



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
2901 North Central Avenue, Suite 955
Phoenix, Arizona 85012

IN REPLY REFER TO:

November 22, 1995

Nevada Division of Wildlife,)	N2-93-14 and
)	IBLA 93-460
Appellant,)	
)	
v.)	
)	
Bureau of Land Management,)	
)	
Respondent.)	

Sierra Club and the Natural Resources Defense)	N2-93-15
Council (NRDC),)	
)	
Appellant,)	
)	
v.)	
)	
Bureau of Land Management,)	
)	
Respondent.)	

Wild Horse Organized Assistance (WHOA),)	N2-93-16 and
)	IBLA 93-522
Appellant,)	
)	
v.)	
)	
Bureau of Land Management,)	
)	
Respondent.)	

Commission For The Preservation of Wild Horses (CPWH),)	N2-93-17 and
)	IBLA 93-523
)	
Appellant,)	
)	
v.)	
)	
Bureau of Land Management,)	
)	
Respondent.)	

DECISION

Appearances:

WAYNE HOULE, Esquire, Deputy Attorney General, State of Nevada, Carson City, Nevada for Nevada Division of Wildlife (NDOW) and Commission For The Preservation of Wild Horses (CPWH).

ROSE STRICKLAND, Reno, Nevada for Sierra Club and The Natural Resources Defense Council (NRDC)

DAWN LAPPIN, Executive Director of Wild Horse Organized Assistance, Reno, Nevada (WHOA).

JOHN PAYNE, Esquire, Sacramento, California for Respondent, Bureau of Land Management (BLM).

Before:

Administrative Law Judge Child

STATEMENT OF THE CASE

On February 9, 1993, the Sonoma/Geolach Resource Area of the U.S. Bureau of Land Management (BLM) issued a full force and effect multiple use decision (the "decision") for the Buffalo Hills allotment. (Ex. A-7)

Appellants have appealed the decision. The consolidated cases came on regularly for hearing at Reno, Nevada commencing January 10, 1995. Following the hearing the parties were allowed time to file proposed findings of fact and proposed conclusions of law and briefs in support of their respective positions, and time to file response to their opponents brief. Appellants, Nevada Division of Wildlife and Commission For The Preservation of Wild Horses have done so as has the respondent, Bureau of Land Management. Appellants Sierra Club, National Resources Defense Council and Wild Horse Organized Assistance have filed nothing, post-hearing except to join in the post-hearing brief filed by the State of Nevada. The consolidated cases are now ripe for decision.

THE ISSUES:

The issues here to be determined are:

1. **What is the scope of review?**
2. **Did the Area Manager act arbitrarily or capriciously, or otherwise abuse his discretion, in setting the carrying capacity for the Buffalo Hills Allotment?**
3. **Did the Area Manager act arbitrarily or capriciously, or otherwise abuse his discretion, in allocating the Animal Unit Months (AUMs) between livestock and horses on the Buffalo Hills Allotment?**
4. **Did the Area Manager act arbitrarily or capriciously, or otherwise abuse his discretion, in issuing any part of livestock or wild horse portions of the Decision?**

STATEMENT OF FACTS

The Buffalo Hills allotment is located near Gerlach, Nevada. (Ex. A-6 p. 1) It comprises a total of 461,739 acres, of which 431,006 acres are public land and 30,733 acres are private land. The allotment has approximately 2,943 acres of wetland riparian habitat, or less than 1% of the total acreage for the allotment. (Ex. A-6 p. 56; Tr. 27) The allotment also contains streambank riparian habitat. (Ex. A-6 p. 56)

The Buffalo Hills allotment has more AUMs allocated to wild horses than it does to livestock. (Ex. A-7 p. 7) According to the 1992 Re-Evaluation of the Allotment, in 1991 actual use for livestock on the allotment was 4,159 AUMs, while for wild horses it was 21,996 AUMs. (Ex. A-6 p. 12) Prior to the issuance of the Land Use Plan in 1982 (the LUP), the Buffalo Hills allotment¹ had

¹ At that time, the Buffalo Hills allotment was divided into two separate allotments, and the 14,000 AUMs were divided between those allotments. Because the land area is exactly the same, for convenience the two allotments will be referred to as "the allotment." (Tr. 198-199)

approximately 14,000 AUMs allocated to livestock. (Tr. 198) However, on November 15, 1982, after the LUP was issued in July, 1992, the largest permittee on the allotment had his permits cancelled. These permits added up to about 11,112 AUMs, and because of the high resource and wildlife values on the allotment, they were not reallocated. (Ex. A-2 p. 2; Tr. 199) The LUP also set the initial stocking rate for wild horses at 597 or 7,164 AUMs. (Ex. A-2 p. 5) .

