DAVID NAWI
Regional Solicitor
Pacific Southwest Region
JOHN R. PAYNE
Assistant Regional Solicitor
Office of the Regional Solicitor
U.S. Department of the Interior
2800 Cottage Way, Rm. E-2753
Sacramento, CA 95825
Telephone: (916) 979-2157

Attorney for the Bureau of Land Management

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

NEVADA DIVISION OF WILDLIFE, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-14 and IBLA 93-460
SIERRA CLUB AND THE NATURAL RESOURCES DEFENSE COUNCIL, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-15
WILD HORSE ORGANIZED ASSISTANCE, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-16 and IBLA 93-522

COMMISSION FOR THE PRESERVATION OF WILD HORSES, Appellant v. BUREAU OF LAND MANAGEMENT, Respondent	N2-93-17 and IBLA 93-523

RESPONDENT'S REPLY BRIEF AND MOTION TO STRIKE

Respondent Bureau of Land Management (BLM) makes the following reply to the brief and proposed decision submitted by the appellants in the above-captioned cases.

Motion to Strike

As an initial matter, BLM strenuously objects to the Appellants' use of the term "prevarication" to describe the testimony of BLM employees. (Appellants' Brief (hereinafter AB) p 7 line 26). Use of this term in relation to testimony is tantamount to an accusation of perjury, and BLM submits that such an accusation should be strongly supported in the record. However, Appellants have failed to provide any such support, and it is unfortunate that in their zeal to win they have found it necessary to attempt to demean the character of honest men. BLM moves to have the term "prevarication" stricken from the Appellants' brief. BLM also asks that the Administrative Law Judge make a specific finding that the testimony of BLM employees was credible.

Appellant's Incorrect Assumption Regarding Prior Management

Turning to the substance of Appellants' brief, BLM wishes to initially address an assumption which the Appellants make throughout their brief, and which forms the basis for many of the

points raised by the Appellants. This assumption is that certain livestock management actions, which the BLM set forth in the Final Full Force and Effect Multiple Use Decision for the Buffalo Hills Allotment (the Decision), had been tried before on the allotment and had been proven to be inadequate. (See) p 3, lines 16-21; p 12, lines 7-21; p 13, lines 3-10; p 17, lines 15-20; p 20, lines 4-8; p 22, lines 7-13). As will be shown below, this assumption is simply incorrect.

The management actions in the Decision which were designed to protect riparian areas can be found at page 9:

> Require permittees to herd livestock so the short term utilization objectives for stream bank riparian, wetland riparian and upland habitats are achieved. Also identify and develop any water projects that are needed to facilitate proper use of each pasture.
>
> * * * * *
>
> Limit utilization on important streams . . . to: . . . 30% on key species at any time during the livestock use period or livestock will be moved within the pasture or removed from the pasture. This will be implemented with the start of the 1993 grazing season and will be followed even if wild horse AMLs are not attained.

(Ex A-7 p 9). As the Area Manager explained, this language gave the BLM the authority to require the permittee to either herd his livestock away from riparian areas or remove his livestock, once the riparian utilization limits were reached. (Tr 215-16).

On the other hand, the only reference to herding prior to the issuance of the Decision was in the 1987 Allotment Management Plan (AMP, Ex A-2), which developed a grazing management system for the allotment. (Tr 195). At page 17 of the AMP is a section entitled "Livestock Distribution/Control," which discusses distribution problems and states in part: "Livestock will be distributed and controlled by horseback." The Area Manager

stated that it was standard procedure to put such a provision in any management plan, but that the language in the plan was different than what was in the Decision. (Tr 268). The difference was that the Decision specifically required herding to accomplish the riparian objectives, and it imposed immediate consequences if the herding did not accomplish the objectives. (Tr 268, See Tr 186, lines 8-17, Tr 187).

Appellants argue that the provision in the AMP was no different than the actions taken in the Decision, because, they argue, regulations provide that the provision in the AMP is binding. (AB p 12 lines 18-21). However, the regulation they cite is 43 CFR § 4130.6, which states:

> 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.

