, Nevada

-----)
EUREKA COUNTY BOARD OF)
COUNTY COMMISSIONERS,)
MICHEL & MARGARET)
ETCHEVERRY,)

Intervenors,)

v.)

BUREAU OF LAND MANAGEMENT,)

Respondent,)

DECLARATION OF W. CRAIG MACKINNON

1. I, W. Craig MacKinnon, am employed by the United States Department of the Interior, Bureau of Land Management (BLM), and serve as the Rangeland Program Team Leader for the Battle Mountain District, Battle Mountain, Nevada. My resume is attached as "Attachment 1."

2. I serve in the former capacity of Floyd Thompson, Shoshone-Eureka Resource Area Supervisory Range Conservationist at the time the Roberts Mountain Allotment Final Evaluation (AFE) was prepared. Marlo Draper, Range Conservationist, worked for Mr. Thompson at that time and was the primary author of the AFE issued in June 1994. Mr.

Thompson and Ms. Draper have since left the Battle Mountain Field Office.

3. As Senior Rangeland Specialist for the District, I am responsible for the technical oversight of all aspects of the grazing program within the District. My duties include administering grazing permits, supervising rangeland monitoring studies and the preparation of allotment evaluations, and providing technical direction, guidance, and training for nine range management professionals and three technicians in the Battle Mountain and Tonopah Field Offices. I have full knowledge of all BLM policy guidance regarding monitoring and grazing.

4. In my capacity as Senior Rangeland Specialist, as well as for the purposes of this appeal, I have thoroughly reviewed all the monitoring information generated for the Roberts Mountain Allotment and all the documentation related to the final multiple use decision (FMUD) under appeal, including the complete record on appeal. I have also read the opening briefs, affidavits, and exhibits submitted by the parties in this appeal.

5. The methodology used by the BLM to determine the carrying capacity of the Roberts Mountain Allotment as set forth in the AFE is consistent with the methodologies outlined in the Rangeland Monitoring Utilization Studies, Technical Reference 4400-3 (Sept. 1984), the Rangeland Monitoring, Analysis, Interpretation and Evaluation, Technical Reference 4400-7 (Nov. 1985), and the Nevada Rangeland Monitoring Handbook (Sept. 1984). Specifically, the BLM used the "potential stocking level" (PSL) formula set out in Technical Reference 4400-7, which is the primary guidance used by the BLM for rangeland monitoring, analysis, interpretation, and evaluation. Utilization (determined by calculating weighted average utilization using the heavy and moderate utilization classes), actual use

(averaged for the evaluation period, 1987, 1989, and 1990), and desired actual use (identified in the Shoshone-Eureka Rangeland Program Summary (Dec. 1988) were all appropriately applied in the formula to determine the PSL or "average carrying capacity" for the allotment.

6. Actual use data for all primary herbivores (cattle, domestic sheep, wild horses, and deer) was determined and applied to the PSL formula using the best information available at the time. The actual use of livestock was determined based upon actual use reports filed by the permittee and compiled by the BLM over the evaluation period. The actual use of wild horses was determined from wild horse census data (population estimates). The actual use of wildlife was determined from estimates of mule deer populations and season of use in the Roberts Mountain Allotment. Mule deer are the only wildlife of significance using key browse species on the allotment. These estimates were made by BLM biologists, based on recommendations from Nevada Division of Wildlife Game Biologists who have direct knowledge and experience in the area.

7. The BLM determined the weighted average utilization based on the use pattern mapping of light (0-40%), moderate (41-60%) and heavy (61-100%) utilization classes. Only averages of the moderate and heavy classes were used in the PSL formula. The light utilization class was not included in the formula because the areas within this class in the Roberts Mountain Allotment typically have one or more of three factors that make them unsuitable for livestock grazing. First, some areas exceed 50% slope, such as the Wilderness Study Area in the northwest portion of the allotment. The BLM has determined that cattle make little to no use of this type of terrain. Second, some areas are located two miles or greater from a viable water source, such as the east, north-central, and southeast

portions of the allotment. The BLM has found that cattle make little use of these areas, except in winter when snow allows cattle to range farther. Third, some areas have low or sparse forage production that typically exceed a rating of 32 acres to support an Animal Unit Month (AUM). The BLM has determined that areas that exceed this rating cannot sustain livestock grazing on a long-term basis. These areas include the lower elevation salt desert shrub communities and sites which have lost their key forage species and subsequent productivity due to overgrazing. Because these areas are unsuitable for livestock grazing, including the light utilization class in the weighted average utilization calculation would overestimate the amount of forage that livestock would actually use on the allotment and, therefore, would result in the overallocation of forage for livestock and subsequent range deterioration.

8. The BLM used 50% as the desired average level of utilization in the PSL formula based on the objectives set out on page 30 of the Shoshone-Eureka Rangeland Program Summary (Dec. 1988). The 30% utilization level (identified for streambanks to be improved for aquatic habitat) was not used because the areas to which this objective applies comprise less than 1% of the allotment and because the utilization of these areas can be limited by livestock management options such as rest-rotation. The 60% level (identified as appropriate by the end of the grazing season) was also not used because it could allow grazing to exceed the 50% average utilization prior to seed dissemination. The decision not to use the 30% or 60% levels does not mean that they will not be used as assessment objectives in field evaluations, it just means they were not used in the formula to set carrying capacity. The 50% level is the best and most objective level to sustain long term rangeland health, in terms

of protecting the key species in the major plant communities.

9. A key to meeting the land-use plan objectives for the allotment is the grazing system and various improvements required or authorized by the FMUD. The successful implementation of a three year rest-rotation grazing system, outlined in the FMUD at pages 10-12, would allow for long-term improvement in resource conditions on the allotment. As the proposed fencing, water developments, and increase in herding practices are implemented grazing distribution should further improve. Confinement of cattle in smaller pastures will force them to make more efficient use of the range, particularly in those pastures where herding is intensified and new water sources are developed. Additionally, key forage species would be expected to recover in reproductive vigor and density, on a long-term basis, as seasonal to full season rest is provided under the intensive grazing system.

10. Although the collection of trend data can offer substantive information on whether resource conditions in a certain area of the allotment are improving or declining, it has no direct application in determining carrying capacity on the allotment. In contrast, use pattern mapping allows us to identify where direct grazing impacts to vegetation are occurring and make proper stocking level adjustments for those areas. It can be reasonably inferred that the areas receiving grazing use, where average utilization exceeds the objective level for key forage species, are declining in trend. This would be expected in many areas throughout the Roberts Mountain Allotment where repeated, season-long, uncontrolled grazing use is occurring.

11. The data used by the BLM in calculating the carrying capacity for the Roberts Mountain Allotment was the most current available and there is no significant reason to

conclude that it was or is unreliable. For the carrying capacity determination, the BLM used data collected consistently during three years and it reflected similar results (same basic areas of use) on the allotment. Between the time the last data was collected (1990) and the issuance of the FMUD (1994) there were no documented changes in grazing management due to drought or any other causative factor. This allotment, as with many allotments that do not have active Allotment Management Plans with prescribed grazing systems, has traditional patterns of livestock use which show little variation. Therefore, the use patterns would be expected to remain the same until management actions, such as those proposed in the FMUD are implemented. The BLM did not use the frequency or ecological status data gathered in 1982 to establish carrying capacity. This data was used to establish a baseline and, with data to be collected in the future, will be used to determine whether management objectives are being met in the long term and whether management changes are necessary.

12. Mr. Balliette's use of the average of key area utilization data presented in the AFE to estimate average utilization is inconclusive or erroneous because, among other reasons, that data is not as current as the use pattern mapping data and because some of the key area sites appear not to adequately represent the allotment. Pages 10-13 of the AFE describe the nine key areas relied on by Mr. Balliette. Utilization estimates in all of these areas were made between 1981 and 1984, and at one time in 1990, whereas the PSL formula relied on use pattern maps from 1987, 1989, and 1990. More importantly, it appears that some of the key area sites are unrepresentative and their inclusion averages down the grazing occurring on the allotment. On pages 12-13 of the AFE, for example, Key Area RM 15 shows recorded utilization levels of 3% for 1983, 1% for 1984, and 10% for 1990. This

indicates that this site does not represent a "key area" and its location should be reconsidered.

13. The County's claim that the "base area suitable for livestock grazing" does not fluctuate and that precipitation does not match the areas found to be suitable for grazing confuses utilization -- a measure of the plant biomass consumed -- with "areas suitable for grazing," presumably meaning production -- the amount of biomass available for grazing. The factors controlling utilization and production are not the same. Production turns on factors such as soil type, aspect and elevation, seral stage, and intra-species competition, as well as precipitation. Utilization turns on factors such as steepness of slope, availability of water, and stocking level. Consequently, utilization is not necessarily consistent with production, much less with precipitation.

14. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed in Salt Lake City, Utah. Dated Dec. 30, 1997


W. CRAIG MACKINNON

RESUME OF W. CRAIG MACKINNON

Education

Bachelor of Science Degree - Range Management, 1975
Bachelor of Science Degree - Botany, 1975
Humboldt State University, Arcata, CA.

USDI-BLM Work Experience

1975 Range Technician - Jarbidge Resource Area, Boise, ID., and
Clear Lake Resource Area, Ukiah, CA.

1975-1976 Range Conservationist, White River Resource Area, Meeker, CO.

1976-1985 Range Conservationist, Kremmling Resource Area, Kremmling, CO.

1985-1987 Environmental Resource Staff Specialist, Richfield District,
Richfield, UT.

1987-1990 Range Conservationist (Experimental Stewardship Program Team
Leader) Bear River Resource Area, Salt Lake City, UT.

1990-1995 Supervisory Rangeland Management Specialist, Bear River
Resource Area, Salt Lake City, UT.

1995-1997 District Range Team Program Lead, Salt Lake District, Salt Lake
City, UT.

1997-Present Rangeland Team Program Leader, Renewable Resource Staff, Battle
Mountain Field Office (District), Battle Mountain, NV.

My present duties include maintaining an effective relationship with the public and monitoring, evaluating, and recommending appropriate rangeland management actions based on land use plan objectives. As a team leader, I have the technical oversight of the administration of all grazing permits, the supervision of rangeland monitoring studies, and the preparation of allotment evaluations. I provide technical direction, guidance and training for nine Range Management professionals and three Technicians in the Battle Mountain and Tonopah Field Offices.

Accomplishments and Select Commendations

Major Accomplishments:

- I was team leader in completing a 260,000 acre soil/vegetation inventory in Middle Park, Colorado (1980).
- I have authored the vegetation, range management and wild horse & burro sections of three BLM Resource Management Plans - Environmental Impact Statements (Kremmling RMP-EIS, Craig District, Colorado; House Range RMP-EIS and Warm Springs RMP-EIS, Richfield District, Utah). I participated as a team member in all of these planning efforts from initial scoping and issue identification to completion of the final Record of Decision/Rangeland Program Summary.
- I have served as the Technical Coordinator (1987-1993) for the Randolph Experimental Stewardship Program in Rich County, Salt Lake District. In 1989, I coordinated the meetings and led the range tours when our Stewardship Committee hosted the National Experimental Stewardship Program Meeting at Utah State University, Logan.
- I have extensive public speaking experience. I have made formal presentations before Advisory Boards, at public hearings, planning/scoping meetings, National Stewardship Committees and at the request of several Public schools. Additionally, I have twice represented the Bureau's position in court regarding complex grazing allocation decisions.
- I have a broad array of experience in wildfire rehabilitation, having participated on and supervised various rehab team efforts in both the Richfield and Salt Lake Districts. I have supervised and administered over \$650,000 in fire rehabilitation contract work on nine projects from 1986 to 1996.

Select Commendations:

May 10, 1974 - Received a Letter of Commendation from the Chairman, Department of Biology, Humboldt State University for honor as one of the top seven of over eighty Botany majors.

July 13, 1978 - Received a Letter of Commendation from the BLM Craig District Manager for completing a special detail and assisting on development of the White River Resource Area - Management Framework Plan.

Dec. 26, 1980 - Special Achievement Award from the Colorado BLM State Director for leading and completing a 260,000 acre Soil/Vegetation (SVIM) Inventory in the Kremmling Resource Area.

July 13, 1981 - Letter of Appreciation from the District Conservationist, Soil Conservation Service for extending agency cooperation in the development of three Conservation Plans.

Feb. 1, 1983 - Letter of Appreciation from the District Attorney, Grand County, Colorado for providing information leading to the successful prosecution of a trespass case involving private, State and Federal lands.

March 20, 1984 - Special Achievement Award from the Acting Colorado BLM State Director for sustained performance in completing the Kremmling RMP-EIS, one of five pilot planning efforts in the BLM.

Oct. 22, 1986 - Letter of Appreciation from the Area Manager, Warm Springs Resource Area, Richfield District for assistance in completing area-wide range trend and utilization studies.

Dec. 6, 1988 - Special Achievement Award from the BLM Salt Lake District Manager for efforts in rangeland stewardship and consultation, cooperation with permittees in Rich County, Utah.

Dec. 18, 1990 - Special Achievement Award from the BLM Salt Lake District Manager for sustained performance in resolving drought related problems in Box Elder and Rich counties.

Dec. 8, 1992 - Special Achievement Award from the BLM Salt Lake District Manager for developing a cooperative grazing system with the Wasatch/Cache National Forest to protect valuable riparian stream systems on the New Canyon Allotment in Rich county, Utah.

Jan. 9, 1995 - Special Act Award from the BLM Salt District Manager for supervising the completion of the Dry Canyon Emergency Fire Rehabilitation, a project involving the administering of \$188,000 in project funding, coordination with the State School Trust Land Administration, Forest Service, County officials and thirty-two permittees.

*Noted
Dec. 5
rec. 12-18
Black Rock E
HMA*

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8 OFFICE OF HEARINGS AND APPEALS
9 BOARD OF LAND APPEALS

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10	NEVADA DEPARTMENT OF WILDLIFE,)	IBLA 93-88
11	Appellant)	Appeal from the Area Manager's Decisions dated June 30 and September 18, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada
12	v.)	
13	BUREAU OF LAND MANAGEMENT,	)	N2-92-12
14	Respondent)	
15	NEVADA COMMISSION FOR THE PRESERVATION OF WILD HORSES,	)	Appeal from the Area Manager's Decisions dated September 18 and November 30, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada
16	Appellant)	
17	v.	)	N2-92-13
18	BUREAU OF LAND MANAGEMENT,)	
19	Respondent	)	Appeal from the Area Manager's Decisions dated September 18 and November 30, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada
20	WILD HORSE ORGANIZED ASSISTANCE,)	
21	Appellant	)	N2-92-13
22	v.)	
23	BUREAU OF LAND MANAGEMENT,	)	Appeal from the Area Manager's Decisions dated September 18 and November 30, 1992, Paiute Meadows Allotment, Winnemucca District, Nevada
24	Respondent)	

25
26 OPENING BRIEF OF APPELLANTS NEVADA
27 DIVISION OF WILDLIFE AND COMMISSION FOR
28 PRESERVATION OF WILD HORSES

1 This brief is submitted in the above-captioned appeals on behalf of the Nevada Division of
2 Wildlife (NDOW), and the Nevada Commission for the Preservation of Wild Horses (Commission), by
3 and through their undersigned counsel, as ordered by the hearing officer on November 7, 1997.