The Decision under appeal was a step in the continued implementation of the LUP. (Tr. 194) The LUP established general goals and guidelines for resource management on the allotment. (Tr. 194; Ex. R-20) The objectives in the Decision conformed to the general objectives in the LUP. (Tr. 229)

The BLM then developed specific activity plans to address specific resource issues as directed by the LUP. (Tr. 194) In 1987 the BLM implemented an Allotment Management Plan (AMP) which set out an intensive grazing management system for the allotment. (Tr. 195; Ex. A-2) The system was designed to keep livestock grazing from having a negative impact on wildlife values, and to improve the overall condition of the vegetative resources on the allotment. (Tr. 196)

In 1986, the BLM Washington Office issued Instruction Memorandum 86-706, which required Area Managers to enter into agreements or issue decisions within five years after the publication of the Rangeland Program Summary. (Tr. 196; Ex. R-15) In order to comply with the Instruction Memorandum, in 1988 the BLM entered into a livestock agreement with the permittee. (Tr. 198; Ex. A-3) This agreement essentially reiterated the AMP, setting livestock numbers and long and short term objectives for vegetative resources on the allotment. (Tr. 198)

In 1989, the BLM issued a Habitat Management Plan (HMP) which covered the allotment. (Tr. 200) This plan set out objectives for the management of wildlife habitat. (Tr. 201)

The AMP, the 1988 agreement, and the HMP all required continued monitoring on the allotment. (Tr. 201) The data collected through monitoring was used to complete a Re-Evaluation for the allotment which was set forth in the 1988 agreement. (Tr. 202)

The BLM maintained contact with affected interests, including all of the appellants, throughout the Re-Evaluation process. In January of 1991, the BLM sent out a letter which notified affected interests of the upcoming Re-Evaluation, and asked them to submit any data they had or to otherwise respond if they wished to continue to be considered an affected interest. (Tr. 202-203; Ex. R-16) The BLM received comments to this letter. (Tr. 203-204; Ex. R-17) In early 1992, the BLM developed a draft Re-Evaluation and issued that for comments. (Tr. 205; Ex. R-18) The BLM again received comments to this draft. (Tr. 206; Ex. R-19)

After taking the comments on the draft Re-Evaluation into consideration, the BLM finalized the Re-Evaluation on January 14, 1993. (Tr. 208; Ex. A-6) As set forth in the Re-Evaluation, the data which had been collected since the 1988 agreement showed that some of the short-term objectives on the allotment were not being met. (Tr. 210-211; Ex. A-6 p. 26) The BLM concluded

there were two reasons for the failure to meet short-term objectives: 1) the cattle were concentrating in riparian areas, and 2) the wild horse numbers were excessive. (Tr. 210)

The BLM came to this conclusion after calculating the carrying capacity for the allotment and determining appropriate numbers for cattle and wild horses on the allotment. In order to calculate the carrying capacity for the allotment, the BLM used the method described in the 1987 AMP. (Tr. 251-252; Ex. A-2) This method provides a formula to determine the Potential Stocking Level (PSL), which is "the level of use that could be achieved on a management unit, at the desired utilization figure, assuming utilization patterns could be completely uniform." (Ex. A-2, Monitoring Plan p. 7) Although with slightly different wording, this formula is also found in BLM's Technical Reference 4400-7. (Ex. A-9 p. 55) What the formula essentially does is to compare the actual use in AUMs, and the utilization of the vegetative resource caused by that level of use, with the number of AUMs you would have to use to reach the desired utilization.

