

I. STATEMENT OF THE CASE

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 for the Buffalo Hills Allotment (the Allotment). See Exhibit _____. That decision is the subject of these appeals.

The Nevada Division of Wildlife (NDOW) appealed from the decision in appeal number N2-93-14. The Nevada Commission for the Preservation of Wild Horses (Commission) appealed in appeal number N2-93-17.

These combined appeals allege that the BLM (A) was arbitrary in the manner in which it determined the carrying capacity for the Buffalo Hills Allotment, and (B) is in violation of law because it authorized livestock use at a level which will cause resource damage and therefore exceeds the carrying capacity of the allotment. In addition, the COMMISSION alleges (C) the BLM was arbitrary in arriving at the numbers of wild horses which should exist on the Allotment (known as the Appropriate Management Level, or AML).

(A) The arbitrary nature of the decision's determination of carrying capacity is shown in several ways. First, the BLM failed to account for riparian utilization objectives in its determination of carrying capacity. Second, none of the documents presented with the decision provide a basis for the number in the decision. Third, the BLM has failed to demonstrate a working understanding of the term "carrying capacity". Fourth, the number determined to be the carrying

capacity appears to be merely a justification for continuing grazing at levels similar to the past several years' authorizations. Such a basis is arbitrary and not consistent with law.

(B) The decision sets the authorized level of livestock grazing at numbers which are certain to cause continued damage to riparian vegetation.

BLM argues that instead of reducing numbers of livestock to ease utilization on riparian vegetation, its decision will achieve that result by managing livestock. But the same provisions for livestock management that appear in the decision were implemented in the 1980's, and were ineffective. It is unrealistic to expect a different outcome with unchanged practices.

The BLM committed in the early 1980's to improve the riparian resource on the Allotment. It has had ten years to do so without affecting the permittees' livestock operation. However, it has been unable to successfully restore the riparian vegetation through these methods. The BLM should now be required to take the additional measure of reduction in numbers of livestock.

(C) The BLM was arbitrary in arriving at the numbers of wild horses which should exist on the Allotment (known as the Appropriate Management Level, or AML).

These appeals were heard on January 10 and 11, 1995, in

Reno, Nevada.

II. STATEMENT OF THE FACTS

The Allotment is located in northwestern Nevada, and is nearly a half million acres in size.

In the early eighties, the BLM acknowledged the poor condition of vegetation--particularly riparian vegetation--on the allotment, and determined through land use planning to cause improvement to it. Through the remainder of the eighties, BLM issued a series of documents and decisions to effect improvement, largely through changes in livestock management and range improvement projects designed to control livestock movement. However, the condition of the riparian vegetation on the allotment did not adequately respond.

In 1993 the multiple use decision here under appeal was issued in response to the continued poor habitat condition. The decision purported to establish the carrying capacity for the Allotment, and on that basis determined the two permittees' authorized grazing levels and seasons of use. It is the appellants' position, however, that the decision determined

carrying capacity in an arbitrary fashion, and that authorized livestock use will continue to exceed the carrying capacity of the Allotment to the continued detriment of riparian vegetation.

The decision further established a system of grazing by dividing the allotment into four pastures, and providing for a rotating schedule of use. Each year, two pastures are used by livestock, two are rested. Every two years, the two pastures used are alternated with the two rested pastures.

III. DISCUSSION

Issue A

State the issue.

BLM determined the carrying capacity for the allotment in a manner which was arbitrary and not in accordance with law.

Recite the applicable law.

"Carrying capacity" is defined at 43 C.F.R. § 4100.0-5 as "the maximum stocking rate possible without inducing damage to vegetation or related resources". BLM must not permit livestock use that exceeds the carrying capacity: "[a]uthorized livestock grazing use shall not exceed the livestock carrying capacity." 43 C.F.R. § 4130.6-1(a).

Livestock grazing must be consistent with the applicable land use plan:

The authorized officer shall manage livestock grazing on public lands . . . in accordance with applicable

land use plans. . . . Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan.

43 C.F.R. § 4100.0-8. Grazing authorizations necessarily include conditions which will cause achievement of the land use plan objectives: "[l]ivestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public lands." 43 C.F.R. § 4130.6.

