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7 **UNITED STATES DEPARTMENT OF THE INTERIOR**
INTERIOR BOARD OF LAND APPEALS
 8

9 NEVADA DIVISION OF : IBLA-
 10 WILDLIFE (NDOW), and :
 11 NEVADA COMMISSION FOR :
 THE PRESERVATION OF WILD :
 HORSES, :
 12 :
 Appellants :
 13 :
 v. :
 14 :
 BUREAU OF LAND MANAGEMENT, :
 15 :
 Respondent :
 16 :
 17

18 **STATEMENT OF REASONS**

19 Appellants Nevada Division of Wildlife and the Nevada Commission for the
 20 Preservation of Wild Horses submit this statement of reasons in support of their appeal from
 21 a hearing officer's decision. The decision affirmed a BLM multiple use decision for the
 22 **Buffalo Hills Allotment in Nevada's Winnemucca District**, in appeals no. N2-93-14/IBLA 93-
 23 460 and N2-93-17/IBLA 93-523.

24 **I. INTRODUCTION**

25 Appellants Nevada Division of Wildlife (NDOW) and the Nevada Commission for the
 26 Preservation of Wild Horses (Commission) are state agencies responsible for the state's
 27 wildlife and wild horses, respectively. Both view this case as pivotal to their continued
 28 commitment to participation in BLM's land use planning.

1 NDOW and the Commission have participated cooperatively for many years with
2 BLM. For them, involvement with the federal agency is necessary in order to influence
3 decisions directly affecting habitat, since most habitat in the State of Nevada is in federal
4 ownership. Their participation is invited by the Department of Interior. See 43 C.F.R. Part
5 24, "Department of Interior Fish and Wildlife Policy: State-Federal Relationships."

6 Appellants' involvement in land use planning has been accompanied by their
7 reasonable expectation that land use decisions would be made objectively and openly. They
8 believed the BLM would first establish objectives for land use which then would control
9 subsequent BLM decisions concerning land use. Such objectivity ideally would replace the
10 unpredictable subjectivity of an individual manager with the rational and predictable result
11 of applied science and reason. Appellants furthermore expected to be involved in the
12 decision-making process as required by law. See 43 U.S.C. § 1712(c)(9) ("the Secretary [of
13 Interior] shall . . . provide for meaningful public involvement of State . . . government
14 officials . . . in the development of . . . land use decisions for public lands").

15 This appeal is from a decision which appellants view as a serious breach of this
16 fundamental understanding of land use planning. The decision is furthermore a breach of a
17 Habitat Management Plan, which is a signed agreement between the state wildlife agency and
18 BLM. Appellants argue the BLM declined to apply its own policies and methodologies for
19 determining carrying capacity, and relied instead on a manager's subjective, nonreplicable
20 determination of carrying capacity, contrary to law. From their perspective, BLM reneged
21 on the commitments it made over fifteen years, through its land use planning process, to
22 implement objectives for habitat improvement. It furthermore broke faith with the state
23 agencies by failing to disclose its reasoning, thereby depriving appellants of any substantial
24 participation in the decision making process.

25 II. NATURE OF THE CASE.

26 This is an appeal from a hearing officer's decision affirming a BLM multiple use
27 decision (MUD) for the Buffalo Hills Allotment (the allotment), located in BLM's
28 Winnemucca District in Nevada.

1 The MUD determined the numbers of livestock and wild horses which would be
2 authorized on the allotment. Appellants contended that the method employed in the decision
3 to calculate the authorized numbers was improper and did not account for riparian resource
4 objectives established in the land use plan.

5 Oddly, BLM did not rely on the calculations of carrying capacity set forth in the
6 decision or in the accompanying documents. Instead, the manager who testified at the
7 hearing gave a previously undisclosed analysis for the number. The calculations appearing
8 in the MUD and supporting documents bear no direct relation to the number fixed as the
9 carrying capacity.

10 Even though the BLM manager abjured the result obtained by his calculations as
11 depicted in the MUD, and substituted a different number for which no analysis was provided,
12 the hearing officer upheld the MUD. The affirmance was based upon the manager's
13 explanation--again, provided for the first time at the appeal hearing--of how he determined
14 the authorized numbers. The hearing officer's decision goes to great lengths to justify BLM's
15 written calculations of carrying capacity, even though the BLM manager did not rely on the
16 calculations and conceded the number they produced was excessive.