Technical Reference 4400-7 discusses the use of potential stocking level. The potential stocking level is the level of use that could be achieved if utilization were completely uniform, and is useful when assessing the benefits of improved distribution. (Ex. A-9 p. 55) In this case, the management actions in the decision were designed to achieve more uniform utilization and protect riparian areas. (Tr. 148-149) The BLM did not assume perfectly uniform utilization, and it did not stock the allotment near what it determined the potential stocking level to be. (Tr. 148, 244-248) Technical Reference 4400-7 does not require the BLM to use the formula for desired stocking level, rather than potential stocking level, to determine carrying capacity. (Tr. 253) The methodology the BLM used to determine carrying capacity conformed to the requirements of Technical Reference 4400-7. (Tr. 252-253)

In order to determine the utilization caused by the actual use, the BLM used a method known as weighted average utilization to determine actual utilization for the PSL formula. (Tr. 251; Ex. A-2, Monitoring Plan p. 7, Ex. A-9 p. 55, Ex. A-8) In order to determine weighted average utilization, the BLM used "use pattern mapping" to determine the areas of various utilization classes on the allotment, i.e. no apparent use, slight, light, moderate, heavy, and severe. (Tr. 130-131; Ex. R-13) Once the BLM calculated acreages for each utilization class, it averaged the moderate and heavy classes to get the weighted average utilization. (Tr. 131; Ex. A-9 pp. 51-53) BLM did not include the no apparent, slight, and light utilization classes in the calculations, nor did it include the severe class, because it decided that using all of the use categories would distort the result. (Tr. 132)

Once BLM had the weighted average utilization for each pasture in the Buffalo Hills allotment, it then determined the actual use for each pasture. (Tr. 132; Ex. A-8) After that, BLM determined what its desired utilization rate would be, which was the maximum utilization BLM would allow on the allotment. (Tr. 230) BLM determined this desired utilization rate to be 60%, in accordance with the Nevada State Handbook on Best Management Practices. (Tr. 233-234; Ex. R-21) This number shows up as 0.6 in the carrying capacity calculation. (Tr. 230-231; Ex. A-8) In the 1988 agreement, the objective had been 50% throughout the livestock use period. (Tr. 231-232) However, because wild horses are on the allotment year-round, and because the Re-Evaluation process was considering wild horse use for the first time, the BLM had to determine what the desired utilization should be

when the November 1 to February 28 period was included. (Tr. 231) Because November 1 to February 28 is in the dormant season for plants, and BLM technical references and the Nevada State Handbook of Best Management Practices allow 60% utilization in the dormant season, BLM made its decision to set the desired utilization rate at 60% for the allotment. (Tr. 232)

The 1988 agreement and the 1992 Rangeland Program Summary (RPS) both provided utilization objectives which consisted of 30% for streambank riparian and 50% for upland habitat. These documents also stated that the objectives could be adjusted by an "approved activity plan." (Tr. 237-238; Ex. A-3 p. 1, Ex. A-5 p. 9) An Allotment Management Plan is an approved activity plan, and the Decision under appeal was the functional equivalent of an approved activity plan. (Tr. 237) Therefore, BLM decided that the terms of the 1988 agreement and the 1992 RPS provided a basis for adjusting the utilization objectives in the Decision. (Tr. 238-239)

The Draft Sonoma-Gerlach Grazing Environmental Impact Statement contained a list of plant species and recommended utilization levels for those species. (Ex. R-10 p. I-7) The document stated that the recommended use levels could be exceeded under intensive management, and the Buffalo Hills allotment was under intensive grazing management. (Tr. 234)

BLM decided not to use 30% utilization, which was the desired utilization in the riparian areas, as the desired utilization for the whole allotment. (Tr. 239-240) The reason given was that the riparian areas represent less than one percent of the allotment, and the BLM chose to limit the utilization on those areas by requiring herding and fencing. (Tr. 27, 149; Ex. A-7 p. 10)

Once the BLM had the actual use, weighted average utilization, and desired utilization, it put these numbers into the Potential Stocking Level equation to determine the carrying capacity for each pasture. (Tr. 133; Ex. A-8) At that point, the BLM had to determine what the proper proportion of horses and livestock was for each pasture, in order to determine how to allocate the AUMs for each pasture. (Tr. 134; Ex. A-8) The only guidance for how to allocate AUMs was found in the Land Use Plan, which stated in part: "After the fifth 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." (Tr. 254) Based on this limited guidance, BLM decided that the best way to apportion the AUMs was to apply the proportion of livestock and wild horse numbers in the Land Use Plan. (Tr. 255) However, because some of the livestock permits had been eliminated, the BLM decided to go with the livestock numbers in the 1988 agreement rather than using permits which no longer existed to create the proportions. (Tr. 256)