This provision discusses terms and conditions in a grazing permit, and does not in any way address language in an AMP or make such language binding. Even assuming that the provision in the AMP was somehow binding and enforceable, however, it is still much different than what is required in the management plan. The AMP does not require herding to meet specific utilization objectives with specific consequences for failing to meet the objectives, and the Decision does.

Because the Appellant's assumption regarding the similarity of prior livestock management is just plain wrong, many of their arguments are immediately weakened. The livestock management set forth in the Decision was not "proven ineffective." (See AB p 4, lines 16-21, p 12 line 8). It was not arbitrary for the BLM to rely on livestock management to achieve the objectives, because

the management actions in the Decision had not been tried before. (See AB p 13 lines 3-10). BLM's characterization of the damage caused by livestock as a distribution problem was not arbitrary, because, again, the livestock management in the Decision had not been "proven ineffective." (See AB p 20 lines 4-8).

In fact, the record does contain an indication of the effectiveness of the new livestock management actions implemented in the Decision. One of the Appellants asked the Area Manager on cross-examination whether there were examples in the Sonoma-Gerlach Resource Area of herding working to protect riparian areas, and the Area Manager replied:

> On this allotment, this last year's use after we implemented the decision, the monitoring indicated that we were meeting the objectives, and this year's use, the monitoring that we've conducted has shown that we've overall met that objective.

(Tr 293-94). The Area Manager also testified that herding had met with some success on the Rock Creek allotment, and the Supervisory Range Conservationist testified that in his experience herding was a viable option for protecting riparian habitat. (Tr 295, 186). Rather than being "proven ineffective," as the Appellants mistakenly assert, the evidence shows that the new management actions in the Decision have for the most part been proven to be effective. (Tr 293-94). BLM is working on fencing projects to protect those few areas where the management actions are not working, even though the Decision only requires such projects to be built after the wild horse AML has been reached. (Tr 294, Ex A-7 p 10).

The Appellants' Claims Concerning the Carrying Capacity

The Appellants' claim that the BLM's determination of the carrying capacity for the allotment was arbitrary, and set forth several reasons for this claim. First, Appellants charge that the BLM was arbitrary because the record is "plagued" with what they describe as "gross inconsistencies." (AB p 7). When analyzed, however, these "gross inconsistencies" boil down to nothing more than the Appellants' unsupported characterizations of the testimony by BLM personnel.

The Appellants point to the fact that the calculated carrying capacity set forth in the allotment Re-Evaluation, 18,481 AUMs, was different than 12,682 AUMs which the Decision set forth as the carrying capacity. (AB p 7). The Area Manager gave a very detailed and reasoned explanation of the process by which he derived the figure of 12,682 AUMs from the calculated figure of 18,481 AUMs. (See Respondent's Brief pp 16-17). To summarize, the 18,481 figure was the calculated carrying capacity for all four pastures, but only two of the pastures are used each year under the livestock management system. Therefore, only half of the calculated livestock AUMs were used. This still left the calculated livestock carrying capacity at a higher number than the actual livestock preference. However, the Area Manager decided that it was premature to raise the livestock preference to the calculated number. Therefore, although the carrying capacity was correctly calculated to be 18,481, the Area Manager in his discretion decided to set the carrying capacity in the Decision at a lower number.

The BLM did explain this process in the Re-Evaluation which formed the basis for the Decision. (Ex A-6 p 40). Although this

explanation could have been made more clearly, that does not make the Area Manager's explanation at the hearing or his determination of carrying capacity unreasonable.

The Area Manager's explanation at the hearing of how he arrived at the carrying capacity was certainly not a "post hoc rationalization," as the Appellants' charge. (AB p 9 lines 10-12). The Area Manager's explanation was not a new rationale which was created after the Decision or which contradicted any rationale given with the Decision. Rather, at the hearing the Area Manager simply described the method he used at the time he made the decision to set carrying capacity. (See Tr 244-48; Ex A-6 p 40).