17 This appeal seeks in these circumstances to establish that there are certain limits on
18 agency discretion. It first seeks confirmation that a MUD must be supported by a record
19 adequate to allow an affected interest to either agree with the decision or make a reasoned
20 appeal from it. BLM's reasoning should be disclosed, not kept secret.

21 Moreover, this appeal seeks confirmation by the Board that a manager's discretion,
22 though broad, is not limitless, that it must have some objective basis, and must be consistent
23 with land use plans.

24 II. ISSUES ON APPEAL

- 25 1. Whether the hearing officer erred by not vacating and remanding the Buffalo
26 Hills Multiple Use Decision, for its failure to disclose the rationale upon which
27 it is based.
- 28 2. Whether the hearing officer erred in deciding that the carrying capacity
established in the Buffalo Hills Multiple Use Decision was properly calculated.

3. Whether the hearing officer erred in affirming BLM livestock authorizations which BLM admits will exceed carrying capacity, until wild horses are brought to Appropriate Management Levels.
4. Whether the hearing officer erred by approving BLM's deviation from land use plan requirements for apportioning adjustments in grazing use between wild horses and livestock.

III. STANDARD OF REVIEW

While the Board of Land Appeals generally accords substantial deference to the findings of an Administrative Law Judge with respect to conflicting evidence, such deference is not absolute since the Board, in the exercise of its delegated plenary authority, may undertake a de novo review of the entire record, and make findings of fact thereon. *United States v. J. Gary Feezor*, 130 IBLA 146 (Aug. 4, 1994). *See also Eldon Brinkerhoff*, 24 IBLA 324 (Apr. 21, 1976) (IBLA review of ALJ is de novo).

IV. STATEMENT OF THE CASE

A. Jurisdiction

This appeal is taken from the hearing officer's decision (the Decision) pursuant to 43 C.F.R. § 4.476, together with 43 C.F.R. § 4.410.

This appeal is timely filed. The Decision is dated November 22, 1995. Appellants were never formally served with the Decision by the Office of Hearings and Appeals. *See* Distribution List on page 14 of the Decision. Appellants did, however, receive notice of the Decision when their counsel received a facsimile copy on November 29, 1995, from the Office of Regional Solicitor.

On December 22, 1995, appellants filed their notice of intent to appeal the Decision, within the 30 days allowed by regulation. 43 C.F.R. § 4.411(a).

This statement of reasons is submitted within 30 days of the date on which the notice of intent was filed with the Office of Hearings and Appeals. 43 C.F.R. § 4.412(a).

B. Proceedings Below

On February 9, 1993, the Sonoma/Gerlach Resource Area of the U.S. Bureau of Land Management (BLM) in Nevada, issued a full force and effect multiple use decision (the

1 MUD) for the Buffalo Hills Allotment. *See* Exhibit A-7.

2 NDOW appealed from the MUD in appeal number N2-93-14. The Commission
3 appealed in appeal number N2-93-17.

4 These appeals were heard on January 10 and 11, 1995, in Reno, Nevada, before
5 Administrative Law Judge Ramon M. Child.

6 On November 22, 1995, the hearing officer issued his Decision affirming the Buffalo
7 Hills MUD.

8 Appellants' arguments on appeal to the hearing officer were that BLM violated its own
9 regulations by (1) improperly determining carrying capacity for the Allotment, (2) over-
10 allocating forage for livestock and wild horse use, and (3) in an additional argument by the
11 Commission, improperly apportioning the available forage between livestock and wild horses.

12 In their post-hearing brief, appellants also raised the argument that BLM failed to
13 disclose its true rationale for the decision, which was divulged for the first time at the
14 hearing.

15 The hearing officer's Decision states that BLM's proper exercise of lawful discretion
16 justified the MUD in all relevant respects, and that BLM therefore did not commit any
17 reversible error. The hearing officer affirmed the MUD.

18 **C. Background and Relevant Facts**

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

28 Next the Allotment Management Plan (AMP) was issued, Tr. at 38, in 1987. Tr. at

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

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

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

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

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

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

24 **V. SUMMARY OF ARGUMENT**

25 Appellants' first argument is that BLM never disclosed its rationale and analysis for
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1 setting the carrying capacity for the allotment at 12,682 AUM's.¹ Because there was no such
2 disclosure, the law clearly requires the decision to be vacated and remanded.