Once they had the carrying capacities and proportions for each pasture, BLM could then determine what the maximum number of wild horses and livestock should be for each pasture. By adding up the totals for each pasture, the BLM determined the carrying capacity for wild horses on the allotment to be 8,568 AUMs. (Tr. 224; Ex. A-6 p. 39) Because BLM estimated the actual use for wild horses to be 21,996 AUMs in 1991, and 25,416 AUMs in 1992, BLM determined that there were too many wild horses on the allotment. (Tr. 213; Ex. A-6 pp. 12, 48)

BLM estimated the total carrying capacity for livestock on the allotment to be 9,913 AUMs. (Tr. 245) Because the actual use on the allotment for livestock was 4,159 AUMs, BLM determined

that the livestock numbers were not excessive. (Tr. 246) Rather, BLM determined that livestock distribution needed to be improved. (Ex. A-6 p. 47, Ex. A-7 p. 9)

Using the carrying capacity calculations based on the formula for potential stocking level, BLM calculated the total carrying capacity to be 18,481 AUMs. (Tr. 244; Ex. A-6 p. 39) However, the carrying capacity in the decision was 12,682 AUMs. (Ex. A-7 p. 7) BLM arrived at this lower figure because it did not allocate all of the AUMs available to livestock. (Tr. 244-248) Because the allotment was under a rest-rotation system in which only two of the four pastures were being used each year, BLM determined that only half of the AUMs were available for livestock each year. (Tr. 245-246) BLM could have allowed the full 9,913 AUMs on two pastures each year, but decided not to do that because of the critical wildlife habitat values on the allotment. (Tr. 246)

By allocating half of the AUMs each year, 4,957 AUMS were available for two pastures each year. (Tr. 246) However, the active preference was only 4,114 AUMs. (Ex. A-7 p. 7; Tr. 246) BLM again could have allocated the additional AUMs, but decided not to do so for three reasons: 1) short-term objectives for riparian areas were not being met, 2) there were too many wild horses, and 3) the BLM wanted to make sure that the heading system which was proposed to improve distribution would actually work. (Tr. 247) Therefore, the BLM did not increase the active preference for livestock, and arrived at a carrying capacity of 12,682 AUMs by adding the livestock preference to that for wild horses. (Tr. 247-248) Therefore, 12,682 AUMs is the carrying capacity for the allotment under the circumstances of the decision. (Tr. 279)

After setting the carrying capacity for the allotment and allocating the available AUMs to wild horses and livestock, the Area Manager decided that the riparian objectives were not being met because there were too many wild horses and because cattle were poorly distributed. (Ex. A-7 p. 12) Therefore, the Decision took steps to remove excess wild horses and to improve livestock distribution. (Ex. A-7 pp. 9-13) Specifically with regard to improving livestock distribution, the Decision imposed a requirement that the cattle be moved within the pasture or removed from the pasture once utilization levels had been reached. (Tr. 215-216; Ex. A-7 pp. 9-10) This requirement was a new requirement which was not in the 1988 agreement. (Tr. 185-186, 267-268)

DISCUSSION

L

What is the Scope of Review?

The IBLA has set forth the scope of review for grazing decisions as follows:

The law is well settled that implementation of the Taylor Grazing Act of 1934 . . . is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. . . . By regulation, the Department has provided

that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100, 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an Administrative Law Judge and by this Board. . . . Although unusual, this scope of review is consistent with the highly discretionary nature of the Secretary's responsibility for Federal range lands.

Jerry Kelly v. Bureau of Land Management, 131 IBLA 146, 151 (1994). Furthermore:

When BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis. The burden is on the objecting party to demonstrate that the decision is improper.

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176, 182 (1992). The standard of proof which the objecting party must meet is a preponderance of the evidence. Ralph and Beverly Eason v. Bureau of Land Management, 127 IBLA 259, 262-263 (1993). Finally, with regard to questions of carrying capacity:

It is established that a determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence of error.

Calvin Yardley et al. v. Bureau of Land Management, 123 IBLA 80, 92 (1992).

Here, the Area Manager's Decision should not be set aside. The Appellants failed to show, by a preponderance of the evidence, that the Decision is unreasonable or fails to comply with Departmental grazing regulations (43 CFR Part 4100). To show that the Decision is unreasonable, the Appellants must show that it cannot be supported on any rational basis. This appellants failed to do. Respondent's action in this regard was in substantial compliance with the regulations at 43 CFR Part 4100.