A case cited by the Appellants illustrates the difference. In Bunyard v. Hodel, 702 F.Supp. 820 (D.Nev. 1988), the BLM based a decision on an incorrect interpretation of a regulation. Id., at 824. Later, the BLM advanced a different rationale as the basis for its decision. The court correctly declined to allow the BLM to change its rationale for its decision after the fact. Id.

Here, though, the BLM is not advancing a different rationale at the hearing than the one it relied on when making its decision. Rather, the Area Manager simply described the process he went through to arrive at carrying capacity in the Decision. Although this process was not described in the Decision, that fact does not make the Area Manager's description at the hearing a post hoc rationalization.

Appellant's reliance on Nevada Lands Ass'n v. U.S. Forest Service, 8 F.3d 713 (9th Cir. 1993), is similarly misplaced. (AB

p 9). In Nevada Lands, the appellants attempted to argue that the Forest Service made an unreasonable decision because the effects of that decision were different than what the Forest Service had predicted. The Court, however, refused to use information after the decision to determine whether the decision was reasonable, stating that it would determine reasonableness on the basis of the record before the agency at the time of the decision. Id. at 718.

This does not mean, as the Appellants assert, that the Decision here should be reversed "[b]ecause the reasonableness of the decision is not demonstrated by reference to the record before the BLM at the time the decision was made." (AB p 9). First, the reasonableness of the Decision was amply demonstrated at trial by reference to the record the BLM had before it at the time the Decision was made. For example, the BLM referred to the Re-Evaluation which was before the BLM at the time of the Decision. (Tr 210-14).

Second, as demonstrated above, Nevada Lands does not mean what the Appellants say it means. It states that a court reviews agency action by reference to the record before an agency at the time of its decision, not that an agency must demonstrate the reasonableness of its decision by reference to the record. This is nothing more than a subtle attempt by the Appellants to shift the burden of proof in this case, which the regulations place squarely on their shoulders. See 43 CFR § 4.474(b) (case may be dismissed if appellant's case is insufficient, before the agency has put on its case); Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176, 182 (1992).

The Appellants' assertions that the BLM testimony involved "prevarication," was "not credible," or was simply a rationalization of a decision to maintain livestock numbers, are unsupported and hardly worthy of a reply. (AB p 7, 9). BLM is more than willing to let the demeanor of its witnesses and the substance of their testimony speak to the credibility of the rationale behind its Decision.

The Appellants' other assertions regarding carrying capacity involve attacks on the actual calculations used by the BLM. Respondents have discussed this issue thoroughly in their opening brief, and will not repeat that discussion here. (See Respondent's Brief pp 13-16). The Appellants base their attack on the assumption that the BLM requires its officers to use the equation for "Desired Stocking Level" rather than "Potential Stocking Level" when calculating carrying capacity. However, Appellants failed at the hearing and fail in their brief to demonstrate any such requirement by the BLM. It is telling that when discussing their theory of the difference between the two equations, the Appellants fail to cite any BLM document or testimony. (AB p 14 lines 9-14). Indeed, Technical Reference 4400-7, which is the applicable BLM Technical Reference, states that the calculation for Desired Stocking Level assumes no change in utilization patterns. (Ex A-9 p 54). However, the Area Manager was attempting to improve distribution through actions in the Decision. (Tr 185-86).

The reason Appellants want the BLM to be required to use the Desired Stocking Level equation is that, as they interpret the equation, it would have required BLM to lower livestock

numbers. (AB pp 14-15). As shown above, Appellants mistakenly believe that lowering livestock numbers is the only way to address riparian damage. Appellants cite Natural Resources Defense Council, Inc. v. Hodel, 624 F.Supp. 1045, 1057 (D.Nev. 1985), for the proposition that reducing livestock numbers is "an appropriate way to address deteriorated range conditions." (AB p 11). This case is worth quoting directly:

> A second important point to note in this context is that even where overgrazing is found to exist, the remedy is not necessarily the immediate removal of livestock. I give due weight to the proposition put forth by defendant's experts that other methods, such as vegetation manipulation and seeding, fencing, water development, or other range improvements or grazing systems may serve to address problems of selective overgrazing without a mandatory reduction in livestock use. . . . While reductions in AUMS for livestock may be one accepted method of addressing range deterioration, as recognized by Congress . . ., it is not the only method.