4 INTRODUCTION

5 These consolidated appeals concern the Paiute Meadows Allotment (the Allotment) in the
6 Bureau of Land Management's (BLM's) Winnemucca District, located in northern Nevada. The single
7 issue in this appeal is whether a grazing authorization issued by the Bureau of Land Management
8 (BLM) is, in the circumstances, an appealable decision.

9 When BLM issued a decision for the Allotment in 1991, NDOW and the Commission
10 (collectively the Appellants) identified unaddressed concerns caused by overgrazing on the Allotment.
11 Consequently, BLM withdrew the decision, but proceeded to renew grazing authorizations on a yearly
12 basis at levels of grazing which BLM had, in its Allotment Evaluation, acknowledged caused resource
13 damage. Appellants therefore appealed from these yearly authorizations. BLM refused to entertain the
14 appeals, contending that the grazing authorizations were not appealable decisions. The availability of
15 appeal from the annual authorizations is the disputed issue presented for decision.

16 The chronology of events which pertain to the appeal is as follows.

- 17 LATE 1991: BLM on November 22 issued a full force and effect decision on the Paiute
18 Meadows Allotment. On December 17 the Commission appealed, and on
19 December 18 NDOW appealed on the grounds of inconsistency with the land use
20 plan, failure to consult with affected interests, inconsistency with the Endangered
21 Species Act, improper procedure under the National Environmental Policy Act,
22 and improperly calculated carrying capacities.
- 23 EARLY 1992: NDOW's Administrator and BLM's Nevada State Director met and agreed that
24 the decision would be withdrawn except for the portion permitting a removal of
25 wild horses.
- 26 The permittee, Dan Russell, appealed the decision to withdraw the decision.
- 27 MAY 12, 1992: The BLM issued a one year permit to the permittee, authorizing livestock
28 numbers equal to those of past years. *See* Exhibit 1.
- 29 JUNE 18, 1992: NDOW appealed the one year permit. *See* Exhibit 2.
- 30 JUNE 30, 1992: The BLM area manager issued a decision that NDOW's appeal of the one year
31 permit was not appealable.
- 32 JULY 24, 1992: Commission appealed the annual permit issued 1992.

- 1 JULY 30, 1992: NDOW appealed the decision that a one year permit is not an appealable
2 decision. This appeal was referred to a hearings officer. *See* Exhibit 3.
- 3 AUGUST 6, 1992: The one year permit was reissued with different terms and conditions. *See*
4 Exhibit 4.
- 5 SEPTEMBER 11, 1992: NDOW again appealed. *See* Exhibit 5.
- 6 SEPTEMBER 18, 1992: The BLM issued another decision that the one year permit is not an
7 appealable decision.
- 8 OCTOBER 19, 1992: Commission appealed the change in use approved August 6, 1992.

8 **ARGUMENT**

9 It is the position of NDOW and the Commission that issuance of an annual grazing permit
10 constitutes an appealable final agency action when the BLM knows--as it did in this case--that
11 significant deterioration of the rangeland resource will result from the use which the permit authorizes.

12 Appellants had long been interested and involved in management on the Allotment. They had,
13 however, been unable to reach the resource issues which concerned them, which were especially acute
14 at the time due to drought and severe overgrazing. A photographic record of the damage caused by the
15 last season of grazing was attached to the July 30, 1992, NDOW appeal. Exhibit 3.

16 Appellants' attempt to address the resource issues first occurred with their appeals from the
17 1991 decision, which decision was withdrawn. Dialogue with BLM then ended regarding ongoing
18 grazing, and grazing on the Allotment was carried forward as it always had been.

19 The BLM position was that resource conditions would eventually be addressed when the
20 Winnemucca BLM District reissued a formal and comprehensive decision. In the interim, BLM
21 contended the permittee could graze at preexisting levels. However, there was no time frame for the
22 BLM to issue its comprehensive decision. At the time when the appeals from yearly authorizations
23 were taken, the BLM solicitor was uncertain whether the District could even issue a new decision while
24 the permittee's appeal was pending. Thus Appellants were faced with the real prospect that the
25 Allotment would be licensed for 1993 and subsequent years at the same harmful level as in past years.

26 Appellants then faced the question whether they would abide the reauthorization of damaging
27 levels of use for an indefinite period into the future. The only action besides an appeal which would
28 alleviate the damage being done was a lawsuit for an injunction. A lawsuit would, however, involve

1 commitment of significant resources by all concerned. It would also unnecessarily heighten the profile
2 of a routine dispute beyond its origins in the administrative domain. Appellants argue here that an
3 appeal in these circumstances would serve the interests of all concerned by affording a less formal
4 method of resolving disputes.

5 The BLM retains authority to adjust year-to-year grazing authorization based on the condition of
6 the range, 43 U.S.C. § 1752(e),¹ so issuance of the annual permit is not merely a ministerial function. It
7 is a function which rests on the exercise of sound professional judgment and is therefore an appealable
8 agency decision. The failure to properly exercise that judgment is reversible as an arbitrary and
9 capricious agency action not in accordance with the law. It should therefore be appealable.

10 The BLM *must* reduce active use which is “causing an unacceptable level or pattern of
11 utilization or exceeds the livestock carrying capacity as determined through monitoring.” 43 C.F.R. §
12 4110.3-2. “The authorized livestock grazing use shall not exceed the livestock carrying capacity.” 43
13 C.F.R. § 4130.6-1. Appellants assert the BLM must abide by its own regulations and make adjustments
14 when annually renewing the grazing authorization. Appellants particularly assert that the BLM in the
15 present instance had more than adequate information to require downward adjustment in the authorized
16 grazing, yet arbitrarily and capriciously continued grazing use at a level which it knew would cause
17 resource damage.

18 The BLM’s own documentation proved the grazing authorized exceeded the carrying capacity of
19 the land, as set forth in NDOW’s appeal dated June 18, 1992. The adverse effect of overgrazing is
20 candidly depicted in BLM’s own Final Allotment Evaluation for the Paiute Meadows Allotment, dated
21 November 22, 1991.² In addition, NDOW offered a report containing both text and color photographs
22 as further visual and written evidence of the distressed state of the vegetation even before the onset of
23 livestock grazing. The BLM was aware of these conditions; the affected land is under its charge.

24 Appellants rely on the legal argument contained in the decision of Administrative Law Judge
25 Rampton in the appeal entitled *Joseph M. Feller v. Bureau of Land Management*, UT-06-89-02 (August

26 _____
27 ¹References to sections of the Code of Federal Regulations are to those in effect at the time of the appeals.

28 ²Appellants presume the Allotment Evaluation already constitutes part of the administrative record. If this presumption is in error, Appellants will furnish a copy of BLM’s document upon request.

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

1 13, 1990), a copy of which is attached as Exhibit 6. The Judge said "the renewal of a 10-year permit
2 clearly is an action both on an application for a permit and relating to its terms and conditions. It is
3 therefore subject to protest and appeal pursuant to 43 C.F.R. Subpart 4160." *Id.* at 4. Appellants
4 believe the same reasoning applies to issuance of an annual permit, especially where the underlying
5 multi-year permit was not subject to review and comment by affected interests, as in the present case.

6 Appellants acknowledge the hearing officer decision in the case entitled *Defenders of Wildlife et*
7 *al. v. Bureau of Land Management*, Case no. AZ-020-97-03080 (June 6, 1997). See Exhibit 7.
8 Language contained therein, however, provides the seed of an important distinction. It was held:

[i]f some material change had been effectuated by the grazing extension, then jurisdiction could arguably be triggered. For example, if, in fact, BLM had not conducted reasonable monitoring with respect to the forage condition of the allotment or if Appellants could factually aver that the condition of the range had materially declined, then such an extension might provide the basis for an appeal.

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12
13 (Emphasis added.) Appellants do not here take issue with the BLM's monitoring efforts, for they in
14 fact depict a range in serious condition. Appellants do therefore assert, though, that BLM's decision to
15 make the annual grazing authorization is appealable because it is in contempt of BLM's own published
16 data, set forth in the Allotment Evaluation of November 1991, showing a range in decline.

17 A second distinction which appears from the *Defenders of Wildlife* decision is that one of the
18 two appealed-from authorizations deviates significantly from previous authorizations. The *Defenders*
19 *of Wildlife* decision states, "a final decision under the auspices of 43 C.F.R. §§ 4.470 and 4160.4 would
20 have resulted only if BLM had approved some change in the previously authorized grazing on the
21 allotment." *Id.* at 2. The BLM letter to the permittee, Exhibit 3, dated August 6, 1992, is a self-
22 professed "change in your 1992 grazing use of the Paiute Meadows Allotment." This fits precisely the
23 criterion established by the *Defenders of Wildlife* opinion.

24 Appellants' position is also supported by recent court decisions. The federal district court found
25 a final agency action in the U.S. Forest Service decision to maintain the status quo in its Region 8
26 pending development of a future land management plan. *Southern Timber Purchasers Council v.*
27 *Alcock*, 779 F. Supp. 1353 (N.D. Ga. 1991) *modified*, 993 F.2d 800 (11th Cir. 1993). The BLM's

28 ...

1 decision to continue permitting livestock on the Paiute Meadows Allotment is analogous: it preserves
2 the status quo while a decision is devised.

3 In reaching its conclusion, the court in *Alcock* referred to the Supreme Court's practical
4 approach to the definition of "final" agency action. "The court looks to see whether the action is
5 'definitive'; whether it has a direct and immediate effect on the parties; and finally, whether judicial
6 review will serve efficiency or enforcement of the regulatory scheme." *Id.*, 779 F. Supp. at 1358,
7 (*quoting Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 1185 (D.D.C. 1985)).

8 Appellants would argue that each of these criteria is met by the reinstatement of grazing on the
9 Allotment at harmful levels pending the formulation of the promised decision at some indefinite time in
10 the future.

11 First, the action is definitive because it establishes the permittee's grazing for the 1992 grazing
12 season. The permit very simply sets the level of grazing which will occur.

13 Second, issuance of the permit has the effect of authorizing grazing on a depleted range resource
14 at levels known to be deleterious to the vegetation. This has a highly adverse effect on habitat, and
15 therefore on the interests of the Appellants, which are legislatively charged with protection of Nevada's
16 natural resources.

17 Third, allowing an appeal from the permit would serve to enforce the regulatory scheme,
18 because it subjects a non-ministerial, allotment-specific BLM grazing decision to public scrutiny for
19 arbitrariness, capriciousness, and unlawfulness. If the appeal is not allowed, then the affected interests
20 have no administrative recourse.

21 In another decision, *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), a
22 similar "interim strategy" was held to be a final agency action. The court remarked that the Ninth
23 Circuit interprets the term "agency action" broadly. *Id.* at 294. The BLM should make the same broad
24 interpretation in recognition of the many interests which are affected by the annual grazing decision.

25 CONCLUSION

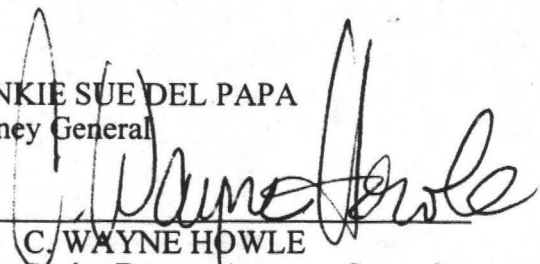
26 Because the decision to issue the permit to Paiute Meadows Ranch for grazing on the Paiute
27 Meadows Allotment was not merely ministerial, because it rested in the agency's sound professional

28 ...

1 judgment, and because it perpetuated harmful levels of grazing, it was a final agency action subject to
2 appeal.

3 Dated this 5th day of December, 1997.

4 FRANKIE SUE DEL PAPA
5 Attorney General

6 By 

7 C. WAYNE HOWLE
8 Senior Deputy Attorney General
9 Office of the Attorney General
10 Conservation & Natural Resources

11 Attorneys for Nevada Division of
12 Wildlife and for the Nevada Commission
13 for the Preservation of Wild Horses

14 Attorney General's Office
15 100 N. Carson Street
16 Carson City, Nevada 89701-4717

1 CERTIFICATE OF MAILING

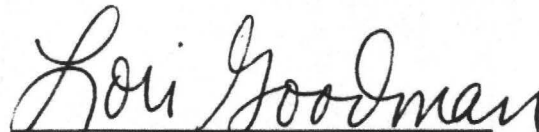
2 I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on
3 this 5th day of December, 1997, I served the OPENING BRIEF OF THE NEVADA APPELLANTS via
4 UPS Next Day Air addressed as follows:

5 James H. Heffernan, ALJ
6 US Department of Interior
7 Office of Hearings and Appeals
8 139 East South Temple, Suite 600
9 Salt Lake City, UT 84111

10 On this same date, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and
11 correct copy of the OPENING BRIEF addressed to the following:

12 Dawn Y. Lappin
13 Wild Horse Organized Assistance
14 Post Office Box 555
15 Reno, NV 89504

16 John R. Payne, Esq.
17 Office of the Regional Solicitor
18 US Department of the Interior
19 2800 Cottage Way, Rm E-1712
20 Sacramento, CA 95825-1980

21 
22 Lori Goodman
23
24
25
26
27
28

c:\lisa\win\p\akula\brief.doc

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

EXHIBIT 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

DUE DATE MAY 12, 1992

TOTAL DUE \$8,352.00

STATE (1) NV
OFFICE (2) 024
OPERATOR NUMBER (3) 272173
PREFERENCE CODE (4) 03
SCHEDULE NUMBER (5) 1
BILL NUMBER (6) 827217315
BILL DATE (7) 05/12/92
BILL CODE (8) 1
AMOUNT COLLECTED (9) _____
FOR BLM USE ONLY

PAIUTE MEADOWS RANCH

DAN RUSSELL
708 10TH ST STE 250
SACRAMENTO, CA 95814

BUREAU OF LAND MANAGEMENT
WINNEMUCCA D.O.
705 EAST 4TH STREET
WINNEMUCCA, NV 89445

MAKE REMITTANCE TO: US DEPT. OF THE INTERIOR-BLM. PLEASE RETURN THE TOP PORTION OF THIS NOTICE WITH YOUR PAYMENT, AND KEEP THE BOTTOM PORTION. THIS NOTICE SHOWS THE AMOUNT DUE IN GRAZING FEES FOR LIVESTOCK GRAZING USE OFFERED TO YOU. YOUR CANCELED CHECK IS YOUR RECEIPT. A SERVICE CHARGE OF \$10.00 WILL BE MADE FOR EACH APPLICATION REQUIRING A REPLACEMENT OR SUPPLEMENTAL BILL.