3 Secondly, appellants argue that the hearing officer erred in determining that BLM's
4 calculation of carrying capacity was reasonable. Appellants will demonstrate the error
5 regardless of whether the hearing officer's decision is reviewed de novo, under the substantial
6 evidence standard, or under a clear error standard.

7 Third, appellants argue the hearing officer erred in affirming a decision which the
8 BLM admitted would result in livestock grazing which exceeds carrying capacity for a
9 number of years until wild horse numbers are reduced.

10 Finally, appellants argue the hearing officer erred in approving an apportionment of
11 forage between horses and livestock which was clearly contrary to the land use plan.

12 VI. ARGUMENT

13 Appellants have appealed from the hearing officer's Decision on the basis of the
14 following arguments.

15 A. THE BASIS FOR BLM'S DECISION NEITHER APPEARS IN NOR IS 16 SUPPORTED BY THE RECORD.

17 The basis for a decision must be disclosed. At the very least, the administrative
18 record must contain sufficient evidence to permit the Board to conduct an objective,
19 independent review of the basis for the decision. *Confidential Communications Co.*, 131
20 IBLA 188 (Nov. 7, 1994). But more is required. BLM must ensure its decision is not only
21 supported by a rational basis, but that such basis is furthermore stated in the written decision,
22 as well as being demonstrated in the administrative record accompanying the decision.
23 *Kanawha and Hocking Coal and Coke Co.*, 112 IBLA 365 (Jan. 19, 1990). The reason for
24 such requirement is that the recipient of the decision deserves a reasoned and factual
25 explanation of the rationale for the decision, and must be given some basis for understanding
26 it and accepting it or appealing it. *Exxon Co. U.S.A.*, 113 IBLA 199 (Feb. 21, 1990). The
27

28 ¹An AUM, or Animal Unit Month, is the "amount of forage necessary for the
sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. § 4100.0-5.

1 requirement for a demonstrated basis for a decision has been expressly identified in a context
2 where the decision rests on mathematical calculation. *Union Oil Co. of California, Union*
3 *Exploration Partners, Ltd.*, 116 IBLA 8 (Aug. 24, 1990) (involving calculation of royalties).

4 In this case, a number was identified in the MUD as the carrying capacity of the
5 Allotment. That number was 12,682 AUMs. Exhibit A-7 at 7. It is impossible to replicate
6 this result from the data and analysis contained in the decision and supporting documents.
7 In fact no documentation exists to explain this number. The BLM's witnesses openly
8 admitted BLM had never set forth the rationale for the determination. Tr. at 269, 289, and
9 341. Thus only at the hearing on the appeal was a rational explanation given by Bud Cribley,
10 Area Manager, in the second day of testimony. Tr. at 244-248. The Decision's recitation
11 of this tortured explanation cannot salvage it from its inherent illogic and arbitrariness, as will
12 be further demonstrated below. But most significantly, the first disclosure of this rationale
13 at an appeal hearing cannot salvage the decision itself. The omission of this explanation from
14 the decision is itself fatal, regardless of the viability of the explanation.

15 State agencies involved in wildlife and wild horse management should not have to take
16 an appeal to a full hearing in order to learn the basis for a decision affecting habitat. The law
17 requires good faith consultation with the state's wildlife agency. 43 U.S.C. §315h. The
18 Federal Land Policy and Management Act expressly also requires BLM to "provide for
19 meaningful public involvement of State and local government officials, both elected and
20 appointed, in the development of land use plans, land use regulations, *and land use decisions*
21 for public lands." 43 U.S.C. § 1712(c)(9) (emphasis added).

22 There can be no meaningful state agency involvement when the agencies have been
23 provided no explanation for a decision, as in this case. It is arrogance for a federal agency
24 to withhold explanation and not even attempt to explain why it was withheld. The manager
25 denied any knowledge of a requirement for disclosing the analysis, tr. at 340, but admitted
26 it would have at least been preferable to include the analysis in the decision. Tr. at 341-342.

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1 B. THE HEARING OFFICER'S DETERMINATION THAT THE DECISION
2 IS CONSISTENT WITH LAW AND IS RATIONALLY BASED IS
3 CLEARLY ERRONEOUS.