II.

Did the Area Manager Act Arbitrarily or Capriciously, or Otherwise Abuse His Discretion, in Setting the Carrying Capacity for the Buffalo Hills Allotment?

BLM asserts that, when setting the carrying capacity for the Buffalo Hills allotment in the 1993 Decision, the Area Manager for the Sonoma/Gerlach Resource Area used a reasonable and proper methodology which conformed to BLM policy. The Area Manager used the equation for Potential Stocking Level to calculate carrying capacity for the allotment. This equation is, in substance, the

equation which the Allotment Management Plan details as being appropriate for the calculation of carrying capacity, although the language used in the plan is slightly different.

The use of the Potential Stocking Level equation to calculate carrying capacity is also contemplated in BLM's Technical Reference 4400-7. According to this Reference, the Potential Stocking Level is the level of use which could be achieved if one assumes utilization is uniform. The Reference further states that this methodology is "most useful when assessing the benefits of improved distribution and changes in number of livestock." (Ex. A-9 p. 55) In his Decision, the Area Manager did impose rigorous new requirements on the livestock operator which were designed to improve distribution. (Tr. 185-186, 267 268; Ex. A-7 pp. 9-10) In addition, although livestock numbers were not reduced, wild horse numbers were drastically reduced. (Ex. A-7 p. 12) Therefore, use of Potential Stocking Level was appropriate to determine what the carrying capacity could be if the new management practices worked.

Having appropriately decided to use the equation for Potential Stocking Level to determine the carrying capacity for the allotment, the Area Manager also appropriately applied that equation. The equation essentially required the Area Manager to determine three numbers in order to determine the potential carrying capacity for the allotment. First, the Area Manager had to determine actual use. This was relatively straightforward, and involved adding up the actual livestock numbers and the wild horse population estimates for each pasture. The livestock numbers were easily derived from the actual use reports. The wild horse numbers for each pasture were calculated from population estimates based on census flights for each pasture. (Ex. A-6 pp. 8, 10-11, Ex. A-8, Ex. A-9) Because the actual utilization figures were only calculated for a certain part of the year, rather than the whole year, the actual use numbers for horses were only done for that same part of the year. (Tr. 188-190) Otherwise, the carrying capacity calculation would have been inflated. (Tr. 189)

The second number which the Area Manager had to obtain to plug into the Potential Stocking Level equation was the Average/Weighted Average Utilization (in the equation for Potential Stocking Level set forth in the Allotment Management Plan, this number is simply named "Actual Utilization," which includes Weighted Average Utilization. (Ex. A-2, Monitoring Plan p. 7; Tr. 251) In order to arrive at this number, the Area Manager chose to use a method known as weighted average utilization. Essentially this method involves mapping various use categories on the allotment, and then averaging those use categories based on the total acreage in each category. (Tr. 130-132) In this case, this method was further refined by using just the moderate and heavy utilization classes to calculate the carrying capacity, which the Area Manager felt more accurately represented the grazing that was taking place. (Tr. 131-132, 147-148) This methodology is contemplated both in the AMP and in the Technical Reference as appropriate for calculating carrying capacity based on the Potential Stocking Level. (Ex. A-6, Monitoring Plan p. 7, Ex. A-9 p. 55) This method gave the Area Manager utilization numbers for each pasture.

Finally, the Area Manager had to decide what his desired utilization would be. Although previous planning documents had given desired utilization numbers for the allotment, this was the first time that the BLM had to address wild horse use and come up with desired utilization numbers for the entire year. The previous utilization numbers for upland areas had been 50% by the end of the livestock use period, which was the end of October. However, the previous numbers did not give the

desired utilization for the period between the end of October and the beginning of the new growing season on March 1. (Tr. 231) After researching technical references and the Nevada State Handbook of Best Management Practices, the Area Manager determined that because the utilization between the end of October and February 28 was in the dormant season for plants, the BLM could allow up to 60% utilization. (Tr. 232; Ex. R-21)

Therefore, the Area Manager's calculations for actual use, actual utilization, and desired utilization were all both reasonable and in conformance with State and BLM policy. (Tr. 252; Ex. R-21) Because each of these individual components of the Potential Stocking Level equation were reasonable, the resulting carrying capacity derived from that equation was also reasonable. Therefore, the Area Manager did not act arbitrarily or capriciously, or otherwise abuse his discretion, in determining the carrying capacity for the Buffalo Hills allotment. Nor did the Area Manager violate any of the regulations at 43 CFR Part 4100 in setting the carrying capacity for the allotment.