BILL NUMBER: 827217315 PAIUTE MEADOWS RANCH

ALLOT

PASTURE	LIVESTOCK NUMBER K	BEGIN PERIOD	END PERIOD	T %PL U	AUM'S	AUM COST	FEE AMOUNT
00057 PAIUTE MEADOWS	700 C	05/01/92	11/05/92	100 A	4350	\$1.92	\$8,352.00
						SUBTOTAL	\$8,352.00
						SERVICE CHARGE	\$0.00
						TOTAL DUE	\$8,352.00

TERMS AND CONDITIONS:

GRAZING USE WILL BE AS FOLLOWS:

NORTH OF PAIUTE CREEK 700 COWS 05/01 TO 07/31

SOUTH OF PAIUTE CREEK 700 COWS 08/01 TO 11/05

4350 AUMS ARE AUTHORIZED AS ACTIVE PREFERENCE AS PER CONSULTATION WITH THE STATE DIRECTOR IN JANUARY 1992.

3477 AUMS WILL BE HELD IN NON-USE FOR CONSERVATION AND PROTECTION PURPOSES PENDING A FINAL ALLOTMENT EVALUATION AND ANY SUBSEQUENT LIVESTOCK USE AGREEMENTS AND/OR GRAZING DECISIONS.

HERDING/BALTING PRACTICES ARE REQUIRED AND SHOULD BE DESIGNED SO THAT LIVESTOCK DRIFT DOES NOT OCCUR INTO USE AREAS WHEN NOT SCHEDULED FOR USE. NO USE IS AUTHORIZED IN THE NORTH PAIUTE USE AREA AFTER JULY 31.

EXHIBIT 2



STATE OF NEVADA
DEPARTMENT OF WILDLIFE

1100 Valley Road
P.O. Box 10678
Reno, Nevada 89520-0022
(702) 688-1500
Fax (702) 688-1595

BOB MILLER
Governor

WILLIAM A. MOLINI
Director

June 18, 1992

Mr. Scott Billings, Manager
Paradise-Denio Resource Area
Bureau of Land Management
705 East Fourth St.
Winnemucca, NV 89445

RE: Formal Appeal of Paiute Meadows Grazing Permit

Dear Mr. Billings:

The Nevada Department of Wildlife hereby formally appeals the issuance of the 1992 Grazing Permit for the Paiute Meadows Allotment, which authorizes 4350 AUMs of livestock use with the Paradise-Denio Resource Area from May 1, 1992 through November 5, 1992. Recognizing that the November 22, 1991 Land Use Plan Decision has been vacated, we must necessarily view the Annual Grazing Permit License as the Bureau's final decision in this matter. A copy of the grazing permit was received by our office through the Freedom of Information Act on May 20, 1992, thereby making this appeal timely and within the required 30 day limitation.

Our agency has a long standing interest and investment in the Land Use Planning Process of the Paradise-Denio Resource Area, and particularly the Paiute Meadows Allotment. As an indication of our involvement, the Department provided a comprehensive response to the Draft Paiute Meadows Allotment Evaluation (issued on July 3, 1991) with specific reference to appropriate livestock stocking rates, and seasons of use which may affect important fish and wildlife values also found in this area (response dated August 7, 1991).

On November 22, 1991 the Bureau issued a Full Force and Effect Multiple Use Decision for the Paiute Meadows Allotment, a decision which was formally appealed by the Department of Wildlife on December 18, 1991. This appeal focused on errors in the decision which were used to determine livestock carrying capacities, the implementation

Mr. Scott Billings, Manager
June 18, 1992
Page 2

of a Livestock Use Agreement, and noncompliance with Bureau of Land Management Policies and the National Environmental Policy Act.

Because of the concern expressed by the Bureau and others relative to excessive numbers of wild horses within the allotment, and subsequent need from a budget and administrative standpoint to immediately address this problem, the Bureau facilitated coordination meetings on January 7, and again on January 14, 1992 with Department representatives and other interest groups. All parties present agreed to withdraw their appeals in an effort to allow for the removal of excess wild horses with the understanding that the livestock grazing portion of the decision and our attendant appeals would remain in place, or that a new grazing decision would be issued prior to the 1992 grazing season. Based on this understanding, the Department submitted a letter dated January 27, 1992 to Mr. Burton Stanley, which was used as support before the IBLA (No. 92-188) to insure the immediate removal of excess wild horses from this allotment.

Much to our surprise, the Multiple Use Decision was vacated by the Bureau in May of 1992, an action which renders our appeal invalid; and most disturbing, an annual license for grazing 4350 AUMs of livestock was issued to the Paiute Meadows Ranch. Although the permit references the establishment of 4350 AUMs "as per consultation with the State Director in January 1992", a letter from the State Director to Johanna Wald of NRDC dated May 27, 1992, states that the amount of use was actually established in April of 1990.

In view of the above, and pursuant to 43 CFR Section 4.470(a), and through the incorporation of comments provided in our original appeal dated December 18, 1992, the following represents the required statement as to why this decision is in error:

1. Livestock carrying capacities are invalid.

Livestock carrying capacities must be computed for the North and South pastures. Grazing authorizations must not exceed these livestock carrying capacities computed with monitoring data presented in the Paiute Meadows Final Allotment Evaluation Summary, November 22, 1991.

Streambank riparian vegetation for Paiute, Battle and Bartlett Creeks must be considered key management areas. The allotment evaluation short term objective limits utilization to 30% on key streambank riparian plant species. Furthermore, the evaluation lists seven riparian species to be monitored by the Bureau of Land Management. Livestock stocking rates and/or season of use that exceeds 30% utilization of these riparian plant species will exceed the livestock carrying capacity for the Paiute Meadows Allotment.

Mr. Scott Billings, Manager
June 18, 1992
Page 3

Average/Weighted Utilization estimates cannot be used in livestock carrying capacity calculations. "Range Monitoring Technical Reference 4400-7" instructs the Bureau to use average/weighted estimates only where livestock distribution and utilization is uniform. Monitoring data clearly shows utilization is not uniform on the Paiute Meadows Allotment. Management actions are to be based upon key management areas. "The Nevada Rangeland Monitoring Handbook" sets criteria for determining key areas and requires these areas be treated with special consideration, even if they do not reflect the entire grazing unit.

Wild horses did not have a significant influence on the utilization of streambank riparian vegetation in the North Pasture. Carrying capacity calculations should not utilize wild horse numbers or estimated animal unit months. Use pattern mapping data collected for grazing seasons 1989 and 1990 distinguish livestock and wild horse use of streambank riparian in the North Pasture. Appendix 1 of the allotment evaluation shows that 244 wild horses were present yearlong on the North Pasture during 1989 and 1990. Monitoring studies measured streambank riparian utilization as slight to light (20%) in 1989 and as severe (95%) in 1990. Regardless of actual wild horse numbers, the only significant differences that occurred between these years were the livestock seasons of use in the North Pasture. During 1989, 701 cows occupied the North Pasture from October 26 to February 28 (Fall/Winter). During 1990, 700 cows occupied the North Pasture from May 3 to October 31 (Spring/Summer). Since 1990 the Bureau of Land Management removed 489 wild horses from the allotment (February 1992) which further reduced the possible influence of wild horses on streambank riparian vegetation in the North Pasture.

The stocking rate for Spring/Summer use of the North Pasture for 1992 exceeds the livestock carrying capacity. Livestock carrying capacity for the North Pasture, in accordance to Bureau of Land Management TR 4400-7 and 1990 use pattern mapping data, is as follows:

$$\begin{array}{rcl} \frac{\text{Actual Use}}{\text{Actual Utilization}} & = & \frac{\text{Potential Actual Use}}{\text{Desired Utilization}} \\ \\ \frac{4,017 \text{ AUMs}}{95 \text{ Percent}} & = & \frac{1992 \text{ Carrying Capacity}}{30 \text{ Percent}} \end{array}$$

The livestock carrying capacity for the North Pasture is 1,268 AUMs for the Spring/Summer season of use. The 1992 Grazing Permit authorizes 2,175 AUMs of livestock use. Bureau of Land Management monitoring data confirms that this authorization will cause damage to streambank riparian vegetation and habitat.

Mr. Scott Billings, Manager
June 18, 1992
Page 4

Livestock carrying capacity calculations for the South Pasture cannot be computed without use pattern mapping data for livestock use. The Paiute Meadows Allotment Evaluation used wild horse use pattern mapping data from 1987 to 1990 to estimate a carrying capacity to be divided between wild horses and livestock. These data clearly indicated that wild horses utilized wetland riparian habitats from heavy to severe (60% to 100%). In several areas heavy and severe utilization were observed on upland sites and a seeding. Data clearly justified a significant removal of wild horses to protect and restore range conditions.

The District's computation of carrying capacity was based on wild horse data, uniform utilization, weight/averages and the assumption that livestock and wild horses exhibit similar foraging habits. These data are erroneous. Furthermore, this carrying capacity (4,950 AUMs) was allocated to livestock (4,350 AUMs) by the 1992 Grazing Permit. The Grazing Permit replaced wild horses with livestock on the South Pasture. Livestock are known to use mountain browse species important to big game during summer/fall months. The South Pasture is a critical big game winter range and livestock will compete with big game on these depleted ranges. Failure to collect trend studies on this critical winter range precludes the Bureau from showing any rationale to re-authorize livestock use in the South Pasture.

Using the allotment evaluation's 1990 use pattern mapping data and short term objective for wetland riparian habitat, a carrying capacity for wild horses can be computed. In accordance with Rangeland Monitoring Technical Reference 4400-7, the wild horse carrying capacity for the South Pasture would be as follows:

$$\begin{array}{rcl} \frac{\text{Actual Use}}{\text{Actual Utilization}} & = & \frac{\text{Potential Actual Use}}{\text{Desired Utilization}} \\ \\ \frac{3,168 \text{ AUMs (Horse only)}}{95 \text{ Percent}} & = & \frac{\text{Potential Actual Use}}{50 \text{ Percent}} \end{array}$$

The carrying capacity for wild horses is 1,425 AUMs for the South Pasture in 1992. In February 1992 the Bureau removed 489 wild horses from the Paiute Meadows Allotment. By agreement with special interest groups, the District left 200 adult wild horses on the allotment. Previous monitoring data indicated even distribution of wild horses on this allotment. Assuming that 100 wild horses remain on the South Pasture, the estimated forage consumption would be 1,200 AUMs. Existing conditions of the Paiute Meadows Allotment would only leave 225 AUMs available to livestock. The 1992 Grazing

Mr. Scott Billings, Manager
June 18, 1992
Page 5

Permit authorizes livestock 2, 175 AUMs of Summer/Fall use. The 1992 Grazing Permit will exceed the livestock carrying capacity.

2. The Grazing Permit is not consistent with the Paradise-Denio Management Framework III Decisions.

The Range Management Program Objectives 5 states:

"At the end of the third and fifth year of grazing following issuance of the grazing decision make necessary adjustments based upon monitoring data..... If monitoring reveals that a particular use or practice is causing resource damage, that particular use may be adjusted....."

The Paradise-Denio Resource Area land use plan was completed by the issuance of the Record of Decision (MFP III) on August 6, 1982. Despite nearly a decade since the completion of the land use plan, the completion of the Paiute Meadows Allotment Evaluation and knowledge of occurring resource damage, the Bureau of Land Management issued this Grazing Permit contrary to this land use plan objective.

Range Program Decision RM 1.11 states:

".....initial stocking levels are based on current data, but will not preclude the future establishment of intensive grazing systems or other management practices that may be necessary to obtain proper management of the rangeland resources..."

Wildlife Program Decision WL 1.5 states:

"Management objectives of activity plans will include specific objectives pertaining to improving and maintaining desired riparian and meadow habitats..... meadows will be considered as critical areas.."

Wildlife Program Decision 1.11 states:

"All activity plans, permits, leaseswill take measures to protect:

1. Wildlife concentration areas.
2. Raptor nesting areas.
3. Sage grouse strutting, nesting and brooding areas.
4. Important wildlife waters."

Mr. Scott Billings, Manager
June 18, 1992
Page 6

Aquatic Wildlife Program Decision WLA 1.1, 1.2 states:

"The following listed streams appear to have this potential:

Habitat Expansion

Battle Creek Pahute Creek

Habitat Improvement

Bartlett Creek Battle Creek Pahute Creek"

Aquatic Wildlife Program Decision WLA 1.4, 1.5 and 1.6 states:

"...ensure that fish habitat factors are included as objectives of AMPs that contain fishable streams".

The stocking level or active preference was to be adjusted, if necessary, with monitoring data collected in accordance with an allotment management plan. The Paiute Meadows Allotment has never had an allotment management plan. Grazing management practices were solely described in the terms and conditions of Grazing Permits. In light of the recent allotment evaluation and vacated Full Force and Effect Multiple Use Decision (November 11, 1991), the Department seeks resource protection in the terms and conditions of the 1992 Grazing Permit. The Grazing Permit fails to list allotment objectives and grazing practices that will address specific fish and wildlife land use plan decisions. The 1992 stocking rates and seasons of use for livestock will exceed livestock carrying capacities and cause resource damage adversely impacting wildlife species.

Sincerely,



William A. Molini
Director

WAM:el

cc: BLM State Director
Region I Manager

EXHIBIT 3



FRANKIE SUE DEL PAPA
Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
208 NORTH FALL STREET
CARSON CITY, NEVADA 89710

July 30, 1992

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

Re: Appeal of Paiute Meadows Grazing Permit

Dear Mr. Billings:

This letter is an appeal from your decision dated June 30, 1992, that the yearly license issued for the Paiute Meadows Allotment is not an appealable decision. Attachment A. This appeal is based on the following.

The Nevada Department of Wildlife ("Department") is an affected interest in the Paiute Meadows Allotment, as set forth in the appeal dated June 18, 1992. Attachment B. As an agency of the State of Nevada, the Department exercises its responsibilities over wildlife in the allotment, and has a long history of participation in the BLM's land use planning process in furtherance of those responsibilities.

It is the position of the Department that issuance of an annual grazing permit constitutes an appealable final agency action when the BLM knows that significant deterioration of the rangeland resource will result from the use which the permit authorizes. The BLM retains authority to adjust the year to year grazing authorization based on the condition of the range, 43 U.S.C. § 1752(e), so issuance of the annual permit is not merely a ministerial function. It is a function which rests on the exercise of sound professional judgment and is therefore an appealable agency decision. The failure to properly exercise that judgment is reversible as an arbitrary and capricious agency action not in accordance with the law. It should therefore be appealable pursuant to 43 C.F.R. §§ 4.470 *et seq.*

The BLM *must* reduce active use which is "causing an unacceptable level or pattern of utilization or exceeds the livestock carrying capacity as determined through monitoring." 43 C.F.R. § 4110.3-2. "The authorized livestock grazing use

Mr. Scott Billings, Manager
July 30, 1992
Page 2

shall not exceed the livestock carrying capacity." 43 C.F.R. § 4130.6-1. The Department believes the BLM must abide by its own regulations and make adjustments when annually renewing the grazing authorization. The Department particularly asserts that the BLM in the present instance had more than adequate information to require downward adjustment in the authorized grazing, yet arbitrarily and capriciously continued grazing use at a level which it knew would cause resource damage.

The BLM's own documentation proves the grazing authorized exceeds the carrying capacity of the land, as set forth in the Department appeal dated June 18, 1992. See Attachment B. In addition, the Department offers the attached report, Attachment C, as further visual and written evidence of the distressed state of the vegetation even before the onset of livestock grazing. The BLM is aware of these conditions; the affected land is under their charge.