4 The hearing officer did not respond in his decision to the point made above about the
5 absence of disclosure. Instead, the decision only examined into the adequacy of the decision
6 taken together with the testimony offered at hearing. On such basis, the decision was upheld
7 as being reasonable. But even in this regard, the decision is in error, no matter under what
8 standard of review the hearing officer's Decision is examined.

9 BLM could have objectively calculated carrying capacity, using a calculation which
10 is replicable and based on pre-established land use objectives. But instead BLM entertained
11 every bias against riparian resources to calculate a carrying capacity. it admits is excessive,
12 and then exercised its claimed discretion to readjusted downward to a number chosen by the
13 manager's subjective judgment, which has no objective support.

14 1. Implausibility of the Area Manager's Logic.

15 BLM's explanation for the number 12,682 AUM's, set in the MUD as carrying
16 capacity, is implausible and irrational.

17 The hearing officer finds BLM's *disclosed* (i.e. written) calculation of carrying
18 capacity set forth in the MUD was reasonable. But the BLM rejected its own calculation.
19 The result produced by it was either 18,481, or 16,880. Exhibit A-6 at 39 and 40, tr. 340-
20 341. The MUD established the number at 12,682. Exhibit A-7 at 7. The significant
21 difference between the numbers has no objective explanation.

22 The area manager conceded, in a convoluted statement taking four pages of transcript,
23 that the result produced by the calculation was too high and would cause resource damage.
24 Tr. at 244-248. This concession was acknowledged in the hearing officer's decision by this
25 euphemistic language: "BLM could have allowed the full [livestock preference] on two
26 pastures each year, but decided not to do that because of the critical wildlife habitat values
27 on the allotment." Decision at 7. The decision only authorized a portion of the livestock
28 preference.

1 So BLM simply disregarded the product of its equation. BLM's witness testified that
2 its product was a starting point, but in truth that number--the product of their mathematical
3 calculation--did not have any effect on the final determination of carrying capacity. Any
4 random number could have been selected as a starting point, and still BLM's final result
5 would have been the same. If BLM had calculated the number properly, it would have had
6 no reason to inject any such subjective element into the decision.

7 The ultimate illogic of the decision is illustrated by the fact it cannot be replicated;
8 it was not determined by any objective measure. It was simply the guess of the manager.

9 The hearing officer's Decision explaining the process by which the number 12,682
10 was derived, *see* Decision at 4-7, is laden with repeated resort to manager discretion.
11 Appellants contend manager discretion cannot justify avoidance of straightforward calculation,
12 conducted with recognition for objectives drawn from years of land use planning. Were it
13 otherwise, BLM's entire scheme of land use planning would be merely an exorbitant
14 superfluity. Land management, instead of being objective-driven, would be personality-
15 driven.

16 BLM's and the hearing officer's explanations are not in fact explanations, they are
17 rationalizations for an improper decision, and must be rejected.

18 2. BLM's Mathematical Calculations Are Contrary to Law, and the Hearing
19 Officer's Determination That They Were Reasonable Has No Basis in the
20 Evidence.

21 Determination of carrying capacity does not involve any rarefied science or higher
22 mathematics. It depends on a simple algebraic equation, the logic of which is self-evident.
23 If grazing animals are consuming twice as much vegetation as should be consumed, then the
24 number of animals must be reduced by half. In other words, the number of animals must be
25 reduced in direct proportion to the amount of overuse occurring. This concept is represented
26 by the following equation:
27

$$\frac{\text{ACTUAL USE}}{\text{UTILIZATION}} = \frac{\text{DESIRED ACTUAL USE}}{\text{DESIRED UTILIZATION}}$$

1 Exhibit A-9 at 54.

2 On page 5 of the decision, the hearing officer concluded that "the methodology the
3 BLM used to determine carrying capacity conformed to the requirements of Technical
4 Reference 4400-7." This is simply not true. The BLM erred in its calculations (1) because
5 BLM did not use streambank riparian utilization objectives as the "Desired Utilization"
6 figure; and (2) because it improperly averaged riparian utilization with upland utilization,
7 thereby downplaying the serious overuse of riparian vegetation.