The carrying capacity which the Area Manager calculated for the allotment, 18,481 AUMs, was set forth in the Re-Evaluation. (Ex. A-6 p. 39) However, in his discretion, the Area Manager decided to go with a lower carrying capacity, 12,682 AUMs, in the final Decision. The Area Manager did this in part because in the intensive grazing system for the allotment, only two of the four pastures were being used by livestock in any given year. (Tr. 245) Although the Area Manager could have stocked the allotment at the calculated livestock carrying capacity for the allotment, he decided to only stock at one-half of the calculated livestock carrying capacity to coincide with the fact that only half of the allotment was being used each year. (Tr. 245-246)

Even with only half of the potential livestock AUMs being allocated each year, the number was still higher than the permittees' actual preference prior to the Decision. The Area Manager again made a discretionary decision not to raise the permittees' preference to half of the calculated livestock carrying capacity. He did this for three reasons: 1) the AML for wild horses would not be achieved for several years, 2) BLM was not meeting its riparian objectives, and 3) BLM wanted to see if the herding proposed to protect riparian areas would actually work before it granted any increase. Therefore, the Area Manager left the active preference for livestock at the same level which it was prior to the Decision, i.e. 4,114 AUMs. (Tr. 247) This decision was clearly a reasonable one which did not conflict with any of the regulations at 43 CFR Part 4100.

III.

Did the Area Manager act Arbitrarily or Capriciously, or Otherwise Abuse His Discretion, in Allocating the Animal Unit Months (AUMs) Between Livestock and Horses on the Buffalo Hills Allotment?

Once the Area Manager calculated the carrying capacity for the allotment, the next step was to apportion the available AUMs between livestock and wild horses. Management actions are required to be in conformance with the Land Use Plan (LUP). 43 CFR § 4100.0-8. The only guidance in the LUP for allocating available AUMs is in Rangeland Management 1.1, which states in part:

After the fifth 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.

(Ex. R-20 p. 1) Not only was this the only guidance in the LUP, it was the only guidance the Area Manager could find anywhere regarding how to allocate available AUMs. (Tr. 255) Therefore, the Area Manager decided it would be appropriate to use the same ratios of horses and livestock that were in the LUP and apply those to the calculated carrying capacity. (Tr. 255-256) However, because the numbers of livestock on the allotment had decreased drastically (due to a permit cancellation) just after the LUP was issued, the Area Manager used the reduced numbers of livestock to determine the appropriate ratios. (Tr. 257) These numbers were found in the 1988 agreement. (Tr. 256) Once the Area Manager had the appropriate ratios, these ratios were applied to each pasture to determine appropriate numbers of livestock and wild horses for each pasture. (Tr. 134)

Appellants argued that the method used to proportion forage was inappropriate, because in the Decision the livestock numbers remained the same and the wild horse numbers decreased. (Tr. 93) However, in light of the fact that wild horse numbers had increased on the allotment since the LUP was implemented, while livestock numbers had decreased, it was not unreasonable that only wild horse numbers would end up being decreased in the 1993 Decision. (Tr. 213-214, 199-200; Ex. A-2 p. 5)

Appellants also argued that the Area Manager should have used proportions based on the damage caused by horses versus that caused by livestock. However, the data collected did not show whether the damage was caused by horses or livestock. (Tr. 172) All appellants have done is to point out that there may have been other ways to allocate AUMs. They have not shown that the Area Manager's method was unreasonable.

IV.

Did the Area Manager Act Arbitrarily or Capriciously, or Otherwise Abuse His Discretion, in Issuing any Part of the Livestock or Wild Horse Portions of the Decision?

Appellants made a few other general challenges to the Decision at the hearing. For example, they argued that not all of the riparian projects which had been called for in the Habitat Management Plan (HMP) had been developed. (Tr. 56-57) This was true as far as it went. (Tr. 258) However, the HMP contained a condition that the riparian projects were dependent on manpower and funding being available, and these had not been available. (Tr. 94-97, 258) Appellants did not meet their burden of proving that the 1993 Decision was unreasonable or failed to substantially comply with the regulations at 43 CFR Part 4100.