It is 10 years since the land management plan for the Paradise-Denio Resource Area was approved, and the State of Nevada is in its sixth and worst year of drought. Delay can no longer be justified. Treating the annual permit as an appealable decision will prevent such delay.

The Department relies on the legal argument contained in the decision of Administrative Law Judge Rampton in the appeal entitled *Joseph M. Feller v. Bureau of Land Management*, UT-06-89-02 (August 13, 1990), a copy of which is attached as Attachment D. The Judge said "the renewal of a 10-year permit clearly is an action both on an application for a permit and relating to its terms and conditions. It is therefore subject to protest and appeal pursuant to 43 CFR Subpart 4160." *Id.* at 4. The Department believes the same reasoning applies to issuance of an annual permit, especially where the underlying multi-year permit was not subject to review and comment by affected interests, as in the present case.

The Department's position is also supported by recent court decisions. The federal district court found a final agency action in the U.S. Forest Service decision to maintain the status quo in its Region 8 pending development of a future land management plan. *Southern Timber Purchasers Council v. Alcock*, 779 F. Supp. 1353 (N.D. Ga. 1991). The BLM's decision to continue permitting livestock on the Paiute Meadows Allotment is analogous: it preserves the status quo while a decision is devised.

In reaching its conclusion, the court referred to the Supreme Court's practical approach to the definition of "final"

Mr. Scott Billings, Manager
July 30, 1992
Page 3

agency action. "The court looks to see whether the action is 'definitive'; whether it has a direct and immediate effect on the parties; and finally, whether judicial review will serve efficiency or enforcement of the regulatory scheme." *Id.*, 779 F. Supp. at 1358, (quoting *Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 1185 (D.D.C. 1985)).

The Department would argue that each of these criteria is met by the reinstatement of grazing on the Paiute Meadows Allotment at its harmful levels pending the formulation of the promised decision at some indefinite time in the future. While acknowledging that the present appeal is one for administrative, not judicial, relief, the Department believes these three criteria are equally relevant in the administrative context because of the practical policies upon which they rest.

First, the action is definitive because it establishes the permittee's grazing for the 1992 grazing season. The permit very simply sets the level of grazing which will occur.

Second, issuance of the permit has the effect of authorizing grazing on a depleted range resource at levels known to be deleterious to the vegetation. This has a highly adverse effect on wildlife habitat, and therefore on the interests of the Department, which is charged with protection of the State's wildlife.

Third, allowing an appeal from the permit would serve to enforce the regulatory scheme, because it subjects a non-ministerial, allotment-specific BLM grazing decision to public scrutiny for arbitrariness, capriciousness, and unlawfulness. If the appeal is not allowed, then the affected interests have no administrative recourse.

In another decision, *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), a similar "interim strategy" was held to be a final agency action. The court remarked that the Ninth Circuit interprets the term "agency action" broadly. *Id.* at 294. The BLM should make the same broad interpretation in recognition of the many interests which are affected by the annual grazing decision.

CONCLUSION

Because the decision to issue the permit to Paiute Meadows Ranch for grazing on the Paiute Meadows Allotment is not merely ministerial, and because it rests in the agency's sound professional judgment, it is a final agency action subject to appeal.

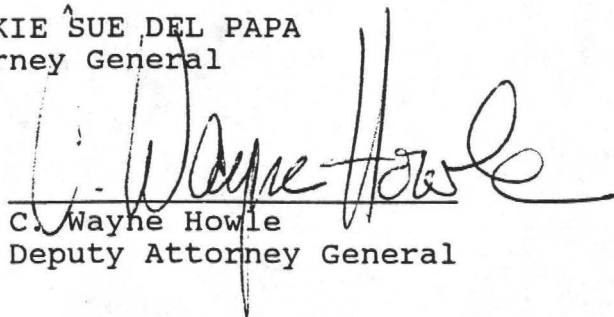
Mr. Scott Billings, Manager
July 30, 1992
Page 4

The grazing authorization was made in spite of information in BLM's possession which shows that grazing at levels authorized by the permit will cause resource damage. There is no other reasonable interpretation of the data. Furthermore, the BLM has the authority and the responsibility to adjust grazing levels when it has such knowledge. Therefore the issuance of the permit authorizing grazing at harmful levels was arbitrary and capricious and not in accordance with law, and the Department appeal of the permit on this basis is entitled to consideration. The Department therefore asks for reversal of the decision finding that the annual grazing permit is not an appealable agency decision, and that the previous Department appeal dated June 18, 1992, be considered on its merits.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:


C. Wayne Howle
Deputy Attorney General

CWH/lhe

Enclosures

cc: Billy Templeton, State Director, Bureau of Land Management
Burton Stanley, Counsel, Bureau of Land Management



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Winnemucca District Office
705 East 4th Street
Winnemucca, Nevada 89445

JUL 1 1992

TAKE
PRIDE IN
AMERICA

IN REPLY REFER TO:

June 30, 1992

4160
(NV-240)

Mr William Molini
Director, Nevada Department of Wildlife
P.O. Box 10678
Reno, Nevada 89520-0022

Dear Mr. Molini:

This letter is in response to a letter I received from you dated June 18, 1992 in which you indicated that you were formally appealing the issuance of the 1992 Grazing Permit for the Paiute Meadows allotment. You are viewing the issuance of this grazing permit as a final decision because the Multiple Use Decision dated November 22, 1991 was vacated.

Your interpretation of this action is not correct. The yearly license is not an appealable action and was issued based on the transfer of 4350 AUMs of active use to Mr. Dan Russell in April of 1990 when he offered proof of control for the base properties at Paiute Meadows.

As you are aware, part of the proposal from the wild horse groups was to drop their appeal of the gathering of wild horses on the Black Rock East HMA if the Bureau would vacate the Full Force and Effect decision for the Paiute Meadows allotment that was issued on November 22, 1991. Once that decision was vacated, then the permittee is allowed to use 4350 AUMs (the amount allowed in the transfer process) until another decision is issued to adjust that amount.

The stipulated agreement with the wild horse groups states that a new Proposed Multiple Use Decision will be issued in consultation with the interested parties and in coordination with the Paiute Meadows evaluation.

The consultation process leading to another decision can be lengthy. In addition to the meetings that you attended in Reno on January 7 and January 14, the Resource Area held a consultation meeting on March 10, 1992 to discuss the issues surrounding Paiute Meadows. Representatives from the Nevada Department of Wildlife were present at that meeting and part of the discussion centered around the action that would be taken if a new decision was not completed and issued prior to the 1992 grazing season.

My staff is currently working to develop alternatives for management on the allotment that address the concerns you identified in your appeal dated December 18, 1991 as well as the concerns of the wild horse groups, NRDC and the Sierra Club. A copy of the alternatives will be sent to all interested parties for their review and comment. Once my staff and I have reviewed the comments, a determination will be made if another consultation meeting is necessary before the management action is developed.

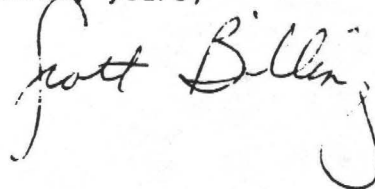
ATTACHMENT A

In closing, I want to reiterate that your interpretation of the yearly grazing permit being a final decision is not correct. Therefore, I view your letter dated June 18, 1992 as a protest as described in 43 CFR 4.450-2 and not as an appeal.

If you wish to appeal this final decision in accordance with 43 CFR Part 4, you are allowed thirty (30) days from receipt of this notice within to file such appeal with the Area Manager, Paradise-Denio Resource Area, Bureau of Land Management, 705 East Fourth Street, Winnemucca, Nevada 89445. The appeal should state clearly and concisely why you think the decision is in error.

If you have any other questions, please give me a call.

Sincerely yours,

A handwritten signature in cursive script that reads "Scott Billing". The signature is written in dark ink and is positioned to the right of the typed name "Scott Billing".

cc: Mr. Richard Heap
Ms. Cathy Barcomb
Ms. Dawn Lappin
Mr. Thomas Van Horne
NRDC
Sierra Club
Humane Society of the United States
American Horse Protection Association
Animal Protection Institute
Mr. William Cummings
Mr. Andy Johas
Mr. Dan Russell



STATE OF NEVADA
DEPARTMENT OF WILDLIFE
1100 Valley Road
P.O. Box 10678
Reno, Nevada 89520-0022
(702) 688-1500
Fax (702) 688-1595

BOB MILLER
Governor

WILLIAM A. MOLINI
Director

June 18, 1992

Mr. Scott Billings, Manager
Paradise-Denio Resource Area
Bureau of Land Management
705 East Fourth St.
Winnemucca, NV 89445

RE: Formal Appeal of Paiute Meadows Grazing Permit

Dear Mr. Billings:

The Nevada Department of Wildlife hereby formally appeals the issuance of the 1992 Grazing Permit for the Paiute Meadows Allotment, which authorizes 4350 AUMs of livestock use with the Paradise-Denio Resource Area from May 1, 1992 through November 5, 1992. Recognizing that the November 22, 1991 Land Use Plan Decision has been vacated, we must necessarily view the Annual Grazing Permit License as the Bureau's final decision in this matter. A copy of the grazing permit was received by our office through the Freedom of Information Act on May 20, 1992, thereby making this appeal timely and within the required 30 day limitation.

Our agency has a long standing interest and investment in the Land Use Planning Process of the Paradise-Denio Resource Area, and particularly the Paiute Meadows Allotment. As an indication of our involvement, the Department provided a comprehensive response to the Draft Paiute Meadows Allotment Evaluation (issued on July 3, 1991) with specific reference to appropriate livestock stocking rates, and seasons of use which may affect important fish and wildlife values also found in this area (response dated August 7, 1991).

On November 22, 1991 the Bureau issued a Full Force and Effect Multiple Use Decision for the Paiute Meadows Allotment, a decision which was formally appealed by the Department of Wildlife on December 18, 1991. This appeal focused on errors in the decision which were used to determine livestock carrying capacities, the implementation

ATTACHMENT B

Mr. Scott Billings, Manager
June 18, 1992
Page 2

of a Livestock Use Agreement, and noncompliance with Bureau of Land Management Policies and the National Environmental Policy Act.

Because of the concern expressed by the Bureau and others relative to excessive numbers of wild horses within the allotment, and subsequent need from a budget and administrative standpoint to immediately address this problem, the Bureau facilitated coordination meetings on January 7, and again on January 14, 1992 with Department representatives and other interest groups. All parties present agreed to withdraw their appeals in an effort to allow for the removal of excess wild horses with the understanding that the livestock grazing portion of the decision and our attendant appeals would remain in place, or that a new grazing decision would be issued prior to the 1992 grazing season. Based on this understanding, the Department submitted a letter dated January 27, 1992 to Mr. Burton Stanley, which was used as support before the IBLA (No. 92-188) to insure the immediate removal of excess wild horses from this allotment.

Much to our surprise, the Multiple Use Decision was vacated by the Bureau in May of 1992, an action which renders our appeal invalid; and most disturbing, an annual license for grazing 4350 AUMs of livestock was issued to the Paiute Meadows Ranch. Although the permit references the establishment of 4350 AUMs "as per consultation with the State Director in January 1992", a letter from the State Director to Johanna Wald of NRDC dated May 27, 1992, states that the amount of use was actually established in April of 1990.

In view of the above, and pursuant to 43 CFR Section 4.470(a), and through the incorporation of comments provided in our original appeal dated December 18, 1992, the following represents the required statement as to why this decision is in error:

1. Livestock carrying capacities are invalid.

Livestock carrying capacities must be computed for the North and South pastures. Grazing authorizations must not exceed these livestock carrying capacities computed with monitoring data presented in the Paiute Meadows Final Allotment Evaluation Summary, November 22, 1991.

Streambank riparian vegetation for Paiute, Battle and Bartlett Creeks must be considered key management areas. The allotment evaluation short term objective limits utilization to 30% on key streambank riparian plant species. Furthermore, the evaluation lists seven riparian species to be monitored by the Bureau of Land Management. Livestock stocking rates and/or season of use that exceeds 30% utilization of these riparian plant species will exceed the livestock carrying capacity for the Paiute Meadows Allotment.

Mr. Scott Billings, Manager
June 18, 1992
Page 3

Average/Weighted Utilization estimates cannot be used in livestock carrying capacity calculations. "Range Monitoring Technical Reference 4400-7" instructs the Bureau to use average/weighted estimates only where livestock distribution and utilization is uniform. Monitoring data clearly shows utilization is not uniform on the Paiute Meadows Allotment. Management actions are to be based upon key management areas. "The Nevada Rangeland Monitoring Handbook" sets criteria for determining key areas and requires these areas be treated with special consideration, even if they do not reflect the entire grazing unit.

Wild horses did not have a significant influence on the utilization of streambank riparian vegetation in the North Pasture. Carrying capacity calculations should not utilize wild horse numbers or estimated animal unit months. Use pattern mapping data collected for grazing seasons 1989 and 1990 distinguish livestock and wild horse use of streambank riparian in the North Pasture. Appendix 1 of the allotment evaluation shows that 244 wild horses were present yearlong on the North Pasture during 1989 and 1990. Monitoring studies measured streambank riparian utilization as slight to light (20%) in 1989 and as severe (95%) in 1990. Regardless of actual wild horse numbers, the only significant differences that occurred between these years were the livestock seasons of use in the North Pasture. During 1989, 701 cows occupied the North Pasture from October 26 to February 28 (Fall/Winter). During 1990, 700 cows occupied the North Pasture from May 3 to October 31 (Spring/Summer). Since 1990 the Bureau of Land Management removed 489 wild horses from the allotment (February 1992) which further reduced the possible influence of wild horses on streambank riparian vegetation in the North Pasture.

The stocking rate for Spring/Summer use of the North Pasture for 1992 exceeds the livestock carrying capacity. Livestock carrying capacity for the North Pasture, in accordance to Bureau of Land Management TR 4400-7 and 1990 use pattern mapping data, is as follows:

$$\begin{array}{rcl} \frac{\text{Actual Use}}{\text{Actual Utilization}} & = & \frac{\text{Potential Actual Use}}{\text{Desired Utilization}} \\ \\ \frac{4,017 \text{ AUMs}}{95 \text{ Percent}} & = & \frac{1992 \text{ Carrying Capacity}}{30 \text{ Percent}} \end{array}$$

The livestock carrying capacity for the North Pasture is 1,268 AUMs for the Spring/Summer season of use. The 1992 Grazing Permit authorizes 2,175 AUMs of livestock use. Bureau of Land Management monitoring data confirms that this authorization will cause damage to streambank riparian vegetation and habitat.

Mr. Scott Billings, Manager

June 18, 1992

Page 4

Livestock carrying capacity calculations for the South Pasture cannot be computed without use pattern mapping data for livestock use. The Paiute Meadows Allotment Evaluation used wild horse use pattern mapping data from 1987 to 1990 to estimate a carrying capacity to be divided between wild horses and livestock. These data clearly indicated that wild horses utilized wetland riparian habitats from heavy to severe (60% to 100%). In several areas heavy and severe utilization were observed on upland sites and a seeding. Data clearly justified a significant removal of wild horses to protect and restore range conditions.