8 a. BLM Improperly Used Weighted Average Utilization in the Calculation.

9 The hearing officer concluded that BLM properly weight averaged riparian utilization
10 with non-riparian utilization. Decision at 5. On this point the Decision is demonstrably in
11 error.
12

13 The record reference of the hearing officer, ostensibly supporting his conclusion that
14 BLM's calculations were proper, *see* tr. at 252-253, is a set of conclusory statements by the
15 BLM manager which are contradicted by BLM's own technical reference.

16 The equation used by BLM to determine the carrying capacity is as follows:

17
$$\frac{\text{ACTUAL USE}}{\text{AVERAGE/WEIGHTED}} = \frac{\text{POTENTIAL ACTUAL USE}}{\text{DESIRED AVERAGE}} \\ \text{AVERAGE UTILIZATION} \qquad \qquad \qquad \text{UTILIZATION}$$

18 Exhibit A-9 at 55. This is the equation entitled "Potential Stocking Level". *Id.* This
19 calculation is inappropriate for setting stocking rates because it assumes a perfect world. It
20 uses weighted averaging, averaging heavy riparian utilization with lesser upland habitat
21 utilization. The result is the muting or virtual elimination of any heavy riparian utilization.
22 Tr. at 82, lines 7-8.
23

24 The hearing officer's Decision effectively ignores the proviso in the BLM manual that
25 "Potential Stocking Level is the level of use that *could* be achieved on a management unit,
26 at the desired utilization figure, assuming utilization patterns could be completely uniform."
27 Exhibit 9 at 55. But the Allotment Reevaluation contains numerous references to uneven
28

1 utilization, with concentrated use on riparian areas. See e.g. Exhibit A-6 at 15. The BLM's
2 own witnesses attested to uneven utilization on the allotment. Tr. at 150 at 11-13. Thus,
3 since utilization is not uniform, use of this equation on this allotment was plainly improper.

4 In one place, the hearing officer improbably denies that BLM assumed uniform
5 utilization. The decision flatly states that "BLM did not assume perfectly uniform
6 utilization." Decision at 5. This simply cannot be a correct statement, for it is inherently
7 contradicted by the use of the potential stocking rate equation itself. In the previous
8 paragraph, the decision acknowledged: "[t]his method provides a formula to determine the
9 Potential Stocking Level (PSL), which is 'the level of use that could be achieved on a
10 management unit, at the desired utilization figure, assuming utilization patterns could be
11 completely uniform.'" Decision at 5. Use of the equation itself assumes uniform utilization,
12 and the hearing officer was plainly wrong to conclude that the BLM did not assume uniform
13 utilization.

14 In a seemingly separate line of reasoning, the hearing officer does not deny
15 minimizing riparian utilization, but appears to *justify* it on the basis that BLM "did not stock
16 the allotment near what it determined the potential stocking level to be." Decision at 5. But
17 this is no justification for improperly determining the number in the first place. Calculation
18 of carrying capacity should be properly and objectively determined, not improperly estimated
19 and then modified by a manager's subjective downward adjustment, the validity of which
20 cannot be verified.

21 Therefore finding of fact no. 5 in the hearing officer's Decision is clearly erroneous.
22 It says, "[n]othing in Technical Reference 4400-7 disqualifies the use of the PSL equation to
23 determine carrying capacity on the Buffalo Hills allotment." The uneven distribution on the
24 allotment disqualifies its use, and the hearing officer erred by concluding otherwise.

25
26 b. The Hearing Officer Erred by Concluding BLM Properly Used 60 Percent
27 Utilization When Calculating Carrying Capacity.

28 The foregoing demonstrates the BLM erred by employing weighted averaging when
calculating carrying capacity. By doing so, BLM undervalued the negative impact of

1 utilization occurring on riparian resources.

2 BLM compounded this error by then not using riparian objectives established in the
3 land use plan as the "desired utilization" when making the calculations.

4 Riparian utilization limits properly control the overall determination of carrying
5 capacity. BLM's own manual instructs:

6 key management areas could be riparian, wetland, or meadow
7 areas surrounded by uplands. Maintaining proper use on the
8 meadow could cause low utilization on the uplands. A key
9 management area is the key area that overrides the indicators of
the other key areas within the management unit. Management
actions are based on the key management area.