Id. (citations omitted). Although the court recognized, as appellants state, that reducing livestock is one method to address overgrazing, it also recognized that there were many other viable alternatives.

Appellants also assert that "riparian utilization limits properly control the overall determination of carrying capacity." (AB p 11). As support for this proposition they quote Exhibit A-9, which is a BLM Technical Reference. (AB p 11). However, the quoted language is simply part of an explanation of the calculation of Desired Stocking Level. (Ex A-9 p 54). It does not support the proposition that riparian utilization limits must be used to control carrying capacity. The Area Manager made a reasoned decision not use riparian utilization objectives to

calculate carrying capacity, which was in line with BLM policy. (See Respondent's Brief pp 20-21).

Appellants assert that BLM's discretion decreases as land use plans are refined through activity plans. (AB p 15). However, the regulations only require that decisions conform to the land use plan, not to subsequent activity plans. 43 CFR § 4100.0-8.

Response to Appellants' Assertion that the Allowed Grazing Exceeds Carrying Capacity

Appellants assert that because actual use on the allotment will exceed carrying capacity, the Decision is in violation of the regulations. BLM did recognize at the hearing that the actual use on the allotment would exceed the carrying capacity set forth in the Decision. (Tr 283, lines 11-12). However, this does not mean that the Decision was in violation of the applicable regulations. The regulation cited by the Appellants, 43 CFR § 4130.6-1(a), applies to livestock carrying capacity, not to total carrying capacity.

The actual livestock use on the allotment will not exceed the livestock carrying capacity in the Decision. (Ex A-7 p 7, p 9).[1] Indeed, the actual livestock use on the allotment is well below the calculated livestock carrying capacity of 9913. (Tr 245, lines 1-2). The reason the total use on the allotment exceeds the carrying capacity is that the wild horse actual use

[1] The total yearly use on p 9 of the Decision adds up to 4,159 AUMs, but 45 of those AUMs are "exchange of use" AUMs which are on private land. Therefore, the total use on public lands will not exceed 4,114, which is the carrying capacity set by the Decision for public lands.

is well above the wild horse carrying capacity. (See Ex A-7 p 7, Tr 212-13).

As stated in the opening brief, the BLM is removing wild horses as rapidly as possible within the constraints of personnel, funding, and Bureau policy. (Respondent's Brief p 25; See Tr 341, lines 3-6; Tr 217). The Area Manager adopted an interim grazing system until the excess wild horses could be removed, and adopted strict utilization criteria on riparian areas which apply even with the excess wild horses. (Respondent's Brief p 25). Apparently, the Appellants want to have livestock operations on the allotment cease until the excess wild horses can be removed. However, the regulations do not require such a drastic remedy, and such a result would certainly be unfair to the permittee. It is not the permittee's fault that the allotment has excess wild horses.

Response to the Appellants' Assertion that the Available AUMs Were Distributed Incorrectly

The Appellants assert that BLM could have used a different method to allocate forage than the one it used, and argues that the method used by the BLM does not conform to the Land Use Plan. BLM discussed this issue in its opening brief and will not repeat that discussion here. (Respondent's Brief p 23-24).

The Appellants assert that the BLM proportions violated the Land Use Plan because wild horses were reduced but livestock numbers were not. (AB p 19). However, BLM's goal was to achieve similar proportions to those in the Land Use Plan, accounting for the fact that the livestock preference had changed significantly. (Resp. Brief p 23). BLM worked out those proportions in the Land Use Plan and the 1988 Agreement, and applied them to the

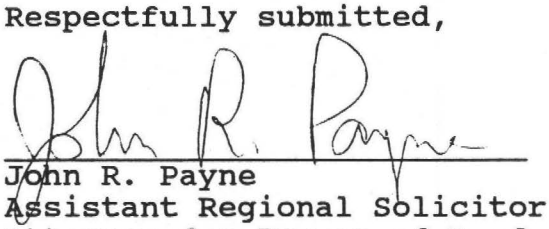
available AUMs. (Resp. Brief p 23). This is how BLM interpreted the language in the Land Use Plan.