The District's computation of carrying capacity was based on wild horse data, uniform utilization, weight/averages and the assumption that livestock and wild horses exhibit similar foraging habits. These data are erroneous. Furthermore, this carrying capacity (4,950 AUMs) was allocated to livestock (4,350 AUMs) by the 1992 Grazing Permit. The Grazing Permit replaced wild horses with livestock on the South Pasture. Livestock are known to use mountain browse species important to big game during summer/fall months. The South Pasture is a critical big game winter range and livestock will compete with big game on these depleted ranges. Failure to collect trend studies on this critical winter range precludes the Bureau from showing any rationale to re-authorize livestock use in the South Pasture.

Using the allotment evaluation's 1990 use pattern mapping data and short term objective for wetland riparian habitat, a carrying capacity for wild horses can be computed. In accordance with Rangeland Monitoring Technical Reference 4400-7, the wild horse carrying capacity for the South Pasture would be as follows:

$$\frac{\text{Actual Use}}{\text{Actual Utilization}} = \frac{\text{Potential Actual Use}}{\text{Desired Utilization}}$$

$$\frac{3,168 \text{ AUMs (Horse only)}}{95 \text{ Percent}} = \frac{\text{Potential Actual Use}}{50 \text{ Percent}}$$

The carrying capacity for wild horses is 1,425 AUMs for the South Pasture in 1992. In February 1992 the Bureau removed 489 wild horses from the Paiute Meadows Allotment. By agreement with special interest groups, the District left 200 adult wild horses on the allotment. Previous monitoring data indicated even distribution of wild horses on this allotment. Assuming that 100 wild horses remain on the South Pasture, the estimated forage consumption would be 1,200 AUMs. Existing conditions of the Paiute Meadows Allotment would only leave 225 AUMs available to livestock. The 1992 Grazing

Mr. Scott Billings, Manager

June 18, 1992

Page 5

Permit authorizes livestock 2, 175 AUMs of Summer/Fall use. The 1992 Grazing Permit will exceed the livestock carrying capacity.

2. The Grazing Permit is not consistent with the Paradise-Denio Management Framework III Decisions.

The Range Management Program Objectives 5 states:

"At the end of the third and fifth year of grazing following issuance of the grazing decision make necessary adjustments based upon monitoring data..... If monitoring reveals that a particular use or practice is causing resource damage, that particular use may be adjusted....."

The Paradise-Denio Resource Area land use plan was completed by the issuance of the Record of Decision (MFP III) on August 6, 1982. Despite nearly a decade since the completion of the land use plan, the completion of the Paiute Meadows Allotment Evaluation and knowledge of occurring resource damage, the Bureau of Land Management issued this Grazing Permit contrary to this land use plan objective.

Range Program Decision RM 1.11 states:

".....initial stocking levels are based on current data, but will not preclude the future establishment of intensive grazing systems or other management practices that may be necessary to obtain proper management of the rangeland resources..."

Wildlife Program Decision WL 1.5 states:

"Management objectives of activity plans will include specific objectives pertaining to improving and maintaining desired riparian and meadow habitats..... meadows will be considered as critical areas.."

Wildlife Program Decision 1.11 states:

"All activity plans, permits, leaseswill take measures to protect:

1. Wildlife concentration areas.
2. Raptor nesting areas.
3. Sage grouse strutting, nesting and brooding areas.
4. Important wildlife waters."

Mr. Scott Billings, Manager
June 18, 1992
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Aquatic Wildlife Program Decision WLA 1.1, 1.2 states:

"The following listed streams appear to have this potential:

Habitat Expansion

Battle Creek Pahute Creek

Habitat Improvement

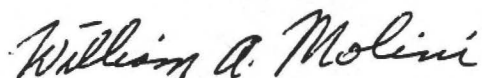
Bartlett Creek Battle Creek Pahute Creek"

Aquatic Wildlife Program Decision WLA 1.4, 1.5 and 1.6 states:

"...ensure that fish habitat factors are included as objectives of AMPs that contain fishable streams".

The stocking level or active preference was to be adjusted, if necessary, with monitoring data collected in accordance with an allotment management plan. The Paiute Meadows Allotment has never had an allotment management plan. Grazing management practices were solely described in the terms and conditions of Grazing Permits. In light of the recent allotment evaluation and vacated Full Force and Effect Multiple Use Decision (November 11, 1991), the Department seeks resource protection in the terms and conditions of the 1992 Grazing Permit. The Grazing Permit fails to list allotment objectives and grazing practices that will address specific fish and wildlife land use plan decisions. The 1992 stocking rates and seasons of use for livestock will exceed livestock carrying capacities and cause resource damage adversely impacting wildlife species.

Sincerely,



William A. Molini
Director

WAM:el

cc: BLM State Director
Region I Manager

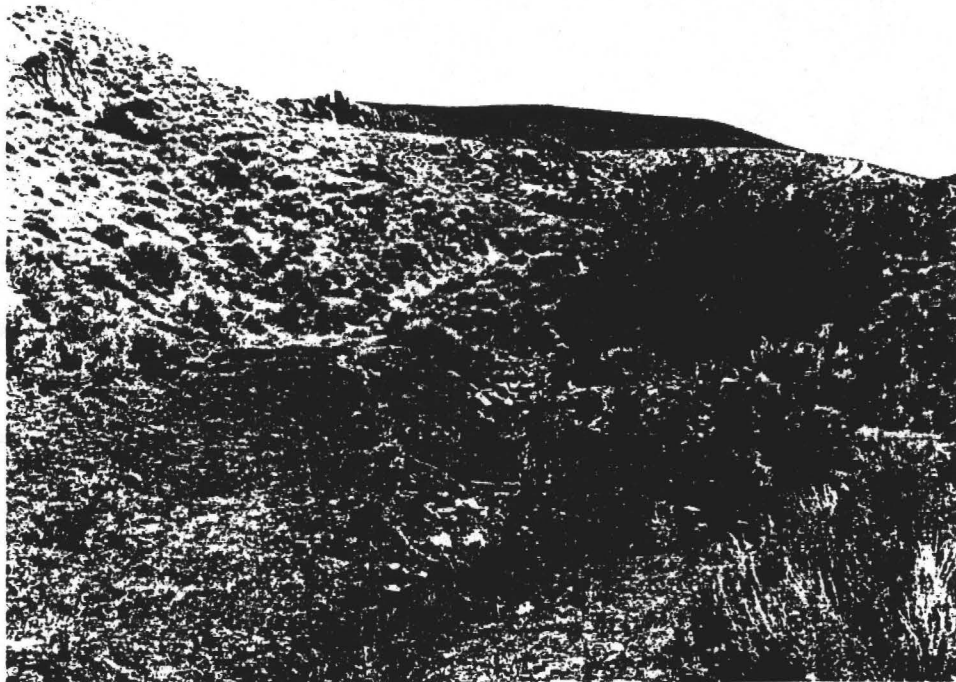
PAIUTE MEADOWS ALLOTMENT MONITORING 1992

Streambank Riparian Habitat - North Battle Creek T44N, R27E, S19
Final Allotment Evaluation (11-22-91):

Short Term Allotment Objective:
"Utilization of key streambank riparian plant species shall not exceed 30% on Paiute, Battle and Bartlett Creeks."

1992 License
North Pasture - 700 Cattle - 2,175 AUMs - 5/1 to 7/31

June 23, 1992 - Roy Leach, Jim Jeffress, Jim French



All cattle were observed within 1/4 mile of water sources. Significant use of riparians were common and licensed use allows for five more weeks before movement to South Pasture.

Field Notes: Streambank riparian vegetation appeared to be used by cattle exclusively. BLM monitoring data confirms this observation by NDOW. Young willows were all hedged by livestock this spring and summer. Mature willows were used. Uplands appeared to have perennial grasses available to cattle, but cattle use is limited to 1/4 of water.

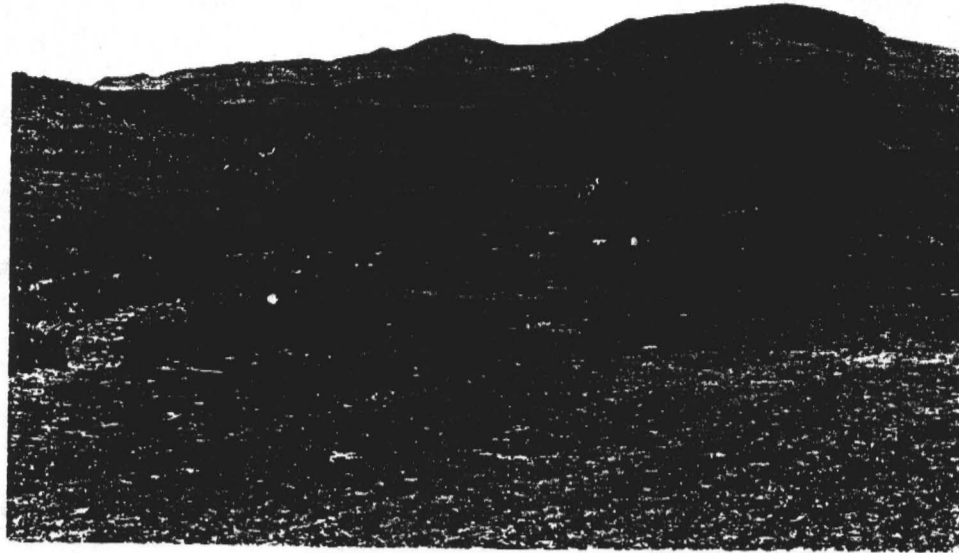
Wetland Riparian Habitat - Burnt Springs - T40N,R26E, S 10

Final Allotment Evaluation 11-22-91

Short Term Objective:

"Utilization of key plant species in wetland riparian habitats shall not exceed 50%."

June 23, 1992 - Roy Leach, Jim French, Jim Jeffress



Heavy use by cattle and wild horses. Bare soils are present. Wild horses use this stringer meadow all spring and summer. There will be no residual cover.

NDOW Appeal/Argument

NDOW used BLM monitoring data to estimate the livestock carrying capacity of 1,268 AUMs of spring/summer use. The 1992 Grazing License authorized 2,175 AUMs from 5/1 to 7/31. This use is known to cause damage to riparian habitats. We assume that these sites will receive continuous use for five additional weeks after these photographs. These sites are typical of the allotment and critical to sage grouse, antelope, mule deer and nongame wildlife.

1992 License:

South Pasture - 700 Cattle - 2,175 AUMs - 8/1 to 11/5

Wetland Riparian Habitat - Trough Springs - T39N, R25E, S12
Final Allotment Evaluation (11-22-91)

Short Term Objective:

"Utilization of key plant species in wetland riparian habitats shall not exceed 50%."

June 23, 1992 - Roy Leach, Jim Jeffress, Jim French



Heavy use by wild horses and trespass cattle. Bare soils present and no cover for sage grouse broods.

Field Notes: This spring is typical of the South Pasture. Water sources are critical to antelope and sage grouse. All springs observed were heavily used by wild horses.

1992 License:

South Pasture - 700 Cattle - 2,175 AUMs - 8/1 to 11/5

Wetland Riparian Habitat - Trough Springs - T39N, R25E, S12
Final Allotment Evaluation (11-22-91)

Short Term Objective:

"Utilization of key plant species in wetland riparian habitats shall not exceed 50%."

June 23, 1992 - Roy Leach, Jim Jeffress, Jim French



Heavy use by wild horses and trespass cattle. Bare soils present and no cover for sage grouse broods.

Field Notes: This spring is typical of the South Pasture. Water sources are critical to antelope and sage grouse. All springs observed were heavily used by wild horses.

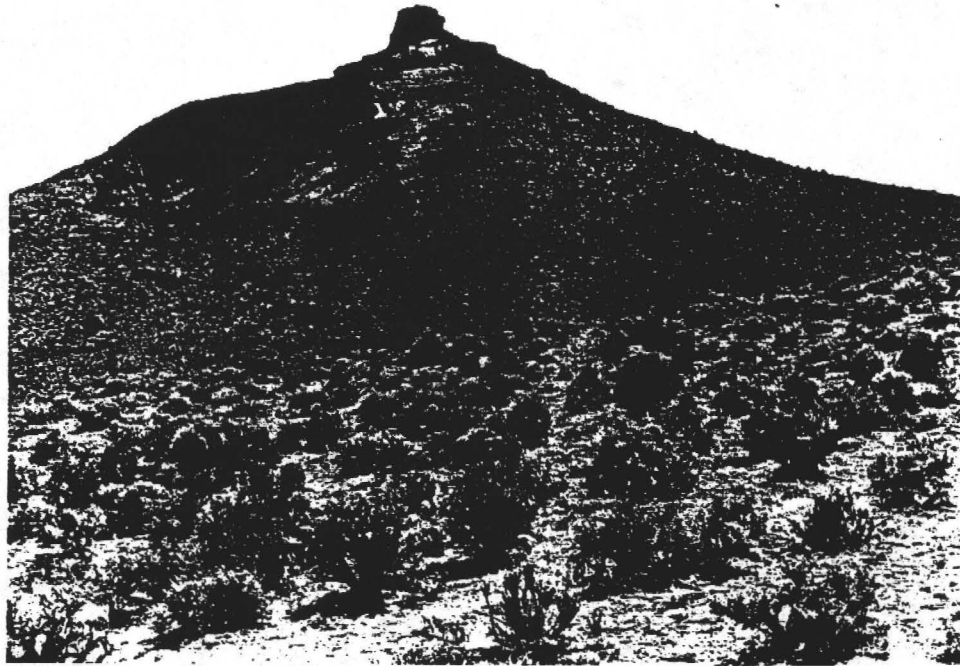
Upland Habitat - T39N, R25E, S 1

Final Allotment Evaluation (11-22-91)

Short Term Objective:

"Utilization of key plant species in upland habitats shall not exceed 50%."

June 23, 1992 - Roy Leach, Jim French, Jim Jeffress



Heavy use of the upland grasses by horses and trespass cattle in 1992. Hedged brush indicated heavy winter use.

Field Notes: The site represents heavy yearlong use by wild horses. It would appear that wild horses had to survive on sage brush last winter. BLM removed 489 wild horses from the South Pasture in February 1992. Antelope, sage grouse and mule deer were observed.

Crested Wheatgrass Site - T39N, R25E

Final Allotment Evaluation (11-22-91)

Short Term Objective:

"Utilization of crested wheatgrass shall not exceed 50%."

June 23, 1992 - Roy Leach, Jim Jeffress, Jim French



Significant use by wild horses at a BLM monitoring site. BLM monitoring data indicate severe use by wild horses prior to the removal in 1992. The observed use is five weeks prior to livestock use. This is a critical antelope summer range.