10 Exhibit A-9 at 54.

11 Yet the carrying capacity calculations performed for the allotment were made without
12 reference to the significant needs of streambank riparian vegetation. Sixty percent was the
13 only "Desired Utilization" figure employed in the calculations. *See* Exhibit A-8. A much
14 lower figure should have been used.

15 The objective for streambank riparian vegetation on the allotment has been consistently
16 identified at 30 percent for years. *See* Tr. at 45, lines 14-25, tr. at 46, lines 1-7, Tr. at 50,
17 lines 12-15. Furthermore, certain riparian species require a far lower level of utilization than
18 even 30 percent. *See* Tr. at 41, 46, 52, and 285. Thus even 30 percent was a compromise
19 figure.

20 The decision cites two reasons why the 60 percent figure was acceptable: (1) the
21 Nevada State Handbook of Best Management Practices identifies 60 percent as an acceptable
22 figure, and (2) BLM chose to rely on livestock herding instead of reduction in numbers as
23 the tool to achieve riparian objectives.² The record absolutely repels these rationalizations
24 of BLM's incorrect calculations.

25
26 ²The Decision also alludes to provisions in certain documents allowing adjustments in
27 utilization rates by an approved activity plan. *See* Decision at 6. These essentially serve
28 to justify reliance on herding or other livestock management techniques in lieu of livestock
reduction. However, these provisions are not a license for arbitrary adjustment, and
adjustments must still be reasonable in the circumstances in which they are made.

1 The hearing officer's decision says "the Nevada State Handbook of Best Management
2 Practices allow[s] 60% utilization in the dormant season." Decision at 6. The hearing officer
3 ignored the testimony of BLM's own witness that the Handbook's 60 percent figure does not
4 apply to important riparian species. Tr. at 287-288. Further, the hearing officer could not
5 reasonably rely on the Handbook as evidence. There is no foundation in the record to explain
6 what the relevance of the generic Handbook excerpt is, or why its prescriptions are properly
7 substituted for the much lower and species-specific, allotment-specific prescriptions developed
8 for this allotment through BLM's land use planning over the years, in consultation with
9 affected interests.³ Instead, BLM went *outside the planning documents* to justify 60 percent
10 utilization. It did so even though 60 percent had never been discussed in previous planning
11 efforts.⁴

12 BLM also indicated it chose to rely on livestock herding instead of reduction in
13 numbers to achieve the desired objectives. Tr. at 240, lines 1-17. The hearing officer
14 approved this reasoning when he wrote, "the Decision imposed a requirement that the cattle
15 be moved within the pasture or removed from the pasture once utilization levels had been
16 reached. (Tr. 215-216; Ex. A-7 pp. 9-10.) This requirement was a new requirement which
17 was not in the 1988 agreement. (Tr. 185-186, 267-268.)"

20 ³ Five percent is desired utilization for some species, according to the Monitoring Plan
21 appended to the Allotment Monitoring Plan, Exhibit A-2 at 10, Table II; the Livestock
22 Agreement, Exhibit A-3 at 3; and the Habitat Management Plan, Exhibit A-1 at 32.
23 Thirty percent is the utilization required for stream bank riparian vegetation, according to
24 the Livestock Agreement, Exhibit A-3 at 1; the Fox Mountain Habitat Management Plan,
25 Exhibit A-4 at 8; and the Allotment Re-evaluation, Exhibit A-6 at 26. Fifty percent is the
26 maximum level of utilization identified for wetland riparian vegetation, according to the
27 Livestock Agreement, Exhibit A-3 at 1, the Fox Mountain Habitat Management Plan,
28 Exhibit A-4 at 10, and the Allotment Re-evaluation, Exhibit A-6 at 27.

⁴BLM attempts to justify the change to 60 percent on the basis that the 50 percent
figure previously relied on was for the "end of the livestock use period, which was the
end of October." BLM Brief at 15 -16. This is a false statement. Nowhere in any of the
documents is the 50 percent figure identified to a portion of the year, or to the "grazing
season," or to any other delimiting period of time. Utilization limits were determined
based on the needs of the plants, not the needs of grazing animals.