The burden of proof in a grazing appeal is a preponderance. *API v. BLM*, 128 IBLA 153 (1993) (In cases involving expert interpretation of data, it is not enough that a party objecting to the interpretation of data demonstrates another course of action is available. The appellant must demonstrate by a preponderance of the evidence that the BLM expert erred when collecting the data, when interpreting the data, or in reaching the conclusion). *See also Jerry Kelly v. BLM*, 131 IBLA 146 (Standard of proof in appeal of grazing hearing is preponderance of evidence. Appellant must show by preponderance that decision was unreasonable or improper).

Nevada Land Ass'n v. U.S. Forest Service, 8 F.3d 713 (9th Cir. 1993) (reasonableness of agency action is determined by reference to the record before the agency at the time the decision was made.)

Bunyard v. Hodel, 702 F.Supp. 820 (D.Nev. 1988) If an agency reaches a proper decision on improper grounds, its decision must be vacated.

43 C.F.R. 4.478 "No adjudication of grazing preference

will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4100 of this title."

Apply the law to the facts.

The arbitrariness of the BLM's determination of carrying capacity is demonstrated in several ways.

1. Gross inconsistencies attend the BLM's determination of carrying capacity. The decision set the carrying capacity at 12,682 AUMs. Exhibit A-7 at 7. However, the BLM's own documents contradict and fail to support this figure. The 1993 Allotment Reevaluation, which was the predicate study upon which the decision was based, listed the carrying capacity at 18,481, and 16,880. Exhibit A-6 at 39. The number 12,682 does not appear anywhere in the document. The carrying capacity document prepared in preparation for hearing also listed the carrying capacity at 18,819 AUMs. See Exhibit A-8, and testimony of Roy Leach, Tr. at 74. It also does not contain the figure of 12,682. None of the documents describe the process used by the BLM to draw a carrying capacity of 12,682 from any of the other figures presented in the documentation. The BLM's witnesses admitted BLM had never set forth the rationale for the determination. Tr. at 269, 289, and 341.

The BLM's witnesses' testimony also contradicts the figure of 12,682 found in the decision, and demonstrates the BLM's prevarication on the issue of carrying capacity. Mr. Cribley was either evasive or unable to define the precise definition

for the term "carrying capacity" as it appeared in the decision. Tr. at 277-282. Mr. Rich Adams was similarly unresponsive when asked what the 12,682 figure represented:

- A. There were 8000 AUM's associated with the rest pastures that were not part of the grazing preference.
- Q. Is that a number that's included in the 12,000 figure for the carrying capacity in the decision.
- A. No.
- Q. *So there are AUM's available in excess of the carrying capacity identified in the decision?*
- A. Yes.
- Q. Well, I thought carrying capacity was the maximum amount of grazing available without doing damage to the resource.
- A. Yes, that's true.

* * * *

- Q. What I'm curious in finding out is if your testimony is that indeed this is the correct carrying capacity for the allotment.
- A. Yes, it is.

* * * *

- Q. Could you read the definition there [Exhibit R-10, p. 6-91] of carrying capacity?
- A. "A maximum stocking rate policy [sic] without inducing resource damage to vegetation or related resources."
- Q. Is that your understanding of what carrying capacity is?
- A. Yes.
- Q. So 12,682 AUM's is the maximum stocking rate possible without inducing damage to vegetation and related resources, would that be a correct statement?
- A. Yes.
- Q. *In that event, do you still maintain there are additional available AUM's on this allotment.*
- Q. *There are not available AUM's additional to these.*

Tr. at 153-155 (emphasis added). The succeeding day of hearing, Bud Cribley then testified on cross-examination that 18,481 AUMs is the carrying capacity of the Allotment. Tr. at 340-341. The BLM cannot therefore agree even among its own personnel what figure is the correct carrying capacity for the allotment.

The evasiveness of the witnesses and the inconsistency of

the documents indicates the lack of rational basis for the carrying capacity determination.

2. The mathematical calculation of carrying capacity set forth in the BLM's documents is improper because of BLM's failure to use riparian utilization objectives in the calculation.

It is undisputed that riparian vegetation on the allotment has been in unsatisfactory condition since the land use plan was issued in 1982. See . Even though significant livestock reductions occurred at or around 1982, Tr. at 261-262, and even though a four pasture rest rotation system was implemented through the 1987 Allotment Management Plan and the 1988 Grazing Agreement, Tr. at 200, damage has continued to occur to riparian vegetation, as late as the time of the Allotment Reevaluation, Exhibit A-6, issued in 1993. Tr. at 210, lines 5-15.