NDOW Appeal/Argument

NDOW used BLM monitoring data and wild horse numbers to estimate carrying capacities. According to our analysis, wild horses will use all available forage prior to livestock moving into the South Pasture. Our photographs clearly show that there is no forage available to livestock on key riparian and upland sites in the South Pasture. Conditions are expected to become worst on the North and South Pastures. The 1992 Grazing License authorizes livestock use known to cause damage. These photographs confirms our argument.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 301-524-5344)

August 13, 1990

JOSEPH M. FELLER, : UT-06-89-02
Appellant : Appeal from a decision of
v. : the San Juan Resource Area
BUREAU OF LAND MANAGEMENT, : Manager dated February 20,
Respondent : 1989, issuing a grazing
: permit to the White Mesa
UTE MOUNTAIN UTE TRIBE, : Cattle Company, Moab
Intervenor : District, Utah

DECISION

Appellant Joseph M. Feller, a Professor of Law at Arizona State University, sought and was granted "affected interest" status with regard to the Comb Wash allotment in the San Juan Resource Area pursuant to the regulations at 43 CFR 4100.0-5. See attachments "A" and "B" to his Statements of Reasons (SOR). The San Juan Resource Area is located within the Moab District under the supervision of the Utah State Office of the Bureau of Land Management (BLM).

Mr. Feller appeals the issuance by the San Juan Resource Area Manager of a 10-year grazing permit authorizing the White Mesa Ute Cattle Company to graze the Comb Wash allotment. The grazing permit, which is set out as Attachment C to appellant's SOR, "is subject to (A) modification, suspension or cancellation as required by land plans and applicable law; (B) annual review and to modification of terms and conditions as appropriate; and (C) the Taylor Grazing Act, as amended, the Federal Land Policy and Management Act, as amended, the Public Rangelands Improvement Act, and the rules and regulations now or hereafter promulgated thereunder by the Secretary of the Interior." Appellant charges that the issuance of the permit was arbitrary and capricious because BLM failed to follow its own procedures and applicable environmental laws.

Mr. Feller and BLM agreed to waive the hearing and to submit the matter on briefs. See my Order dated January 30, 1990. The Ute Mountain Ute Tribe (Tribe) moved to intervene on March 19, 1990. The Tribe is a Federally recognized Indian tribe with three cattle operations, one of which is the White Mesa Ute Cattle Company in Utah. The motion was granted on March 22, 1990.

The record consists of appellant's appeal and statement of reasons dated March 14, 1989; BLM's Answer dated March 2, 1989; appellant's March 27, 1990, reply to BLM's answer; the Tribe's motion to intervene, and appellant's response to the motion. Appellant also supplemented his initial statement of reasons on April 11, 1990.

Issues

Mr. Feller's appeal asserts that the issuance of a 10-year grazing permit is subject to the provisions of 43 CFR Subpart 4160, which requires service of a proposed decision on all affected interests and an opportunity to protest and/or appeal BLM's proposed action. The appeal asserts BLM failed to comply with these provisions in issuing the subject permit and that it therefore should be set aside.

Additionally, the appeal asserts that the issuance of the subject permit violated provisions of the National Environmental Policy Act of 1969, the Clean Water Act of 1977, the Federal Land Policy and Management Act of 1976, and applicable grazing regulations. Mr. Feller argues that preparation of a site-specific Environmental Impact Statement (EIS) is necessary before BLM may decide to reauthorize grazing in the Comb Wash allotment and that such a study would show that changes in grazing levels and practices are required in order to keep grazing levels within the allotment's carrying capacity and to comply with applicable environmental laws.

In his final submittals, Mr. Feller makes clear that he does not seek any substantive relief in these proceedings. He seeks merely a procedural remedy: that the permit be set aside and the matter be remanded to BLM for further action in conformity with all applicable laws and regulations.

Applicable Law

The general authority of the Secretary of the Interior with respect to management of Federal rangelands is set forth in the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315 et seq.:

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of [Federal rangelands] and he shall * * * do any and all things necessary to accomplish the purposes of this chapter * * * namely, to regulate their occupancy and use, to preserve the land and resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement and development of the range * * *.

43 U.S.C. § 315a.

Thus, the management of the Federal range is committed to the discretion of the Secretary. "[T]he entire authority and responsibility for allocation of the Federal range is vested in the Department [of the Interior], to be exercised in such a manner as to provide for the most beneficial use thereof." United States v. Maher, 5 IBLA 209, 221; 79 I.D. 109, 115 (1972), citing Red Canyon Sheep Company v. Ickes, 98 F.2d 308 (D.C. Cir. 1938).

Where, as here, a decision adjudicating grazing privileges is appealed, it is well settled that the appellant bears the burden of showing by substantial evidence that the decision was arbitrary, capricious, or clearly erroneous as a matter of law. A decision may be regarded as arbitrary and capricious only if it is not supportable on any rational basis or if it does not substantially comply with the grazing regulations. See, e.g., Fasselin v. Bureau of Land Management, 102 IBLA 9 (1988). A decision must also comply with Federal environmental laws. See, e.g., Natural Resources Defense Council v. Morton, 388 F. Supp. 819 (D.D.C. 1975) aff'd, 527 F.2d 1386 (D.C. Cir. 1976), cert. denied, 427 U.S. 913 (1976).

Discussion

The first issue to address is whether the renewal of a 10-year grazing permit for the Comb Wash allotment is a decision or an action on an application for a permit within the meaning of 43 CFR Subpart 4160. BLM asserts that the issuance of a grazing permit for the Comb Wash allotment is not a protestable or appealable decision because the permit "does not convey any new rights or privileges" but "merely recognizes [the permittee's] prior preference." BLM's Answer at 3. See also attachment B to appellant's SOR.

The applicable regulation provides:

[T]he authorized officer shall serve a proposed decision on any applicant * * * who is affected by the proposed action on applications for permits * * * or by the proposed action relating to terms and conditions of permits * * *. The authorized officer shall also send copies to other affected interests. The proposed decision shall state reasons for the action * * * and shall provide * * * for the filing of a protest.

43 CFR 4160.1-1 (emphasis added).

The renewal of a 10-year grazing permit clearly is an action both on an application for a permit and relating to its terms and conditions. It is therefore subject to protest and appeal pursuant to 43 CFR Subpart 4160.

The next issue to determine is whether Mr. Feller received appropriate notice of and opportunity to protest BLM's decision to renew the White Mesa Ute Cattle Company's permit to graze the Comb Wash allotment. Mr. Feller asserts he received an unsigned copy of the proposed permit on February 13, 1989. The permit was dated February 6, 1989. It apparently was signed by all parties and became effective as of February 20, 1989.

Mr. Feller asserts that he was not informed until he asked whether the permit he received was intended to be a proposed or final action. Nor is there any indication that any explanation of the reasons for deciding to renew the permit as issued was provided to anyone.

This is not surprising in light of BLM's stated position of which Mr. Feller was advised only days before the permit was issued:

[A]s an affected interest you would have the right to protest and/or appeal decisions which relate specifically to the Comb Wash allotment. Appeal or protests of actions which do not require specific decisions would not be allowed. An example of such an action which would not require a decision would be the renewal of a grazing permit or lease where monitoring showed that there was no need for adjustments in grazing use and are normally issued as standard operating procedure.

Attachment B to Appellant's SOI

Nevertheless, BLM argues that

If indeed BLM did not give Mr. Feller as much notice as he feels he should have had, he obviously has had every opportunity to appeal this matter, and is now being given an opportunity to have his side of the story told. The very documents which Mr. Feller has submitted for review indicate that BLM has made [an] extraordinary effort to involve this extremely active person in what is merely one allotment of a great many which one area office must assume total responsibility for.

Whether technical violations of informing Mr. Feller occurred or not he obviously has not been harmed in any way in his ability to have his views heard and reviewed.

Indeed, however, violations of the applicable regulation at 43 CFR Subpart 4160 did occur to the substantial prejudice of Mr. Feller's ability to participate as an affected interest in BLM's decision to reauthorize grazing in the Comb Wash allotment. For that reason, BLM's decision to issue the present 10-year grazing permit to the White Mountain Ute Cattle Company must be set aside and the matter must be returned to BLM for proper processing.

As noted above, Mr. Feller also asserts that the grazing permit issued to the White Mountain Ute Cattle Company for the Comb Wash allotment fails to comply with applicable provisions of several environmental laws and grazing regulations. Among other things, he argues

(1) A new site-specific EIS is required to be prepared for the Comb Wash allotment prior to the issuance of a new 10-year grazing permit pursuant to the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4347 (1982) and the District Court's decision in Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (D.D.C. 1975), aff'd, 517 F.2d 1386 (D.C. Cir. 1976), cert. denied 437 U.S. 913 (1976).

(2) Grazing levels must be reduced to prevent any violations of Sec. 61 of the Clean Water Act of 1977, P.L. 95-139, 91 Stat. 1566, 1598, 33 U.S.C. § 1323 (1982), which requires all Federal actions to comply with State water quality standards.

(3) Grazing levels must be reduced to those supportable by the allotment's carrying capacity and in conformity with the applicable allotment and resource management plans pursuant to

provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1702, 1733, and 1752, and the grazing regulations at 43 CFR 4130.6-1(a) and 4110.3.

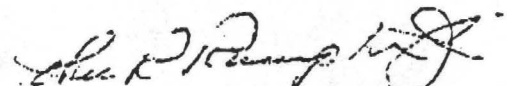
The parties have all submitted arguments concerning the provisions and applicability of, inter alia, a 1963 allotment management plan (AMP) for the Comb Wash allotment, an EIS prepared for an area encompassing the Comb Wash allotment, and a proposed San Juan Resource Management Plan which also encompasses the allotment. Significantly, none of these documents has been submitted into the record before me.

In light of the remand of this matter to BLM and the lack of a substantial factual record, I find it inappropriate to address the other issues raised in this appeal. On remand, BLM should take care to set out in an articulate and reasoned manner the basis for any decision regarding grazing in the Comb Wash allotment and, among other things, the decision should set forth the basis for asserting compliance with, or exemption from, the applicable provisions of law and regulation and should demonstrate consideration of any applicable monitoring studies.

A new decision regarding grazing on the Comb Wash allotment should issue within 60 days of the effective date of this decision and should be issued in compliance with the provisions of 43 CFR 4160.1-1.

Conclusion

For the reasons set forth above, the decision of the San Juan Resource Area Manager to issue a 10-year grazing permit to the White Mountain Ute Cattle Company for grazing on the Comb Wash allotment is hereby set aside. The matter is remanded to BLM for further action consistent with this decision. A new decision concerning grazing on the Comb Wash allotment should be issued by BLM within 60 days of the effective date of this decision. In the interim, grazing levels should be maintained as currently authorized.


John R. Rampton, Jr.
District Chief
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Distribution

By Certified Mail:

David K. Grayson, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior
Room 6201 Federal Building
125 South State Street
Salt Lake City, Utah 84138

Joseph M. Feller
Associate Professor of Law
College of Law
Arizona State University
Tempe, Arizona 85287

Judy Knight-Frank, Chairperson
Ute Mountain Tribal Council
P.O. Box GG
Towaoc, Colorado 81334

EXHIBIT 4



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Winnemucca District Office
705 East 4th Street
Winnemucca, Nevada 89445



IN REPLY REFER TO

AUG 06 1992

4130
(NV-241.4)

Daniel Russell
P.O. Box 339
Folsom, CA 95630

Dear Mr. Russell:

This letter authorizes a change in your 1992 grazing use of the Paiute Meadows Allotment in the Paradise-Deno Resource Area as applied on July 31, 1992. This represents a change in your authorized use areas, season of use, and authorized active preference. The change in your authorized use is approved as follows:

From:

South Paiute Use Area
700 cows 08/01 to 11/01 2232 AUMs

To:

North Paiute Use Area
High Elevations
250 cows 08/01 to 08/14 115 AUMs

South Paiute Use Area
High elevations
300 cows 08/01 to 10/31 907 AUMs

North Paiute Use Area
Low Elevations-east of Leonard Creek Rd.
250 cows 11/01 to 02/28 988 AUMs

Non-Use
--- cows 08/01 to 11/05 224 AUMs

This represents a reduction in herd size of 57% during the remainder of the normally scheduled use period, by taking voluntary non-use and deferring use until November. Winter use may only be made in the North Paiute Use Area in the lower elevations east of Leonard Creek Road and north of Elephant Mountain. No winter use is authorized south of Paiute Creek. Some drift may occur into areas west of the Leonard Creek Road in the vicinity of the well and reservoir south of Battle Creek Ranch.

Diligent riding and herding is required to ensure livestock remain in the authorized use areas only during the authorized use periods. Salt and/or mineral blocks shall not be placed within 1/4 mile of springs, streams, meadows, riparian habitats or aspen stands.

The change to winter use is authorized due to drought conditions and the existing population and distribution of wild horses. The winter use area authorized for use has not been identified as a conflict area for wild horse use or wildlife use. Wild horse populations are known to utilize the southern half of the allotment during the winter months intensively, therefore no livestock grazing will be authorized in that area to assure that forage is available for wild horses and wildlife through the winter.

A replacement grazing bill is attached and is due and payable immediately. If your payment is not received within 15 days of the due date (August 1, 1992), you will be charged a late fee assessment of \$25.00 or 10 percent of the grazing bill, whichever is greater, not to exceed \$250.00. Failure to make payment within 30 days of the due date may result in trespass action.

The authorized use as outlined above is the only authorized use in the Paiute Meadows Allotment. Any changes to the above must be applied for and approved in advance by the authorized officer. Please allow a minimum of two weeks notice to process any requests for a change in the above use.

Thank you for your continued cooperation in the proper management of the public rangelands. If you have any questions feel free to contact Bob Hopper or Abbie Jossie of my staff.

Sincerely yours,


Area Manager
Paradise-Denio Resource Area

cc: Thomas Van Horne
Mr. and Mrs. Bill Phillips

EXHIBIT 5

RECEIVED

SEP 15 1992

OFFICE OF ATTORNEY GENERAL
DEPUTY ATTORNEY GENERAL



STATE OF NEVADA
DEPARTMENT OF WILDLIFE

1100 Valley Road
P.O. Box 10678
Reno, Nevada 89520-0022
(702) 688-1500
Fax (702) 688-1595

BOB MILLER
Governor

WILLIAM A. MOLINI
Director

September 11, 1992

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

RE: Appeal - August 6, 1992 Grazing Authorization - Paiute Meadows Allotment

Dear Scott:

This letter is an appeal from your recent re-authorization of grazing livestock on the Paiute Meadows Allotment of August 6, 1992. The Nevada Department of Wildlife has great interest and concern with grazing authorizations made by the Paradise-Denio Resource Area. As an affected interest, the Department appealed the Multiple Use Decision dated November 22, 1991, the 1992 yearly license, and the manager's decision of June 30, 1992. Our appeals have objected to livestock management practices which have, based on rangeland monitoring studies, caused resource damage.

The Department of Wildlife's previous appeals have found errors in your authorizations based upon monitoring data, livestock carrying capacities calculations and their consistency with the Paradise-Denio Management Framework Plan III Decisions (land use plan). In addition, we argue that the 1992 Grazing License and this authorization are appealable final agency actions (See Appeal June 18, 1992).