Appellants offer a different method of apportionment, but fail to show how the BLM's method was unreasonable or failed to conform to the Land Use Plan. Indeed, the Appellants' method would result in a different proportion than that found in the Land Use Plan and 1988 Agreement, which would violate the Land Use Plan as interpreted by the BLM.

Conclusion

For the above reasons, Respondent BLM asks that the February 9, 1993 Final Full Force and Effect Decision for the Buffalo Hills Allotment be affirmed.

Respectfully submitted,



John R. Payne
Assistant Regional Solicitor
Attorney for Bureau of Land Management

CERTIFICATE OF SERVICE

The original of the foregoing "Respondent's Reply Brief and Motion to Strike" was sent via Certified Mail-Return Receipt Requested on March 31, 1995, to:

Office of Hearings and Appeals
Hearings Division
6432 Federal Building
Salt Lake City, UT 84138

A copy of the foregoing "Respondent's Reply Brief and Motion to Strike" was sent via "Certified Mail-Return Receipt Requested" on March 31, 1995, to:

C. Wayne Howle
Deputy Attorney General
Capitol Complex
198 S. Carson St., No. 311
Carson City, Nevada 89710

Dawn Y. Lappin, Director
Wild Horse Organized Assistance
15640 Sylvester Rd.
Reno, NV 89511

Ms. Rose Strickland
Sierra Club - Toiyabe Chapter
619 Robinson Ct.
Reno, NV 89503

Johanna Wald, Esq.
Natural Resources Defense Council
1350 New York Avenue
Washington, D.C. 20005-4709

Copies of the foregoing "Respondent's Reply Brief and Motion to Strike" was sent via regular mail on March 31, 1995, to:

State Director
Bureau of Land Management
P.O. Box 12000
Reno, Nevada 89520-0006

Bud Cribley, Area Manager
Sonoma-Gerlach Resource Area
BLM
705 E. 4th St.
Winnemucca, NV 89445

I certify that the foregoing is true under penalty of perjury.

Executed this 31 day of March, 1995 at Sacramento, California.

Carolyn Brooks

FRANKIE SUE DEL PAPA
Attorney General
C. WAYNE HOWLE
Deputy Attorney General
198 South Carson Street, No. 311
Carson City, Nevada 89710
Telephone: (702)687-3700
Attorneys Commission for the Preservation of
Wild Horses & Nevada Division of Wildlife, Appellants

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RESPONSE TO MOTION TO STRIKE AND STIPULATION TO SUBSTITUTE WORDAGE

It would seem the BLM protests too much. The object of a hearing with live witnesses is to present the testimony to a fact finder so that he can discern the facts. The fact finder appropriately evaluates the live testimony together with the demeanor of the witnesses for whatever effect he may give it.

Not only does the record reflect that the witnesses were unable to give a firm definition to the term "carrying capacity"; the hearing officer may also recall from his own observations the extremely long pauses that preceded the confused discussion of the term by the BLM witnesses. The hearing officer may also recall that the testimony on the point remained uncertain even on the second day of hearing, and the pauses equally long, after having had an evening to deliberate in search of a meaning for the term.

However, in the spirit of professional courtesy and in order to avoid recriminations among agency personnel, counsel for NDOW and the COMMISSION hereby unilaterally stipulates to substitution of the word "vacillation" for the word "prevarication" on line 26 of page 7 of appellants' opening brief.

DATED this 6th day of April, 1995.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General

By: C. Wayne Howle

C. Wayne Howle
Deputy Attorney General
Capitol Complex
198 S. Carson St., No. 311
Carson City, Nevada 89710
Tel: (702) 687-3700

Attorneys Commission for the
Preservation of Wild Horses &
Nevada Division of Wildlife, Appellants

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Office of Hearings and Appeals
Hearing Division
6432 Federal Building
Salt Lake City, UT 84138

John Payne, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior
2800 Cottage Way, Room E-2753
Sacramento, CA 95825-1890

Dawn Y. Lappin, Director
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15640 Sylvester Rd.
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