Yet the carrying capacity calculations were made without reference to the significant needs of riparian vegetation. The objective in particular for streambank riparian vegetation has been consistently identified at 30 percent throughout the planning process for the allotment. See . Furthermore, certain riparian species require a far lower level of utilization than 30 percent. See Tr. at 41, 46, 52, and 285.

When questioned why the more conservative streambank riparian objectives were not used to set carrying capacity, Rich Adams, the BLM's witness, could only respond "I cannot answer that question." Tr. at 142.

The next day of hearing, Bud Cribley offered some additional response. He said that BLM chose to use livestock management instead of reduction in numbers to achieve the desired objectives. Tr. at _____. This would include removal of livestock when the utilization limits were exceeded. Tr. at _____.

Mr. Cribley's response is inadequate. Reliance on livestock management had already been attempted on the allotment and was proven ineffective in the 1980's. Tr. at _____. Mr. Cribley's attempt to deny this is not credible. He stated that herding as an instrument for livestock management was not provided for in the 1988 Livestock Agreement with the operator, but the Agreement itself and Mr. Adams contradict this testimony. See Exhibit A-3 at _____, and Tr. at 150. Mr. Cribley even conceded that herding was part of the grazing management practices of the 1980's. Tr. at 267, line 25, and 268 at line 1.

Mr. Cribley also attempted to portray the utilization objectives contained in the AMP and Livestock Agreement as nonbinding, see Tr. at _____, although regulations provide that such objectives and conditions are binding. 43 C.F.R. § 4130.6. Mr. Cribley simply misconstrues the significance of utilization objectives and the clear authority of the BLM to control livestock practices on public lands under such an agreement.

Mr. Cribley ultimately revealed the true reason why the lower utilization limits were not employed: it is because the

riparian areas are only a small percentage of the allotment, and BLM does not wish to allow their management to limit the use of the remainder of the allotment. Tr. at 240, lines 5-17.

Instead, the BLM chose to rely on herding, *id.*, even though herding has already proved ineffective for meeting riparian objectives. Essentially, BLM has chosen to manage riparian sites that receive heavy utilization as "sacrifice areas," in spite of BLM's denial of that fact. See Tr. at _____.

There is no justification in the law for BLM to determine that riparian objectives can be ignored. The law does not allow this kind of discretion.

3. The foregoing discussion demonstrates that the BLM's own calculations did not serve as a basis for the decision that the carrying capacity is 12,682 AUMs. But the BLM's calculations are arbitrary even if examined in isolation and apart from their failure to rationally correlate with the 12,682 figure, because they fail to follow BLM's own instructions for making the calculations.

The calculation to determine stocking rate is a simple one.

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

Exhibit A-9 at 54. But the methodology used in the carrying capacity document prepared for the Buffalo Hills Allotment, Exhibit A-8, is improper because the BLM inappropriately confuses the calculation for "Desired Stocking Level," with the calculation for "Potential Stocking Level." See Exhibit A-9 at 55. The calculation actually employed by the BLM is as follows:

$$\text{ACTUAL USE} + \text{POTENTIAL ACTUAL USE}$$

AVERAGE/WEIGHTED
AVERAGE UTILIZATION

DESIRED AVERAGE
UTILIZATION

This is the Potential Stocking Level calculation described in the Technical Reference. But the Potential Stocking Level calculation is inappropriate for setting stocking rates because it assumes a perfect world. "A Potential Stocking Level 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." Exhibit 9 at 55. the Allotment Evaluation contains numerous references to uneven utilization, with concentration on riparian areas.

The mathematical problem with using the Potential Stocking Level calculation is that it inappropriately uses weighted averaging, averaging heavy riparian utilization with lesser upland habitat utilization. The result is the muting or elimination of the heavy riparian utilization. Tr. at 82, lines 7-8.

The BLM calculation performed in Exhibit A-8 employs the "Potential Stocking Rate" calculation in BLM Technical Reference 4400-7, see Exhibit A-9 at 55, rather than the calculation entitled "Desired Stocking Rate" contained in the same reference. *Id.* at 54.

Use of the potential stocking rate calculation to set the carrying capacity, rather than using the desired stocking rate calculation, was unjustified according to the terms of the BLM's own manual reference. The Potential Stocking Level is defined as "the level of use that *could* be achieved on a management unit, at the desired utilization figure, assuming utilization

patterns could be completely uniform." *Id.* at 55. BLM conceded that utilization patterns on the allotment are not uniform. Tr. at _____.

The effect of using weight averaged utilization is that it masks the influence of riparian utilization. Tr. at 82, lines 7-8.