Specific to your re-authorization of August 6, 1992, we find the following errors:

North Paiute Use Area		
High Elevations		
250 cows	8/01 to 8/14	115 AUMs

Mr. Scott Billings
September 11, 1992
Page 2

The Multiple Use Decision dated November 22, 1991 established a carrying capacity for the North Paiute Use Area that the Bureau knew would cause damage to streambank and wetland riparian systems (See Appeal December 18, 1991). The 1992 Grazing License perpetuated the previous decision and was appealed under the basis that riparian habitat did not receive consideration in determining the livestock carrying capacity (See Appeal June 18, 1992). As explained in these appeals, the 1992 livestock authorization for the high elevation of the North Paiute Use Area would exceed the livestock carrying capacity. Department photographs of key management areas on June 23, 1992 clearly exhibit ongoing resource damage six weeks prior to the scheduled removal of livestock (See Appeal July 30, 1992). Your re-authorization for the North Paiute Use Area did not take into account those concerns or evidence provided in three previous administrative appeals.

Knowing that previous decisions would cause damage and in spite of three appeals and photographic documentation of resource degradation, the Paradise-Denio Resource Area Manager by this decision (August 6, 1992) extended livestock use for two weeks or 115 AUMs which perpetuated ongoing and predictable damage to riparian systems in the North Use Area. This decision is arbitrary and contrary to law.

South Paiute Use Area
High Elevations
300 cows

8/01 to 10/31

907 AUMs

Department of Wildlife appeals of the Multiple Use Decision and 1992 Grazing License focused upon the monitoring data, analysis and livestock carrying capacity determinations for the South Paiute Use Area. As explained in the Department's appeals, our interpretation of Bureau rangeland monitoring data and stocking rate estimates indicate the South Paiute Use Area had only 225 AUMs available to livestock in 1992 (See Appeal June 18, 1992). In addition to our appeal points, photographs taken June 23, 1992 of key riparian areas and upland areas in the South Paiute Use Area clearly show that allowable use levels or utilization objectives for uplands and riparian key management areas were exceeded six weeks prior to beginning livestock use for the higher elevations.

Knowing that resource damage was imminent and in spite of photographic documentation, the Paradise-Denio Resource Area re-authorized livestock grazing for forage that did not exist, thus exceeding the allotment livestock carry capacity. This decision is arbitrary and contrary to law.

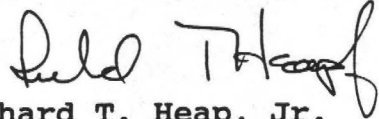
Mr. Scott Billings
September 11, 1992
Page 3

Conclusion

The voluntary non use of 300 cows, from the previously licensed 700 cows, appears to be a significant reduction; However in reality non use of only 224 AUMs is insignificant and cannot protect the critical fish and wildlife habitats of this allotment. Due to existing wild horse numbers and their use of the South Paiute Use Area, forage is not available to livestock. The acceptance of 224 AUMs of voluntary non-use is only five percent of the 1992 Grazing License authorization of 4,350 AUMs. To portray this decision as a 60 percent reduction is misleading and will not provide adequate relief or protection to critical wildlife habitats.

Sincerely,

WILLIAM A. MOLINI, DIRECTOR



Richard T. Heap, Jr.
Region I Manager
Region I

REL:rl/

CC: Habitat, Reno
Wayne Howle, Deputy Attorney General, Nevada
Billy Templeton, State Director, Bureau of Land Management
Burton Stanley, Counsel, Bureau of Land Management

EXHIBIT 6



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

August 13, 1990

JOSEPH M. FELLER, : UT-06-89-02
: :
Appellant : Appeal from a decision of
: the San Juan Resource Area
v. : Manager dated February 20,
: 1989, issuing a grazing
BUREAU OF LAND MANAGEMENT, : permit to the White Mesa
: Cattle Company, Moab
Respondent : District, Utah
: :
: :
UTE MOUNTAIN UTE TRIBE, :
: :
Intervenor :

DECISION

Appellant Joseph M. Feller, a Professor of Law at Arizona State University, sought and was granted "affected interest" status with regard to the Comb Wash allotment in the San Juan Resource Area pursuant to the regulations at 43 CFR 4100.0-5. See attachments "A" and "B" to his Statements of Reasons (SOR). The San Juan Resource Area is located within the Moab District under the supervision of the Utah State Office of the Bureau of Land Management (BLM).

Mr. Feller appeals the issuance by the San Juan Resource Area Manager of a 10-year grazing permit authorizing the White Mesa Ute Cattle Company to graze the Comb Wash allotment. The grazing permit, which is set out as Attachment C to appellant's SOR, "is subject to (A) modification, suspension or cancellation as required by land plans and applicable law; (B) annual review and to modification of terms and conditions as appropriate; and (C) the Taylor Grazing Act, as amended, the Federal Land Policy and Management Act, as amended, the Public Rangelands Improvement Act, and the rules and regulations now or hereafter promulgated thereunder by the Secretary of the Interior." Appellant charges that the issuance of the permit was arbitrary and capricious because BLM failed to follow its own procedures and applicable environmental laws.

Mr. Feller and BLM agreed to waive the hearing and to submit the matter on briefs. See my Order dated January 30, 1990. The Ute Mountain Ute Tribe (Tribe) moved to intervene on March 19, 1990. The Tribe is a Federally recognized Indian tribe with three cattle operations, one of which is the White Mesa Ute Cattle Company in Utah. The motion was granted on March 22, 1990.

The record consists of appellant's appeal and statement of reasons dated March 14, 1989; BLM's Answer dated March 2, 1989; appellant's March 27, 1990, reply to BLM's answer; the Tribe's motion to intervene, and appellant's response to the motion. Appellant also supplemented his initial statement of reasons on April 11, 1990.

Issues

Mr. Feller's appeal asserts that the issuance of a 10-year grazing permit is subject to the provisions of 43 CFR Subpart 4160, which requires service of a proposed decision on all affected interests and an opportunity to protest and/or appeal BLM's proposed action. The appeal asserts BLM failed to comply with these provisions in issuing the subject permit and that it therefore should be set aside.

Additionally, the appeal asserts that the issuance of the subject permit violated provisions of the National Environmental Policy Act of 1969, the Clean Water Act of 1977, the Federal Land Policy and Management Act of 1976, and applicable grazing regulations. Mr. Feller argues that preparation of a site-specific Environmental Impact Statement (EIS) is necessary before BLM may decide to reauthorize grazing in the Comb Wash allotment and that such a study would show that changes in grazing levels and practices are required in order to keep grazing levels within the allotment's carrying capacity and to comply with applicable environmental laws.

In his final submittals, Mr. Feller makes clear that he does not seek any substantive relief in these proceedings. He seeks merely a procedural remedy: that the permit be set aside and the matter be remanded to BLM for further action in conformity with all applicable laws and regulations.

Applicable Law

The general authority of the Secretary of the Interior with respect to management of Federal rangelands is set forth in the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315 et seq.:

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of [Federal rangelands] and he shall * * * do any and all things necessary to accomplish the purposes of this chapter * * * namely, to regulate their occupancy and use, to preserve the land and resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement and development of the range * * *.

43 U.S.C. § 315a.

Thus, the management of the Federal range is committed to the discretion of the Secretary. "[T]he entire authority and responsibility for allocation of the Federal range is vested in the Department [of the Interior], to be exercised in such a manner as to provide for the most beneficial use thereof." United States v. Maher, 5 IBLA 209, 221; 79 I.D. 109, 115 (1972), citing Red Canyon Sheep Company v. Ickes, 98 F.2d 308 (D.C. Cir. 1938).

Where, as here, a decision adjudicating grazing privileges is appealed, it is well settled that the appellant bears the burden of showing by substantial evidence that the decision was arbitrary, capricious, or clearly erroneous as a matter of law. A decision may be regarded as arbitrary and capricious only if it is not supportable on any rational basis or if it does not substantially comply with the grazing regulations. See, e.g., Fasselin v. Bureau of Land Management, 102 IBLA 9 (1988). A decision must also comply with Federal environmental laws. See, e.g., Natural Resources Defense Council v. Morton, 388 F. Supp. 819 (D.D.C. 1975) aff'd, 527 F.2d 1386 (D.C. Cir. 1976), cert. denied, 427 U.S. 913 (1976).

Discussion

The first issue to address is whether the renewal of a 10-year grazing permit for the Comb Wash allotment is a decision or an action on an application for a permit within the meaning of 36 CFR Subpart 4160. BLM asserts that the issuance of a grazing permit for the Comb Wash allotment is not a protestable or appealable decision because the permit "does not convey any new rights or privileges" but "merely recognizes [the permittee's] prior preference." BLM's Answer at 7. See also attachment B to appellant's SOR.

The applicable regulation provides:

[T]he authorized officer shall serve a proposed decision on any applicant * * * who is affected by the proposed action on applications for permits * * * or by the proposed action relating to terms and conditions of permits * * *. The authorized officer shall also send copies to other affected interests. The proposed decision shall state reasons for the action * * * and shall provide * * * for the filing of a protest.

43 CFR 4160.1-1 (emphasis added).

The renewal of a 10-year grazing permit clearly is an action both on an application for a permit and relating to its terms and conditions. It is therefore subject to protest and appeal pursuant to 43 CFR Subpart 4160.

The next issue to determine is whether Mr. Feller received appropriate notice of and opportunity to protest BLM's decision to renew the White Mesa Ute Cattle Company's permit to graze the Comb Wash allotment. Mr. Feller asserts he received an unsigned copy of the proposed permit on February 13, 1989. The permit was dated February 6, 1989. It apparently was signed by all parties and became effective as of February 20, 1989.

Mr. Feller asserts that he was not informed until he asked whether the permit he received was intended to be a proposed or final action. Nor is there any indication that any explanation of the reasons for deciding to renew the permit as issued was provided to anyone.

This is not surprising in light of BLM's stated position of which Mr. Feller was advised only days before the permit was issued:

[A]s an affected interest you would have the right to protest and/or appeal decisions which relate specifically to the Comb Wash allotment. Appeal or protests of actions which do not require specific decisions would not be allowed. An example of such an action which would not require a decision would be the renewal of a grazing permit or lease where monitoring showed that there was no need for adjustments in grazing use and are normally issued as standard operating procedure.

Attachment B to Appellant's SOI

Nevertheless, BLM argues that

If indeed BLM did not give Mr. Feller as much notice as he feels he should have had, he obviously has had every opportunity to appeal this matter, and is now being given an opportunity to have his side of the story told. The very documents which Mr. Feller has submitted for review indicate that BLM has made [an] extraordinary effort to involve this extremely active person in what is merely one allotment of a great many which one area office must assume total responsibility for.

Whether technical violations of informing Mr. Feller occurred or not he obviously has not been harmed in any way in his ability to have his views heard and reviewed.

Indeed, however, violations of the applicable regulation at 43 CFR Subpart 4160 did occur to the substantial prejudice of Mr. Feller's ability to participate as an affected interest in BLM's decision to reauthorize grazing in the Comb Wash allotment. For that reason, BLM's decision to issue the present 10-year grazing permit to the White Mountain Ute Cattle Company must be set aside and the matter must be returned to BLM for proper processing.

As noted above, Mr. Feller also asserts that the grazing permit issued to the White Mountain Ute Cattle Company for the Comb Wash allotment fails to comply with applicable provisions of several environmental laws and grazing regulations. Among other things, he argues

(1) A new site-specific EIS is required to be prepared for the Comb Wash allotment prior to the issuance of a new 10-year grazing permit pursuant to the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4347 (1982) and the District Court's decision in Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (D.D.C. 1975), aff'd, 517 F.2d 1386 (D.C. Cir. 1976), cert. denied 437 U.S. 913 (1976).

(2) Grazing levels must be reduced to prevent any violations of Sec. 61 of the Clean Water Act of 1977, P.L. 95-139, 91 Stat. 1566, 1598, 33 U.S.C. § 1323 (1982), which requires all Federal actions to comply with State water quality standards.

(3) Grazing levels must be reduced to those supportable by the allotment's carrying capacity and in conformity with the applicable allotment and resource management plans pursuant to

provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1702, 1733, and 1752, and the grazing regulations at 43 CFR 4130.6-1(a) and 4110.3.

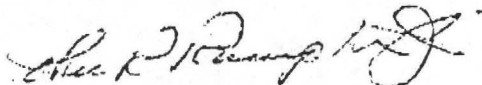
The parties have all submitted arguments concerning the provisions and applicability of, inter alia, a 1968 allotment management plan (AMP) for the Comb Wash allotment, an EIS prepared for an area encompassing the Comb Wash allotment, and a proposed San Juan Resource Management Plan which also encompasses the allotment. Significantly, none of these documents has been submitted into the record before me.

In light of the remand of this matter to BLM and the lack of a substantial factual record, I find it inappropriate to address the other issues raised in this appeal. On remand, BLM should take care to set out in an articulate and reasoned manner the basis for any decision regarding grazing in the Comb Wash allotment and, among other things, the decision should set forth the basis for asserting compliance with, or exemption from, the applicable provisions of law and regulation and should demonstrate consideration of any applicable monitoring studies.

A new decision regarding grazing on the Comb Wash allotment should issue within 60 days of the effective date of this decision and should be issued in compliance with the provisions of 43 CFR 4160.1-1.

Conclusion

For the reasons set forth above, the decision of the San Juan Resource Area Manager to issue a 10-year grazing permit to the White Mountain Ute Cattle Company for grazing on the Comb Wash allotment is hereby set aside. The matter is remanded to BLM for further action consistent with this decision. A new decision concerning grazing on the Comb Wash allotment should be issued by BLM within 60 days of the effective date of this decision. In the interim, grazing levels should be maintained as currently authorized.


John R. Rampton, Jr.
District Chief
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Distribution

By Certified Mail:-

David K. Grayson, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior
Room 6201 Federal Building
125 South State Street
Salt Lake City, Utah 84138

Joseph M. Feller
Associate Professor of Law
College of Law
Arizona State University
Tempe, Arizona 85287

Judy Knight-Frank, Chairperson
Ute Mountain Tribal Council
P.O. Box GG
Towaoc, Colorado 81334

EXHIBIT 7



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
139 East South Temple, Suite 600
Salt Lake City, Utah 84111
Phone: 801-524-5344

June 6, 1997

ORDER

DEFENDERS OF WILDLIFE, A	:	AZ-020-97-03080
DISTRICT OF COLUMBIA NON-	:	
PROFIT CORPORATION; SIERRA	:	
CLUB, GRAND CANYON CHAPTER,	:	
AN ARIZONA NON-PROFIT	:	Appeal of BLM grazing bill No.
CORPORATION; SOUTHWEST	:	G02239420, South Vekol Grazing
CENTER FOR BIOLOGICAL	:	Allotment, Phoenix Grazing District,
DIVERSITY, A NEW MEXICO NON-	:	Arizona
PROFIT CORPORATION; and STEVE	:	
JOHNSON.	:	

Appellants

v.

BUREAU OF LAND MANAGEMENT,

Respondent

RESPONDENT'S MOTION TO DISMISS GRANTED

BACKGROUND

This case involves an appeal of a BLM grazing bill initially issued on March 1, 1997, to cover the South Vekol Grazing Allotment (number 3080) in the State of Arizona. The South Vekol Allotment is a perennial-ephemeral allotment previously permitted to Lamco Livestock, Inc. of Gilbert, Arizona. Lamco's 1997 Grazing Application is set out at Exhibit A of Respondent's Answer, Motion to Dismiss. Following that application, BLM issued two bills for grazing on this allotment. The first grazing bill (G02239419, with due date of March 1, 1997) was subsequently cancelled by BLM and replaced with another bill (G02239420, with due date of March 10, 1997). (Exhibit B of Respondent's Answer: Motion to Dismiss).