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

FINDINGS OF FACT

1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. On November 15, 1982, grazing permits totalling 11,112 AUMs were cancelled for two allotments which were later combined to form the Buffalo Hills allotment, and these permits were not reallocated. (Ex. A-2 p. 2)
3. Wild horses have increased on the allotment since the Land Use Plan for the Buffalo Hills allotment was issued in July, 1993.
4. The 1987 Allotment Management Plan for the Buffalo Hills allotment sets forth the equation for Potential Stocking Level as the proper equation to be used in calculating carrying capacity for the allotment. (Ex. A-7, Monitoring Plan p. 7)
5. BLM Technical Reference 4400-7 sets forth the equation for Potential Stocking Level as one option for determining carrying capacity for an allotment. Nothing in Technical Reference 440-7 disqualifies the use of the PSL equation to determine carrying capacity on the Buffalo Hills allotment. (Ex. A-9 pp. 55-57; Tr. 252-253)
6. An allotment management plan is an approved activity plan. (Tr. 236-237)
7. The Multiple Use Decision at issue is the functional equivalent of an allotment management plan. (Tr. 237)
8. The 1988 Livestock Agreement, the 1992 Rangeland Program Summary, and the 1992 Re Evaluation for the Buffalo Hills allotment all allow utilization objectives to be adjusted by an approved activity plan. (Tr. 237-238; Ex. A-3 p. 1, Ex. A-5 p. 9, Ex. A-6 p. 26)
9. BLM Technical Reference 4400-7 and the Allotment Management Plan both state that weighted average utilization may be used to determine actual utilization, in order to calculate Potential Stocking Level. (Tr. 252; Ex. A-9 p. 55, Ex. A-2, Monitoring Plan p. 7)
10. The only guidance for allocating available AUMs for the Buffalo Hills allotment was found in the Land Use Plan. (Ex. R-20 p. 1)

11. In order to determine proper ratios between horses and livestock, the Area Manager used the number of horses in the Land Use Plan compared to the number of livestock in the 1988 agreement. (Tr. 256-257)
12. The 1988 Habitat Management Plan set dates for the construction of certain riparian projects, so long as funding and personnel were available. (Tr. 94-97)
13. The BLM did not have the funding or personnel to complete the planned projects by the target dates listed in the 1988 Habitat Management Plan. (Tr. 258)

CONCLUSIONS OF LAW

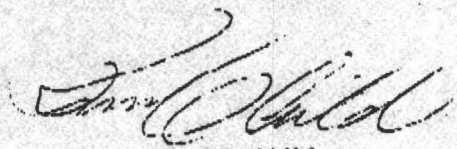
1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.
2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
3. The Area Manager's use of the Potential Stocking Level equation to determine carrying capacity for the Buffalo Hills allotment was reasonable and complied with BLM policy and grazing regulations at 43 CFR Part 4100.
4. The Area Manager's choice of 60% as the desired utilization rate for determining carrying capacity was reasonable and complied with BLM policy and grazing regulations at 43 CFR Part 4100.
5. The Area Manager's use of weighted average utilization to determine the actual utilization was reasonable and complied with BLM policy and grazing regulations at 43 CFR Part 4100.
6. In the 1993 Full Force and Effect Decision for the Buffalo Hills allotment, the BLM's determination of carrying capacity was reasonable and complied with BLM policy and grazing regulations at 43 CFR Part 4100.
7. In the 1993 Full Force and Effect Decision for the Buffalo Hills allotment, the BLM's allocation of AUMs between livestock and wild horses was reasonable and complied with BLM policy and grazing regulations at 43 CFR Part 4100.
8. The 1993 Full Force and Effect Decision for the Buffalo Hills allotment was reasonable and complied with BLM grazing regulations at 43 CFR Part 4100.
9. The February 9, 1993 Final Full Force and Effect Decision for the Buffalo Hills allotment should be affirmed.

TYPE-ERASE

52% COTTON FIBER USA

ORDER

The February 9, 1993 Final Full Force and Effect Decision for the Buffalo Hills allotment is **AFFIRMED.**



Ramon M. Child
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision had the right of 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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