1 This statement is verifiably false, and BLM's reliance on herding is not a rational
2 basis for the MUD. The hearing officer's statements are erroneous. Reliance on livestock
3 management had already been attempted on the allotment and was proven ineffective. Tr.
4 at 117, 118, lines 1-4, 150, lines 1-13. The area manager stated that herding as an
5 instrument for livestock management was not provided for in the 1988 Livestock Agreement
6 with the operator, but the Agreement itself specifically incorporates the AMP, *see* Exhibit A-
7 3 at 2, and the 1987 AMP states that "Livestock will be distributed and controlled by
8 horseback . . . to achieve even distribution and proper utilization levels." *See* Exhibit A-2
9 at 17, and Tr. at 150. The area manager himself conceded that herding was part of the
10 grazing prescription for the allotment in the 1980's. Tr. at 267-269. His only hesitation was
11 in characterizing the herding as mandatory under the previous actions. His hesitation only
12 arose from his failure to appreciate the legal effect of conditions in permits and licenses. He
13 attempted to portray conditions for herding and utilization contained in the AMP and
14 Livestock Agreement as nonbinding, *see* Tr. at 271, lines 11-25, although regulations provide
15 that such objectives and conditions are binding. 43 C.F.R. § 4130.6.

16 Mr. Cribley ultimately revealed the true reason why the lower utilization limits were
17 not employed: it is because the riparian areas are only a small percentage of the allotment,
18 and BLM does not wish to allow their management to limit the use of the remainder of the
19 allotment. Tr. at 240, lines 5-17. Instead, the BLM chose to rely on herding, *id.*, even
20 though herding has already proved ineffective for meeting riparian objectives. Essentially,
21 BLM has chosen to manage the allotment for livestock use, and relegate riparian vegetation
22 that receives heavy utilization to "sacrifice area" status. However there is no law which
23 authorizes the concept of sacrifice areas, and there is no law authorizing a manager's decision
24 to avoid a land use plan objective to improve riparian conditions. *Cf. Joe Saval Co. v. BLM*,
25 119 IBLA 202, 208 (May 7, 1991) (there is no legal requirement that livestock use take
26 priority over wildlife use).

27 ////
28

1 In view of past failure of livestock herding to succeed in achieving the riparian
2 objectives on the allotment, it was arbitrary for BLM to omit riparian objectives in the
3 calculations for carrying capacity. Carrying capacity adjustments are the only means left for
4 alleviating the impacts of livestock grazing, given the limits of funding for projects and the
5 inadequacies of herding.

6 C. THE HEARING OFFICER'S DECISION IS CONTRARY TO LAW,
7 BECAUSE IT AFFIRMS A DECISION WHICH AUTHORIZES
8 LIVESTOCK USE WHICH BLM ADMITS WILL EXCEED CARRYING
9 CAPACITY FOR YEARS INTO THE FUTURE.

10 Carrying capacity is "the maximum stocking rate possible without inducing damage
11 to vegetation or related resources". 43 C.F.R. § 4100.0-5. BLM identified this number on
12 the allotment as 12,682. Exhibit A-7 at 7. BLM admitted wild horse numbers on the
13 allotment would be excessive until the necessary gathers were completed. In the years until
14 authorized horse numbers are attained, BLM admits livestock use authorized by the decision
15 would exceed the carrying capacity. Tr. at 282-283. This is an admitted violation of law.
16 "Authorized livestock grazing use shall not exceed the livestock carrying capacity." 43
17 C.F.R. § 4130.6-1(a). This point is not addressed by the hearing officer's decision,
18 even though it was argued in appellants' brief. There is no authority to justify licensing of
19 livestock in excess of carrying capacity. This infirmity of the Decision and of the MUD
20 necessitates their reversals.

21 D. THE HEARING OFFICER ERRED AS A MATTER OF LAW BY
22 CONCLUDING BLM HAD DISCRETION TO AMEND A LAND USE
23 PLAN DECISION WHICH REQUIRES APPORTIONMENT OF GRAZING
24 REDUCTIONS BETWEEN WILD HORSES AND LIVESTOCK.

25 Appellant Commission made a further argument that BLM was required to apportion
26 any necessary grazing reductions between wild horses and livestock.