Appellants submitted their Grazing Appeal and Statement of Reasons, dated March 14, 1997. Respondent submitted an Answer and Motion to Dismiss dated April 22, 1997. In that Motion, Respondent moved to dismiss the instant appeal on two alternative grounds, namely, lack of jurisdiction because no final decision had been entered by the authorized BLM official, and, in the alternative, lack of standing based on alleged absence of adverse affects. Because of the content of this ruling and Order with respect to the jurisdictional issue, there is no necessity to address the issue of standing. Consequently, this ruling deals exclusively with the referenced jurisdictional challenge posited by BLM.

In turn, Appellants submitted a Notice of Amended Appeal, Answer to Respondent's Motion to Dismiss and Reply to Respondent's Answer to the Appeal, dated May 19, 1997. Through their Notice of Amended Appeal, Appellants have, appropriately, extended the scope of their appeal to also cover the second grazing bill, number G02239420, with respect to which they did not have notice at the time they filed their original appeal in this matter.

STATEMENT OF ISSUES

Appellants contend that the 1997 BLM renewal of grazing authorization to Lamco on the South Vekol Allotment constituted a final decision by the authorized BLM official, which they contend is now jurisdictionally amenable to appeal. BLM in its Brief contends just the opposite. The undersigned concurs with the government on this procedural issue for the reasons set out below in the Discussion section of this ruling.

Appellants argue that BLM has taken an action which constitutes a final decision within the purview of 43 C.F.R. §§ 4.470 and 4160.4, and that the Hearings Division now enjoys jurisdiction with respect to their timely filed notice of appeal. However, BLM has done nothing more in this case than receive Lamco's application for renewal and then send out the standard billing form. The number of previously authorized AUM's has not been changed, and consequently the previously authorized grazing on this allotment has not been changed or amended. Indeed, as the administrative record makes clear, going all the way back to 1988, there has been no change in approved AUM's for this allotment. (See Exhibit C to Respondent's Answer: Motion to Dismiss.)

In the context of these facts, a final decision under the auspices of 43 C.F.R. §§ 4.470 and 4160.4 would have resulted only if BLM had approved some change in the previously authorized grazing on the allotment. That previously authorized grazing followed all pertinent regulatory requirements at the time, including coordination and consultation with interested parties. With respect to the 1997 renewal, BLM has approved no material changes from prior years. As counsel for BLM has correctly pointed out in his Brief, "It would be a mistake to assume that the 1997 grazing authorization and grazing billing for the South Vekol Allotment denotes a new management practice. ... Appellants may also assume that BLM's 1997 calculation (1862 AUMs, and 160 head) for the South Vekol Allotment is new. It is not. The South Vekol Allotment was classified by BLM for

yearlong use by cattle at 1863 AUMs, the equivalent of 160 head (CYL), as early as a February 7, 1973 memorandum to the prior preference holder." (Emphasis added, Sec: Respondent's Answer; Motion to Dismiss, p.p. 4-5) Without such a change, there has been no BLM management action that would now be jurisdictionally subject to appeal. (See, for example: Headwaters, Inc., et al., 101 IBLA 234, 239-240 (1988); and, Ruskin Linco, Jr., v. BLM, 66 IBLA 109 (1982)). Consequently, given the specific facts of this case, the Hearings Division enjoys no subject matter jurisdiction for purposes of an appeal.

In their Statement of Reasons to support their appeal, Appellants have alleged the following Specifications of Error as follows:

1. NEPA Error, 42 U.S.C. § 4332. Appellants allege that BLM made a final decision to issue a new permit and that a site-specific EA or EIS was necessary as a predicate to issuance of such an alleged final decision.
2. FLPMA Error. Appellants contend that the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., has been violated because BLM's decision to extend grazing for another year was "... made in violation of the Lower Gila South Resource Management Plan (RMP), and FLPMA requires BLM to comply with its decisions in the Lower Gila South RMP." (Appellants' Grazing Appeal, p. 3)
3. Failure to acquire or assess required monitoring data before making the decision. Appellants allege that rangeland monitoring required by the Lower Gila South RMP has not been performed by BLM.
4. Failure to respond to livestock conflicts with the ACEC. Appellants allege that the Vekol Valley Grassland Area of Critical Environmental Concern (ACEC) has been overgrazed based upon aerial monitoring photos of the ACEC "which show an extraordinary fenceline contrast between the remnant tobosa grassland portion on the allotment and the portion on the adjoining Tonoho O'Odham Indian Reservation." (Appellants' Grazing Appeal, p. 5)
5. Failure to respond to livestock conflicts with the wildlife resource when making the alleged decision. Appellants allege that BLM has not done adequate monitoring to determine whether livestock and wildlife conflicts exist.
6. Failure to respond to livestock conflicts with the recreation resource when making the alleged decision. Appellants contend that BLM reissued a grazing permit and that such so-called reissuance was improper because there were no terms or conditions specific to the Table Top portion of the allotment. Appellants contend that failure to include such terms and conditions in the permit itself violates the Record of Decision (ROD) concerning the allotment.

7. Failure to consult, cooperate and coordinate with the interested public before making the alleged final decision. Appellants contend that BLM failed to consult with them under the provisions of 43 C.F.R. § 4130.2(b) prior to extending the grazing authorization.
8. C.F.R. and BLM Manual Error. Appellants allege that BLM failed to perform adequate monitoring.
9. Administrative Procedure Act Error. Appellants allege that BLM did not demonstrate a rationale basis for its extension of grazing privileges.

It is noteworthy that the extensive documentation submitted by counsel for BLM does serve to rebut the allegations of error submitted by the Appellants. While a number of these allegations are peripheral to the instant jurisdictional issue, the facts established in the administrative record to date provide no basis for an appeal, even if BLM's extension of grazing privileges were to be construed as a final decision under the provisions of 43 C.F.R. §§ 4160.3, 4160.4.

DISCUSSION

This case raises the procedural issue of whether a routine, annual grazing renewal by BLM constitutes a final decision of the authorized officer that is, in turn, jurisdictionally amenable to appeal to the Hearings Division under the auspices of 43 C.F.R. § 4160.4, which makes clear that appeals are limited to "final decisions," as further expostulated under the provisions of 43 C.F.R. § 4160.3. Thereunder, a final decision is one which is reduced to writing, following the issuance of a proposed decision and an opportunity for affected interests to protest the proposed decision. In context, Appellants take the procedural position that any annual grazing renewal, however routine or perfunctory, constitutes an appealable final decision. The undersigned does not concur with this procedural premise given the relevant facts of this particular case.

In the opinion of the undersigned, for a routine application and billing to constitute an appealable decision, the authorized officer would have to approve therein some material substantive change, such as an increase in AUM's, in order to trigger Appellate jurisdiction in the Hearings Divisions under the purview of 43 C.F.R. § 4160.3. In this case, the administrative record makes clear that the application and ensuing billing contained no material changes from the previously authorized use throughout the years 1988 through 1996. (See Exhibit C to Respondent's Answer; Motion to Dismiss) Indeed, since February 7, 1973, the BLM had consistently authorized yearlong use by cattle at 1863 AUMs, the equivalent of 160 head. (Exhibit D, Respondent's Answer; Motion to Dismiss) Therefore, the extension in grazing privileges afforded to Lamco Livestock, Inc. through the referenced application and billing process did not include any material change in the historically authorized grazing on this allotment. Without some material change in the authorized grazing use, the simple renewal of grazing privileges inherent in the billing

format constituted a mere extension of the status quo that had existed on this allotment all the way back to 1973. In this context, the Appellants' Notice of Appeal is jurisdictionally untimely. Under procedurally analogous circumstances, the Interior Board of Land Appeals (IBLA) has addressed this jurisdictional issue. As IBLA has stated:

The MFP (Management Framework Plan) calling for removal of all wild horses from the Hot-Springs Peak Allotment was approved in 1982 and an implementation decision to remove wild horses from the allotment was issued in 1986. * * * The decision under appeal did not authorize the removal of wild horses from the allotment. That action was authorized and carried out in 1986 subsequent to notice by letters dated April 8 and September 17, 1986. * * * Accordingly, we find that BLM properly concluded that APIA's protest of its proposed decision was untimely * * *. (Animal Protection Institute of America v. BLM, 120 IBLA 342, 345 (1991))

In the instant case, Appellants' should have lodged their appeal earlier, following the promulgation of the various documents which constitute the resource management plan for the South Vekol Allotment. Those various documents have been submitted by BLM for the administrative record and are summarized immediately below.

If some material change had been effectuated by the grazing extension, then jurisdiction could arguably be triggered. For example, if, in fact, BLM had not conducted reasonable monitoring with respect to the forage condition of the allotment, or if Appellants could factually aver that the condition of the range had materially declined, then such an extension might provide the basis for an appeal. However, none of the Appellants' contentions along these lines are supported by the administrative record. Appellants, have alleged the specifications of error, summarized above, including the contention that BLM has not conducted adequate monitoring. BLM's evidentiary submissions rebut these contentions. With respect to Appellants specifications of error, BLM has submitted the following comprehensive, rebuttal documentation: (1) Lower Gila South Resource Management Plan, Environmental Impact Statement, Phoenix District, Arizona, Final, (LGS-RMP), BLM, August 1985, (attached in pertinent part, pgs. 1-76, Exhibit E to Respondent's Answer; Motion to Dismiss); (2) Record of Decision for the Approval of the Lower Gila South Resource Management Plan (LGS-RMP ROD), BLM, Arizona State Office, June 1988 (attached as Exhibit F to Respondent's Answer; Motion to Dismiss); (3) Rangeland Program Summary for the Lower Gila South Resource Management Plan and Environmental Impact Statement (RPS), Phoenix District Office, BLM, January 1989 (attached as Exhibit G to Respondent's Answer; Motion to Dismiss); (4) Environmental Assessment AZ-027-7-21 and Lower Gila South RMP Monitoring Plan (Lower Gila EA), Phoenix District Office, BLM, March 1988 (attached as Exhibit H to Respondent's Answer; Motion to Dismiss); (5) Lower Gila South Habitat Management Plan (LGS-HMP), Phoenix District Office, BLM, August 1990 (attached as Exhibit I to Respondent's Answer; Motion to Dismiss); and, (6) South Vekol Allotment Trend, 1988-1990, and Utilization Studies, 1996 (attached as Exhibit J to Respondent's Answer; Motion to

Dismiss). Recourse to these documents belies the Appellants' various contentions that a simple extension of the grazing privileges on the allotment was somehow not in compliance with the applicable, resource management plan.

In addition, Appellants' contentions with respect to alleged inadequate monitoring are not correct as Exhibit A to the Declaration of Mr. Jack Spears clearly demonstrates. The Trend Study Data and the Utilization Study Data, based upon the key forage plant method, which are attached to Mr. Spears' declaration make clear that the critical species on the South Vekol Allotment were within the parameters of the applicable resource management plan. Consequently, as a matter of plain fact, the allegations by Appellants that BLM has not conducted adequate monitoring are incorrect. To the contrary, as Mr. Spears Declaration and its exhibits confirm, BLM had conducted the necessary monitoring upon which to authorize an extension of grazing on the South Vekol Allotment. As a matter of proven fact, therefore, BLM had a rational, factual basis upon which to authorize a routine continuation of the same, historic grazing levels upon the South Vekol Allotment.

This conclusion is further corroborated by the Declaration of Mr. Spears, Rangeland Management Specialist. As stated by Mr. Spears, "... for each grazing year since 1988, the use of perennial-ephemeral forage has been authorized pursuant to an annual grazing authorization and grazing billing. ... With respect to the authorization of livestock grazing on the South Vekol Allotment for the 1997 grazing year, no proposed or final decision was issued because the authorization was within the scope of prior BLM planning and management decisions." (Emphasis added, Exhibit M, p. 2 of Respondent's Answer; Motion to Dismiss) Mr. Spears has further averred, "I have read the statement of reasons (SOR) for appeal filed by Appellants in the context of this appeal. At p. 5 of their SOR, Appellants appear to be claiming that current livestock grazing is negatively affecting the Vekol ACEC and the key plant species (Hilaria mutica). Appellants are incorrect. Aerial photography taken in June of 1978 and again in September of 1992 show no real change in the ACED over a fourteen year period." (Emphasis added, Exhibit M, pgs. 3-4, of Respondent's Answer; Motion to Dismiss) It should be noted that the pursuit of aerial photography over a period of years also reflects responsible and adequate monitoring by BLM.

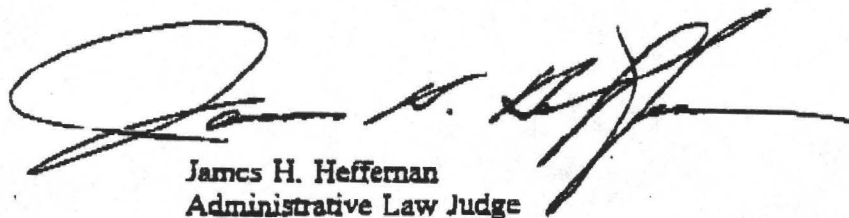
With respect to alleged conflicts between grazing and wildlife, Mr. Spears avers as follows. "Based on the monitoring and trend studies summarized in Exhibit A and other information in the administrative record related to this appeal, BLM has no information to suggest that stocking rates should be reduced, or allotment-specific terms and conditions added to the grazing authorization to address Appellants' allegation of conflicts between grazing and wildlife." (Ibid., Exhibit M, p. 5.) In other words, Mr. Spears had confirmed that there was no change from the status quo implicit in the extension of grazing privileges.

The extensive evidence presented by the government to accompany its Motion demonstrates that the extension of grazing privileges which followed the grazing

application and grazing billings, is permissibly within the existing planning and management framework covering the South Vekol Allotment. As such, the undersigned concurs with the BLM that "there can be no new round of appeals." (Respondent's Answer, Motion to Dismiss, p. 10) BLM's authorization of grazing for the 1997 grazing year could be regarded as arbitrary or capricious only if not supported by a rational basis in compliance with the grazing regulations. Bert N. Smith v. Bureau of Land Management 48 IBLA 385 (1980); Clyde L. Dorius v. Bureau of Land Management, 83 IBLA 29 (1984). No such showing has been made by the Appellants. Further, it is plain based upon the government's extensive documentation, including, in particular, the Declaration of Mr. Spears, that BLM has complied with all pertinent documents and legal requirements implicit in the generic land use plan for this allotment.

CONCLUSION AND ORDER

Based upon the foregoing reasons, Respondent's Motion to Dismiss based upon lack of subject matter jurisdiction under the provisions of 43 C.F.R. § 4.470(d) is hereby granted. No action is taken with respect to Respondent's alternative ground for dismissal based upon alleged lack of standing.



James H. Heffernan
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 C.F.R. Part 4 (see enclosed information pertaining to appeals procedures).

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