State conclusion as to that issue.

Issue B

State the issue.

BLM's determination of allowable levels of livestock grazing will result in exceeding carrying capacity, and therefore is contrary to law.

Recite the applicable law.

Apply the law to the facts.

BLM admitted the use authorized by the decision would exceed the carrying capacity.

State conclusion as to that issue.

Issue C

State the issue.

BLM's determination of AML is arbitrary and contrary to law.

Recite the applicable law.

Apply the law to the facts.

State conclusion as to that issue.

PROPOSED FINDINGS OF FACT

- * The Buffalo Hills Allotment is located in the Sonoma-Gerlach Resource Area in northwest Nevada.

- 1. Riparian vegetation on the Allotment has been in unsatisfactory condition since the development of the land use plan, *i.e.* the Sonoma-Gerlach Management Framework Plan, in 1982.
- 2. BLM, through its land use plan, is required to manage the Allotment to improve riparian resources.
- 3. Through the 1980's, BLM developed a series of activity plans and other management tools which attempted to address the unsatisfactory condition of the riparian resource.
- 4. The plans and decisions of the 1980's relied upon an intensive grazing system, characterized by a four pasture rest-rotation schedule. The system furthermore included herding of livestock and utilization objectives of 30 and 50 percent for riparian vegetation.
- 5. The plans and decisions of the 1980's failed to remedy the condition of riparian resources, and utilization on riparian vegetation continued to exceed objectives.

- * In 1993, BLM issued its final full force and effect

multiple use decision for the Allotment.

6. The 1993 Decision relies upon the same grazing system implemented in the 1980's, and increased utilization limits of 40 and 60 percent.
7. The 1993 full force and effect multiple use decision for the Allotment set the carrying capacity for the Allotment at 12____ AUMs.
8. The carrying capacity for the Allotment is identified at 16,____ in the Allotment Reevaluation; at 18,____ in the Allotment Reevaluation; and at 18,____ in the separate document offered to support the carrying capacity figure in these appeals.
10. Bud Cribley, Area Manager for the Sonoma-Gerlach Resource Area, testified he set the carrying capacity at 12,____ by initially determining it to be 18,____; then halving it to allow use of a four pasture rest rotation system, with two pastures used by livestock for two consecutive years, while the same two years two pastures are rested, and then alternating the use and rest pastures the next two consecutive years; then further reducing the livestock carrying capacity to equal the existing level of livestock use on the Allotment. Tr. at 244-248.

The testimony of Bud Cribley regarding the method by which he determined the carrying capacity for the Allotment is not credible. His testimony was a *post hoc* rationalization of BLM's decision to continue livestock

grazing at its present level. There is nothing in the documents offered at hearing which tends to substantiate his explanation at hearing of the method used to set carrying capacity. Furthermore, his testimony came the day following testimony by Rich Adams. Mr. Adams conceded: "[the carrying capacity of 12,____ AUMs] was a management decision to say that the existing active preference would be allocated." TR. at 168, lines 23-24.

BLM, more likely than not, determined livestock carrying capacity for the Allotment by simply referring to existing levels of livestock use on the Allotment, and determining to preserve this use, rather than by mathematical calculation and reliance on monitoring data as required by law.

11. BLM did not disclose the methodology and rationale it used to determine the carrying capacity for the Allotment, as set forth in the 1993 decision, at any time during the consultation and coordination process. Tr. at 65, 269, and 289.
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1. BLM omitted streambank riparian objectives in its calculation of carrying capacity for the Allotment.
 2. BLM calculated carrying capacity by use of weighted averaging of utilization.
 3. BLM determined carrying capacity by reference to, and in order to sustain, the existing levels of livestock use on

the Allotment.

PROPOSED CONCLUSIONS OF LAW

1. The BLM lacked a rational basis for its determination that the carrying capacity of the Allotment is 12,____ AUMs.
2. BLM's failure to include streambank riparian objectives in the determination of carrying capacity is contrary to law.
3. BLM's use of weighted averaging to determine the Allotment's carrying capacity was contrary to law.
4. BLM's authorization of livestock use for the next five years will cause resource damage, and thus the carrying capacity of the allotment to be exceeded.
5. BLM must determine carrying capacity in the manner prescribed in its manual, TR 4400-7, or by some other equally rational and objective method which depends upon monitoring data and objectives set for the Allotment.
6. BLM must manage livestock management in a manner which does not exceed carrying capacity.
- 7.

PROPOSED ORDER