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

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

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

6 The hearing officer did not find there had been any amendment to the land use plan
7 which justified a modification of this requirement. Instead he overtly relied on manager
8 discretion:

9 Based on this limited guidance [i.e. the land use plan requirement for
10 proportional reductions], BLM decided that the best way to apportion the
11 AUMs was to apply the proportion of livestock and wild horse numbers in the
12 Land Use Plan. (Tr. 255.) However, because some of the livestock permits
13 had been eliminated, the BLM decided to go with the livestock numbers in the
14 1988 agreement rather than using permits which no longer existed to create the
15 proportions.

16 Decision at 6. This is simply another way of saying the manager had total discretion to
17 decide there should be no reductions for livestock, and that horses would suffer the full
18 adjustment.

19 There is no such managerial discretion. Pursuant to 43 C.F.R. § 1610.5-3(a), all
20 resource management authorizations and actions and subsequent more detailed planning shall
21 conform to the approved land use plan. *Uintah Mountain Club*, 112 IBLA 287 (Jan. 5, 1990)
22 See also *Marvin Hutchings v. BLM*, 116 IBLA 55 (Sept. 5, 1990), *Jerry Kelly v. Bureau of*
23 *Land Management*, 131 IBLA 146 (Oct. 31, 1994). The grazing regulations themselves
24 require consistency with land use plans. 43 C.F.R. § 4100.0-8. If the manager has the
25 discretion represented by the decision, then the entire planning process is hyperbole and
26 artifice. This is not the law. The Decision erred as a matter of law in approving deviation
27 from the land use plan in this manner, and the Decision should be reversed for this additional
28 reason.

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1 **VII. CONCLUSION**

2 This appeal exists in the context of the court's decision in *Natural Resources Defense*
3 *Council v. Hodel*, 624 F.Supp. 1045, 1058 (D.Nev. 1985), in which the judge allowed BLM
4 a reasonable time to make changes necessary to meet land use plan objectives. However, the
5 judge warned he would welcome a renewal of the challenge if BLM delayed beyond five
6 years in taking necessary actions.

7 In this case, land use planning was instituted fifteen years ago. BLM has had
8 adequate time to attempt an intensive grazing system, gather data, and determine the
9 effectiveness of the system. BLM can no longer evade its responsibility to take necessary
10 action. Manager discretion, even in the range program, cannot excuse compliance with land
11 use plans.

12 The Decision of the hearing officer affirming BLM's continued delay in this case erred
13 on questions of law by affirming a decision (1) whose basis was not disclosed, (2) which
14 authorized livestock grazing in excess of carrying capacity for an indefinite number of years,
15 and (3) which apportioned forage on a basis contrary to a land use plan decision.

16 On questions of fact, the burden of proof in a grazing appeal is a preponderance. *API*
17 *v. BLM*, 128 IBLA 153 (1993), *Jerry Kelly v. BLM*, 131 IBLA 146.

18 Appellants have met this standard. They showed that BLM's justification for
19 averaging utilization data was improper, because utilization was not uniform as BLM's own
20 manual requires. And they showed BLM's stated reasons for not using riparian objectives
21 to determine carrying capacity were baseless: reliance on a generic objective contained in the
22 Nevada State Handbook of Best Management Practices cannot justify displacing the specific
23 objectives set in the land use planning documents for the allotment; and livestock herding has
24 not worked, so it is unreasonable for BLM to continue to rely on herding as a means to
25 improve riparian condition.

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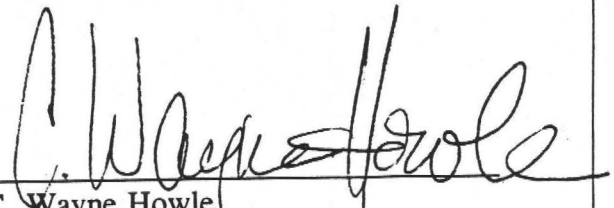
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1 The conclusions in the Decision upon which are based the affirmance of the MUD are
2 therefore contrary to law and the evidence. The Decision should be reversed, and the MUD
3 remanded to the District for proper computation of the carrying capacity, and proper
4 allocation of forage according to the land use plan, with all legally required consultation and
5 disclosure.

6 DATED this 18th day of January, 1996.

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8 FRANKIE SUE DEL PAPA
Attorney General

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11 By: 
12 C. Wayne Howle
13 Deputy Attorney General
14 Attorneys for Commission for the
15 Preservation of Wild Horses and
16 Nevada Division of Wildlife
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